

(1993) 06 SHI CK 0009
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 75 of 1993

Regional Manager S.B.I. and Another	Vs	APPELLANT
Ajay Sharma		RESPONDENT

Date of Decision : 24-06-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1 , Order 39 Rule 2, Order 41 Rule 27, Order 7 Rule 14(2), 107
Constitution of India, 1950 — Article 14, 16
Industrial Disputes Act, 1947 — Section 7

Citation : (1994) 1 ShimLC 377

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Kuldip Singh, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—This is a revision petition arising out of an order passed on 6th January, 1993 by Additional District Judge, Sirmou District at Nahan, allowing the appeal of the Plaintiff-Respondent and consequently accepting the application moved by him under Order XXXIX, Rules 1 and 2 of the CPC by granting a temporary injunction in the mandatory form directing the Petitioner-bank to allow Respondent to work as clerk/typist (English) in State Bank of India at its Nahan branch till the final disposal of the suit by ordering the order of transfer to remain in abeyance and thereby reversing the order passed on 13th November, 1992, passed by Senior Sub-Judge, Sirmour District at Nahan, dismissed his application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure.

2. On 2nd April, 1992, a civil suit was filed by the Plaintiff claiming a decree for declaration to the effect that his transfer, effected by the Petitioner-bank, through order dated 18th September, 1992 from Nahan to Paonta Sahib Branch was arbitrary, discriminatory, violative of Articles 14 and 16 of the Constitution and nullity and as a consequential relief a decree for permanent prohibitory

injunction was claimed restraining the Petitioner-bank from giving effect to the order of transfer. In the alternative, mandatory injunction was also claimed for keeping the order of transfer in abeyance and not to relieve the Plaintiff in absentia.

3. It was alleged in the plaint that the Plaintiff had been posted as clerk-cum-typist in Nahan branch of the Defendant-bank for the last 4-1/2 years. Prior thereto he was posted in the inspection department of the State Bank of India at Jaipur, from where he was repatriated to his parent cadre and as such as per the policy and rules he earned the merit to be posted at the place of his choice and in pursuance thereto he was posted at Nahan. At Nahan, his stay was the shortest, as compared to similarly situate colleagues of his. The transfer made on 18th September, 1992 from Nahan to Paonta Sahib was challenged by him on the ground that the Paonta Sahib branch had made requisition for posting of a clerk-cum-cashier and not clerk-cum-typist. That branch of the bank falls under category "A" whereas under rules all work, including typing is required to be done in Hindi and as such the services of a clerk/typist (English) are not required. He being an English typist clerk, his services are not required at Paonta Sahib. It was alleged that his transfer was because of victimization. It has further been alleged that three years prior to the date of filing of the suit, one Mr. Pant, clerk-cum-typist from Paonta Sahib was transferred to Delhi on his own request mutually with one Mr. Shalinder Kumar, clerk-cum-cashier. Instead of posting Mr. Shalinder Kumar at Paonta Sahib, he was retained at Nahan and in place and stead the Plaintiff was transferred to Nahan on the plea that since Mr. Pant was a clerk-cum-typist, a substitute is required in his place at Paonta Sahib. It is further alleged that inter-se transfer of clerk-cum-typist cannot be made in the cadre of clerk-cum-cashier and is against the terms of the policy applicable to the bank employees. The retention of Mr. Shalinder Kumar at Nahan was termed as illegal and it is also alleged that his transfer from Nahan to Paonta Sahib tantamount to inflicting punishment and victimization.

4. Alongwith the suit, an application for temporary injunction under Order XXXIX, Rules 1 and 2 was also filed, which was supported on the affidavit of the Plaintiff dated 2nd November, 1992. The trial Court while issuing notice to the Petitioner-bank directed that since the Plaintiff is said to have not been relieved yet directed that he be not relieved till 11th November, 1992. On 13th November, 1992, the Defendant-bank by putting an appearance filed reply to the miscellaneous application and in support thereof also placed on record number of documents. On the same day, arguments were heard. The trial Court, on consideration of the pleadings and documents on record, recorded a finding that there was no question of any irreparable loss being suffered in case the order of transfer is allowed to be implemented. The balance of convenience was also not found in favour of the Plaintiff by observing that Paonta Sahib is located just at a distance of 45 kms. and is linked with motorable road and consequently while vacating the order of ad-interim injunction passed on 3rd November, 1992, dismissed the application.

5. The stand of the Petitioner-bank in the reply, which was filed to the application for grant of temporary injunction, was that though the Plaintiff served at Jaipur but it was denied that he had earned the merit for being posted at a place of his choice. It was averred that the Plaintiff went to Jaipur of his own and thereafter he was posted at Nahan. It was denied that only clerk-cum-typist (knowing Hindi typing) is to be posted at Paonta Sahib or that the services of English knowing typist are not required there. In the reply, it is also denied that the services of English knowing typist could not be utilised or that only a clerk on mutual request posted at Paonta Sahib could be made to join. It was denied that the order of transfer was actuated with malice or the same was illegal, arbitrary or discriminatory. The Petitioner denied that suitable clerk-cum-typist junior to the Plaintiff were available for transfer. Reliance was placed by the bank by producing on record the two undertakings of the Plaintiff dated 13th August, 1984 and 16th August, 1985 that his request for transfer could not be entertained before two years of confirmed service and that he could be transferred to any branch in the circle of his posting. The Petitioner also alleged that no employee has any preferential right with regard to his posting at any particular place and he is liable to be transferred by the Management by taking into consideration various factors. The transfer of the Plaintiff was made in the interest of the bank and not by way of punishment.

6. The lower appellate Court, before whom the Plaintiff-Respondent challenged the order passed by the trial Court, reversed the order passed by the trial Court by observing that the transfer in the instant case does not appear to have been ordered for any administrative or co-related reason, since Paonta Sahib branch of the Plaintiff-bank does not require the services of clerk-cum-typist (English) but that of clerk-cum-cashier. Negating the contention raised on behalf of the Petitioner that Civil Court had no jurisdiction to entertain and decide the suit since what was the grievance of the Plaintiff could exclusively be agitated before the Industrial Court/Tribunal, the lower appellate Court proceeded to grant temporary injunction in the mandatory form. In coming to its conclusion that the transfer of the Plaintiff does not appear to have been ordered for any administrative or co-related reason, the lower appellate Court took into consideration number of documents, which had not been filed by the Plaintiff on the record of the trial Court but had, in fact, been put in on the record of the lower appellate Court without making any prayer to the Court under Order XLI Rule 27 of the CPC or without seeking any express permission of the court. Feeling aggrieved, the Defendant-bank has approached this Court by filing the instant civil revision. I have heard Mr. K.D. Sood, appearing for the Defendant-Petitioner-bank and Mr. Kuldip Singh for the Plaintiff-Respondent.

7. At the very outset, learned Counsel for the Petitioner contended that civil court had no jurisdiction to entertain and decide the suit, since the dispute was an industrial dispute for which the appropriate remedy, if any, was under the provisions of the Industrial Disputes Act, 1947. The jurisdiction of the civil court was impliedly barred. Reliance has been placed by Mr. Sood on two decisions of

this Court in Himachal Khadi Mandal and Ors. v. Om Parkash. CR 189/91 decided on 11th December 1991 and H.P.S.E.B. and Ors. v. Jagat Ram CR 47/92, decided on 29th May 1992 Reliance has also been placed upon another decision rendered in Himachal Khadi Mandal and Ors. v. Rattan Singh CR 190/91 decided on 11th December 1991 in support of his submission that in the instant case order of transfer was passed on 18th September, 1992, which was given effect to on 17th October, 1992, thus the Plaintiff already stood relieved, when the suit was instituted on 2nd November, 1992. In these circumstances, it was not permissible for the lower appellate court to have granted the temporary injunction in the mandatory form, which otherwise amounts virtually to decreeing the suit at the initial stage.

8. Mr. Kuldeep Singh, appearing for the Respondent, contends that the jurisdiction of the civil court is not barred since it was not a dispute of such a nature of which the Plaintiff could seek reference to the labour court of his own. The dispute was of a civil nature for which the jurisdiction of the civil court is there Moreover, according to the submissions made by the learned Counsel for the Plaintiff-Respondent, the order was contrary to the policy and had not been passed for any administrative reasons, which aspect had been duly considered by the lower appellate Court and in exercise of revisional powers, it was not permissible to interfere with such an order- It has further been contended that the documents, which had been filed before the appellate Court, were the documents of Petitioner-bank and no objection was taken at the time of hearing or even in the civil revision that the same could not have been taken note of by the lower appellate Court. It is also contended by Mr. Kuldeep Singh that the employees union of its own had taken up the matter of the transfer of the Plaintiff with the conciliation authorities under the Industrial Disputes Act, 1947 (hereinafter called as "the Act"), wherein the stand taken by the Petitioner-bank had been that the dispute could not be referred to the labour Court in view of the fact that the Plaintiff had approached the civil court and now on 12th March, 1993, reference to the labour Court has been declined and consequently the Petitioner-bank was estopped from questioning the jurisdiction of the civil court, since it cannot approbate and reprobate.

9. Having considered the submissions made by the learned Counsel for the parties and gone through the pleadings, what can be noticed at the very outset is that the dispute which the Plaintiff has raised in the suit for granting the reliefs are squarely covered by item No. 6 in the Second Schedule of the Act, namely, "all matters other than those specified in the Third Schedule", which matter is within the jurisdiction of the labour Courts by virtue of Section 7 of the Act.

10. "Industrial dispute" in the Act has been defined to mean any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. The terminology such as "terms of

employment" are of very wide amplitude and embraces within it number of disputes or differences. The dispute whether a workman can or cannot be transferred or whether the order of transfer is in violation of the terms of policy would, on the face of it, be included by the words "terms of employment" It being a matter other than the one specified in the Third Schedule, would be covered by Item No. 6 of the Second Schedule.

11. In *Himachal Khadi Mandal and Anr. v. Om Parkash* (supra), this Court after noticing the judgment of the Supreme Court in *Jitendra Nath Biswas Vs. M/s. Empire of India and Ceylon Tea Co. and Another*, held that when the remedy sought to be availed is available under the provisions of the Act, the civil court's jurisdiction would be barred by implication, since the Act provides for a detailed procedure and machinery for getting the grievances redressed in case the challenge is that the impugned action of the employer is not in accordance with the standing orders. The decision in *Himachal Khadi Mandal's* case (supra) was followed in a subsequent decision in *H.P S.E B. and Ors. v. Jagat Ram* CR 47 of 1992 decided on 29th May 1992, wherein the main question was with regard to the entertainment of the dispute of the nature for which remedy could be availed under the provisions of the Act. It was held that the jurisdiction of the civil court to entertain the suit would be impliedly barred and since the civil court's jurisdiction would be impliedly barred to entertain and decide the suit, it will also have no jurisdiction to grant ad-interim injunction under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure.

12. In the instant case, the grievance of the Plaintiff is that the transfer is not in consonance with the policy of the bank and is by way of victimisation. There is no manner of doubt that this dispute squarely falls under item No. 6 of Second Schedule and in view of the judgments of this Court and that of Supreme Court in *Jitendra Nath's* case (supra), the jurisdiction of the civil court is impliedly barred and consequently the civil court will have no jurisdiction to entertain the suit or to grant interim relief. The lower appellate court after noticing the submissions made in this behalf by the Petitioner erred in discarding the same on an altogether erroneous ground. The lower appellate court held that remedy by way of civil suit is not barred inasmuch as proceedings initiated before the Assistant Labour Commissioner (C), Chandigarh have been launched by the Union of which the Plaintiff is the member, but not by the Plaintiff. Since, the Plaintiff himself had not taken out simultaneous proceedings in the civil court and the other under the Act before the Assistant Labour Commissioner (C), the jurisdiction of the civil court was not barred. These reasonings of the lower appellate court are not only erroneous but also did not meet the submissions made on behalf of the bank that the civil court, in fact, had no jurisdiction to entertain and decide the suit, when the relief claimed in the civil suit is the one for which the remedy is available and can be had by resorting to the provisions of the Act.

13. In *Himachal Khadi Mandal and Anr. v. Rattan Singh* (supra), the court held

that in the absence of any material on record to show that the transfer of an employee from one place to the other was malafide, the court would have no jurisdiction to grant any order of interim relief in the mandatory form, more especially, when the impugned order of transfer under challenge had been implemented before the Plaintiff comes to the court or before the order of injunction is passed.

14. In the instant case, as noticed above, before the suit had been instituted, the Plaintiff stood relieved by virtue of the impugned order of transfer. The trial Court initially granted the interim relief but ultimately the same was vacated on 3rd November, 1992. An appeal against the said order was preferred on 26th November, 1992. The lower appellate court proceeded to grant temporary in a mandatory form, after observing that the temporary injunction, including the mandatory injunction on interlocutory application could be granted in a fit case even if it results in granting relief calmed in the suit- After making these observations, it proceeded to say "To my mind, the requisite pre-conditions for grant of such relief in the present case and in the nature of prima facie good case, balance of convenience and apprehension of irreparable loss and injury, which cannot otherwise be compensated in terms of money, exist on the facts and in the circumstances of the present case". In observing so, reliance was placed by the lower appellate court on three judgments. The first decision relied upon by it is Nanak Chand Khanna Vs. Union of India (UOI), in which it was held that the orders of transfer of Plaintiffs, in that case, being purely an administrative orders and the law does not require the authorities to indicate the reasons or considerations which impel them to make the order and consequently an order of temporary injunction cannot be granted against an administrative order transferring a booking clerk from station X to station Y. It is not understandable as to how the ratio of this judgment was applied to the facts and circumstances of the case in hand, while granting temporary injunction in the mandatory form, since the ratio of the above judgment clearly spelt out the principle that an order of temporary injunction in the matter of transfer cannot be granted.

15. The other two decisions relied upon are Indian Cable Company Limited Vs. Smt. Sumitra Chakraborty, and Vijay Srivastava Vs. Mirahul Enterprises and Others, upholding the principle that there is no bar to the courts in granting interlocutory relief in the mandatory form. The lower appellate court failed to consider the guidelines, which have been evolved by the courts, which have to be borne in mind while considering the question as to whether the interlocutory relief in the mandatory form is or is not to be granted. If mandatory injunction is granted at all, on an interlocutory application, it is granted only to restore the status quo as existed on the date when the suit was instituted and generally it is never granted to establish a new state of affairs, differing from the state of affairs, which existed on the day, when the suit was instituted. This principle of law is now universally recognised. The Supreme Court, noticing its various earlier decisions and other foreign decisions and noticing numerous decisions of the

other High Courts in *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, has observed as under:

The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded that pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

1. The Plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
2. It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
3. The balance of convenience is in favour of the one seeking such relief.

(Emphasis supplied)

16. The court also gave a word of caution, which must always be borne in mind by the courts while granting interlocutory mandatory injunction by observing that being an essentially and equitable relief the grant or refusal of such type of injunction ultimately rests in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances of each case. The guidelines carried out may not be exhaustive or complete and may not be taken as absolute rule. There may be exceptional circumstances needing action, which can be done only by exercise of a sound judicial discretion.

17. The lower appellate court, as observed above, recorded its findings not on the basis of the material, which had not been placed on the record of the trial court but only on the basis of the documents, which had been introduced on its record by the Plaintiff, without obtaining any leave or permission. It was not at all permissible for the lower appellate court to have taken note of these documents, since it was supposed to decide the appeal on its merit on the basis of the material, which had been brought on the record of the trial Court only. Without having recourse to the provisions of Order XLI, Rule 27 of the Code of Civil Procedure, it would not be permissible for the court, while hearing an appeal against an order passed under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, to look into any fresh material or additional evidence. Applications for interim relief are required to be decided on the basis of the pleadings of the parties, supported by evidence, which is taken on affidavits as provided under Order XXXIX, Rule I of the Code of Civil Procedure. The trial Court had on the

basis of the material before it came to the conclusion that no prima facie case had been made out. The Plaintiff had not filed any document on the record of the trial Court. In the list of documents appended to the plaint, it has been stated that the documents "shall be produced later on". There is also no list of reliance appended to the plaint. Order VII, Rule 14(2) of the Code enjoins upon the Plaintiff to disclose in the list the particulars of the documents on which he places reliance. The documents had in fact been filed by the Defendant-bank.

18. The general principle is that the appellate Court should not travel outside the record of the lower Court while hearing the appeal. In *Chaturbhuj Pande and Others Vs. Collector, Raigarh*, the Supreme Court while accepting the contention of the counsel for the Appellant that the High Court was not right in looking into the documents which were not the part of the record of the case and when no opportunity had been given to the Appellants to rebut the same, observed that:

...it appears that these documents were looked into by the learned Judges after the conclusion of the arguments. If the High Court wanted to take into consideration any fresh evidence, it should have admitted the same in accordance with law. In that event, the Appellants would have got opportunity to rebut that evidence. That having not been done, we do not think it was open to the High Court to rely on those documents.

(Emphasis supplied)

19. The exception to the aforementioned general rule that the appellate Court should not travel outside the record of the lower court is to be found in Clause (d) of Section 107 of the Code of Civil Procedure, which has further been elucidated in Rule 27 of Order XLI of the Code, which enable the appellate Court to take additional evidence, in case the circumstances mentioned therein exist. The appellate Court, otherwise has no inherent jurisdiction to admit any additional evidence outside the scope of Rule 27 or Order XLI of the CPC. Reference may be made to a decision of the Privy Council in *Kessowji Issur v. Great Indian Peninsula Railway Co.* Vol. XXXI ILR (Bombay Series), PC 381. The principles laid therein to the aforementioned effect were followed in a subsequent decision in AIR 1931 143 (Privy Council). A five Judges Bench of the Supreme Court in *The Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others*, held that "under Order XLI, Rule 27 the High Court has the power to deal with all documents to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence".

20. The contention of the learned Counsel for the Plaintiff-Respondent that the opposite party did not object and cannot be allowed to agitate this point in this Court that documents filed before the lower appellate Court could not have been taken, cannot be accepted, since neither the Plaintiff-Respondent made a prayer before the lower appellate Court to admit or accept the additional evidence, nor the lower appellate Court recorded any reason to admit or accept additional evidence at belated stage. The lower appellate Court ignoring the salutary procedure, prescribed under law, proceeded to take into consideration the documents, which had been introduced in the appeal record without permission, as if the same formed the part of the record.

21. In case the lower appellate Court wanted to make use of the documents filed by the Plaintiff-Respondent before it along with the appeal, it was also incumbent for it to have allowed an opportunity to the Petitioner-bank to rebut the same. This could only be done in case a request in that behalf was made by the Plaintiff-Respondent for taking into consideration the documents by having resort to the provisions of Order XLI, Rule 27 of the Code of Civil Procedure, in the absence of which it was not permissible for the appeal Court to look into these documents. The additional documents as also the material placed before the lower appellate Court were made the basis for passing the impugned order, without affording any opportunity to the Petitioner-bank to rebut the same. The lower appellate Court also failed to make any reference to the documents, which had been filed by the Defendant-bank, namely, the Plaintiff's undertaking to the effect that he could be transferred to any branch in the circle of his posting. In other words, the documents are to the effect that the Plaintiff's job is a transferable one. The other documents filed by the bank were to the effect that the transfer had been made in the Bank's interest and for administrative reasons.

22. The Supreme Court in *Union of India and Others Vs. H.N. Kirtania*, has in the following words deprecated the practice of granting injunction against the orders of transfer of an employee holding transferable job:

...there was no valid justification for issuing injunction order against the Central Government. The Respondent being a Central Government employee held a transferable post and he was liable to be transferred from one place to the other in the country, he has no legal right to insist for his posting at Calcutta or at any other place of his choice. We do not approve of the cavalier manner in which the impugned orders have been issued without considering the correct legal position. Transfer of a public servant made on administrative grounds or in public interest should not be interfered with unless there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rules or on ground of mala fides. There was no good ground for interfering with the Respondent's transfer.

23. For the aforementioned reasons, I find that the lower appellate Court not only committed material irregularity but also acted in exercise of its jurisdiction with material irregularity, which vitiates the impugned order and consequently

there is no option but to quash and set aside the said order.

24. The submission made by the learned Counsel for the Plaintiff-Respondent for allowing the Plaintiff-Respondent to continue to remain at Nahan for a reasonable time to enable him to have the dispute referred to the Industrial Court/Tribunal cannot be accepted and no relief in this behalf can be granted in view of the observations that the jurisdiction of the civil court is impliedly barred.

25. It is also not disputed on behalf of the Plaintiff that the Union of which the Plaintiff is a member had taken up the dispute in question for being referred to adjudication to the Labour Court under the provisions of the Act. Irrespective of the stand taken by the Petitioner that reference could not be made, the Plaintiff through the Union concerned can still continue agitating the matter. The matter can be taken up further by resorting to appropriate proceedings for quashing the said order and it has rightly and frankly been conceded by Mr K.D. Sood that in case the said proceedings are taken out, the Petitioner-bank shall not challenge the jurisdiction of the Industrial Court and shall not take up a stand that reference is bad, in view of the pendency of the civil litigation.

26. In the result, the revision petition is allowed. The impugned order is quashed and set aside. The interim relief is vacated. The record of the courts below be sent back immediately. The parties are directed to appear before the trial Court on 31st July, 1993.

No costs.