

**The Nashik Merchants**

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**SooperKanoon Citation :** [sooperkanoon.com/922248](http://sooperkanoon.com/922248)

**Court :** Mumbai

**Decided On :** Aug-16-2011

**Judge :** P.B. Majmudar; R.M. Savant, Jj.

**Acts :** [Industrial Disputes Act, 1947](#) - Section 2 (s)

**Appeal No. :** LETTERS PATENT APPEAL NO. 62 OF 2011 IN WRIT PETITION NO. 6682 OF 2010 WITH CIVIL APPLICATION NO. 81 OF 2011; LETTERS PATENT APPEAL NO. 85 OF 2011 IN WRIT PETITION NO. 6672 OF 2010

**Appellant :** The Nashik Merchants

**Respondent :** Madhukar Bhaurao Hingmire and anr.

**Advocate for Pet/Ap. :** Mr. P.M. Palshikar, Adv.

**Judgement :**

1. The above appeals have been admitted on 7th April, 2011 and the hearing was expedited. Considering the limited issue involved, this Court thought it fit to hear the appeals finally.

2. The facts necessary to be cited can in brief be stated thus:

3. The appellants are the original petitioners in the above mentioned writ petitions. The appellant No.1 is a multi-State Co- operative Bank having its branches in Maharashtra as well as Andhra Pradesh and Gujarat. The respondent No.1 in each of the above appeals (hereinafter "the respondents") was working as a Branch Manager in the branches of the Appellant No.1 Bank. The transfer order came to be issued transferring the respondents on 22nd May, 2010. The respondent No.1 in LPA No. 62 of 2011 came to be transferred to Hyderabad as a Branch Manager whereas the respondent No.1 in LPA No. 85 of 2011 was transferred to Surat as a Branch Manager. Both the respondents protested against the said transfers. However, the said protestations were replied to by the appellant No.1 that the said transfers were in accordance with the contract of employment and in tune with the service rules and have been made on account of administrative exigencies.

4. The respondents thereafter, aggrieved by the said orders of transfer, filed Complaint (ULP) Nos. 96 of 2010 and 97 of 2010. The sum and substance of the case of the respondents in the said complaints was that they have been transferred vindictively as they are office-bearers of the Union concerned. It was contended that though there were persons who had a longer tenure at Nashik were retained, they were transferred.

In the said complaints, the respondents filed an application for interim relief seeking stay of the said transfer orders dated 22nd May, 2010. To the said applications, the appellants herein filed their reply and raised an issue as regards the maintainability of the complaints on the ground that the respondents were not "workmen" within the meaning of Section 2 (s) of the [Industrial Disputes Act, 1947](#) (hereinafter "the Act") and, therefore, the complaints filed at their behest were not maintainable. To buttress the said contention, the appellants had placed material on record in the form of their salary slips as well as relied upon the duties which they were discharging as Branch Managers. The Industrial Court heard the applications for interim relief and by its order dated 9th July, 2010, allowed the said interim applications and resultantly stayed the orders of transfer. The gist of the reasoning of the Industrial Court appears to be that the respondents had made

out a prima facie case for the stay of the transfers. However, since the appellants had raised the issue as regards the maintainability of the complaints on the ground that the respondents were not workmen, the Industrial Court held that all the issues could be tried together including the issue as to whether the respondents were workmen.

4. The said order dated 9th July, 2010 passed by the Industrial Court came to be challenged by the appellants herein by way of filing the above writ petitions. A learned Single Judge of this Court by her order dated 18th October, 2010 rejected the said petitions. The learned single Judge also rejected the case of the appellants that the Industrial Court should be directed to decide the maintainability of the complaints on the ground that the respondents were not workmen as a preliminary issue. The learned Single Judge has recorded a finding that since at the time when the respondents were appointed, they were not informed that they could be transferred out of the State as in fact there was no branch at Surat at that time. The learned Judge was of the view that the Industrial Court had committed no error in staying the transfers. As indicated above, it is the said order dated 18th October 2010 passed by the learned single Judge in the above writ petitions which is the subject matter of the above two appeals.

5. Heard the learned counsel for the parties.

6. It is the principal contention of the learned counsel appearing for the appellants that in view of the contentious issue as regards the maintainability of the complaints on the ground that the respondents were not workmen, the Industrial Court had erred in granting the interim relief, without addressing the said issue first. The learned counsel would contend that the learned Single Judge of this Court had also erred in dismissing the petitions filed by the appellants without issuing directions to the Industrial Court to decide the said issue. The learned counsel for the appellants drew our attention to the order passed in Writ Petition No. 6041 of 2007 in which, according to the learned counsel, in an identical fact situation the same learned single Judge had directed framing of a preliminary issue as regards the maintainability of the complaint on the ground that the

respondent therein was not a workman. It is, therefore, the submission of the learned counsel for the appellants that where there is a contentious issue as regards the maintainability of the proceedings on the ground of status of the party invoking the jurisdiction, the said issue would have to be addressed at the outset.

7. Per contra, it is submitted by Mr. Topkar, learned counsel appearing for the respondents, that the issue in Writ Petition No. 6041 of 2007 was as regards the termination of the employee concerned therein and not the transfer and in view of the said fact situation, the learned single Judge had directed the preliminary issue to be framed and a decision rendered thereon before the relief of mandatory order by way of reinstatement could be granted. However, the learned counsel would submit that in the instant case the issue is as to whether the respondents could at all be transferred in view of the fact that they were not informed at the time of their appointment that they could be transferred out of the State and it is in the said context that the interim reliefs were granted by the Industrial Court and have been, according to the learned counsel, rightly confirmed by this Court while dismissing the writ petitions.

7. Having heard the learned counsel for the parties, in our view, it is not necessary for us to dilate on the merits of the case of the respective parties. The pleadings on record unequivocally indicate that there is a contentious issue between the parties as regards the maintainability of the complaints on account of the status of the respondents. The appellants have sought to place on record plethora of evidence to indicate that the respondents, by any stretch of imagination, cannot be called workmen. They have placed on record the salary slips, duty list which the respondents were performing and other material to buttress the said position. In our view, therefore, it would have been appropriate for the Industrial Court to address the said issue first as the jurisdiction of the Industrial Court hinges on the said fact. If ultimately it is held that the respondents are not 'workmen', the sequitur to that would be that the complaints are not maintainable. In our view, therefore, the Industrial Court ought to have framed the issue as regards the maintainability of the complaints on account of the fact that the appellants herein claim that the respondents are not workmen. In our view, therefore, without interfering with the

order passed by the Industrial Court which is dated 9th July, 2010, we set aside the order passed by the learned single Judge of this Court and issue the following directions:-

(i) The Industrial Court, Nashik, is directed to frame a preliminary issue as regards the maintainability of the complaints in view of the fact that the appellants herein challenge the same on the ground that the respondents are not workmen.

(ii) The parties would be entitled to lead oral evidence in that behalf. The parties would be also entitled to produce further documents, if necessary, which they will do by 24th August, 2011. (iii) The interim order granted by the Industrial Court dated 9th July, 2010 will be continued for a period of four weeks from date within which the preliminary issue would be considered by the Industrial Court. The continuance of the interim relief granted vide order dated 9th July, 2010 would be contingent upon the decision of the Industrial Court on the said preliminary issue.

(iv) If the said preliminary issue is decided in favour of the appellants, interim relief granted vide order dated 9th July, 2010 would automatically come to an end. If the issue is decided in favour of the respondents, the said interim relief would be subject to the decision in the complaints;

(v) If the complaints are held to be maintainable i.e. if the respondents are held to be workmen, the said complaints to be decided within a period of three months from the decision on the first issue as regards the maintainability of the complaints. The parties shall appear before the Industrial Court on 23rd August, 2011 and produce a copy of this order before the Industrial Court.

8. The appeals are allowed to the aforesaid extent with parties to bear their respective costs. Civil Application No. 81 of 2011 to also accordingly stand disposed of.