

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5066 OF 2021**

Nitin Ganpat Dingankar ... Petitioner
versus
The Indian Express (P) Ltd. And Anr. ... Respondents

Ms. Tanaya Patankar for Petitioner.

Dr. Abhinav Chandrachud with Mr. Amol Joshi, Mr. Pranit Kulkarni, Ms. Tejaswi Ghag, Mr. Shivam Singh i/by Ms. Poorvi Kamani, for Respondents.

CORAM: N.J.JAMADAR, J.

**RESERVED ON : 25 APRIL 2023
PRONOUNCED ON : 5 JUNE 2023**

ORDER :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. This Petition takes exception to the judgment and order dated 29 January 2021 in Complaint (ULP) No.267 of 2017 passed by the learned Member, Industrial Court, Mumbai, whereby the learned Member dismissed the complaint preferred by the Petitioner alleging unfair labour practices under Items 3, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the Act, 1971).

3. The background facts can be stated as under :

3.1 In the year 1992, the Petitioner was appointed under an appointment letter dated 24 February 1992 to the post of 'Assistant Layout Man' in a 'Samakaleen',

a Gujarati newspaper, then printed and published in Mumbai by the Respondent No.1. In the year 2005, the services of various staff working at 'Samkaleen' were transferred to other departments of Respondent No.1. The Petitioner came to be transferred to the Research and Reference Bureau (Library) of the Respondent No.1 and his designation was changed to Clerk, though the nature of work then performed by the Petitioner was that of a Librarian -Index Assistant.

3.2 As per the then prevailing Wage Board Award, the designation 'Clerk' fell in the category of administrative staff and that of Librarian – Index Assistant in the category of Working Journalist (Group – 3J). With the implementation of the Majethia Wage Board, the Petitioner was given fitment in Group 5A. In fact, the Petitioner was entitled to be placed in Group 1AF and, thus, the Petitioner was made to suffer loss upon his fitment as per the Majethia Wage Board.

3.3 The Petitioner made repeated requests, including a representation dated 14 December 2016, to the superior officers. Instead of addressing the grievances of the Petitioner, Respondent No.1 issued an order dated 10 August 2017 transferring the Petitioner from Mumbai to Indian Express (P) Ltd., Chandigarh. The Petitioner alleges, the transfer order was not issued on account of any administrative exigencies. It was by way of a counter blast to the grievances raised by the Petitioner regarding his fitment as per the Majethia Wage Board.

3.4 The Petitioner addressed representation dated 18 August 2017. There

was no response. Hence, the Petitioner was constrained to file a complaint under Items 3, 9 and 10 of Schedule IV of the Act, 1971. By an order dated 18 September 2017, interim relief was declined by the Industrial Court. A review application was also dismissed.

3.5 On 15 October 2018, the services of the Petitioner came to be terminated. Two References being Reference IDA No.149 of 2019 for wrongful fitment and Reference IDA No.195 of 2019 assailing illegal termination of the services of the Petitioner were made.

3.6 In the meanwhile, after recording the evidence of the Petitioner and the Respondent No.1's witness and the appraisal of the material on record, the Industrial Court decided the complaint by the impugned judgment and order dated 29 January 2021.

3.7 Being aggrieved, the Petitioner has invoked the writ jurisdiction.

4. I have heard Ms. Patankar, learned Counsel for the Petitioner, and Dr. Chandrachud, learned Counsel for the Respondents. The learned Counsel took the Court through the pleadings and documents tendered for the perusal of the Industrial Court and the impugned judgment and order.

5. Ms. Patankar submitted that the learned Member, Industrial Court, was not at all justified in taking a view that the transfer of the Petitioner was on account of the business exigencies. In the process, according to Ms. Patankar, the learned

Member unjustifiably overlooked the fact that the business exigency was neither pleaded nor established. Ms. Patankar laid emphasis on the fact that even the reason for transfer stated in the Written Statement filed on behalf of the Respondent was disowned by Mr. Anilkumar S. Somji, Respondent's witness.

6. Moreover, according to Ms. Patankar, the learned Member committed an error in not appreciating that the transfer order was clearly actuated by malice as the Petitioner had consistently raised the grievance of wrongful fitment. In any event, the transfer of the Petitioner to Indian Express (P) Ltd., Chandigarh, constituted a change in the conditions of service, and could not have been effected without following the provisions contained in Section 9A of the Industrial Disputes Act, 1947. Thus, the impugned order deserves to be interfered with, submitted Ms. Patankar.

7. Per contra, Dr. Chandrachud would urge that no case for interference by the court in the transfer order was made out as the order was issued is in conformity with the conditions of contract of service and was not at all actuated by any mala fide. Inviting the attention of the Court to the allegations in the complaint, and the manner in which the Petitioner fared in the cross-examination, Dr. Chandrachud would urge that no case of mala fide is even remotely made out. There are no allegations of bias. In the absence thereof, mere contention that the transfer was mala fide, is of no avail.

8. Laying emphasis on the onus which rests on a party who alleges mala fide, Dr. Chandrachud would submit that no effort was made to discharge the onus.

Thus, according to Dr. Chandrachud, the Industrial Court was fully justified in dismissing the complaint. To bolster up the aforesaid submissions, Dr. Chandrachud placed reliance on the decisions of the Supreme Court in the cases of **Rajendra Roy V/s. Union of India and Anr.**¹, **Rajneesh Khajuria V/s. Sockhardt Ltd. And Anr.**² and a judgment of this Court in the case of **Cosmo Films Ltd. Aurangabad V/s. Sunil Vasudeorao Deshmukh**³.

9. I have given anxious consideration to the aforesaid submissions. Since the issue primarily turns out on the alleged unfair labour practice in transferring the Petitioner from Mumbai to Chandigarh, it may be necessary to first note the conditions of contract of service. Whether transferability was the term of employment ? The letter of appointment dated 24 December 1992 under which the Petitioner was appointed as an Assistant Layout Man, contains, *inter alia*, the following clauses :

“9. You are liable to be transferred from one job to another from one department to another, and from one shift to another in accordance with the exigencies of work and the category in which you are employed.

10. You are liable to be transferred to any place/department in India, in any of our branch offices, associate concerns, or publications or allied offices in existence or to be established

1 (1993) 1 SCC 148

2 (2020) 3 SCC 86

3 2002 (4) MhL.J.709

hereafter as and when necessary.”

10. The aforesaid conditions make it abundantly clear that the transferability was an expressed term of employment. If transferability is an express term of employment, the challenge to transfer order can only succeed if it could be shown that the transfer was either mala fide or in violation of any statutory prescription.

11. In the case of **VIP Industries Ltd. V/s. Maharashtra Kamgar Karmachari Sanghatana and Ors.**⁴ explaining the import of the judgment of the Supreme Court in the case of **M/s. Kundan Sugar Mills V/s. Ziyauddin and Ors.**⁵ this Court enunciated that once the transferability is a condition of service and the conditions of service are not being adversely affected by the order of transfer, the action of the employer in exercising the right to transfer the employee cannot be faulted, except for mala fides or where there is a statutory violation. A profitable reference can also be made to a judgment of the Supreme Court in the case of **Pearlite Liners Pvt. Ltd. V/s. Manorama Sirsi**⁶.

12. The position in law which thus emerges is that in the absence of the term to the contrary in the contract of service, a transfer order is a normal incidence of service. In the absence of a term prohibiting the transfer of an employee, ordinarily the transfer orders can not be called in question. Where transferability is a condition of service, it would be impermissible for a Court or Tribunal to interdict an order of

4 2008 III CLR 22

5 AIR 1960 SC 650

6 2004 II CLR 965

transfer which flows from the express term of the contract. Even in the absence of an express term of contract, the Court may embark upon an inquiry as to whether the transferability is an implied term of employment.

13. 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.

14. In the case of **State of Bihar and Another Vs. P.P. Sharma, IAS and Another**⁷, the Supreme Court, observed that the determination of a plea of *mala fide* involves two questions, 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.

15. 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**⁸ on which reliance was placed by Dr. Chandrachud, 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

7 1992 Supp (1) SCC 222

8 (2020) 3 SCC 86

an oblique motive.

16. It is also well recognized that the allegations of *mala fide* are easy to make than prove. In the case of **Union Of India and Others Vs. Ashok Kumar and Others**⁹, 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 fides* are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.

17. On the aforesaid touchstone, the plea of malafide attributed to the Respondents deserves to be appreciated. Ms. Patankar made an earnest endeavour to draw home the point that the transfer order was a counter blast to the grievances raised by the Petitioner in respect of his fitment under Majethia Wage Board. Attention of the Court was invited to a communications made by the Petitioner to Mr. Anilkumar Somji during the period 2012 to 2016.

18. The aforesaid endeavour of Ms. Patankar, however, does not merit countenance. From the allegations in the complaint, it becomes abundantly clear that the Petitioner claimed to have raised the grievance regarding the fitment in the year 2012. In contrast, the Petitioner conceded in the cross-examination that he had raised the dispute regarding the fitment before the Assistant Commissioner, Mumbai, only after filing the complaint. The time lag of more than five years in the first

9 (2005) 8 SCC 760

communication allegedly made in the year 2012 to the date of the transfer order dilutes the allegation of malice in a large measure. It does not appear that apart from addressing communications to the superior officers seeking fitment in a higher grade, the Petitioner ever raised appropriate industrial dispute which could bear the weight of the allegations that the transfer order was mala fide.

19. Secondly, the learned Member, Industrial Court was justified in adverting to the first communication post transfer dated 17 August 2017, wherein the Petitioner made no allegation of mala fide. Instead, the Petitioner expressed his inability to join the transferred place on account of personal and familial difficulties. It is only in the subsequent communication dated 18 August 2017, the allegations of victimization were made.

20. As a second limb of the submission, Ms. Patankar would urge that the stated reason for transfer namely the retirement of Pravinsinh Chandansinh Gohil, who was transferred to Chandigarh in the year 2009 to assist the archives team at Chandiragh (paragraphs 12 and 13 of the Affidavit of Respondent No.2, opposing ad-interim reliefs), was disowned by the Respondent's witness. Drawing attention of the Court to the manner in which Mr. Anilkumar Somji fared in the cross-examination, Ms. Patankar would urge that if the express reason stated in the written statement is shown to be incorrect, the transfer order could not have been sustained. Mr. Somji denied that the Petitioner was transferred in the place of Mr. Pravinsinh Gohil. Even

when the attention of Mr. Somji was invited to the aforesaid contentions in paragraph 13 of the Affidavit in Reply, Mr. Somji maintained that the Petitioner was not transferred in the place of Mr. Pravinsinh Gohil, but as per the requirement of the work thereat.

21. The aforesaid deposition of Mr Somji is required to be read in the context of the express term of employment. The Respondent could show that there was necessity of deployment of staff at Chandiragh. Under the contract of employment, the Petitioner was liable to be transferred anywhere. The aforesaid admissions, even if they can be so termed, do not detract materially from the case of the Respondents that the administrative exigencies warranted the transfer of the Petitioner. Therefore, the Petitioner cannot draw much mileage from the aforesaid stand of Mr. Somji.

22. A faint attempt was made by Ms. Patankar to contend that the transfer would have entailed the change in the conditions of service. It is imperative to note that the transfer order itself records that the other terms and conditions of the Petitioner's employment shall remain unchanged. On the one hand, the Petitioner could not demonstrate how the conditions of service would have been adversely affected. On the other hand, the Respondent categorically affirmed repetitively that there would be no change in the terms and conditions of the employment. The challenge to the transfer order on the ground that it would adversely affect the

conditions of service can hardly be countenanced where the adverse changes could not be spelled out.

23. In the totality of the circumstances, in my view, none of the challenges to the transfer order merit acceptance. The learned Member, Industrial Court, thus, committed no error in dismissing the complaint. Resuntantly, no interference is warranted in exercise of extra ordinary writ jurisdiction.

24. Hence, the following order :

ORDER

- (i) The Writ Petition stands dismissed.
- (ii) No costs.
- (iii) Rule discharged.

(N.J.JAMADAR, J.)