

Engineering Workers Association Vs. M/s. Radium Creation Ltd. and Others

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Court : Mumbai

Decided On : Mar-15-2016

Judge : R.D. Dhanuka

Appeal No. : Writ Petition No. 2941 of 2016

Appellant : Engineering Workers Association

Respondent : M/s. Radium Creation Ltd. and Others

Judgement :

1. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has impugned the order dated 20th February, 2016 passed by the Industrial Court, Thane rejecting the application filed under section 30(2) of the MRTU and PULP Act, 1971 (for short hereinafter referred to as the said ULP Act) inter alia praying for a direction to the respondents not to give effect to transfer order dated 19th December, 2015 of the employees and to allow them to resume their work with equitable relief. The said application for interim order was filed in a complaint filed by the petitioner under section 28 read with items 3, 9 and 10 of Schedule IV of the said ULP Act. Some of the relevant facts for the purpose of deciding this petition are as under:-

2. The petitioner is a trade union registered under the provisions of Trade Unions Act, 1926 and represents the large number of employees as its members in the respondent no.1 company. The employees of the respondent no.1 who are

members of the petitioner union have made various demands for the benefit and facilities and improvement in the service conditions of members of the petitioner. Various proceedings have been filed by the petitioner union against the respondent no.1 and vis-a-versa in various courts against each other.

3. Sometime in the year 2009, the petitioner had filed a complaint of unfair labour practice being Complaint (ULP) No.256 of 2009 before the Industrial Court at Thane against the respondent no.1 and applied for interim relief. By an order dated 7th November, 2009, the Industrial Court directed the respondents to maintain status quo regarding the issue involved in the said complaint.

4. On or about 3rd December, 2010, the petitioner and the respondent entered into a settlement recording various terms and conditions as agreed between the parties. It is the case of the petitioner that inspite of such settlement, the respondents were always vindictive and started harassing the members of the petitioner union and had continuously committed unfair labour practice upon the members of the petitioner union who were employees of the respondent no.1. Several complaints were accordingly filed by the petitioner alleging unfair labour practice against the respondents which are pending. The petitioner decided to call for four days protest strike on two occasions and issued a strike notice. The petitioner thereafter filed a complaint (ULP) No.114 of 2014 before Industrial Court at Thane. The Industrial Court, Thane passed an order on 16th April, 2014 on the application for interim relief filed by the petitioner and restrained the respondents from recruiting any fresh hands in place of the striking workmen and not to remove plant machinery, raw material etc. The said order was confirmed by the Industrial Court by its judgment and order dated 1st August, 2014. The review application filed by the respondent no.1 against the said interim order came to be rejected.

5. It is the case of the petitioner that the respondent no.1 issued a notice on 2nd July, 2014 thereby suspending the operation restricted to 202 members of the petitioner union whose names were given in the list attached to the said notice.

6. The respondents by their further notice dated 5th July, 2014, declared a partial lockout effective from 20th July, 2014 restricting only to the members of the petitioner union.

7. On or about 18th July, 2014, the petitioner filed a complaint (ULP) No.194 of 2014 in the Industrial Court, Thane under item 6 of Schedule II and item 9 and 10 of Schedule IV of the said ULP Act alongwith an application for interim relief. By an order dated 24th July, 2014, the Industrial Court rejected the said application for interim relief.

8. On 29th July, 2014, the petitioner gave an undertaking to the respondents on behalf of 202 members that they shall work peacefully, give normal production with discipline and for restoration of normalcy as required by the 1st respondent. The petitioner thereafter filed a writ petition in this court (9896 of 2014) inter alia challenging the said order dated 24th July, 2014. By an order dated 3rd February, 2015, this court dismissed the said writ petition filed by the petitioner. The petitioner thereafter filed Special Leave Petition (8379 of 2015) impugning the said order passed by this court. By an order passed by the Supreme Court in the said writ petition, the Supreme Court directed the respondent no.1 to calculate and deposit the wages payable to the affected workmen in the Supreme Court w.e.f. 1st August, 2014 till 30th April, 2015 subject to various conditions.

9. By a notice dated 6th August 2015, the respondents lifted the lockout in respect of 150 workmen. It is the case of the petitioner that by notice dated 1st September 2015, the respondents lifted the lockout in respect of 40 workmen and placed them under suspension pending enquiry without any reason whatsoever.

10. On 19th December 2015, the respondents by their notice and individual letters issued transfer orders to 48 workmen to their Sanjan Unit, Vapi, Gujrat who all are members of the petitioner-Union. Being aggrieved by the said action on the part of the respondents, the petitioner herein filed a complaint alleging unfair labour practice being Complaint ULP No.280 of 2015 before the Industrial Court, Thane under items 3, 9 and 10 of Schedule IV of the said ULP Act. The petitioner also filed an application for interim relief under Section 13(2) of the said ULP Act, in the said complaint, inter alia praying for a direction against the respondents not to give effect to the transfer order dated 19th December 2015 of the workmen and allow them to resume their work with equitable relief.

11. By an order dated 20th February 2016 passed by the Industrial Court, Thane, the said application for interim relief is rejected. It was, however, made clear that the said order will take effect after four weeks from the date of the said order. The complaint filed by the petitioner under Section 28 read with Items 3, 9 and 10 of Schedule IV of the said ULP Act alleging unfair labour practice against the respondents is still pending. The said order dated 20th February 2016 passed by the Industrial Court, Thane is impugned by the petitioner in this petition under Articles 226 and 227 of the Constitution of India.

12. Ms.Buch, learned counsel for the petitioner invited my attention to the interim order dated 16th April 2014 passed by the Industrial Court in the earlier complaint (114 of 2014) which was filed by the petitioner against the respondents in which the Industrial Court had granted interim relief against the respondents from recruiting any fresh hands in place of striking workmen etc. and restraining the respondents from removing the raw material, machineries and semi-finished goods from the Company. She submits that the review application filed by the respondent no.1 against the said order dated 16th April 2014 came to be rejected by an order dated 1st August 2014. It is submitted that in view of the petitioner having succeeded in the said proceedings before the Industrial Court and also in the Special Leave Petition filed before the Supreme Court arising out of the order passed by this Court by which, the respondents required to deposit payment towards wages to the workmen who all are members in the petitioner-Union, the respondent no.1 issued notices of transfer against 48 workmen. She submits that out of those 48 workmen, 46 workmen are women.

13. Learned counsel invited my attention to various interim orders passed by the Supreme Court and more particularly the orders dated 27th July 2015 and 14th October 2015 in Civil Appeal No.8644 of 2015 arising out of Special Leave Petition No.8379 of 2015. It is submitted that when the Supreme Court was hearing the said special leave petition filed by the petitioner challenging the order passed by this Court refusing to interfere with the action of the respondent no.1 in declaring lockout, the respondent no.1-Company had made a statement before the Supreme Court that the Company was ready to lift the lockout qua 150 out of a total 202 workmen, to be named in a list, agreed by them before the Supreme Court. The

respondent no.1 had also made a statement before the Supreme Court that the Company was ready and willing to transfer such of the workmen mentioned in the list as may choose to be so transferred to a factory at Chembur which according to the respondent no.1 was nearer to the place where those workmen were living. The petitioner through its learned senior counsel made a statement that if any such list was provided to the petitioner, the petitioner would be able to take instructions whether any workman, out of those, mentioned in the list was ready and willing to be transferred to the factory at Chembur. She submits that similar statement was made before the Supreme Court also in the subsequent hearing which statement is recorded by the Supreme Court in the order dated 14th October 2015 disposing of the said Civil Appeal No.8644 of 2015.

14. It is submitted by the learned counsel for the petitioner that the respondent no.1-company had furnished a list of workmen pursuant to the statement made by the respondent no.1-company before the Supreme Court to the petitioner. The petitioner, however, did not accept the said statement made by the respondents by filing an affidavit before the Supreme Court. It is submitted that the salary being paid to these transferred workmen by the respondents was about Rs.7,000/- per month only. It is submitted that if these workmen and more particularly 46 women are transferred to another State, serious prejudice would be caused to these workmen.

15. It is submitted by the learned counsel that since the respondents were not able to demonstrate any administration exigency for transferring 48 workmen inclusive of 46 women, the transfer sought to be effected by the respondents was obviously effected with malafide intention and thus the Industrial Court ought to have granted stay on such transfer of the application filed by the petitioner.

16. It is submitted by the learned counsel for the petitioner that when the matter was pending before the Supreme Court, there was no reference made to Sanjan Unit, Vapi, Gujrat of the respondents. She submits that only after the order came to be passed by the Supreme Court, the respondents deliberately and with malafide intention issued notices for transfer against 48 workmen. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in

the case of **M/s.Kundan Sugar Mills Vs. Ziyauddin and Ors.**, reported in **AIR 1960 SC 650** in support of the submission that 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. Reliance is also placed on the judgment of the Supreme Court in the case of **M/s.Parry and Co. Ltd. Vs. P.C. Pal, Judge of the Second Industrial Tribunal, Calcutta and Ors.**, reported in **AIR 1970 SC 1334** and in particular paragraph 14 thereof. Learned counsel also placed reliance on the judgment of this Court in the case of **Crest Communication Ltd. and Ors. Vs. Ms.Sheetal Shenoy**, reported in **2001 (3) ALL MR 612** and in particular paragraphs 12, 13 and 29 thereof and would submit that after adverting to the judgment of the Supreme Court in the case of M/s.Kundan Sugar Mills (supra), this Court rejected the submission of the employer that the case would not attract Item 9 of Schedule IV of the said ULP Act.

17. It is submitted by the learned counsel for the petitioner that notices issued by the respondents for transfer of 48 workmen was off shoot of the order passed by the Supreme Court in the Special Leave Petition filed by the petitioner which was against the respondent no.1-Company and thus notices of transfer of the workmen by the respondents was a mala fide action against the workmen who are members of the petitioner Union. She submits that out of 600 members of the petitioner who were the workmen of the respondent no.1-company, the respondents deliberately selected only 150 workmen who had either filed proceedings against the company earlier or had made a legitimate dues against the respondents.

18. It is submitted by the learned counsel for the petitioner that there was no provision for transfer in the service condition applicable to the workmen who were sought to be transferred by the respondents. She submits that the factory to which the transfer was sought to be made by the respondents at Sanjan, Vapi, Gujrat was not even in existence on the date of appointment of these workmen.

19. Mr.Talsania, learned senior counsel for the respondents, on the other hand, invited my attention to various orders passed by the Supreme Court in Civil Appeal No.8644 of 2015 arising out of Special Leave Petition No.8379 of 2015 which was

filed by the petitioner inter alia impugning the order dated 3rd February 2015 passed by this Court in Writ Petition No.9196 of 2014 and more particularly the orders dated 17th July 2015 and 14th October 2015. He submits that admittedly, the said civil appeal filed by the petitioner was arising out of an action of the respondents in respect of lock out of the respondent no.1-company. There was no issue of transfer of workmen in the said proceedings before the Supreme Court.

20. It is submitted that even those two orders passed by the Supreme Court would indicate that the respondent no.1-company was ready and willing to transfer those workmen to be named in a list as may choose to be so transferred to a factory at Chembur. He submits that in the order dated 14th October 2015 passed by the Supreme Court, there was a reference to the statement made by the respondents before the Supreme Court on 27th July 2015. He submits that admittedly, the respondents had furnished a list of such workmen to the petitioner which was admittedly not accepted by the petitioner by filing an affidavit before the Supreme Court. He submits that neither any direction was issued by the Supreme Court to transfer those workmen whose names were mentioned in the said list to a factory of the respondent at Chembur nor any agreement was arrived at between the parties for transfer of those workmen to a factory at Chembur. It is submitted that the submission of the learned counsel for the petitioner that the order passed by the Supreme Court based on any such statement made by the respondent no.1-company for transferring those workmen to the factory at Chembur is ex facie contrary to the orders dated 27th July 2015 and 14th October 2015 passed by the Supreme Court.

21. It is submitted by the learned senior counsel that in the said final order in the said Civil Appeal No.8644 of 2015, the Supreme Court had made it clear that entitlement to the benefits of the workmen would depend upon whether the lock out was legally valid and justified which finding has yet to be recorded by the Industrial Court. He submits that the Supreme Court though directed the respondents to deposit certain amount before the Industrial Court, it was made clear that release in favour of the workmen shall be subject to the condition that each of them files before the Industrial Court an undertaking to the effect that in case the said Court records a finding that the lock out was legal or justified which

finding was finally upheld by the appellate/revisional authorities, the amount so received shall be refunded back to the company. He submits that as regards the 40 workmen qua whom the lock out stands withdrawn but facing the disciplinary proceedings, the Supreme Court left it to the Industrial Court to examine whether any payment of wages could be made in their favour also by way of an interim direction. Supreme Court also directed that the excess, if any, remained unutilised shall be invested in a fixed term deposit. While disposing of the said civil appeal, the Supreme Court had made it clear that the Supreme Court had not expressed any opinion on the merits of the contentions raised by the parties which was left open for consideration at an appropriate stage. He submits that the submission thus made by the learned counsel for the petitioner that the notices issued by the respondents for transfer of 48 workmen were off shoot of the order passed by the Supreme Court is factually incorrect.

22. Learned senior counsel for the respondents invited my attention to one of the appointment letters issued by the respondents to one of such workmen who was sought to be transferred by the respondents. He submits that under clause 7 of the said appointment letter, it was specifically agreed that the company would have right to transfer the workmen to any other place according to exigency of work. My attention is also invited to Memorandum of Settlement dated 3rd December 2010 entered into between the respondents and the petitioner under Section 2(p) read with Section 18(1) of the Industrial Disputes Act, 1947 and Rule 62 of the Industrial Disputes (Bombay) Rules, 1957 and more particularly clause 9 thereof. He submits that even under the said clause of the Memorandum of Settlement, it was agreed by and between the parties that the services of the workmen shall be transferred from one Department /Unit to another Department/Unit and on such transfer to other Unit, they shall be governed by the terms and conditions at the transferred Unit, however, their pay packets shall be protected. He submits that upon such transfer of 48 workmen who are members of the petitioner to Sanjan, Vapi, Gujrat, their pay packets are going to be protected in terms of clause 9 of the Memorandum of Settlement.

23. It is submitted by the learned senior counsel that existing departments of the respondents such as Electroplating, Casting, Soldering etc. in which these

workmen were employed have been shifted to Sanjan, Vapi, Gujarat with installation of new plant and machinery therein. He submits that those units were transferred due to constant threat by the pollution board and for environmental reason. It is submitted that 48 workmen who are transferred were working in these departments. It is submitted by the learned senior counsel that the respondent no.1-company was facing space constraints due to which the company had purchased a plot at Sanjan, Vapi in Gujrat. In so far as the submission of the learned counsel for the petitioner that out of 48 workmen, 46 workmen are women is concerned, it is submitted by the learned senior counsel that more than 80% to 85% of the workmen working in the departments are female employees.

24. Learned senior counsel for the respondents placed reliance on the judgment of this Court in the case of **VIP Industries Limited, Satara Vs. Maharashtra Kamgar Karmachari Sanghatana, Satara and Anr.**, reported in **(2008) III CLR 22** and in particular paragraphs 7 and 9 thereof. He submits that this Court after adverting to the judgment of the Supreme Court in the case of M/s.Kundan Sugar Mills (supra) has held that once transferability is a condition of service and the conditions of service are not being adversely affected by the order of transfer, the action of the employer in exercising the right to transfer the employee cannot be faulted except for malafides or where there is a statutory violation. It is submitted that a case of malafides has to be established on the basis of clear and cogent material. In this case, the petitioner had failed to establish the same.

25. It is submitted by the learned senior counsel that admittedly, the petitioner did not challenge shifting of those three departments to Sanjan,Vapi, Gujrat and thus the petitioner could not have challenged the notices issued by the respondents for transfer of order of those 48 workmen in absence of such challenge to the action of shifting of those departments. He submits that the notices for transfer issued by the respondents were after considering the exigency of work and was within the provision of such transfer mentioned in the letter of appointment and also forming part of Memorandum of Settlement arrived at between the petitioner and the respondent no.1-company.

26. Learned senior counsel for the respondents also placed reliance on the judgment of the Supreme Court in the case of **Pearlite Liners Pvt. Ltd. Vs. Manorama Sirsi**, reported in **(2004) II CLR 965** and in particular paragraphs 6 and 10 thereof. It is submitted that the Supreme Court has held that unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service.

27. Learned senior counsel distinguishes the judgments relied upon by the learned counsel for the petitioner. He submits that by transferring these workmen, they would not be declared as surplus. By issuing notices of transfer, those 48 workmen are not sought to be retrenched.

28. In so far as the submission made by the learned counsel for the petitioner that there was no reference to the Sanjan Unit made by the respondents in the proceedings filed by the petitioner before the Supreme Court is concerned, my attention is invited by the learned senior counsel for the respondents in paragraph 15 of the impugned order passed by the Industrial Court and would submit that even in the said order, the Industrial Court had held that it was stated by the respondents before the Supreme Court that 75 workmen were already working at Sanjan, Vapi, Gujrat.

29. Learned senior counsel placed reliance on paragraph 14 of the judgment of the Supreme Court in the case of M/s.Parry and Co. Ltd. (supra) which was relied upon by the learned counsel for the petitioner. He submits that even in the said judgment, the Supreme Court has held that it is within the managerial discretion of an employer to organise and arrange his business in the manner he considers best and if the same is done bonafide, it is not competent of a tribunal to question its propriety.

30. In so far as the judgment of this Court in the case of Crest Communication Ltd. and Ors. (supra) relied upon by the learned counsel for the petitioner is concerned, it is submitted by the learned senior counsel for the respondents that the Supreme Court in the case of Pearlite Liners Pvt. Ltd. (supra) which judgment was delivered subsequently i.e. on 6th January 2004 has taken a view that unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of

service.

31. It is lastly submitted by the learned senior counsel that the Industrial Court has only decided the application for interim relief prayed by the petitioner and the complaint filed under Section 28 read with items 3, 9 and 10 of Schedule IV of the said ULP Act is still pending.

32. Ms. Buch, learned counsel for the petitioner in rejoinder submits that though in the letter of appointment and in the Memorandum of Settlement, there is a provision for transfer of workmen on certain grounds, the respondents cannot be permitted to exercise such right with malafide intention which is apparent in the facts of this case.

REASONS AND CONCLUSIONS

33. Before I deal with the issue raised by the petitioner that the notices of transfer issued by the respondents was a malafide action, the first issue which is required to be dealt with prima facie at the interlocutory stage is as to whether the condition of services applicable to these workmen provided for transferability.

34. A perusal of one of the letter of appointment placed for consideration of this court which was issued to one of the workmen would clearly indicate that the company would have right to transfer the workmen to any other place according to exigency of work. A perusal of clause 9 of Memorandum of Settlement dated 3rd December, 2010 which was entered into between the respondents and the petitioner union under section 2(p) read with section 18(1) of the Industrial Disputes Act, 1947 and Rule 62 of the Industrial Disputes (Bombay) Rules, 1957 indicates that it was agreed by and between the parties that the services of the workmen shall be transferred from one department/unit to another department/unit and on such transfer to other unit, they shall be governed by the terms and conditions at the transferred unit, however their pay packets shall be protected.

35. Though the learned counsel appearing for the petitioner initially urged before this court that there was no provision for transfer of any of the workmen in the letter of appointment or in the memorandum of settlement, learned counsel in her

rejoinder arguments urged that though there was a condition of transfer of the workman in the letter of appointment or in the memorandum of settlement, such transfer could not be effected by the respondents mala fide. A perusal of the provision in the letter of appointment as well as in the memorandum of settlement clearly indicates that the respondent no.1 company had right to transfer the workmen from one department/unit to another department/unit subject to the protection of pay packets of such workmen. It was also a term of the letter of appointment that the company would have a right to transfer the workman to any other place according to exigency of the work.

36. The next question now arises for consideration of this court is whether there was any mala fide intention on the part of the respondents in issuing notices of transfer to 48 workmen as urged by the learned counsel for the petitioner.

37. Insofar as allegations of malafides raised by the petitioner are concerned, the allegations are based on the premise (1) the notices of transfer were offshoot of the order passed by the Supreme Court in the civil appeal filed by the petitioner against the respondents which order was against the respondents, (2) The notices of transfer were issued contrary to the statement made before the Supreme Court, (3) 46 of the workmen out of 48 workmen are women, (4) when these 48 workmen were employed by the respondent no.1 company, there was no unit of the respondent no.1 company commenced at Sanjan, Vapi, Gujarat or there was no proposal in hand to commence any such unit at Sanjan, Vapi, Gujarat by the respondent no.1, and (5) there was no reference of Sanjan Unit made before Supreme Court by the respondents.

38. Insofar as submission of the learned counsel for the petitioner that the notices of transfer issued by the respondents is offshoot of the order passed by the Supreme Court in the civil appeal filed by the petitioner is concerned, a perusal of those two orders of the Supreme Court clearly indicates that the issue raised by the petitioner in the said civil appeal before the Supreme Court was whether the lockout declared by the respondents was illegal or not. There was no issue involved in the said civil appeal or in the proceedings filed by the petitioner before the Industrial Court and before this court whether those workmen could be

transferred to another unit by the respondents or not. A perusal of those two orders further indicates that the respondent company had made a statement before the Supreme Court that the company was ready and willing to transfer such of the employees mentioned in the list as may choose to be so transferred to a factory at Chembur which according to the company was nearer to the place where those workmen were living.

39. It is not in dispute that pursuant to the said statement made before the Supreme Court by the respondent no.1 through its senior counsel, a list of such workmen was furnished to the petitioner union before the Supreme Court. It is a common ground that the petitioner union refused to accept such statement by filing an affidavit in the said civil appeal. A perusal of the orders passed by the Supreme Court clearly shows that the Supreme Court had neither accepted such statement made by the respondent no.1 company nor passed any order directing the respondent no.1 to transfer those workmen whose names were mentioned in the list furnished to the petitioner to the factory at Chembur. I am thus not inclined to accept the submission of the learned counsel for the petitioner that the notices of transfer issued by the respondents is contrary to the orders passed by the Supreme Court or contrary to the statement made before the Supreme Court. In my view the petitioner cannot urge that the respondent no.1 was bound to comply with the said statement made before the Supreme Court since the petitioner had admittedly refused to accept the said statement made by the respondents.

40. A perusal of those two orders passed by the Supreme Court further indicates that the Supreme Court had though directed the respondent no.1 company to deposit certain amount, it was made clear that the entitlement to the benefit of the workmen would depend upon whether which finding was to be recorded by the Industrial Court. The withdrawal of such deposit in favour of the workmen was made subject to the condition that each of them would file before the Industrial Court an undertaking to the effect that in case the said court records the finding that the lockout was legal or justified and if such finding was finally upheld by the appellate/revisional authorities, the amount so received by the workmen shall be refunded back to the company. Supreme Court also made it clear that the court had not expressed any opinion on the contention raised by the parties which was

left open for consideration at an appropriate stage. There is thus no merit in the submission of the learned counsel for the petitioner that the notices of transfer issued by the respondents were issued as a off shoot to the orders passed by the Supreme Court in the said civil appeal filed by the petitioner or earlier interim orders passed by the Industrial Court referred to aforesaid.

41. The issue as to whether the lockout was legal or justified or whether the amount allowed to be withdrawn by the workmen pursuant to the said order passed by the Supreme Court could be appropriated by the workmen or shall be refunded to the respondents is pending.

42. Insofar as submission of the learned counsel for the petitioner that out of 48 workmen who have been issued notices of transfer by the respondents, 46 workmen are women are concerned, the petitioner has not disputed that about 80 to 85% of the workmen working in the departments were female employees. There is thus no merit in the submission of the learned counsel for the petitioner that the notices of transfer were issued with a malafide intention by the respondents.

43. Insofar as next submission of the learned counsel for the petitioner on the issue of malafide that when the appointment of these workmen was made by the respondents, there was no such unit commenced by the respondents at Sanjan, Vapi, Gujarat and the notices of transfer thus after the judgment of Supreme Court in the civil appeal filed by the petitioner would amount to malafide intention is concerned, a perusal of the letter of appointment and the memorandum of settlement entered into between the parties clearly indicates that the respondent no.1 could transfer the workmen to any other place/unit of the respondent no.1. A perusal of the record further indicates that the respondent no.1 had shifted existing departments of the respondents such as electroplating, casting, soldering etc. to Sanjan, Vapi, Gujarat with installation of new plant and machinery therein. There is a reference to the said unit at Sanjan, Vapi, Gujarat in the proceedings filed by the petitioner in the Supreme Court. A reference to the said unit is also made by the Industrial Court in the impugned order. There is thus no merit in this submission of the learned counsel for the petitioner.

44. A perusal of the order passed by the Industrial Court indicates that after considering the arguments of both the parties and after considering various judgments of the Supreme Court, this Court and various other High Courts, the Industrial Court, prima facie, observed that the allegation of the petitioner that the transfer of the workmen to Sanjan, Vapi, Gujrat was without any right to the respondents and was in violation of the service conditions is raised for the first time in written notes of the arguments and not based on any pleadings. In spite of there being no pleadings in support of this allegation, the Industrial Court considered the said submission and has rightly rejected on the ground that it was one of the service conditions mentioned in the appointment orders and also in the Memorandum of Settlement in which the petitioner Union had agreed for transfer from one department to another department.

45. The Industrial Court has held that transferability became the service condition of the employees. It is held that the plant at Sanjan, Vapi was also one of the units of the respondent no.1-company and though may be established subsequently, still the transfer seems to be at the other unit of the respondent no.1. The Industrial Court also took a cognizance of those provisions in the letter of appointment and Memorandum of Settlement in which it was provided that there would not be a change in service conditions of transfer. The Industrial Court accordingly came to the prima facie conclusion that the petitioner herein had failed to point out at this prima facie stage that the orders of transfer were in violation of the order of the Supreme Court and contrary to the oral submissions made on behalf of the company before the Supreme Court or in violation of the contents made in the affidavit before the Supreme Court or it amounted to unfair labour practice under Item 9 of Schedule IV of the ULP Act.

46. In my view, the Industrial Court has rightly prima facie held that the transferability was the service condition of the employees in question and the transfers of the employees were within the rights of the management and considering the reason for transfer to another unit which is installed at Sanjan, Vapi, Gujrat is due to pollution/environmental problems. It is rightly held that in absence of malafides, it is difficult to accept that the petitioner had made out any prima facie case of unfair labour practice under any of the Items of Schedule IV of

the ULP Act as invoked by the petitioner. The Industrial Court also prima facie held that due to pollution/environmental problem, the department of Electroplating, Casting and Soldering have been shifted at Sanjan, Vapi, Gujrat with installation of new plant and machinery and the Electroplating, Casting and Soldering have been modernized, upgraded technologically so as to improve quality of the product which fact made it clear by the respondent no-1 company in the affidavit submitted before the Supreme Court.

47. It is held that because of the shifting of the departments, the respondent no-1 company had transferred the employees from Turbhe plant to Sanjan, Vapi, Gujrat and therefore, the workmen working in those departments were transferred to Sanjan, Vapi, Gujrat and thus transfer of those employees prima facie seems to be bonafide. It is held that even assuming for the sake of arguments, various complaints of unfair labour practices are pending before the Industrial Court. The transfer could not be termed as malafide. In my view, it is rightly held that the aspect of malafides can be proved only after recording the evidence of the parties on merits. The Industrial Court adverted to the judgment of this Court in the case of the **Janata Commercial Co-operative Bank through its Managing Director, Akola Vs. the Member, Industrial Court and Anr.** in which it is held that merely because there was a mass transfer of the employees, the same cannot be termed as malafides. In my view, prima facie view taken by the Industrial Court on the issue of malafides and on the terms and conditions of the service providing transferability is a right view expressed by the Industrial Court and does not suffer from any infirmity.

48. In so far as the judgment of the Supreme Court in the case of M/s.Kundan Sugar Mills (supra) relied upon by the learned counsel for the petitioner is concerned, the parties had conceded that it was not an express term of the contract of service that the employees should serve in any future concerns which the appellant might acquire or start. Supreme Court considered the evidence on record that though the same persons owned both the Mills, they were two different concerns and though the only connection between the two was in the identity of ownership, one person has nothing to do with the other. Supreme Court also considered the fact that the service conditions at both the places were different.

49. Clause 9 of the Memorandum of Settlement entered into between the parties clearly indicates that it was agreed by and between the parties that the services of the workmen shall be transferred from one Department /Unit to another Department/Unit and on such transfer to other Unit, they shall be governed by the terms and conditions at the transferred Unit, however, their pay packets shall be protected. Learned senior counsel for the respondents has made a statement that upon transfer of these 48 workmen to Sanjan unit, their existing pay packets shall be protected in terms of clause 9 of the Memorandum of Settlement. In my view, the judgment of the Supreme Court in the case of M/s.Kundan Sugar Mills (supra) would not assist the case of the petitioner union and is clearly distinguishable in the facts of this case.

50. Learned counsel appearing for both the parties placed reliance on the judgment of the Supreme Court in the case of M/s.Parry and Co. Ltd. (supra). It is held by the Supreme Court in the said judgment that it is well established that it is within the managerial discretion of an employer to organise and arrange his business in the manner he considers best and if the same is done bonafide, it is not competent of a tribunal to question its propriety. In my view, the petitioner could not even prima facie prove before the Industrial Court and also before this Court that though the service conditions provided for transfer to another unit, the notices of transfer by the respondents were not issued bonafide and were issued with malafide intention. The judgment of the Supreme Court in the case of M/s.Parry and Co. Ltd. (supra) thus would assist the case of the respondents and not the case of the petitioner. I am respectfully bound by the judgment of the Supreme Court in the case of M/s.Parry and Co. Ltd. (supra) which is applicable to the facts of this case.

51. In so far as the judgment of this Court in the case of Crest Communication Ltd. and Ors. (supra) relied upon by the learned counsel for the petitioner is concerned, in that case there was no agreement between the parties that the services of the workmen were transferable at any other place and thus does not assist the case of the petitioner.

52. Mr. Talsania, learned senior counsel for the respondents rightly placed reliance on the judgment of the Supreme Court in the case of Pearlite Liners Pvt. Ltd. (supra) which is delivered in the year 2004 which is much after the judgment of this Court in the case of Crest Communication Ltd. and Ors. (supra). Supreme Court in the case of Pearlite Liners Pvt. Ltd. (supra) has held that unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. It is held that it is to be considered that if the employee does not comply with the transfer order, it may ultimately lead to a termination of his service and therefore, the declaration that the transfer order is illegal and void in fact amounts to imposing the employee on the employer in spite of the fact that the employee allegedly does not obey order of his superiors in the management of the employer-company. In my view, the said later judgment of the Supreme Court in the case of Pearlite Liners Pvt. Ltd. (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

53. I shall now deal with the judgment of this Court in the case of VIP Industries Limited, Satara (supra) delivered in the year 2008 which is relied upon by the learned senior counsel for the respondents. There was a scheme of arrangement formulated under Sections 391 to 394 of the Companies Act, 1956 and as a result of which the industrial unit belonging to a company by the name Artistocrat Luggage Limited came to be transferred to and vested in the VIP Industries Limited. VIP Industries Limited issued notices transferring all the workers of the plant at Satara to the plant at Sinnar which notices were challenged by the Union by filing a complaint under Items 3, 9 and 10 of Schedule IV of the said ULP Act alleging unfair labour practices before the Industrial Court. One of the issues raised by the union was that when the employees were engaged at the factory at Satara, there was no branch at Sinnar and the workers had worked only at the Satara plant. No transfer had taken place previously.

54. It was also urged in that matter that the plant at Sinnar came to vest in the employer as a result of the scheme of amalgamation and as a consequence thereof, the transfer of the employees from the plant at Satara to Sinnar constituted a change in the conditions of service. On the other hand, it was urged by the employer that the letters of appointment expressly include transferability as

a condition of service and thus the Industrial Court was not justified in restraining the implementation of the orders of transfer for the reason that on the date on which the orders of appointment were issued, there was no branch at Sinnar. The union placed reliance on the judgment of the Supreme Court in the case of M/s.Kundan Sugar Mills (supra).

55. This Court in the case of VIP Industries Limited, Satara (supra), after adverting to the judgment of the Supreme Court in the case of M/s.Kundan Sugar Mills (supra), held that in the case of M/s.Kundan Sugar Mills (supra), the contract of employment had no express condition empowering the employer to transfer the workman to any other place. The employer had urged before the Supreme Court that the right to transfer was implicit in the contract of service but the Supreme Court held that it was not a universally correct proposition. Supreme Court had considered that though two factories were owned by the same employer, they were distinct entities situated at different places and even the service conditions that were prevailing therein were different. This Court distinguished the said judgment of the Supreme Court and held that in the case before this Court in the case of VIP Industries Limited, Satara (supra), both the establishments i.e. establishment at Sinnar as well as the establishment at Satara belong to one and the same employer and the service conditions of the workmen were not to be adversely affected by the order of transfer. It was also an admitted position that transferability was a condition of service in the letters of appointment.

56. This Court held that once transferability is a condition of service, and the conditions of service are not being adversely affected by the order of transfer, the action of the employer in exercising the right to transfer the employee cannot be faulted except for mala fides or where there is a statutory violation. This Court further held that a case of malafides has to be established on the basis of clear and cogent material. It is also held that transferability is a part of the contract of service. A change of the work place cannot be regarded as a matter of adverse effect. This Court has held that once the workmen were at the time of appointment placed on notice of the fact that their services were liable to be transferred that would comprehend any establishment of the same employer so long as there was no adverse impact on the existing conditions of service. There was no adverse

impact on the existing conditions of service.

57. This Court also adverted to the judgment of the Delhi High Court in the case of **General Marketing and Manufacturing Co. Ltd. Vs. Presiding Officer**, reported in **2000 (III) L.L.J. 1171(Del.)** in which it was held that if the service condition provides that workman were liable to be transferred to anywhere in India or any department and the management was at liberty to utilize services from time to time in any department or any section/branch of the company in India, it could not be said that the workman could not be transferred to a particular branch which was opened after the appointment of the workman. This Court agreed with the views formulated by the Delhi High Court in the said judgment and has accepted the arguments of the employer that transfer of the workmen from the plant at Satara to the plant at Sinnar which came to be vested in the petitioner as a consequence of a scheme of amalgamation subsequently was within the rights of the employer under the terms and conditions of the contract agreed between the parties and could not be considered as mala fide.

58. It is not in dispute that in the letter of appointment, it was clearly provided that considering the exigency of work, the workmen can be transferred to any other place and the same would be within the rights of employer. Clause 9 of the Memorandum of Settlement also clearly provided that the services of the workmen shall be transferred from one Department/Unit to another Department/Unit and on such transfer to other Unit, they shall be governed by the terms and conditions at the transferred Unit, however, their pay packets shall be protected. It is not in dispute that some of the existing departments referred to aforesaid at Turbhe were shifted to Sanjan, Vapi, Gujrat which unit also belongs to the respondent no.1-company. The respondent no.1-company made it clear that in accordance with the terms and conditions agreed between the parties under the Memorandum of Settlement, pay packets of these workmen will be protected. In my view, the judgment of this Court in the case of VIP Industries Limited, Satara (supra) thus clearly applies to the facts of this case. I do not propose to take any different view in the matter.

59. In my view, since there is no term to the contrary in the contract of service and in view of specific provision in the contract providing for transferability of the services of these workmen as recorded in the letter of appointment and in the Memorandum of Settlement, a transfer order issued by the respondents was a normal incidence of service unless the workmen would approve malafides on the part of the employer. The allegation of malafides cannot be vague and without particulars and have to be specifically pleaded and proved with clear and cogent material.

60. A perusal of the record prima facie indicates that the allegation of the malafides was made for the first time in the written arguments filed by the Industrial Court. The Industrial Court though found that the allegation of malafides was made for the first time in the written arguments, still considered such submission and after considering the material on record has rightly rejected such allegation of malafides. Be that as it may, the fact remains that the complaint filed by the petitioner union is still pending before the Industrial Court which can be considered on its own merits.

61. In my view, the order passed by the Industrial Court is a well reasoned order and has been passed after considering the submissions and material produced by both the parties and after adverting to the judgments of various Courts relied upon by both the parties. The said order passed by the Industrial Court does not suffer from any infirmity or perversity and thus cannot be interfered with by this Court under Articles 226 and 227 of the Constitution of India.

62. I therefore pass the following order:-

a) Writ Petition is dismissed;

b) The statement made by the learned senior counsel for the respondents that the respondents will not take any disciplinary action against the workmen in question for a period of five weeks from 15th March 2016 for not reporting to duty at Sanjan, Vapi is accepted;

c) This Court has already rejected the application made by the petitioner for continuation of the protection granted by the Industrial Court by an order dated 15th March 2016;

d) There shall be no order as to costs.

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