
(2009) 03 BOM CK 0111
In the Bombay High Court
Case No : O.O.C.J.A. No. 126 of 2009

Associated Cement Companies Limited	APPELLANT
Vs	
Associated Cement Staff Union	RESPONDENT

Date of Decision : 21-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 9A
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 30(2)

Citation : (2010) 124 FLR 1036 : (2009) 4 LLJ 756

Hon'ble Judges : Mridula Bhatkar, J; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : J.P. Cama., instructed by H. Mehta and Company, for the Appellant;
P.M. Patel, for the Respondent

Judgement

D.Y. Chandrachud, J.—Admit. The Learned Counsel appearing for the Respondents waives service. With the consent of the Learned Counsel and upon their request, the appeal is taken up for hearing and final disposal.

On January 2, 2009 the appellant issued orders to ten employees engaged in the Share Department effecting transfer from Mumbai to diverse places, all over India. The administrative exigencies which warranted the orders of transfer have been explained by the employer thus;

2. Until 1996-97 transfers of shares were carried out in the physical form. Thereafter in accordance with the requirement introduced by the Securities and Exchange Board of India (SEBI) shares of publicly held companies were dematerialised and electronic transfer became mandatory. The letters of transfer addressed to the ten employees advert to the fact that the volume of physical transfers declined by 99% and, as on December 31, 2008 more than 93.8% of the shares of the company have been dematerialised. Out of 1,56,000 shareholders of the company 32,000 shareholders representing less than 7% of

the total share capital were stated to hold shares in the physical form. In the year 2007-2008 only 1214 transfers of shares took place in the physical form as against nearly 4 lacs transfers in the year 1997-98. Consequently the workmen were informed that since the shares of the company have been traded in the Demat form involving a considerable reduction in the work of the Share Department, the Company was not able to gainfully utilise the services of the ten workmen in the share department. In these circumstances, the Company issued orders of transfer to the workmen.

3. A complaint of unfair labour practices was instituted by the Union under items 3 and 9 Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (M.R.T.U. & P.U.L.P. Act). The complaints proceed on the basis that the employer had purported to effect transfers on the ground that there was no work for the concerned workmen in the Share Department as a result of the introduction of the Demat Facility and it was not due to the introduction of the SAP technology.

4. The employer filed a reply to the application for interim relief before the Industrial Court setting out the job descriptions of each of the concerned workmen and the circumstances in which the transfers were being effected. According to the employer it was unable to effectively and gainfully utilise the services of the workmen in the Share Department and hence orders of transfer were issued. The following averments contained in the reply set forth the defence of the employer.

I say that till the period 1996-97, transfer of shares were in physical form. With the introduction of Demat and Electronic transfer of shares, the volume of physical transfers have declined by over 99%. As on December 31, 2008, more than 93.8% of shares of the company have been dematerialised. It is submitted that the Company has about 1,56,000 shareholders, out of which, around 32,000 share holders representing less than 7% of the total shareholdings hold shares in the physical form. Further, there were only 1214 transfers of the shares in the year 2007-08, which reflect about four transfers a working day, as against a high number of 4,00,088 transfers ten years back, i.e. 1997-98.

The employer stated that the 10 employees upon their transfers would be required to carry out mainly clerical jobs which are commensurate with their grades; that they would be provided with accommodation at the establishment of the respondent to which they were transferred; and the transfers were without prejudice to their existing wages, emoluments and grades.

By a judgment dated January 30, 2009 the Industrial Court allowed the application for interim relief; stayed the orders of transfer and restrained the employer from giving effect to the order of transfer dated January 2, 2009 pending the disposal of the complaint. The Industrial Court held that (i) Transfer in the present case is a condition of service; (ii) There is no material prima facie indicating that the orders of transfer had been issued mala fide; (iii) There was

no material to indicate that sufficient work was available at the Head Office at Mumbai; and (iv) The employees cannot be continued with idle wages forever. The observations of the Industrial Court in that regard are to the following effect.

While considering the submissions of both parties, as per the pleadings and material on record, prima facie it seems that transfer order of the concerned employee is as per their contract of the employment. As per the appointment letters issued to the concerned employees, the concerned employees are liable to be posted to work in any of division, department, etc. of the respondents, therefore, it cannot be said that transfer order of the concerned employees are without any power to transfer or term of employment. Prima facie, there is no material showing that transfer orders of the concerned employees are mala fide under the guise of management policy as there is no material showing that there is sufficient work in Head Office for providing to the concerned employees. The concerned employees cannot be continued with idle wages forever. Their services can be utilised as per exigency of work.

Despite these observations the Industrial Court interfered with the order of transfer at the interim stage holding that a breach of Section 9-A of the Industrial Disputes Act, 1947 had taken place in as much as the employer had reduced the number of persons employed in the Share Department without issuing a notice of change.

5. The order of the Industrial Court was challenged by the employer in a Petition under Article 226 of the Constitution of India. The Petition was dismissed by the judgment, in appeal, which was delivered on February 16, 2009.

6. The learned Counsel appearing on behalf of the appellant submitted that the Industrial Court having come to the conclusion that prima facie the transfer orders are not mala fide and that transferability is a condition of service, there was no warrant for the interference of the Court at the interlocutory stage. The learned Counsel submitted that the grounds in regard to the breach of Section 9-A are specious. In so far as the ten complainants/workmen are concerned the order of transfer would not affect them adversely and unless the orders were to have adverse effect there could be no breach of Section 9-A. Transfer being an incident of service there is no question of the order of transfer being in violation of Section 9-A. That apart, it was submitted that item 11 of Schedule IV of the Industrial Disputes Act is not attracted. The transfers from the Share Department were not within the control of the employer and in any event there is no reduction in the number of posts in the department.

7. On the other hand the learned Counsel appearing on behalf of the respondent-Union supported the judgment of the Industrial Court and of the learned single Judge and urged that the Whole basis of the order of transfer was that the services of the workmen could be gainfully utilised, which is belied by the circumstance: that the employer had issued a notice of Voluntary Retirement on February 4, 2009 in all its cement plants in the country; the evidence produced

on behalf of the employer in another complaint of unfair labour practices would show that the witness for the employer had admitted that he was unaware whether the company had carried out a study about the number of employees that would be required in the Share Department and if any of the employees in that department had been rendered surplus. The learned Counsel submitted that the complaint raises triable issues and the learned single Judge was in the circumstances justified in confirming the Interim order of the Industrial Court.

8. In evaluating the rival contentions of the learned Counsel it would be necessary to emphasise that the Industrial Court allowed an application for the grant of interim relief in the complaint of unfair labour practices which arises out of the orders of transfer served by the employer on the employees concerned. Undoubtedly the Industrial Court has jurisdiction to pass interim orders u/s 30(2) of the M.R.T.U. and P.U.L.P. Act, 1971. The complaint invokes items 3 and 9 of Schedule IV. Under item-3 the unfair labour practice consists in the transfer of an employee "mala fide" from one place to another in the guise of following management policy. At the prima facie stage the Industrial Court was of the view that no case of mala fide has been established. Therefore, at this stage it was not possible to hold that there was a breach of item 3 of Schedule-IV.

9. In Item 9 of Schedule-IV the unfair labour practice consists of a breach of a settlement or agreement. Now it is settled law that compliance of mandatory provisions of the Industrial Disputes Act is an implied term of a contract of employment. The question, therefore arises as to whether prima facie there was material before the Industrial Court to show that there was a breach of Section 9-A of the Industrial Disputes Act, 1947.

10. The conditions of service for which a notice of change is required u/s 9-A are spelt out in the fourth schedule. Item 11 of the fourth Schedule reads as follows:

Any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift, (not occasioned by circumstances over which the employer has no control).

11. Item-11 requires an increase or reduction in the number of persons employed or to be employed in any occupation, department or shift. Now it is a settled position of law that before the provisions of Section 9-A are attracted the change which is proposed by the employer must be such as would adversely affect the conditions of service of the workmen. The Supreme Court in Hindustan Lever Ltd. Vs. Ram Mohan Ray and Others, while interpreting Item 11 of Schedule-IV observed that at p. 431 of LLJ:

9. As regards item 11 it was urged that as one department out of three has been abolished, this item applies, though to bring the matter under this item the workmen are not required to show that there is increase in the workload, it must be remembered that the 4th Schedule relates to conditions of service for change of which notice is to be given and Section 9-A requires the employer to give notice under that Section to the workmen likely to be affected by such change.

The word "affected" in the circumstances could only refer to the workers being adversely effected and unless it could be shown that the abolition of one department has adversely effected the workers it cannot be brought under item 11.

12. Now so far as the complainant workmen are concerned, once it is held that transferability is prima facie an incident of service it is impossible to deduce as to how the Tribunal could surmise that the transferred workmen would be adversely affected by an order of transfer. Apart from this the learned Counsel appearing on behalf of the management placed reliance upon *Amrit Banaspati Co. Ltd. Vs. S. Taki Bilgrami and Others*, in support of his submissions.

13. It is not necessary for the Court to express a conclusive view on any aspect of the case since the trial of the complaint is still to take place before the Industrial Court. Prima facie, however, having regard to the judgments of the Supreme Court construing Section 9-A, particularly in *Hindustan Lever Ltd. v. Ram Mohan Ray and Ors.* (supra) it is not possible to accept the submission that a mere an order of transfer would affect adversely the workmen-concerned where transferability is a condition of service.

14. While the Industrial Tribunal has jurisdiction to grant interim orders, such orders ought not to be passed as a matter of course" unless a prima facie case is made out in regard to the commission of an unfair labour practice. On the findings which the Industrial Court recorded the commission of unfair labour practices could not have been inferred at the interim stage. The finding in regard to the breach of Section 9-A is prima facie unsustainable. Consistent with the parameters of the writ jurisdiction under Articles 226 and 227 of the Constitution, the interference of the; learned single Judge in the present case was warranted in order to correct a manifest error on the part of the Industrial Court. So far as the submissions urged on behalf of the respondents are concerned, the mere fact that the, management has issued a notice of voluntary retirement on February 4, 2009 at all cement plants in the country would not at the interim stage furnish a ground for interfering with the order of transfer. It is for the management to determine how its work force should be deployed. The reasons indicated by the management, relating to a reduction in the work of the Share Department over a period time, cannot be regarded as extraneous or colourable, in any event at the interim stage. Reliance was placed on the evidence adduced on behalf of the management in an earlier complaint of unfair labour practices. Those proceedings arose out of the introduction of the S.A.P. technology by the management. The Industrial Court had enjoined the management from introducing or implementing the S.A.P. system till the disposal of the complaint or until a notice of change was issued u/s 9-A. This Court while setting aside the order of Industrial Court by its order dated April 3, 2007 passed in Writ Petition No. 1287/2007 directed that the management shall not effect retrenchment of any employee on the ground that the workman is rendered surplus as a result of S.A.P. technology and no workman shall be redeployed or

transferred without prior permission of the Industrial Court. It was in the context of the allegations in that complaint that the evidence which was adduced on behalf of the management would have to be read. In any event the evidence in the earlier complaint was adduced some time in August, 2008 while the impugned order was issued much thereafter in the month of January, 2009. The management is entitled to demonstrate at the trial the change in circumstances as of January, 2009. The trial of the complaint is still to take place after evidence is adduced in the complaint on behalf of the workmen.

15. In these circumstances, the appeal would have to be allowed, The impugned order of the learned single Judge would have to be set aside, Accordingly the order is thus:

ORDER

The judgment under appeal is set aside. The application for the grant of interim relief before the Tribunal shall stand dismissed. In the circumstances there shall be no order as to costs.

In view of the disposal of the appeal, the Petition does not survive. It is accordingly disposed of.