

Joseph Vs. Mathruboomi Printing and P. Co. Ltd.

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Court : Kerala

Decided On : Oct-14-1988

Reported in : (1991)ILLJ359Ker

Judge : Sukumaran, J.

Appeal No. : O.P. No. 3716/1986

Appellant : Joseph

Respondent : Mathruboomi Printing and P. Co. Ltd.

Advocate for Def. : E.R. Venketeswaran, Adv.

Advocate for Pet/Ap. : P.F. Thomas and; C.V. Anthony, Advs.

Disposition : Petition allowed

Judgement :

Sukumaran, J.

1. A Compositor (one who 'puts black onto white', as Gantier, the French writer would picture him) sent out from service by a mighty printing establishment-the Mathrubhoomi-and tired by a wearisome and long litigation, has come before the Court, He was in service for about 18 years. He is now out of employment for about eight years. The termination of his employment was unjust, is his complaint.

That did not, however, appeal to the Labour Court which looked into it. A fundamental flaw vitiated the Labour Court decision, is what is urged in the writ petition. That contention needs closer examination by this Court.

2. It is better to browse through the show cause where the facts are packed and paraded.

3. The petitioner had a case that there were some skeletons in the cup board. He alleged victimisation as a main motivation for the termination of his service. The Labour Court did not note any. If it could otherwise be helped, a gruesome sight can be better be avoided. The decision in the writ petition can be had, even without an evaluation of the plea of victimisation, is my feeling.

4. The petitioner was born and brought up in the suburbs of Cochin; at Elamakkara, where Bhavan has its school. He has his middle class family with its inseparable problems. Children attending schools; parents in advanced age; moorings difficult to sever. His house was close to the place of work. The distance could be easily trekked.

5. He joined the Printing Section of Mathrubhoomi in the year 1962. His work was never found wanting. Such solid and sincere work was rendered for a long period, a decade and eight years.

6. When the Cochin establishment grew to great stature, attendant organisational activities spread among the employees. Trade Unions, many of them, were formed. The petitioner was the Treasurer of one such Union. The petitioner has a theory that the Management, on that count, generated a desire to ease him out.

7. Mathrubhoomi decided to have an additional edition from the capital of the State. A new printing establishment was thus established in Trivandrum. The new establishment required many to run it - in various sections, administrative, editorial and technical. New posts could be filled up by fresh recruits. If the Management felt that some at any rate of the posts needed more experienced hands, it could either select such experienced personnel from the open market, or attempt transfer of such employees, if such transfer is other-wise permissible and/or

agreeable. If the Management has bonafide taken a decision that some experienced personnel of the Cochin or Calicut office, could do the work more competently, that decision prima facie may not be unjustified. That conclusion, however, is rested on an assumption that the transfer is well within the power of the management.

8. The Management decided that the petitioner should be transferred to Trivandrum. Then came the rub. the petitioner reacted. The difficulties arising out of the transfer, and the lack of legal competence for the management to effect a transfer, were highlighted in his reply.

9. The management did not yield. Refusal to obey a lawful and reasonable order is a misconduct. It is so provided under the standing orders applicable to the establishment. Disciplinary proceedings were set in motion.

10. If the order of transfer was a lawful and reasonable one, a misconduct could be attributed to the employee. The question, however, is whether in the light of the legal principles, the transfer could be said to be either lawful or reasonable.

11. Transfer of a servant had been accepted as part of service conditions in certain given situations. Administrators, even from early times, had bestowed much thoughts on the efficiency of the reign and the safety and security for the Rulers. They had found the innovation of transfer an extremely useful one. Such was the case with the emperors of China. Such was the position with the empire builders like the English.

12. Even in recent times, transfer was accepted by the servants without demur, as in the case of the East India Company and early English Rule in India. There was possibly not much of difference for the British boy whether he serves in the Tanjore delta or the Thar desert. Those employed in the Railways - there were many Anglo-Indians in that category - did not mind being shunted about, sometimes loosely and harshly. (It is a matter of recorded history that that happy mentality made them good guardians of lovely gardens in the Railway colonies. On transfer, they had no regrets, in leaving to their successors, the flowers and fruits of their labour of love.) Collectors in British India used to be shuttled from

one end of the empire to another.

13. Rules of Government quite often, positively provided for an obligation on the part of the Government servant to serve in any part of the territory under the Master whom he serves. The Fundamental Rules and the service rules generally provided positive provision in that behalf. This power of a Government, however, stands on a different footing as has been clarified by the decision of the Supreme Court. For the Government servant, his engagement is a matter of status. His position under the Government is not a matter exclusively of a private contract. His terms and conditions of service could be unilaterally altered, according to the desires and decisions of the employer- Government. It is not so with a private employer. The relationship between master and servant is ordinarily a matter of contract. Unilateral alteration is inconceivable in relation to bilateral contracts.

14. In the case of a private employment, transferability, therefore, is a matter of mutual agreement. Sometimes express provisions appear in the agreement. Some-times transferability is treated as an implied term.

15. Banks, carriers, and comparable commercial establishments, with branches distributed all over a vast area, could legitimately rely on such an implied term. When one takes up an employment, in any such concern, he carries with him, the cross of transferability.

16. In the case of an employer with single place of employment, transfer is ordinarily ruled out. For obvious reasons, transfer could not have been in the contemplation of the parties, in such a situation. The legal position is no longer res integra. The Supreme Court has spoken about it in *Kundan Sugar Mills v. Ziya Uddin & Others*, (1960-I-LLJ-266). Transferability could not be taken as an implied condition in such a situation. Thakker J. (as he then was of the Gujarat High Court) felt that there should be a compulsion to read transferability into a contract of service by necessary implication, having regard to the very nature of employment. (See *Automotive Manufacturers v. Nanalal Panchand*, 1977 Lab.I.C. 1188).

17. The governing principles have been explained in *Kundan Sugar Mill's* case (supra) clearly and forcibly. To imply a term of transferability as regards an

employee who entered service of a concern with a single establishment, it must be established that the employer entertained an intention to have a proliferation of its activities. Not only that. There must be communication of such intention to the employee also. Without a knowledge on the part of the employee of such an intention as entertained by the employer, transferability could not be inferred as an implied condition. That in a sense is the principle. This is, self evident from the passage reading (p.268):

'Apart from any statutory provision, the rights of an employer and an employee are governed by the terms of contracts between them or by the terms necessarily implied therefrom. It is conceded that there is no express agreement between the appellant and the respondents whereunder the appellant has the right to transfer the respondents to any of its concerns in any place and the respondents' duty to join the concerns to which they may be transferred. If so, can it be said that such a term has to be necessarily implied between the parties? When the respondents 1 to 4 were employed by the appellant, the latter was running only one factory at Amroha. There is nothing on record to indicate that at that time it was intended to purchase factories at other places or to extend its activities in the same line at different places. It is also not suggested that even if the appellant had such an intention, the respondents 1 to 4 had knowledge of the same. Under such circumstances, without more, it would not be right to imply any such term between the contracting parties when the idea of starting new factories at different places was not in contemplation. Ordinarily the employees would have agreed only to serve in the factory then in existence and the employer would have employed them only in respect of that factory. The matter does not stop there. In the instant case, as we have indicated, the two factories are distinct entities, situated at different places and, to import a term conferring a right on the employer to transfer respondents 1 to 4 to a different concern is really to make a new contract between them.'

18. No doubt, in the case before the Supreme Court, there were some adventitious additions, such as certain differences in the service conditions and facilities, consequent on transfer. It is, however, to be emphasised that those factors are not the crucial components of the principle.

19. If these tests are applied, the action of the Management would be unsustainable. There is no evidence about the entertainment by the management of an intention for the setting up of another Unit at Trivandrum when the employee was entertained in service in Cochin. There was much less any communication of such an intention to the employee. In such a situation, it is for the Management clearly to make out an obligation on the part of the employee for being transferred to a far too distant establishment. This crucial and fundamental aspect was unfortunately missed alike by the Management, by the Enquiry Officer and by the Labour Court. The fundamental misapprehension of the legal principle has vitiated the decision of the Management, the conclusion of the Enquiry Officer and the award of the Labour Court.

20. The Labour Court felt it safer to rest its conclusion on an event subsequent to his initial entry into service. That was the order of promotion given on 27th June 1972. That order mentioned that the employee was liable to be transferred to any of the establishments owned by the Company in India at the discretion of the Management. (That order is Ext.M1 in the Domestic Inquiry Report). This reasoning also overlooks certain basic legal principles. Ext.W7 is the staff pattern, which reflects the terms and conditions of service. Among others, they include the promotional avenues. There was no dispute that the workman, by virtue of his established seniority, was entitled to promotion. The general principle is that one party to the contract cannot unilaterally change it. As noted earlier, that is the essential distinction between an employment under a private employer, and the service under the State. The former is a matter of contract, the latter one is of status unilaterally changeable at the desire of the State. The incorporation of a condition without either competence or unsupported by any consideration, is an inoperative provision, It would be wholly illegal and unjustified. If the promotion was, therefore, his rightful due and not something by way of gratis, an addition of a new condition is totally incompetent and unjust. Viewed from the pure principles of pristine contract law, a detriment is imposed on the employee without any consideration, much less any adequate consideration. The situation would have been different, if a superior post, not claimable as of right, was offered to the employee with a condition of transferability hedged therein. When the employee unilaterally accepts such a conditional promotion, he brings himself under the yoke

of transferability. He who voluntarily got under the yoke while rushing to eat the carrot dangling before him, may have to suffer the burden. The Labour Court, according to me, missed this aspect. That upsets the logical base of the ultimate conclusion.

21. There is yet another way of looking at the order of promotion on which reliance had been placed by the management. That order is one of promotion and putting the employee on probation. Necessarily, therefore, the order is not one which firmly installs him in the upper post. Probation, necessarily, postulates a successful completion thereof, before the employee could conceive of a confirmation in the promoted post. And that change is brought about, and the position of confirmed Compositor F2 is accorded, only by the letter issued by the management. That letter did not contain any stipulation of transferability. Consistent with the logic adopted by the Labour Court, the earlier condition of service is again altered when a new letter, one of confirming him in the promotion post, is issued. If that letter does not contain a provision for transfer, we are back to square one. That indeed is a situation where transferability was unknown and unintended. Looked from that angle too, an insistence on the employee to move out on a transfer was neither lawful nor reasonable. If that foundation of the managerial action flounders, the subsequent disciplinary proceedings, the decision therein, and the dismissal of the workman all will collapse soon like a pack of cards. The analysis of the facts and the application of the legal principles would lead to this result, is my conclusion. It would then follow that the finding of the enquiry officer was indefensible, that the dismissal was unjustified, and the Labour Court's decision was unsustainable. The Court, in such a situation, has necessarily to denounce the disciplinary finding, declare invalid the management's decision, and quash as erroneous the award of the Labour Court.

22. In the course of the discussion above, I have excluded matters of equitable considerations. Though such matters have doubtless relevance in industrial jurisprudence. It is easy to swear by a management's inherent right to transfer an employee. The claim may be too tall, in absolute terms. The limitations on the concept have been already alluded to. If equitable considerations are also added on, one would then get a totally unjust result in the managerial action of posting

the employee in Trivandrum. The reasons for grievance, of an acute nature, had been already stressed by the employee in his plea and report presented at the earlier stage. He had his humble home in Ernakulam. He had been born and brought up in these surroundings all through. At the time of entry in service a transferability was never in his contemplation. Comparatively speaking, the employee is in a lower post. He is not in the same pedestal as an erudite editor, a privileged journalist, or a powerful technologist. The mere fact that in the place to which he is transferred, he will have his food and could manage a new accommodation (with much difficulty), would not be enough of consolation. It is in evidence that his children are prosecuting their educational career in institutions around Ernakulam. His aged parents acclimatised to their home and its environment were also there. An uprooting of an employee of an inferior capacity, financial and otherwise, is to tire and to weary him beyond measure. Industrial jurisprudence would not tolerate such an avoidable agony. Viewed that way too, the Court would acquire a moral force in addition to the legal weight, for consolidating its conclusion.

23. In the light of the discussion above, I quash Ext.P3 award. That necessarily leads to the corollary that the dismissal is unsustainable and non est. That will entitle the employee to continue in service. Reinstatement would be ordinary procedure. No circumstance is made out to depart from that normal rule. The petitioner would then earn his entitlement to continue in the service of the 1st respondent establishment.

24. The relief so granted is something sub-stantial, but not all. Something more remains to be decided, about the back wages of the intervening period. That is an aspect about which the Labour Court did not address itself. There is no harm if that question is relegated for a quick and fresh decision by the Labour Court. If the employee could enter service instantaneously-as I have directed - he could wait a little bit for a considered decision of the Labour Court itself on his entitlement in relation to the anterior period. It is quite possible that without a job, and with a tiring litigation, he is distressed by an economic debility. A postponement of a decision on that point may per chance induce the Management to have a second look at the whole issue. There was no case that the workman was wanting in his

capacity or lacking in his sincerity. Eight years wait is no small agony. An establishment of the stature and of the tradition of the 1st respondent could well-afford to be magnanimous and graceful in its domestic affairs. The relegation of a portion of the dispute for a fresh decision of the Labour Court may perhaps enable a composed compromise between the parties.

25. If reconciliation is elusive, the decision of the Labour Court should be expedited. I would direct the Labour Court to render such a decision within an outer limit time, of four months.

26. Initially there were some arguments about the inefficacy of an order of transfer when it is in conflict with the provisions in the standing orders. Counsel for the management submitted that transfer is not a matter in respect of which the Standing Orders Act obligates the framing of a provision. Efficacy ordinarily obtainable by a provision well-covered by the Standing Orders Act will be unavailable to a provision which is outside the scope of the parent Act itself. That legal position may not, however, make much of a difference. It may well be argued that even if the provision in relation to a matter outside the schedule to the Standing Orders Act will not have the statutory flavour, it can have the effect of an ordinary agreement. However, the present is not a case where there is a positive provision in the Standing Orders interdicting transfer of the employees. Consequently, the subsidiary contention will not arise for consideration.

27. A question of severity of the punishment might arise even otherwise. If the understanding of the legal position requires detailed arguments had been attempted exhaustively by counsel on either side - the Court expresses much appreciation of the professional performance -could an employee honestly but earnestly believing in the justifiability of his stand, be accused of a serious misconduct? Misconduct itself posits a conscious act, in defiance of the proper conduct. Elucidation of this idea has been attempted by academics writing even in early times. An honest, even if ultimately untenable, view may not be the basis of a serious accusation. In the light of the earlier finding, it is unnecessary to labour much on this aspect of the matter. I have refrained from a detailed discussion about a considerate treatment mandated in relation to low strata employees. The Supreme

Court in the Nurses' case, emphasised that aspect of social justice. Executive orders of the Government have insulated many low paid employees from the disconcerting experiences of long distance transfers. These aspects have not been highlighted in view of the decision already come to on the main point.

28. The writ petition is disposed of as above. Consistent with the approach of this Court, and the desire to foster amity between the parties, I decline to make any order as to costs.

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