

(2007) 04 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 5738 of 2007

Madura Coats Pvt. Ltd.

APPELLANT

Vs

Madura Coats Employees" Union (CITU)

RESPONDENT

Date of Decision : 10-04-2007

Acts Referred:

Industrial Disputes Act, 1947 — Section 33, 33 A

Citation : (2007) ILR (Kar) 3897 : (2007) 4 KarLJ 678 : (2007) 3 LLJ 970

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : S.N. Murthy Assts, for the Appellant; T.S. Anantharam, for C/R1, for the Respondent

Final Decision : Allowed

Judgement

Subhash B. Adi, J.—Though this matter is listed for preliminary hearing, since the contesting Union had entered caveat, the matter was taken up for final disposal.

2. In this Writ Petition, the order passed on I.A.I in Complaint No. 3/2006 in I.D. No. 160/2006 dated 27.3.2007 on the file of the Industrial Tribunal, Bangalore is called in question.

3. The respondent - Union has filed an application in I.A.I u/s 33-A of the Industrial Disputes Act (hereinafter referred to as "the Act") read with Rule 60 of the Industrial Disputes (Karnataka) Rules 1957.

4. It is alleged that, by order 30th October 2006, the petitioner has transferred 17 workmen from Bangalore to Ambasamudra and further alleged that the Management has no right or power to transfer the workmen as per the Certified Standing Orders or as per appointment orders and there is no practice of transfer from one State to another State and the workmen have been working in Bangalore for 15 to 25 years.

5. It is further alleged that a dispute is raised in terms of the application dated

27th September 2005 and two of the issues namely, item Nos. 20 and 21 i.e., the Management shall not reduce the existing number of workmen as on 1.11.2005 presently on the Rolls of the Company without the consent of the Union and all existing facilities, amenities, privileges, rights, benefits monetary or otherwise hitherto enjoyed by the workmen either by virtue of the previous settlements, statutory enactment, customs, conventions or precedence shall not be changed, withdrawn or reduced. It is further alleged that in view of the issues referred to the Industrial Tribunal and the matter being pending, the order of transfer issued by the Management directly contravenes the provisions of Section 33 of the Act as it prejudice the workmen and amounts to changing the service conditions, which were applicable to the workmen immediately before the commencement of the proceedings. It is also alleged that, once the service conditions are altered during the pendency of the proceedings before the Industrial Tribunal, it violates the provisions of Section 33 of the Act and in this regard, a complaint was filed u/s 33-A by filing an application in I.A.I before the Industrial Tribunal.

6. The Industrial Tribunal considering the said application on merit and relying on the Certified Standing Order and also relying on the submissions made by the parties, held that, prima facie, it is the custom prevailing in the petitioner-industry that, the workmen working in Bangalore unit are not transferable outside Bangalore or outside State and it also held that they are not transferred from Bangalore except on one or two occasions based on the request of the employees. On these findings, the Tribunal allowed the I.A.I and confirmed the order dated 7.12.2006, on which date the Tribunal had stayed the order of transfer.

7. Sri. S.N. Murthy, learned Senior Counsel appearing for the petitioner mainly submitted that, there is no violation of Section 33 of the Act, the transfer is incidental to the appointment and it does not amount to violation of Section 33 of the Act, no custom is proved before the Tribunal and he further alleged that the application u/s 33-A of the Act is not maintainable unless there is a violation of Section 33 of the Act. Elaborating his argument, learned Senior Counsel submitted that, the order of appointment of the workmen, which is produced as Annexure-S1 at Clause (5), it states that:

5. You are liable to be transferred to any of our Units. You are initially posted at Bangalore.

Relying on this cases, learned Senior Counsel submitted that, apart from the fact that the transfer is incidental to the appointment, the appointment order itself states that the workmen are liable to be transferred from Bangalore. He further submitted that there is no custom, prohibiting the transfer of workmen from Bangalore to any other place outside the State. He further submitted that, not transferring the workmen for long time cannot be construed as a custom unless there are instances of the workmen even in exigency where there is requirement of transfer, but have not been transferred. Further submitted that, what is

alleged by the workmen is that, they have not been transferred for 15 to 20 years.

8. He further submitted that custom does not mean that the Management having not transferred, it automatically becomes a custom not to transfer. In this regard, he relied on a decision of Division Bench of Bombay High Court reported in *India Security Press Mazdoor Sangh Vs. Currency Note Press and Others*, He referred to para-4 of the said judgment and submitted that, even in case where the current working hours had become their condition of service by custom or usage of over 10 years and that privilege cannot be taken away by a mere notice of change u/s 9A of the Act, was not accepted by the Division Bench of the Bombay High Court and further solely because for a length of time of whatever duration, the shifts were so arranged as to include also the overtime hours of work that would not confer on the workman a right to overtime work. Learned Senior Counsel submitted that just because there was practice for many years even in the case referred to above, the Division Bench of Bombay High Court has negated the contention of the workman to hold that, it is the custom and the rights and privilege are conferred on them.

9. Further, he submitted that transfer is incidental to the appointment and in this regard, he relied on a decision reported in *Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi*, Referring to para-10 of the said judgment, learned Senior Counsel submitted that, unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. Further he submitted that even in case where a workman does not comply with the transfer order, it may ultimately lead to termination of service. In such case also, the Apex Court has declined to hold that the transfer is illegal or void and further held that since the transfer being incidental to the appointment, workman is required to obey the said order.

10. He also submitted that, the granting of relief u/s 33-A would amount to granting of final relief in the dispute itself. He further submitted that one of the issues raised by the Union is, regarding the alleged custom, privileges and amenities that are prevailing in the petitioner - establishment. Such issue which is required to be adjudicated at the final stage has been dealt by the Tribunal by granting interim relief by holding that there is a custom and the transfer is impermissible. He further submitted that, even in case of violation of Section 33, the Industrial Tribunal ought not to have dealt with the issue, which is required to be finally adjudicated. In this regard, he relied on a judgment of the Apex Court reported in *SCLJ Vol. 8 page 405* and submitted that in an enquiry u/s 33-A, the employee would not succeed in obtaining an order of reinstatement merely by proving contravention of Section 33 by the employer, even after such contravention is proved, it would still be open to the employer to justify the impugned dismissal on merit. Under the said circumstances, the Apex Court has held that if an order is to be granted after the final adjudication of the dispute by way of interim order, the employee should not be reinstated and it is not open to the Tribunal to order reinstatement as an interim relief, it would amount to giving

the workman the very relief, which he could get only if on a trial of the complaint, where the employer failed to justify the order of dismissal.

11. He further submitted that the Tribunal in this case at para-21 has observed:

27...whether this assertion will come within the framework of custom or not has to be gone into by the Court at the time of trial. But the meaning of custom according to Mitra in his Legal and Commercial Dictionary is, a thing/practice, which starts with usage and ends with beginning of the custom dealing with the binding nature of the custom....

He also pointed out that, the Tribunal on the probabilities has found that, prima facie there is a custom not to transfer any of the workmen from Bangalore. He also submitted that, there is no definite finding arrived at by the Tribunal as to whether there is such custom, which is prevailing in the petitioner-establishment. He further submitted that when the Tribunal itself has not come to the conclusion, as to whether there is a custom or not, by alleging that there is a custom and staying the transfer order, is not in consonance with the requirement of Section 33 of the Act, inasmuch as unless a finding is arrived by the Tribunal holding that there has been contravention of Section 33, allowing the application u/s 33-A does not arise. He also referred to para-23 of the order and submitted that the Tribunal only proceeds on the probabilities that there may be a custom and based on that finding, it arrives at a conclusion that the order of transfer is required to be stayed.

12. Sri. Anantharam, learned Counsel for the Union submitted that, undisputedly reference made to the Tribunal involves question as to whether the existing benefits and privileges could be denied to the workmen and if this issue is pending for adjudication before the Tribunal, the Management changing the service condition by passing an order of transfer would prejudice the issue pending before the Tribunal and, would amount to altering the service conditions, which were prevailing before the commencement of the proceedings, relying on this cases, he submitted that there is a clear violation of Section 33 of the Act. In this regard, he pointed out that in identical circumstances, the Management had passed an order of transfer and the said transfer order had become subject matter of conciliation proceedings and before the conciliation proceedings, the Management after considering that, it has no power, has withdrawn the transfer order. He relied on the correspondence addressed by the Management referred to in para-22 and submitted that the Management has admitted that, no permanent employee has been transferred to any other units out of Bangalore, except one that was done purely for administrative reasons and at the request of the employee concerned. This is the normal practice that is prevailing in the petitioner - establishment. By relying on the said correspondence and also relying on the conciliation proceedings where the Management has admitted and has withdrawn the transfer order, learned Counsel for the respondent submitted that, this is the practice, which is prevailing in the petitioner-establishment. He further submitted that there is no condition even in the appointment order or in

the Certified Standing Order for transfer of workmen from Bangalore to outside Bangalore and in this regard, for the last 25 years, the employees have not been subjected to any transfer from Bangalore and all the transfers are made within Bangalore unit itself. In support of his contention, learned Counsel for the respondent submitted that, even in a correspondence dated 12th April 2001, the Management addressed a letter to the General Secretary of the respondent, wherein it has stated that the transfer is a condition of service for all the employees, who are employed in the Group Head office of the Company. By relying on the said averment in the said letter, he submitted that the transfer is only in respect of employees of the Group Head and not in respect of the petitioner - Warehouse. He also relied on a settlement dated 7.11.1997 produced at Annexure-T5 wherein at item No. 22, it was specifically mentioned that, both Management and the Union have agreed that all existing benefits, rights, privileges hitherto enjoyed by the workmen either by virtue of the previous settlement, statutory enactments, customs, conventions or precedence will continue to be protected and enjoyed as before. By relying on these documents, learned Counsel for the respondent submitted that, one is, there is no condition in the transfer order, second, Certified Standing Order does not provide for transfer, third, even in case where transfer has been effected, it has been withdrawn and the practice is only to transfer within the Unit and the settlement also provides for continuing rights, privileges and benefits, which were in existence.

13. He further referred to the findings of the Tribunal and submitted that the Tribunal considering these matters has arrived at a conclusion that prima facie, the order of transfer is violative of Section 33 of the Act and has confirmed the order dated 7.12.2006. He also referred to 2 or 3 instances of transfer, which were based on the request of the employee and not based on the condition of service in this regard, he relied on a judgment of the Apex Court reported in *Monthly Rated Workmen at the Wadala Factory of the Indian Hume Pipe Co. Ltd. Vs. Indian Hume Pipe Co. Ltd., Bombay, Bombay* and submitted that, the Management is not justified in trying to upset a scheme that had worked satisfactorily for a period of 18 years and there has been no change in the existing system. He further submitted that the existing system, which is prevailing, has to be continued and the Apex Court in the said decision has upheld the contention to protect the workmen's right in respect of the existing scheme and the system, which has been working satisfactorily. He further submitted that, in this case also, the existing system of not transferring the employees has been working and there is no reason for the petitioner to transfer the employees. He also relied on another decision reported in *B.D.K. Process Controls Private Ltd. and Another Vs. Bharatiya Mazdoor Sangha*, and submitted that, transfer between one Company and another Company is being two different entities, is impermissible in law. By relying on these judgments, learned Counsel submitted that the order of Tribunal does not call for interference.

14. Though this writ petition is directed against the interim order, normally this

Court will not interfere with the interim orders unless it is pointed out that, there is an error of jurisdiction in exercise of power. Now I.A.I has been filed by the respondent inter alia alleging violation of Section 33 of the Act and sought for relief u/s 33-A of the Act.

15. The crux of the matter is that, the custom that was prevailing in the petitioner --industry does not permit the transfer of the employees from Bangalore to outside Bangalore. In this regard, the respondent had relied on the settlement between the Management and the Union, and the order of transfer and Certified Standing Order and the instances where the Management had withdrawn the order of transfer. The Industrial Tribunal on consideration has found that, prima facie there is a custom prevailing in the petitioner - industry and confirmed the order of stay, staying the transfer of the workmen of the respondent - Union.

16. In order to know the meaning of custom, it is useful to refer the meaning from the Law Lexicon Dictionary. "Custom in the legal sense means a long established practice considered as unwritten law and resting for authority on long consent, for instance the custom office grazing in the village waste." Custom in one sense means, an usual practice, in another sense, it means an established practice or usage having the force of law. By reading of the meaning as given in the Law Lexicon Dictionary, a custom which requires a long established practice and which would have effect of law for the purpose of enforcing the said custom as against the other. In the light of the meaning of the practice, what is required to be seen in this case is, whether there has been practice followed by the petitioner -Management for long time in the matter of transfer. Now the Industrial Tribunal except referring to the word "custom" and "usage", does not even refer to the meaning of custom or usage. In turn, it only refers to the correspondence made by the Management wherein the Management has stated in normal circumstances, a permanent employee has not been subjected to transfer to any other unit from Bangalore except for the administrative reason. Whether in a normal circumstance, if the employee is not subjected to transfer would by itself amount to custom or whether such a practice is prevailing in the petitioner-establishment, that would constitute a custom. As far as the instances of practicing custom are not referred to by the Tribunal. The difference between the "usage" "custom" and "prescription" has been mentioned in the Law Lexicon Dictionary, where it means, the usage acquires force and sanction by dint, of time; the custom acquires sanction by the frequency of its being done or the numbers doing it; the prescription acquires force by the authority which prescribes it, namely, Law and the universal consent of mankind. This means that custom acquires sanction only if frequency of act being done or number of acts being done. In this regard, the Tribunal was required to consider whether, the transfers are not effected even in exigencies where there was a requirement for transfer on account of custom prevailing in the establishment. In this regard, what is pointed out by the learned Counsel for the respondent - Union is that, any one such circumstances under which the transfer was withdrawn ought to

have been referred to by the Tribunal to understand whether there has been a custom or usage prevailing in the petitioner - industry. Further, the Apex Court in many cases has held that, the transfer is normally incidental to the appointment. Now the appointment order" is produced in this case, which shows the post is transferable. Whether it is transferable within units or outside Bangalore, is a matter, which required to be considered by the Tribunal. Further, a reference is made to the Certified Standing Order. In fact, the Certified Standing Order does not provide for transfer. However-, the Certified Standing Order referred to by the Tribunal by itself will constitute a custom prevailing in the industry, which is also a matter required to be considered.

17. In my considered view, the Tribunal on probabilities ought not to have proceeded to hold that, there is no custom to transfer an employee from Bangalore to outside Bangalore unless a clear finding is given on the question of custom, on the question of usage and on the question of practice, which might have been followed by the petitioner - Management. However, it is made clear that the circumstances, which are referred by themselves, may not be adequate to arrive at a conclusion of the custom for the purpose, whether the workmen is transferable from Bangalore or not, but cumulative effect of all these documents and other evidence, if any, produced by the workman, the Tribunal may be in a position to arrive at a definite conclusion, but the Tribunal having said that the issue as to whether the transfer is within the framework of custom or not has to be gone into by the Court at the time of trial, is itself indicated that Tribunal was not clear in its mind to decide the issue finally and if it is not finally decided and if this issue is required to be finally decided, then the Tribunal ought not have confirmed the order of stay of transfer without even giving a definite finding of the question of custom. Hence, the Tribunal is required to arrive at a definite finding on the question of rights, practice, privileges, which are already there in the settlement, which are protected in favour of the workmen. The only question is whether those privileges would include the transfer also. If this question is considered based on the documents and the material and the finding is arrived at by the Tribunal that would justify the issue. Hence, the order of Tribunal requires to be interfered even though it is an interim order.

Accordingly, the writ petition is allowed. The order passed on I.A.I in Complaint No. 3/2006 in I.D. No. 160/2006 dated 27.3.2007 on the file of the Industrial Tribunal, Bangalore and the exparte order dated 7.12.2006 are quashed. The matter is remitted to the Industrial Tribunal, Bangalore to try the issue of transfer in the light of the above observation.

Since the order of transfer is stayed by an exparte order dated 7.12.2006 and the said order admittedly having been in force till the order is passed on I.A.I, the workmen during this period definitely had the benefit of interim order protecting the alleged transfer and their services is neither suspended nor terminated, as such during this period, they are entitled for wages it is now submitted by the learned Counsel for the respondent. - Union that, the workmen

are not paid their wages and are not in a position to maintain themselves and meet litigation expenses. In these circumstances, I find it appropriate to direct the Management to pay wages for the period from 7.12.2006 till the order dated 27.3.2007 passed by the Tribunal. Accordingly, the Management is directed to pay wages from 7.12.2006 to 27.3.2007. As indicated by the Tribunal that the enquiry has to be completed at the earliest, the said position is not altered in this order. Since this writ petition was against the interim order and since the Tribunal is taking the matter day to day and has already fixed the target, the Tribunal is directed to complete the enquiry at the earliest within the period, which has already been fixed by the Tribunal.