

(2002) 04 BOM CK 0039
In the Bombay High Court
Case No : A.J.W.P. No. 1958 of 2002

Brihan Mumbai Union of Journalists and Others	APPELLANT
Vs	
Nav Bharat Press Ltd. and Another	RESPONDENT

Date of Decision : 09-04-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 9A

Citation : (2003) 1 ALT 27 : (2002) 6 BomCR 361 : (2002) 95 FLR 1116 :
(2002) 3 LLJ 879

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : C.U. Singh and Malinie D'Souza, instructed by Sanjay Udeshi and Co, for the Appellant; T.S. Shetty and Pushkar Gadkari, for the Respondent

Judgement

F.I. Rebello, J.—Rule. Respondents waive service. Heard forthwith.

2. Petitioner Nos. 2 to 17 are employed with Respondent No. 1 either falling in the category of Journalists or non-working Journalists. The Petitioner No. 1 is a registered trade union. The Petitioners filed a complaint being Complaint No. 1039/2001. In the complaint it was alleged that the Respondents have engaged in and continue to engage in unfair labour practices from November 28, 2001 under Items 3,5,6,9 and 10 of Schedule IV of the M.R.T.U. & P.U.L.P. Act, 1971. Respondent No. 1 is a Company engaged in printing and publishing a newspaper known as Nava Bharat in Hindi. The Respondents also undertake work jobs of various other local newspaper such as Nav Nagar, Janmudra, Dinman, Maha Janshakti etc. Respondent No. 1 is in existence for more than 4 years. Respondent No. 2 is the Managing Director of the Company. Respondent No. 1 employs more than 125 employees and has establishments at Navi Mumbai and Chinchpokli. In the complaint, the Petitioners have set out the joining date of each of the Petitioners, their designation and salary drawn. It was their case that they are covered by the Manisana Wage Board Award and, that, the Respondent No. 1 company falls in Class IV under the said Award. It is their further case

that, the Respondent No. 1 has failed to implement the award considering that they fall under Class IV Establishment, in a like manner as other establishments have done. The Petitioners along with others were agitated on account of the attitude of Respondent No. 1 and as such, they approached the Petitioner No. 1 Union. The Petitioner Nos. 2,3 and 5 approached the Petitioner No. 1 on November 27, 2001. The Respondent No. 1 on coming to know on the very next day, threatened to transfer them from Mumbai. The Petitioners Nos. 9, 10 and 11 have also been aggrieved by non-implementation of the Award. On November 28, 2001 they were also threatened of dire consequences of transfer from Mumbai. Similarly, other Petitioners were also threatened of transfer to various other places if they continue their membership. It is contended that this action of the petitioners of threatening the complainant of transfer and action of transferring Petitioners Nos. 2,3,5,10,11 amounts to an unfair labour practice under Items 3, 5, 6, 9 and 10 of Schedule IV of the M.R.T.U. & P.U.L.P Act, 1971. Various reasons are also set out in the complaint. The nature of work done by the petitioners is also set out. It is also set out that, apart from those transfers the. Petitioners 4,6,7, 9,13,15 and 17 are liable to be summarily transferred. Various reliefs have been prayed, including that the transfers and proposed transfers be stayed and, that, the petitioners Nos. 2 to 17 should not be transferred to any place outside Mumbai. An affidavit was filed in support of the complaint. Interim relief applications were also taken out.

3. On behalf of the respondents Mr. Vivek Prasad, Deputy General Manager has filed an affidavit in reply opposing the application of interim relief. It is set out that the complaint is misconceived, untenable and no case of unfair labour practices under the items invoked has been made out by the Petitioners. It is contended that the allegations regarding joining union are an after-thought. The transfer orders are challenged as a mala fide action, without giving legally cognizable particulars. The complaint it is averred is an abuse of the process of law. It is pointed out that, it is only on December 11, 2001 at about 5.30 P.M. that the Respondent realised that there is a union by name "Brihan Mumbai Union of Journalists". The first respondent has not sent any letter, communication or any writing in regard to any enrolment of the Petitioners as members nor any material is produced to show that the Petitioners are its members. The transfers as contended are issued on November 27, 2001 and December 10, 2001 and has been issued to Petitioner Nos. 2,3,4,5,9,10 & 11. The transfers have become effective. It is then set out that the letters of appointment issued to the Petitioner Nos. 2 to 17 provides for transfer clause and Clause 5 of the appointment letter provides that the Petitioners are liable to be transferred from one establishment to another establishment depending upon administrative exigencies. It is then set out that, the first respondent has been incurring heavy losses and unless the losses are averted and the finances are put in better position, closure is inevitable. The position regarding improvement of finances are periodically discussed and in these circumstances, it was decided to strengthen the branches by providing necessary manpower by reshuffling some

of the employees, to start with. It is in these circumstances, the transfer orders have been issued in the bona fide interest of Respondent No. 1. It is also denied that any of the Petitioners were threatened with dire consequences. It is pointed out that the Petitioner No. 2 without challenging the order of transfer, merely prayed for time to report for the work by letter dated December 1, 2001. For all these reasons as set out, it is prayed that the interim relief be rejected. A written statement has also been filed, meeting the various averments by the Petitioner in the complaint and denying the contentions. An additional affidavit which is by way of objection to interim relief is filed on January 21, 2002. Reliance is placed on documents which include minutes of various meetings held by Respondent No. 1.

4. By order dated February 22, 2002, the application for interim relief at Exhibit-A/2 was rejected. The learned Industrial Court held that the Petitioners herein have failed to make out case of unfair labour practice under items 3,5,6,9 and 10 of Schedule IV of M.R.T.U. & P.U.L.P. Act, 1971 and considering that held that the balance of convenience is not in favour of the petitioners nor was there any probability of irreparable loss being caused to the Petitioners herein. The learned Industrial Court held on perusal of the documents that, there was nothing on record to show that the Respondent No. 1 was aware that the Petitioner Nos. 2 to 17 had joined Petitioner No. 1 on account of grievance of improper implementation of Manisana Wage Board Award. In fact the contention advanced on behalf of the Respondent No. 1 is that Manisana Award has been implemented from May, 2001. The reasons advanced by Respondent No. 1 for transfer has been accepted and, that, no mala fides in the guise of following the Management's policy in issuance of the transfer orders under consideration has been established. The Court held that the burden lies on the Petitioners to prove a strong prima facie case which they failed to discharge and accordingly refused to grant interim relief.

5. At the hearing of the petition, on behalf of the Petitioners, it is contended that, a perusal of Clause 5 of the letter of appointment would indicate that it is not attracted as the Petitioners have not been transferred, in the normal sense that the expression transfer is understood. The other contentions are reiterated. In reply to the averments in the petition and the grounds therein, the Respondents have filed an affidavit-in-reply. One of the grounds raised is that orders of transfers as per settled law cannot be challenged without the Petitioners first joining the place of transfer. It is then set out that on account of technological changes, advanced tele-communications, availability of equipments such as computers, modems, etc. the Respondent No. 1 company strives to edit the up-country pages at branch levels, and such edited pages can easily and be instantaneously transmitted to Mumbai to bring out the entire newspaper. Various contentions as raised before the Industrial Court have also been made. In view of above, the first question would be whether in exercise of the extra-jurisdiction of this Court the order of Industrial Court is liable to be quashed and set aside.

6. Before dealing with the contentions a few additional facts may be set out. The minutes of the meeting of Respondent No. 1 are placed on record, as also the transfer orders of six of the Petitioners from Serial Nos. 3,5,9,10 and 11. Clause 5 as contained in the appointment order of Petitioner No. 2 may now be reproduced:

"That for the present you are posted at Mumbai. However, your services are transferable to any of our offices located elsewhere in India or abroad".

Similar clause also forms part of the appointment letter of other Petitioners. Then we have the Minutes of Meeting dated September 21, 2001 wherein it is set out that at Nasik at the moment full time reporter is not required as they have good free-lance net-work, but they require (sic) a Sub-Editor and a P.T.S. Operator. At Pune office, it is set out that Sub-Editor post was necessary for strengthening the editorial department. At the Surat Office there is a need for one reporter and one Sub-Editor. At Jalgaon Office they require Sub-Editor, a reporter and one P.T.S. Operator. The Minutes of the Meeting dated September 28, 2001, it is set out that Editorial and P.T.S. Staff were appointed for a 20 page newspaper and, that, currently newspaper is published for 12 pages only and as such excess employees in Editorial and P.T.S. department at Mumbai Office could be utilised more efficiently at branch office where there is a need for such people. It is set out that six Sub-Editors are in excess. Similarly three reporters are in excess. In so far as P.T.S. there was an excess of five and two are sought to be transferred. The Minutes of the Meeting dated October 22, 2001 show the points discussed were:

- (1) Circulation recovery and outstanding,
- (2) Circulation billing,
- (3) Advertising billing,
- (4) Advertising recovery, and
- (5) Management implementation.

Minutes of the Meeting dated. October 23, 2001, shows that at Nasik Office the P.T.S. Operator will type the matters and Sub-Editor will edit the same and send the page to Mumbai Office. There will also be a reporter. The work of stringers of Jalgaon area who send the news from different areas will be coordinated by the Reporter to be posted. The news will be edited by Sub-Editor at Jalgaon and typed by P.T.S. Operator and sent to Mumbai Office. Both at Nasik and Jalgaon presently none of these posts exist. At Surat Office the same procedure will be followed as in Jalgaon. No posts presently exists at Surat. In the Pune Office, there is presently one P.T.S Operator, Reporter and one Proof Reader and the news is sent to Mumbai Office and this will be done by the Sub-Editor who will be transferred. In the meeting of November 22, 2001, again the major points were the same as in the meeting of October 21, 2001 and hence, they are not being reproduced. The minutes will disclose that the petitioners are being transferred

to non-existing posts. The posts are being re-located at those places the employees are being transferred.

7. We then have the Award which is known as Manisana (Wage Board) Award. The said Award in the first schedule has grouped Journalists. Group 2A includes Deputy Chief Reporter, who has been defined as a person who assists the Chief Editor and acts in his place in his absence. Group 3 defines Sub Editor to mean a person who receives, selects, shortens, summarises, elaborates, translates, edits and headlines news itself of all descriptions and may do some or all of these functions. Proof reader means a person who checks up printed matter or proof with Editor's copy to ensure strict conformity of the former with the latter. Factual discrepancies, slips of spelling, mistakes of grammar and syntax may also be discovered by him and he either corrects or gets them corrected. Deputy Chief Editor, Sub Editors and Proof Readers fall within the Second Schedule of Working Journalists. Third Schedule consists of Non-Journalists Employees in the Administrative Staff. Then, we have the 4th Schedule of Factory Staff which includes P.T.S. Operators.

8. The first question that has to be answered is whether, the petition should not be entertained on the ground that the Petitioners have not joined their place of transfers. Reliance for that purpose has been placed in the case of Shivaji More and the Estate Manager, Maharashtra State Farming Corporation Ltd. and Anr. 1997 III LLJ (Supp)1082 (Bom). In that case, no doubt, a learned Judge of this Court has stated that it is well settled that in matters of transfers, the employee who has been served with the transfer order must first report to the place where he is transferred and thereafter, make representation and take out legal proceeding. That statement of law obviously would be in the case of a regular transfer where there is no challenge on the ground of arbitrariness or mala fides or being in violation of the guidelines issued or rules in force. In fact, the Apex Court in Rajendra Roy Vs. Union of India (UOI) and Another, has observed as under:

"Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification, the Court or the Tribunal should not interfere with the order or transfer. In a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department".

It is clear therefore, from the law declared by the Apex Court that only in such cases of transfer representation can be made. A complaint otherwise on the ground of unfair labour practice is maintainable where the order is passed mala fide or in violation of the rules of service or guidelines of transfer without any proper justification. In fact, before the learned single Judge in More's case what was in issue was transfer from what is known as Lalpuri Section to another section in the same local area. It is clear, the learned Judge has made those observations in that context. The learned Judge was aware of the position as in the case of Executive Engineer, Mechanical Division, Ahmednagar and others Vs.

Madhav Narhari Walake and another, , the learned Judge had addressed the question as to whether the transfer order was mala fide. The learned Judge also observed that, as long as the transfer order is not shown to be contrary to the applicant's service rules or mala fides it is impermissible for the Industrial Court to interfere under Item 3 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. It is therefore, clear that," the observations in case of Shivaji More (supra) must be restricted to the facts of that case and cannot be generally applied when the transfer is challenged on the ground of mala fide and/or arbitrariness or as amounting to be an act of unfair labour practice or contrary to rules and guidelines for transfer. The position has thereafter been reiterated by the Apex Court in State of Madhya Pradesh, and Another Vs. S.S. Kourav and Others, where the Apex Court has observed that in the matter of transfer, the decision of transfer is not vitiated unless it is mala fides or by extraneous consideration without any factual background foundation. In B. Varadha Rao Vs. State of Karnataka and Another, in the matter of transfer order of Government employees the Apex Court observed as under:

"However, a transfer order which is mala fide and not made in public interest but made for collateral purpose, with oblique motives and in colourable exercise of power is vitiated by abuse of power and is open to challenge before Court being wholly illegal and void".

It is therefore, clear that the transfer from one place to another in public interest or administrative exigencies, would normally not be interfered with and the remedy for the parties in such cases if there be difficulties is to make a representation. In private employment also a similar managerial exercise for administrative exigencies or in the regular courses of employment in terms of the service conditions would not be interfered with. However, where the action is challenged as mala fide or colourable exercise of power or being arbitrary or an unfair labour practice being contrary to known policy laid down in the form of rules and guidelines, Courts would interfere. The law, therefore, is clear. The complaint is maintainable. The judgment in Shivaji More (supra) has to be confined to those cases where the transfer is a regular transfer or in the same locality to a similar post. The first contention is therefore rejected.

9. We then come to the case whether the Petitioners have made out strong prima facie case to show that the transfer was mala fide. In the first instance, even assuming for the moment that the finding of the Industrial Court is upheld that there was nothing before the Management to indicate that the Petitioners and others were members of Petitioner No. 1, the question still remains whether a person can be transferred from one post to a non-existing post. The transfer is supported based on the clause in the letters of appointment by the Respondent No. 1 and the Industrial Court accepted the same. Admittedly, from the facts as set out and which are available, the Petitioners have not been transferred to an existing post in another office. In fact, what is sought to be done is re-deployment of posts and transfer of the Petitioners to those posts or transfer

alongwith the posts. For such an exercise Clause 5 of letter of appointment could not have been resorted to. Clearly therefore, this was not a transfer of person from one post to another. This was transfer of the posts from one establishment to another establishment along with the employees. To my mind clearly such a transfer would not fall under Clause 5 of the appointment letter. In the report of Manisana (Wage Board), the various functions of working Journalists have been set out. The job of Deputy Chief Reporter is in the office of the establishment when the Chief Reporter has been appointed in the absence of Chief Reporter the Deputy Chief Reporter acts in his place. Sub Editor's work is also set out. Prima facie, it is in the same establishment as the Chief Reporter. From the Minutes referred to earlier, it is clear that the transfers are sought on the ground that there are excess staff. In other words, the transfer is not made to give effect to Clause 5, but on account of surplus staff. This aspect has not at all been considered by the Industrial Court. At this stage, it is not necessary to go into the report as to how by transferring the Petitioners, how the circulation, or the recovery of outstandings or billing would be increased. That job or work is not of the Petitioners who work as Journalists or Editing staff. The Petitioners' job are either in the office or in the factory. To my mind therefore, the Industrial Court in spite of the material before it did not address itself to the correct question which it ought to have addressed itself. If the posts are surplus and are being re-deployed, even if this can be done, must the principle of "first come last go" be followed. In other words where posts have to be re-deployed what is the criteria to be applied in re-deploying the posts and persons occupying the posts. The order also does not take into consideration that on account of the managerial policy there will be reduction of posts in one establishment. This procedure will attract Item 11 of Schedule IV of Industrial Disputes Act and hence Section 9-A may be attracted. These are questions that will have to be answered. The order discloses non-application of mind on these vital aspects. The action therefore, of the Respondents in transferring the Petitioners along with posts under the guise of strengthening the regional offices, to my mind was not in the exercise of the managerial powers under Clause 5 of the letter of appointment, considering the work of publishing a paper and the work to be done by the working journalists as set out in the Manisana Award or of the non-working journalists. The transfer is in fact a colourable exercise of powers even if it is accepted that the Petitioners have not established that they were transferred for trade union activities and for joining as member of petitioner No. 1. Apart from that consideration the award and the transferred post from Mumbai City to other cities or towns the Petitioners who are enjoying benefits in the Mumbai Office would lose the same in the regional offices. Thus, this would attract Item No. 6 in addition to Item No. 3. The impugned order, therefore, suffers from errors apparent on the face of the award and is liable to be quashed and set aside. In the light of the above, Rule made absolute in terms of prayer Clause (a) and consequently there will be ad interim relief in terms of prayer Clause (a) of Exhibit-U pending hearing and final disposal of the complaint.

10. The learned counsel for the Respondents prays for stay of the order. Considering what has been set out earlier, this is not a fit case to grant stay. In the light of that, the application for stay rejected.