

(2001) 08 BOM CK 0001
In the Bombay High Court
Case No : Writ Petition No. 731 of 2001

Cosmo Films Ltd.

APPELLANT

Vs

Sunil Vasudeorao Deshmukh

RESPONDENT

Date of Decision : 16-08-2001

Acts Referred:

Industrial Disputes Act, 1947 — Section 9A

Citation : (2002) 4 MhLj 709

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : T.K. Prabhakaran, for the Appellant; P.K. Joshi, for the Respondent

Final Decision : Allowed

Judgement

R.M.S. Khandeparkar, J.—Heard the learned Advocates for the parties. Perused the records.

2. The petitioner challenges the judgment and order dated 30th January, 2001 passed by the Industrial Court, Aurangabad in Complaint (ULP) No. 26/2000.

3. The complaint came to be filed by the respondent herein in the Industrial Court against the petitioner contending that the petitioners are engaged in unfair labour practice by transferring the respondent from Chikalthana plant to Bombay Head Office under the transfer order dated 2-3-2000 received by the respondent on 5-3-2000. According to the respondent, the transfer order amounts to the petitioner being involved in unfair labour practice under Item Nos. 3, 5 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter called as the "said Act"). It is the contention of the respondent that the action of transfer is mala fide and has been taken only to harass the respondent to compel him to withdraw the earlier complaint No. 124/1999 filed by the respondent against the petitioner. On the other hand, it is the case of the petitioner that the transfer of the respondent to Bombay is purely on administrative grounds and in terms of the contract of

employment between the parties and that, the respondent was doing the work of supervision of loading and unloading of the goods and, therefore, there is no unfair labour practice as such having been adopted by the petitioner towards the respondent.

4. The Industrial Court, by the impugned order, has held that the respondent was working as an Operator and in the said category, he is covered by the definition of workman and as the respondent complained against his deputation at Waluj plant, the petitioner has chosen to transfer the respondent to Bombay and that, the change in the nature of work without changing designation and without giving any rise in salary and continuing a person on deputation without fixing any period is illegal act on the part of the petitioner and transferring the respondent without any justifiable reason is nothing but adopting unfair labour practice in terms of Item Nos. 3, 5 and 9 of Schedule IV of the said Act and, therefore, the Industrial Court, by the impugned order, has set aside the order of transfer dated 2-3-2000 and ordered the respondent to join the duties at Waluj as Operator and the petitioner is ordered to provide the work to the respondent as the Operator. The order also speaks about payment of wages to the respondent as Operator from 8-5-2000 till he is allowed to join duties.

5. The impugned order is sought to be challenged on various grounds including the ground of non application of mind, deviation from the settled principles of law relating to transfer, as well as unwarranted observations in relation to the subject matter of complaint (ULP) No. 124/1999 and 145/2000 pending before the Industrial Court which are yet to be disposed of. According to the petitioner, there are no analysis of the evidence on record in proper perspective and the findings have been arrived at without any material on record besides, some of them being totally contrary to the evidence led by the parties. The contentions are sought to be made good by referring to the decisions in the matter of Canara Banking Corporation Ltd. Vs. U. Vittal, , The Management of the Syndicate Bank Ltd. Vs. The Workmen, . The Bareilly Electricity Supply Co., Ltd., v. Sirajuddin and Anr. reported in 1960 F.L.R. 243 , S.K. Maini Vs. M/s. Carona Sahu Company Limited and others, and Management of Addisons Paints and Chemicals Ltd. v. Workmen, represented by the Secretary (A. P. and C) Assistants Association and Anr. reported in 2001 1 CLR 587. It is the contention of the learned Advocate for the petitioner that there is absolutely no material on record to suggest that there is any change in the nature of duties on account of the transfer of the respondent to Bombay and the respondent has illegally refused to join his duties at Bombay. On the other hand, it is the contention of the learned Advocate for the respondent that the findings arrived at by the Industrial Court, on analysis of the entire evidence, apparently disclose that the respondent is a workman and once it is established that the party to the proceeding is a workman, the nature of the work assumes no importance for the purpose of transfer. Besides, the petitioner has not proved that the transfer has been for a justifiable reason and mere statement in the order of transfer that it is for administrative exigency by itself is not sufficient to show that the transfer has really been for administrative

exigencies when the petitioner has failed to establish the same by leading necessary evidence in that regard. In the absence of any justifiable reason being shown for transfer and that there being change in the nature of the work, as is apparent from the findings arrived at by the tribunal that there is no factory at Bombay and admittedly, there is no compliance of the provisions of Section 9A of the Industrial Disputes Act and, therefore, it is a clear case of adopting unfair labour practice in terms of Item No. 9 of Schedule IV of the said Act. The transfer having been made only to pressurize the respondent to withdraw with the complaint (ULP) No. 124/1999 and complaint (ULP) No, 145/2000 filed by him against the petitioner, the acts on the part of the petitioner disclose unfair labour practices as are contemplated under Item No. 5 of Schedule IV of the said Act. It is further contention that the respondent is the sole person chosen for transfer to Bombay and none other employee of the petitioner has been transferred and that shows favouritism to others as against the revengeful attitude towards the respondent and hence, Item No. 3 of Schedule IV of the said Act is attracted. Reliance is sought to be placed in the decision of the Apex Court in the matter of S. G. Chemical and Dyes Trading Employees Union v. S.G. Chemicals and Dyes Trading Ltd. and Anr. reported in 1986 1 C.L.R. 360. Further, pointing the limited scope of writ jurisdiction while entertaining the petition against the orders passed by the inferior Courts, attention is drawn to the decision of the Apex Court in the matter of Syed Yakoob Vs. K.S. Radhakrishnan and Others, .

6. The Apex Court, in Syed Yakoob's case, has held that the jurisdiction of the High Court to issue a writ of certiorari is supervisory jurisdiction and the Court exercising the same is not entitled to act as appellate Court and this limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in Writ proceedings and 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. It is further held that a writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals and these are the cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. It is also held that a writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. In catena of decisions given by the Apex Court and this Court subsequently, it has been held that passing an order without assigning proper reason even by the Administrative authority apart from the judicial or quasi-judicial authorities, amounts to violation of principles of natural justice.

7. The Apex Court in S. G. Chemical's case (supra), after holding that closing down of Churchgate Division of the Company therein was illegal as it was in contravention of the provisions of Section 25-O of the Industrial Disputes Act, it was observed that:

"Under Sub-section (6) of Section 25-O, where no application for permission under Sub-section (1) of Section 25-O is made, the closure of the undertaking is to be deemed to be illegal from the date of the closure and the workmen are to be entitled to all the benefits under any law for the time being in force, as if the undertaking had not been closed down. The eighty-four workmen were, therefore, in law entitled to receive from September 18, 1984, onwards their salary and all other benefits payable to them under the Settlement dated February 1, 1979. These not having been paid to them, there was a failure on the part of the Company to implement the said Settlement and consequently the Company was guilty of the unfair labour practice specified in Item 9 of Schedule IV to the Maharashtra Act, and the Union was justified in filing the complaint u/s 28 of the Maharashtra Act complaining of such unfair labour practice."

Drawing attention to the above ruling of the Apex Court, it was sought to be contended by the learned Advocate for the respondent that there is a clear violation of Section 9 of the Industrial Disputes Act by the petitioner inasmuch as, no notice regarding the change in the conditions of service of the respondent was given as is otherwise required under the said provision of the law and, therefore, without complying the said mandatory provision of law, the petitioner having proceeded to transfer the respondent resulting in change of nature of the work, amounts to being guilty of unfair labour practice under Item 9 of Schedule IV of the said Act as is otherwise held by the Apex Court in S. G. Chemical's case in relation to non-compliance of mandatory provision of Sub-section (6) of Section 25-O of the Industrial Disputes Act.

8. Section 9A of the Industrial Disputes Act provides that no employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change, - (a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or (b) within twenty-one days of giving such notice; Provided that no notice shall be required for effecting any such change - (a) where the change is effected in pursuance of any settlement or award; or (b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules. Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in that behalf by the appropriate Government in the Official Gazette, apply. Bare reading of Section 9A of the Industrial Disputes Act, therefore, discloses that the provisions therein would apply in cases of change of nature of work and not otherwise. Certainly, if there is a change in the nature of work of the workman, it would amount to change in conditions of service and, therefore, compliance of the provisions of Section 9A would be necessary and without such compliance, action in that regard can certainly be termed as unfair labour practice by the employer against the employee within the meaning of the

provisions under Item 9 of Schedule IV of the said Act. It is, therefore, necessary to ascertain as to whether the impugned judgment and order discloses a finding regarding change in the nature of the work on account of transfer of the respondent to Bombay. The learned Advocate for the respondent being unable to locate any such finding in the impugned order, fairly conceded that the impugned judgment does not disclose proper narration of the facts and analysis and based on such analysis, the clear finding in that regard. Nevertheless, the same cannot be used to the prejudice of the respondent when the respondent had taken enough care to place on record sufficient evidence justifying his case regarding adoption of unfair labour practice by the petitioner. In that regard, therefore, the learned Advocate for the respondent also drew attention of the court to the various parts of the evidence placed on record by the parties and, it was contended that the evidence clearly discloses a clear statement by the respondent in the course of his deposition that there is no factory at Bombay and there is only office at Bombay and there is no work of operator at Bombay office and whatever the work the respondent was performing at Chikalthana or Waluj plants, is not available at Bombay. Merely because, there is no finding arrived at by the Industrial Court in spite of such clear evidence being brought on record by the respondent, there can be no justification for the interference by this Court in the impugned judgment when the ultimate order does justify the final directions issued by the Industrial Court in the facts and circumstances of the case. On the other hand, it was sought to be contended by the learned Advocate for the petitioner that though there was no specific challenge to the said statement of the respondent in his deposition in the course of cross-examination, it was specifically admitted by the respondent himself that he did not take any information from the management as to what work he is required to perform at Bombay and that, he had categorically stated that because he is transferred to Bombay, he had mentioned that he would not do the work at Bombay. This, according to the learned Advocate for the petitioner, discloses that the respondent is actually not aware of the work he is required to perform at Bombay and, therefore, his statement regarding absence of factory or absence of the work of operator at Bombay is devoid of substance. Further, it was submitted that the petitioner, on its part, has produced evidence on record to the effect that the work which would be required to be done by the respondent at Bombay would be the same work which he was doing till 1st or 2nd March, 2000.

9. Perusal of the impugned judgment discloses that the Industrial Court, after going through the record, has found that the respondent was working in F.G.S. Department and his designation was that of an operator, that the respondent was sent on deputation from Chikalthana to Waluj plant also as an operator and that, at no point of time the respondent was designated as supervisor and that, the work of operator is not available at Mumbai office and at Mumbai, it is the Head Office of the petitioner where operator's work is not available and that, therefore, the action of transfer is bad in law. Moreover, and as rightly submitted by the learned Advocate for the respondent, the impugned judgment nowhere

discloses the analysis of the evidence so as to arrive at the findings which are arrived at by the Industrial Court and in that regard, therefore, the petitioner is justified in contending non application of mind by the Industrial Court while deciding the matter. While being fully conscious of the limitations in the matter of writ jurisdiction while considering the matter under Article 227 of the Constitution of India, at the same time, failure on the part of the inferior Court to adopt the correct procedure in the matter of assessment of evidence, cannot be allowed to result in injustice to the parties, and therefore, as held by the Apex Court in the matter of Shama Prashant Raje v. Ganpatrao and Ors. reported in 2001(1) Mah.L.J. 206 in such a case, nothing prevents the Court from looking into the evidence and even to reappraise the same in the interest of justice. In fact, the respondent himself found it difficult to justify the impugned judgment without referring to the evidence on record. Apparently, because the Industrial Court has not taken into consideration even the material evidence on record.

10. In the circumstance, perusal of the evidence on record discloses that undisputedly, the respondent has stated in his deposition that he was working as operator in Chikalthana plant from 1983 to 1999. He was transferred on deputation to Waluj in January, 1999 and after he had filed complaint accusing the petitioner of adopting unfair labour practice in case of the respondent, the impugned order of transfer was issued against the respondent for his transfer to Bombay, where there is no factory but only an office and that, he would not be able to perform the work of operator at Bombay. Equally, it is true that he has deposed in the course of his testimony that he had not taken any information from the Management regarding the work which he is required to perform at Bombay. However, mere statement that he had not enquired with the Management as to what work he was required to perform at Bombay cannot nullify the effect of a positive statement on the part of the respondent that there is no factory at Bombay and he would not be able to work as operator at Bombay, when the fact that he was appointed as operator has also been established by other evidence on record. However, it is not possible to arrive at final conclusion by merely referring to these two statements referred to by the learned Advocates for the parties.

11. The testimony of the respondent further discloses that the workers who were designated as operators in F.G.S. Department, were doing the work of packing and not operating any machines. In fact, there is a clear statement to that effect in his deposition in examination-in-chief itself. His testimony further discloses that the Management had not prepared any record showing the work performed by the respondent and the respondent used to perform the work as per the directions given by the management from time to time. The relevant portion of his testimony in this regard, reads thus :

"It is true to say that my work was changed time to time. I used to operate RPG plant and I also operate MBX plant. I also worked in PTC Department and also in packing department. When I posted to Waluj plant my work was not fixed. It is

not correct to say that I did not work in any other department except the packing department. I worked in various Departments. According to I operate the stapler machine is a machine work. I am not performed the stapler machine as it is not the operator job."

12. The testimony of the Manager of the petitioner before the Tribunal discloses that the respondent was working in Chikalthana plant as operator but, he was not working on machine and he was working in RPG section. The testimony also discloses the statement to the effect that whatever work the respondent was doing till 2nd March, 2000, would be the work which is available at Bombay. The sum and substance of his evidence on record is definitely to the effect that the respondent was working as operator at Chikalthana as well as at Waluj plant but, he was working in various departments and as per the directions given by the Management from time to time. This evidence clearly discloses that the work performed by the respondent was not of a particular fixed nature but, according to the availability of the work.

13. Undisputedly, the Tribunal has not arrived at any finding as to what was the nature of the work which was allotted to the respondent or what was the nature of the duties which the respondent was required to perform. The evidence on record also does not disclose any specific nature of the work being performed by the respondent while in employment of the petitioner either at Chikalthana plant or at Waluj plant. Being so, one fails to understand how the provisions of Section 9A of the Industrial Disputes Act are attracted in the case in hand. If the applicability of Section 9A Industrial Disputes Act is ruled out, the question of serving notice or question of there being any change of nature of work does not arise at all and that can never be a ground to accuse the employer of having adopted unfair labour practice within the meaning of Item No. 9 of Schedule IV of the said Act.

14. As regards Item Nos. 3 and 5 of Schedule IV of the said Act, they refer to transfer of an employee mala fide from one place to another, under the guise of following management policy and to show favouritism or partiality to one set of workers, regardless of merits. Undisputedly, the order of transfer on the face of it, discloses that the same was on account of administrative exigency. It is the case of the respondent that the petitioner has adopted unfair labour practice within the meaning of Item Nos. 3 and 5 of Schedule IV of the said Act and with that complaint, the respondent approached the Industrial Court. Being so, it was primarily necessary for the respondent to establish his complaint regarding adoption of unfair labour practice within the meaning of Item Nos. 3 and 5 of Schedule IV of the said Act, by the petitioner. The burden was squarely upon the respondent and unless this burden was discharged, the question of onus being shifted upon the petitioner to disprove the contention or to establish that the transfer was in administrative exigencies, did not arise at all. The respondent having failed to discharge the said burden and, there being no material on record on the relevant aspect of the grievance of the respondent i.e. regarding the

change in nature of work, the main grievance itself was without any basis. The Industrial Court having totally ignored the said aspect, has clearly acted not only in improper exercise of jurisdiction but, in the total absence of any material in support of the grievance, has clearly exceeded its jurisdiction by giving relief of the nature granted by the Industrial Court.

15. It is well established that when the transfer order, on the face of it, discloses that it is for the administrative exigencies, then unless it is established by cogent evidence on the part of the person accusing the employer of having adopted unfair labour practice in the matter of transfer, there cannot be any conclusion or inference against the contention of the employer that the transfer is for administrative exigencies.

16. For the reasons stated above, therefore, the impugned order cannot be sustained and is liable to be set aside. Considering the view that I am taking, it is not necessary to refer to various decisions relied upon by the learned Advocate for the petitioner.

17. In the result, the petition succeeds. The impugned order is hereby quashed and set aside. Rule is made absolute accordingly, with no order as to costs.

At this stage, the learned Advocate for the respondent prayed for stay of the order passed today. It is pertinent to note that the order for transfer apparently, shows the same to be for administrative exigencies and there is absolutely no material to arrive at any conclusion to the contrary. In the circumstances, there is no case for grant of stay. It is further contended that throughout the proceedings, there was stay against the order of transfer. The same cannot be a justification to grant stay. Hence, prayer for stay is rejected.