
(2001) 06 BOM CK 0081

In the Bombay High Court

Case No : Writ Petition No. 5987 of 1998

Crest Communications Ltd. and Others

APPELLANT

Vs

Sheetal Shenoy

RESPONDENT

Date of Decision : 28-06-2001

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 2(1)
Industrial Employment (Standing Orders) Act, 1946 — Section 3(2)

Citation : (2001) 3 ALLMR 612 : (2001) 4 BOMLR 339 : (2001) 90 FLR 1039 :
(2001) 4 MhLj 919

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : A.V. Bukhari and Pankaj Patel, for the Appellant; R.D. Bhatt and Sunil Dighe, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This Writ Petition under Article 227 of the Constitution of India takes exception to the order passed by the Industrial Court, Maharashtra, Mumbai, dated 30th March, 1998 in Complaint (U.L.P.) No. 107/98.

2. The Respondent herein filed the aforesaid complaint before the Industrial Court for a declaration that the Petitioner herein have engaged and are engaging in unfair labour practices under Item Nos. 3, 9 and 10 of Schedule 4 of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the said Act for the sake of brevity). The Respondent further prayed for a direction against the Petitioners to cease and desist from continuing to engage in unfair labour practices referred to above. The main ground on which the Respondent approached the Industrial Court, by way of complaint under the said Act, was that, when she had joined the services of the Petitioner Company, there was no agreement between the Respondent and the Petitioner Company that the services of Respondent were

transferable at any place; whereas the Petitioner Company by the impugned action wanted to transfer her from its Mumbai Office to Delhi Office, which was admittedly established much after the Respondent had Joined the services of the Petitioner Company.

3. The relevant dates for the adjudication of the present matter and the brief facts are that; admittedly, the Respondent joined the services of the Petitioner Company on 10th November, 1993 without any written appointment order. It is relevant to note that when the Respondent Joined services of the Petitioner Company, there was only one office of the Petitioner Company in Mumbai. There is nothing on record to Indicate that, at the relevant time the Petitioner Company had made its intention known to the Respondent, that they would start office at other places outside Mumbai, and that the Respondent was likely to be transferred to such places as and when occasion arises. It is also relevant to note that, at the relevant time the Petitioner Company was a private limited company and was converted into a private limited company only on 8th July, 1994. After the Petitioner Company became a public limited, it is stated that the Petitioner Company framed rules and regulations to govern the terms, conditions and privileges of employment for their employees placed at the Corporate office and the Regional offices. It is stated that the said rules and regulations were circulated and made known to the employees engaged with the Petitioner Company before making the same effective from 1st August, 1995.

4. No doubt, one of the rules, viz. rule 2.16 specifically deals with the issue of transfer of services of the employees of the" Company. Rule 2.16 specifically states that the Company reserves right to transfer the services of the employees to any of its associate concerns or Its offices in India on the same terms and conditions of appointment.

5. It is also not In dispute that the Petitioner Company established its office at Delhi some time in November, 1995 and another at Chennai in September, 1995. Obviously, on the strength of the abovesaid rules, the Petitioner Company issued impugned transfer order on 12th January, 1998, transferring the services of the Respondent from its Mumbai office to Delhi office. The said order directed the Respondent to report to the Delhi office on 19th January, 1998 at 10.00 a.m. and the Respondent was called upon to hand-over charge with immediate effect to Mr. K.R.Vijayan. This order has been issued by the Company Secretary of the Petitioner Company. As per the directions issued in the said transfer order, the Respondent handed over charge to the named officer on 13th January, 1998. The Respondent, however, was seriously aggrieved by the said transfer order and therefore immediately preferred the complaint before the Industrial Court at Mumbai, alleging that the Petitioner Company has engaged and is engaging in unfair labour practices within the meaning of Item Nos. 3, 9 and 10 of Schedule IV of the Act.

6. The said complaint was resisted by the Petitioner Company by filing written statement. The Petitioners, inter alia, contended that, the complaint filed by the

Respondent was not maintainable and also denied all the material allegations in the complaint. The Petitioner Company mainly contended that the Respondent was employed as an Account Assistant and since the Petitioner Company had established office at New Delhi with its expanding activities, the Management felt it imperative to have a competent Account Assistant in New Delhi and that the Respondent was found to be fit for the said post. Accordingly, the Petitioner Company justified its action of transfer and denied the allegations that the transfer was mala fide or motivated as alleged. In other words the stand taken by the Petitioner Company was that the order of transfer under challenge was purely due to administrative exigencies.

7. It is relevant to point out that although the Respondent had claimed interim relief during the pendency of the said complaint, the same was not granted; but instead, the main complaint was taken up for final hearing. Both sides filed their pursis in that behalf. Both the parties decided to proceed with the hearing on the basis of pleadings and documents already before the Court, without leading any oral evidence. In the circumstances, the Industrial Court proceeded to decide the said complaint on the basis of pleadings and documentary evidence on record.

8. The Industrial Court relied on the decision of this Court, *Maharashtra General Kamgar Union v. All India Handloom Fabrics Marketing Co-op. Society*, which, according to the Industrial Court, was squarely applicable to the facts of the present case. It held that infraction of any service condition is impermissible; moreover since there is no provision for transfer of employees in the Standing Orders, there is lack of authority to transfer the employees and therefore the transfer order in question suffered from mala fide in law, thus covered by Item No. 3 of Schedule IV of the Act. The Industrial Court, while coming to the said conclusion has held that there was no dispute that the Standing Orders were applicable to the present case. The Industrial Court further negated the Petitioner Company's plea that the power to transfer flowed from the rules and regulations which came into force in August, 1995 and that there was a vested right in Petitioner Company to transfer employee from one place to another. The Industrial Court, following the aforesaid decision, took a view that since the said rules and regulations were not certified, the same were of no avail and there was lack of authority to transfer the employees. Insofar as the stand taken by the Petitioner Company that the employees of the Petitioner Company have impliedly consented to the rules and regulations, the Industrial Court held that merely because the employee did not protest after coming into operation of the said rules and regulations but also availed of the benefits under the said rules and regulations, it cannot legitimise or accord legal sanctity to the transfer clause provided in the said rules and regulations which was not covered by the Standing Orders. The Industrial Court has also proceeded to hold that since there was no appointment order when the Respondent joined services of the Petitioner Company in 1993; and the Delhi office was also not in existence, but was established only in November, 1995; and that the Respondent was not made known about the intentions of the Petitioner Company to expand the business or

of opening a branch at Delhi; and in the absence of such knowledge; and also in the absence of express terms of transfer while joining the service, there was no inherent power in the Petitioner Company to transfer the Respondent and that the rules and regulations framed posterior to the joining of service by the Respondent would be of no avail to the Petitioner Company. To support this view, the Industrial Court relied upon the decision of Karnataka High Court *Nippani Urban Co-op Bank Limited v. Workmen*, as well as the decision of Apex Court. *Kundan Sugar Mills v. Zuauddin*,. Referring to the aforesaid decisions, the Industrial Court held that the action of the Petitioner Company of Issuing the transfer order and introducing a new term of transfer which was not in existence when the Respondent had joined the services in the year 1993, amounts to unfair labour practice under Item 9 of Schedule IV of the Act. In the circumstances, the Industrial Court held that the Petitioner Company engaged in the commission of unfair labour practices covered by Item Nos. 3 and 9 of Schedule IV of the Act, and therefore, restrained the petitioners from engaging into such unfair labour practices. The Industrial Court therefore quashed the transfer order dated 12th January, 1998 and directed the petitioners to allow the Respondent to resume duty in her original post and original place at Mumbai office. This decision of the Industrial Court has been taken exception to in the present Writ Petition.

9. In substance, the learned Counsel for the petitioners has reiterated the stand taken by the Petitioners before the Industrial Court. The principle argument advanced by the learned Counsel for the Petitioners is that the Company has inherent power to transfer any of its employees and that the transfer is only an incidence of service. It is further submitted that when there is no agreement or contract in writing, it can be safely inferred that the parties had agreed to the condition of transfer of service; and, in any case, in the facts and circumstances of the present case, such an inference can be safely drawn. According to the learned Counsel for the Petitioners, only in situation where there is an express agreement between the parties viz. the workmen and the employer, that the employer shall not resort to transfer of the workmen from one place to another, the power of employer is curtailed, but in all other situations there is inherent power with the employer to transfer its employees from one place to another so long as the service conditions of the employees are not prejudicially affected in any manner. He further submits that in the present case, the Petitioners have framed rules and regulations which became effective from 1st August, 1995 and the said rules and regulations expressly provide for right of management to transfer the services of its employees by virtue of Rule 2.16. The learned Counsel for the Petitioners further submits that, the Petitioner Company, after framing the said rules and regulations, has duly circulated the same to its employees and that none of the employees raised any protest or objected to any clause therein. According to him, the said rules and regulations are a complete package offered to the employees which provides for privileges and facilities relating to the service conditions of the employees; and that the employees have availed of the

privileges and facilities made available under the rules and regulations from the time it has come into effect from 1st August, 1995. He further submits that all the employees of the Petitioner Company including the Respondent herein have therefore acquiesced of the said rules and regulations, for they have availed of the facilities provided under the said rules and regulations. Therefore, it is not open for the Respondent to challenge the authority of the Petitioner Company to transfer her services from Mumbai office to Delhi office. It is submitted that the said rules and regulations are binding on the Respondent. The learned Counsel for the Petitioners further submits that in any case, the complainant has failed to establish that the present case is covered under Item 3 of Schedule IV of the Act. According to him, Item 3 is attracted only when the transfer of an employee is mala fide in fact, for this is the only meaning which can be ascribed to purport of Item 3 which provides to transfer of employee from one place to another place under the guise of management policy. He therefore, submits that, Item 3 of Schedule IV cannot be Invoked on the ground that the transfer is mala fide in law, but only when the transfer is alleged to be mala fide in fact; and that there is absolutely no material on record to establish the same. He submits that Items mentioned In the Schedule IV of the Act should be strictly construed because the proceedings are of quasi criminal nature as It entails in penal consequences. He further submits that the Industrial Court has clearly exceeded its authority in concluding that the Respondent had established that the case was covered under Item 9 of Schedule IV of the Act. According to him, Item 9 would be attracted only when there is failure to implement award, settlement or agreement. In the present case there is none. Inasmuch as, it is nobody's case that there is failure to implement award, settlement or agreement. The grievance of the Respondent proceeds obviously on the basis of word "agreement" referred to in the said Item. According to him, to conclude that there was failure to Implement an agreement, the quint-essence is that there should be an agreement in writing, and since there is no such agreement that the employee shall not be transferred by the employer, this Item shall have no application to such a situation. He further submits that, in fact, the Industrial Court has not recorded any reason for arriving at a conclusion that the case was covered under Item 9 of Schedule IV of the Act. For the aforesaid submissions, the learned Counsel for the Petitioners contends that the Impugned order passed by the Industrial Court cannot be sustained in law. Reliance has been placed on several authorities by the learned Counsel for the Petitioners to support the above submissions, to which I shall advert to a little later.

10. On the other hand, the learned Counsel for the Respondent has adopted the reasons given by the Industrial Court to support the Impugned order. He submits that the argument advanced on behalf of the Petitioners that the company has inherent power to transfer its employees is fallacious. According to him, it is well settled that the employer cannot alter any of the service conditions to the detriment of the employee without his consent. That the power to transfer is not inherent but would flow only if there is an express agreement between the

parties in that behalf, and it cannot be inferred as such. Insofar as the authority of the Petitioner Company founded on Rule 2.16 of the Rules and Regulations, it is submitted that the said rules have been introduced unilaterally and without consent of the employees, and In any case the Respondent had never consented for the same. As such, it cannot have any binding effect on the Respondent. The learned Counsel further submits that the said rule regarding transfer is unenforceable against the Respondent. A fortiori, the power exercised by the Petitioner Company on the basis of such rule is without authority of law. The learned Counsel for the Respondent has countered the submissions of Petitioner Company that the Respondent has acquiesced of the said rules by contending that there can be no such inference unless there is clear evidence and proof in that behalf. He further submits that the interpretation put forth by the petitioners to Item Nos. 3 and 9 of Schedule IV of the Act, is totally fallacious and devoid of merits. According to him, Item ,3 of Schedule IV can be invoked even when the employee is in a position to establish that the transfer from one place to another is mala fide in law and which would include the ground that the transfer is without authority of law. The learned Counsel fairly concedes that insofar as allegations of mala fide in fact are concerned, the same cannot be pressed as no proof has been adduced before the Court below, though there is force in the allegations made in the complaint in that behalf. Insofar as unfair labour practice falling under Item 9 is concerned, the learned Counsel contends that the express agreement would Include an agreement in writing as well as an oral agreement. According to him not only when there is negative covenant in the agreement - not to transfer the employee, but also when the agreement, either in writing or oral, is totally silent about the right to transfer an employee, even in such a case, it will have to be presumed in law that right to transfer the employee has not been agreed upon by the parties. According to him, only when there is an express agreement between the parties that the management reserves right to transfer its employee, the power of transfer can be said to have vested in the management. He submits that the stand taken by the petitioners is no more res integra, but squarely covered by catena of authorities. In the circumstances, he submits that the petition can be dismissed.

11. Having considered the rival submissions, I would first proceed to examine the argument as to whether the management has inherent power to transfer Its employee on the ground that the transfer is an incidence of service or whether it is imperative to have an express agreement between the employer and workman conferring such a right in favour of the employer? It would be useful to advert to the decision of the Division Bench of Calcutta High Court in L.W. Middleton v. Harry Playfair,. It would be apposite to reproduce the ratio of the said decision which reads thus :

"It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers or Inconveniences which were not Incident to it and were not within the contemplation of the

employee when he was engaged. Any reduction of the rank or a material change in the duties of an employee is from this point of view, regarded as a violation of the contract of employment, and the servant may thereupon consider the contract as having been violated by the master".

12. The next decision that can be usefully referred to is of the Apex Court in the case of Kundan Sugar Mills v. Ziyauddin and Ors.,. This decision has been relied upon by the Industrial Court in the present case. The Apex Court in the aforesaid case, after analysing the gamut of case law has taken a view that an employer has no inherent right to transfer his employee to another place where he chooses to start a business subsequent to the date of the employment. That in the absence of an express term of the contract of service between the employer and the employee that the later should serve in any future concerns which the former might acquire or start, a person employed in a factory cannot be transferred to some other independent concern started by the same employer at another place at a stage subsequent to the date of his employment. In such a case the right of the employer to transfer the employee to the new concern cannot be Implied as a condition of service of the employment. This authority squarely deals with the principle argument advanced by the Petitioners that the Company had inherent power to transfer its employees and the transfer is merely an incidence of service and it can be Inferred that there is a contract, of service between the parties relating to the condition of transfer. As observed earlier, in the present case there is no dispute that, when the Respondent had Joined services, there was-only one office of the Petitioner Company that too at Mumbai Besides this there is nothing on record to indicate that the Petitioner Company had made its intention known to the Respondent at the relevant time that they intend to expand business activities and/or, to, open offices at other places and that the Respondent would be required to join such places as and when occasion arises.

13. In another decision, the Kerala High Court, in the case of Joseph v. Matrubhoomi Printing & P. Co. Ltd., while following the abovesaid decision of the Apex Court in the case of M/s. Kundan Sugar Mills (supra), took a view that to Imply a term of transferability as regards an employee who entered service of a concern with a single establishment, it must be established that the employer entertained an intention to have a proliferation of its activities. Not only that, there must be communication of such intention to the employee also. It is further held that without a knowledge on the part of the employee of such an intention as entertained by the employer, transferability could not be Inferred as an implied condition. I find no reason to depart from the view taken by the Kerala High Court which is consistent with the enunciation of the Apex Court as well as that of the Division Bench of the Calcutta High Court referred to above. In the circumstances. I have no hesitation in rejecting the plea taken by the Petitioner Company about the Inherent power of the company to transfer its employee from one place to another or to infer that there was a contract between the parties permitting the Petitioner Company to transfer its employee to other offices outside Mumbai which were to be established in future. As mentioned

earlier, there is nothing on record that any such intention was made known by the Petitioner Company to the Respondent when the Respondent joined services of the Petitioner Company. Therefore, there was no agreement, either express, implied or tacit arrived at between the parties permitting the Petitioner Company to transfer the services of the Respondent to any other place outside Mumbai office where she had originally Joined.

14. To counter the aforesaid position, the learned Counsel for the Petitioner Company had argued that, in the present case, the Petitioner Company had framed rules and regulations which came into effect from 1st August, 1995 and all the said rules and regulations were duly circulated to all the employees including the Respondent herein and none of the employees had raised any protest or registered any objection in that behalf, but instead, all of them availed of the benefits and facilities provided under the said rules and regulations. Therefore, according to the learned Counsel for the Petitioner Company, in view of the said rules and regulations, which are complete package, it was not open to the Respondent to avail of the same selectively. A fortiori, the rule relating to the transfer of service was binding on the Respondent. An argument was advanced on behalf of the Petitioner Company that this submission has been negated by the Industrial Court by relying upon the decision In the case of Maharashtra General Kamgar Union v. All India Handloom Fabrics Marketing Co-operative (supra), which decision has been subsequently over-ruled by the Division Bench Judgment of this Court In All India Handloom Fabrics Marketing Co-operative Society Ltd. v. Maharashtra General Kamgar Union and Ors.,". It was therefore argued that the foundation on the basis of which the Industrial Court proceeded to negative the submission is itself demolished and the said conclusion therefore cannot be sustained in law. The Division Bench of this Court In the said decision has no doubt reversed the view taken by the learned Single Judge on the basis of which the Industrial Court had proceeded to accept the challenge put forth by the Respondent. However, in my view," this decision of the Division Bench would not make any difference to the final outcome of the present case. The decision of the Division Bench can be distinguished, for in that case the co-operative society had framed regulations in the year 1959 whereas the employees had joined services much thereafter with full knowledge of the existence of the said regulations which contained the power and authority of the management to transfer its employees; Besides this, the Division Bench has taken Into account that the transfer of the employees In that case was on account of unavoidable and compelling circumstances, whereas in the present case, it is an admitted fact that when the Respondent had joined services of the Petitioner Company there was only one office in Mumbai and moreover the rules and regulations in question came into being at later point of time. In the circumstances, the said rules and regulations, which are posterior In point of time, cannot change the service condition of the Respondent unless the Respondent expressly consents to such condition.

15. The learned Counsel for the Petitioner Company relied upon another decision

of this Court in the case of Agricultural Finance Corpn. Employees Association and Ors. v. Agricultural Finance Corpn. Ltd. and Ors.,. This judgment is of learned Single Judge of this Court. Even in this case, the facts can be distinguished; inasmuch as the concerned rules were framed in the year 1969, whereas the employee was appointed in the year 1971. Moreover there was clear evidence on record that at the time of appointment, the employee was not only shown the relevant rules but the rules were also furnished to the employee and the employee had acquiesced and consented to such condition. In the circumstances, even this judgment can be of no avail to the Petitioner Company.

16. There can be no doubt that, by an agreement between the parties, condition which is not covered by the Standing Orders and which does not require certification, can be arrived at between the parties, and the parties would be governed by such contractual relations. Even the regulations can make provision with regard to such Item. But, the mandate is that if the regulations are posterior to the date of joining service, then, it is incumbent upon the employer to obtain express consent of the employee or of the union of employees in that behalf to make the same binding. However, when the regulations are anterior to the date of joining service and the employee had been made known or informed of such regulations, or appointment order makes reference to the existence of such regulations, then, in such a situation, the position would be entirely different. The cases cited by the learned Counsel for the Petitioners would support the latter, but in the present case we are faced with the former situation; and therefore, it is not possible to countenance the submission that the rules and regulations framed by the Petitioner Company can have binding effect on the Respondent.

17. The learned Counsel for the Petitioner Company relied upon the decision of the Apex Court, (1970) 38 F.J.R. 342 In the case of Workmen of Lakheri Cement Works Ltd. v. Associated Cement Companies Ltd., to contend that it was open to the Petitioner Company to frame the rules and regulations governing transfer and since the same were framed and made effective they would be binding on its employees. However, on a close scrutiny of this decision, it would emerge that the Apex Court was concerned with an issue of inclusion of two Standing Orders, which according to the workmen could not be so Included because there was no authority to frame the standing orders on those topics either under the Act or the rules made thereunder. No doubt, the Industrial Court has taken this view in the present case, but has observed earlier, the same is founded on the decision of learned Single Judge of this Court which has been subsequently overruled by the Division Bench. In any case. I would prefer to be guided by the decision of the Apex Court, for the same is binding. The Apex Court has held that there is no authority to extend the Standing Orders to the topics not mentioned in the first Schedule to the Act as amplified by the rules. As mentioned earlier, the right of employer to frame regulation on the matter of transfer is not doubted, but the Issue in the present case is whether such regulation framed posterior In point of time can bind the employee in absence of his express consent in that behalf. The

abovesaid decision of the Apex Court is therefore of no avail to the Petitioners.

18. Reliance was placed by the learned Counsel on another judgment of the Apex Court in the case of Rohtak and Hissar Districts Electric Supply Co. Ltd. v. State of Uttar Pradesh,". In this case, the Apex Court has held that it is for the appropriate authority to decide whether a particular Standing Order is fair and reasonable or not. The Apex Court has further observed that u/s 3(2) of the Industrial Employment (Standing Orders) Act, 1946, the employers have to frame draft Standing Orders and they must normally cover the items in the Schedule to the Act. If, however, it appears to the appropriate authorities that having regard to the relevant facts and circumstances, it would not be unfair and unreasonable to make a provision for a particular item, it would be competent for them to do so; but the employer cannot insist upon adding a condition to the Standing Order which relates to a matter which is not Included in the Schedule. Section 3(2) of the Act specifically requires that the Standing Orders shall be, as far as practicable, In conformity with the model standing order. This decision is, therefore, an authority on the proposition that the appropriate authority may permit departure from the model standing orders If it is satisfied that insistence upon such conformity may be impracticable, for the time being, to be included in the Standing Orders of any particular establishment. No doubt, this authority deals with the issue of condition regarding transfer included In the Standing Order. In para 15 of the Judgment, the Apex Court has dealt with this aspect and observed that the transfer does not fall under any of the items In the Schedule, and so, the certifying authorities were quite justified in not Including them in the certified Standing Orders. Relying upon these observations it is contended that merely because the rules in question have not been certified the same cannot be enforced, as held by the Industrial Court, is totally ill-founded. There is force in this submission. However, this infirmity would not alter the final conclusion that the regulation unilaterally framed by the Petitioner Company Is not binding on the Respondent.

19. In a subsequent decision of the Apex Court in the case of Western India Match Company Ltd. v. Workmen, the Apex Court has considered the Importance of the provisions made in the Standing Orders Act. The Apex Court in the aforesaid decision observed that while formerly there were two parties at the negotiating table - the employer and the workman, it was thought that there should also be present a third party, the State, as representing the interest of the society. The Industrial Employment (Standing Orders) Act gives effect to this new thinking. While adjudging the fairness or reasonableness of any Standing Order, the Certifying Officer should consider and weigh the social interest in the claims of the employer and the social interest in the demands of the workmen. The Apex Court further held that as long as the Standing Order is in force it is binding on the Company as well as the workmen. The Apex Court further observed that, to up hold the special agreement would mean giving a go-by to the Act's principle of three-party participation in the settlement of terms of employment. In this context the Apex Court observed that inconsistent part of

the special agreement is ineffective and unenforceable. The Apex Court further held that the terms of employment specified in the Standing Order would prevail over the corresponding terms in the contract of service in existence on the enforcement of the Standing Order. In para 8 of the Judgment, the Apex Court has clearly held that if a prior agreement, inconsistent with the Standing Orders will not survive, an agreement posterior to and inconsistent with the Standing Order should not have prevail.

20. The learned Counsel for the Petitioner Company has also relied upon the decision of Allahabad High Court, in the case of U.P. State Sugar Corpn. and Anr. v. Bipin Kumar Mishra,. In this case, the Allahabad High Court has held that since under the Industrial Employment (Standing Orders) Act, 1946 there is no requirement to frame standing order in respect of transfer, the employer cannot be denied the normal right available to him to transfer, an employee from one place to another. It is further held that the employer cannot also be denied the right to frame rules and regulations relating to transfer of employees. The view taken in this decision cannot be doubted. However, the question that arises in the present case is entirely different; inasmuch as, the rules in question have been framed and brought into effect by the employer posterior to the date of joining of the employee. On a close scrutiny of the said decision, it appears that the employee in that case was in service since 1979 whereas the mill was acquired by the State Government pursuant to the Acquisition Act of 1971 and that the employee on his own had requested for being transferred to another factory under the employer In July, 1987 but when he was subsequently transferred from the said place to another place, he took exception to the subsequent transfer order being without authority of law. In this context, the Division Bench of that High Court has held that the Schedule to the Act does not mention transfer and therefore, the employer cannot be denied the normal right of the transferring an employee from one unit to another. The view taken in this decision is obviously contextual one that the law does not preclude employer from framing rules and regulations relating to transfer of employees. This decision is, however, not an authority on the proposition that the employer has inherent right to transfer, as contended by the Petitioner Company in the present case.

21. As observed earlier, the right of employer to frame rules cannot be doubted, but, if the rules are framed posterior to the date of joining of service by the employee, then, in that situation. It is mandatory to obtain express consent of the employee concerned or the consent of the workers' union. There can be no doubt that the employer can frame rules and regulations on matters which are outside the Items mentioned in Schedule I to the Standing Orders Act, but, if the rules pertain to any of the matters falling under the said Schedule, and if the same are inconsistent with the Model Standing Orders or Certified Standing Orders, to that extend It would become unenforceable. Since transfer is not the subject included in the said Schedule, it would be open to the employer to frame rules and regulations in that behalf or make it as a service condition at the time

of appointment itself. But, this would not mean that the employer has inherent right to transfer and can exercise such a right in the absence of any express consent-agreement in that behalf. Understood thus, the authorities relied upon by the Petitioner Company are inapplicable and have no bearing on the issue that arises for consideration in the present case.

22. The learned Counsel for the Petitioner Company has relied upon another decision of the Apex Court in the case of *State of Jammu and Kashmir v. Shri Triloknath Khosa and Ors.* In this case, the Constitution Bench of the Apex Court was dealing with the issue of change in condition of service of Government servant with retrospective effect. In that context, the Apex Court has observed that it is well-settled that though employment under the Government like that under any other master may have a contractual origin, the Government servant acquires a status on appointment to his office. As a result, his rights and obligations are liable to be determined under statutory or constitutional authority which, for its exercise, requires no reciprocal consent. The Government can alter the terms and conditions of some of its employees unilaterally and though in modern times consensus in matters relating to public services is often attempted to be achieved, consent is not a precondition of the validity of rules of service, the contractual origin of the service notwithstanding. The learned Counsel for the Respondent has rightly distinguished this Judgment as it relates to the change of condition of the service of a Government servant, which stands on a totally different pedestal. However, in the present case, the Respondent has been employed in the Petitioner Company which is not a Government Organisation; and therefore, the contractual relationship cannot be altered to the prejudice of an employee without his prior consent.

23. The learned Counsel for the Petitioner Company has also relied upon another decision of the Apex Court in the case of *Balmer Lawrie Workers' Union Bombay and Anr v. Balmer Lawrie and Co. Ltd. and Ors.*, to contend that the consent of an employee can be inferred. The submission is totally misplaced inasmuch as the facts of the said decision would indicate that the recognised union had consented to the settlement, and in that context, the Apex Court observed that such a settlement would be binding on all the workmen. It is relevant to note that in the said decision, the settlement was reached in the proceedings under the Industrial Dispute Act, in which the representative union had appeared and therefore, the Apex Court observed that the same was binding on all the workmen of the undertaking. This decision is therefore of no avail to the Petitioners.

24. On the other hand, in the present case, there is nothing on record to indicate that the rules and regulations in question were framed with the consent of the recognised union or that the rules and regulations were the outcome of settlement arrived at between the employer and the union within the meaning of Section 2(1)(p) of the Industrial Disputes Act. In the circumstances, the rules, though made effective from August, 1995, and contained power to transfer, the

same being posterior to the date of joining of the Respondent, cannot alter the condition of service of the Respondent to her prejudice or detriment, unless it was proved by the Petitioner Company that the Respondent had duly consented thereto.

25. Reliance has been placed on another decision of the learned single Judge of this Court in the case of Group Pharmaceuticals Limited v. Blossom Godinho and Anr., to contend that the Petitioner Company had a right to transfer the Respondent to any of its offices outside Mumbai. Reliance was placed on this decision because, even in this case - the argument advanced on behalf of the employer was that, the employer had inherent and fundamental right to start business and to organise and/or re-organise the same according to his needs and requirements and there is no obligation at law upon any employer to run his business only at a particular place, and that no employee can insist that the employer must carry on business at the place where the employee originally joined or where he was located at the date the employer decided to shift the place of business. This submission of the employer was countered by the employee on the ground that in the appointment order there were no terms and conditions that the employee's services were liable to be transferred anywhere from the present place of the organisation, and moreover, at the time of her joining the duties there was no other branch/undertaking/establishment owned by the employer Company. There was no service condition of transferability of the employee from her place of appointment in the present organisation and thus there was no power vested in the employer Company, either express or implied, transferring the employee from the present place or business in Mumbai to Bangalore. While dealing with the rival submissions in the aforesaid case, the learned Single Judge of this Court (R.M. Lodha, J.) in para 10 of the judgment has held that there was neither any inherent right of transfer in the employer nor in the absence of any express provision of transfer either under Rules and Regulations or under the conditions of service, Implied right or power of transfer can be traced in the employer. While arriving at any conclusion, the learned Single Judge has referred to the decision of Apex Court in M/s. Kundari Sugar Mills (supra) as well as the decision of Karnataka High Court in the Management of M/s. Nippant Urban Co-op. Bank Ltd., 1992 (1) C.L.R. 854. Further, in para 13 of the judgment, the learned Judge has held that the facts of that case were quite close and nearer to the case decided by the Division Bench of the Karnataka High Court in the Management of M/s. Nippani Urban Co-op. Bank Ltd. inasmuch as at the time the employee joined her service the employer Company and its entire organisation was functioning at Mumbai and that the employer had neither any branch or any office outside Mumbai, and It was also not the case of the employer Company that at the time when the employee was appointed in the year 1980 there was any contemplation or Intention to have its branch or office or any division outside Mumbai nor the employee was Informed at the time she joined her duties that there was possibility of any division of the organisation being shifted outside Mumbai and that the transfer could be made in such

Company. The Court observed that, had all these facts made known to the employee, she might or might not have joined her services with the employer Company, and that she would have agreed to serve the employer Company only at Mumbai then in existence and no other place. In the said case, the Court concluded that the employer had indulged in unfair labour practices under Item 9 of Schedule IV of the Act and had failed to implement the agreement of service. The learned Counsel for the Petitioner Company, however, contends that the view taken by the learned Single Judge of this Court in the aforesaid case (Group Pharmaceuticals Ltd. (supra)] is pending consideration before the Division Bench in Appeal No. 912/97. However, that need not deter this Court from deciding the present case on the basis of law enunciated by the Apex Court which has already been referred to above.

26. The next decision relied upon by the learned Counsel for the Petitioner Company is - Raghupathy v. Additional Commissioner for Workmen's Compensation II, Madras and Anr. Relying upon this decision it is contended that the service rules are binding on both: the master and the servant. There can be no doubt that the rules are enforceable and the same will have binding force on the master and the servant. However, in the present case, the rules framed by the Petitioner Company are posterior to the date of joining the services by the Respondent and thus, introduction of any rule subsequent to the joining of the service, which alters the service condition of the Respondent, will have to be declared as unenforceable against the Respondent, because there is nothing on record to indicate that the Respondent had consented to such a rule. The argument of acquiescence advanced on behalf of the Petitioner Company is misplaced and stands answered by this decision. In para 6 of this decision, the Division Bench of the Madras High Court has dealt with the requirement of pleadings and proof of acquiescence. In the present case, no doubt the Petitioner Company has made an attempt to plead acquiescence of the Respondent with regard to applicability of the rule in question, but, no proof has been adduced in support of the said stand. It is well settled that the issue of acquiescence is a pure question of the fact and it is not only essential to plead but also to prove the same. Therefore, for want of proof, it is not possible to accept the plea of the Petitioner Company that the Respondent had acquiesced of the subject rule. Undisputedly, both the parties have not adduced any oral evidence but preferred to rely on pleadings and documentary evidence alone. Much was argued on behalf of the Petitioners that the employees have availed of the benefits under the selfsame Rules, to buttress the plea of acquiescence. There can be no doubt that even this is a pure question of fact for which it was essential to adduce proof. Further, the Counsel for the Respondent has rightly pointed out that all the benefits and facilities provided for to the employee under the said Rules were nothing but fulfilment of statutory obligation of the employer. There is force in this submission. It is, therefore, not possible to hold that the Respondent had acquiesced or gave implied or tacit consent to the applicability of the subject rule.

27. Reverting to the other contention raised on behalf of the Petitioner Company

that, only those matters in which mala fide in fact is alleged are covered under Item 3 of Schedule IV of the Act. To examine this argument, it would be appropriate to reproduce Item 3 of Schedule IV of the Act, which reads thus :

" To transfer an employee mala fide from one place to another, under the guise of following management policy".

On a plain reading of this provision, it is wholly incomprehensible that only matters of mala fide in fact are covered by this provision. Such a restricted meaning cannot be assigned as it would defeat the legislative intend. No doubt, proceedings under this Act of quasi criminal nature; and if the allegations in the complaint are proved; the employer would face penal consequences. However, this by itself cannot be a justification to limit the meaning of Item 3 to exclude the cases of mala fide in law. When the complainant succeeds in establishing that the employer has no authority to effect transfer, it would be preposterous that such a case would not be covered under Item No. 3, for it would be a case of mala fide in law. Under the circumstances, I have no hesitation in rejecting the plea taken by the Petitioners that only cases of mala fide in fact are covered under Item No. 3 of Schedule IV of the Act. On the other hand, the transfers which are mala fide per se, whether in law or in fact, are covered under Item 3 of Schedule IV of the Act.

28. The learned Counsel for the petitioners next contends that in any case, no oral evidence has been adduced by the Respondent to establish the case of mala fide in fact. I find force in this submission. In absence of proof regarding mala fide in fact, the Court would not record finding in that behalf. The learned Counsel for the Respondent on the other hand contends that there is substance in the allegation made in the complaint regarding mala fide in fact as well. However, it is not possible for this Court to permit the Respondent to adduce evidence for the first time in writ jurisdiction though the evidence intended to be adduced may be admissible one. In the circumstances, I have no hesitation in concluding that the Respondent has not placed any material on record to prove the allegations in the complaint of mala fide in fact. Nevertheless, the Respondent has succeeded in establishing that the transfer order in question, Issued by the Petitioner Company, is mala fide in law, being without authority of law; and, therefore, covered under Item No: 3 of Schedule IV of the Act.

29. The next submission of the learned Counsel for the Petitioner that the facts of the present case would not attract Item 9 of Schedule IV of the Act, is also ill-founded and devoid of merits. Item 9 of Schedule IV of the Act reads thus :

"Failure to implement award, settlement or agreement."

The argument advanced on behalf of the Petitioner Company that, since there is no written agreement between the parties, Item 9 of Schedule IV is not attracted, is wholly fallacious. It is well settled that an agreement or contract need not be in writing, but can also be an oral agreement. In the present case, admittedly, when the Respondent Joined the services of the Petitioner Company,

no appointment order was issued by the Petitioner Company, but, nevertheless, the contractual relationship between the Petitioner Company and the Respondent that of master and servant was consummated when the Respondent joined the services of the Petitioner Company on 10th November, 1993 at Mumbai office. As observed earlier, since there is no written agreement between the parties, nor any material has been placed on record to indicate that the parties had agreed to the condition of transfer, as one of the condition of service, it will have to be presumed in law that there was no authority vested in the Petitioner Company to transfer the Respondent employee to any other office to be started or established at a subsequent point of time. On the other hand it will have to be presumed that there was agreement between the parties of not to transfer the Respondent from Mumbai office where she had initially joined; and, therefore, the impugned transfer order was in breach of such an agreement on account of which the Petitioner Company had committed unfair labour practices under Item 9 of Schedule IV of the Act. In the circumstances, I have no hesitation in affirming the conclusion of the Industrial Court that the Petitioner Company has committed unfair labour practices falling under Item 9 of Schedule IV of the Act as well.

30. At one stage, when the matter was being argued, I was inclined to think that it would be necessary to remand this case to the Industrial Court for re-trial by permitting both the parties to adduce evidence. As observed earlier, both the parties chose not to lead any oral evidence before the Industrial Court. This was notwithstanding the fact that the Petitioner Company alleged that the Respondent had acquiesced and impliedly consented to the rules in question and therefore the same were binding; on the other hand, the Respondent has alleged that her transfer from Mumbai office to Delhi office was a mala fide action of Petitioners 2 and 3, both being pure questions of fact. However, on close examination of the matter, I am inclined to think that no fruitful purpose would be served by remanding the matter to the Industrial Court for the view that I have taken that the rules and regulations in question, particularly Rule 2.16 regarding transfer, is not enforceable as against the Respondent for want of express consent in that behalf. In other words, the transfer order is mala fide in law being without authority of law, and therefore, not only covered by Item 3 but also by Item 9 of Schedule IV of the Act.

31. Even if the matter was to be remanded back to the Industrial Court, the question that would assume relevance is the distance of time. The stand taken by the Petitioner Company was that since the Petitioner Company had opened office at Delhi, they wanted the Respondent to assume charge at Delhi office for administrative exigencies. Since, admittedly, the Respondent did not join at the said place of transfer and since this Court while admitting the writ petition, by an order dated 26th November, 1998 declined to grant any interim relief, it presupposes that the Respondent was entitled in law to resume duty in the original post and original place at Mumbai. The Respondent, however, asserts that though she reported for work after the aforesaid order, the Petitioners did not permit her to join or offer any work. This has not been seriously challenged by the

Petitioners. Now, with the passage of time, the administrative exigency which was the fulcrum of the order of transfer issued by the Petitioner Company, must have obviously become non-existent. Naturally, therefore, no fruitful purpose would be served by remanding the matter to the Industrial Court to examine any other issues.

32. In the circumstances of this case, it would be appropriate to affirm the decision of the Industrial Court. It would also be appropriate to direct the Petitioner Company to allow the Respondent to resume her duty in the original post and original place at Mumbai, if she has already not done so or even if she was not allowed to do so, as the case may be.

33. The Petitioner Company has not placed any material on record to justify its inaction in not complying with the order passed by this Court on 26th November, 1998, whereby the interim relief was refused, which means that the Petitioner Company was under an obligation to comply with the directions issued by the Industrial Court by allowing the Respondent to resume her duty in her original post and original place at Mumbai. The Respondent was justified in making serious grievance about the conduct of Petitioner Company and urged that this Court should not show any indulgence to the Petitioner Company who has failed to comply with the directions of the Court and more particularly when the Respondent employee is a female employee and has suffered severe mental agony and financial problems.

34. For the reasons mentioned above, I find no merits in this petition, for there is no infirmity in the ultimate conclusion reached by the Industrial Court that the Petitioner Company has engaged in commission of unfair labour practices under Item 3 and 9 of Schedule IV of the Act. In the circumstances, the impugned order of the Industrial Court is confirmed and the Petitioner is directed to comply with the directions and injunction orders issued by the Industrial Court which is subject matter under challenge in the present writ petition.

35. Accordingly, writ petition fails and the same is dismissed with costs. Rule stands discharged.