IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8387 OF 2024

The Indian Express (P) Ltd. and Ors. ....*Petitioners*

: Versus :

Ganesh Gopinath Rane ....*Respondent*

Dr. Abhinav Chandrachud *a/w. Mr. Amol Joshi, Mr. Pranit Kulkarni, Ms. Tejasvi Ghag i/by. Ms. Poorvi Kamani, for the Petitioners.*

Ms. Jane Cox, *i/by. Mr. Ghanshyam R. Thombare, for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

Judgment Reserved on: 26 June 2024.

Judgment Pronounced On : 2 July 2024.

JUDGMENT :-

1) ***Rule.*** Rule is made returnable forthwith. With the consent of the learned counsel appearing for the parties, the petition is taken for final hearing and disposal.

2) Interim order passed by the Industrial Court, Thane on Application at Exh.U-2 temporarily restraining Petitioner No.1 to give effect to the

promotion/transfer order issued in respect of the Respondent is the subject matter of challenge in the present petition.

3) Petitioner No. 1 is engaged in the business *inter alia* of printing and publishing newspapers and other publications and has multiple printing presses across the country. Respondent joined services of the first Petitioner as Trainee Semi-Skilled Baller in the Rotary Department of the first Petitioner vide appointment letter dated 25 March 2002. Subsequently, Respondent was put on probation as Semi-Skilled Baller in the Rotary Department by order dated 27 March 2003. After his performance being found satisfactory, he was made permanent by letter dated 11 July 2003. He was re-designated as Senior Semi-Skilled Baller by letter dated 22 March 2004 with effect from 1 July 2003. Respondent was promoted to the post of Machineman on 29 December 2008 and Assistant Printer on 16 August 2012. As per the recommendation of the Majithia Wage Board, he was re-designated as Senior Printer with effect from 1 July 2019. Respondent is posted as Senior Printer at the printing press of the first Petitioner at Mahape, Navi Mumbai. Respondent and other employees apprehended adverse action of termination and transfer against them in the light of conduct of Union elections in August 2022 and filed Complaint (ULP) No.160 of 2022 seeking stay on proposed termination/transfer. On 19 September 2022, an interim order was passed by Industrial Court, Thane in the said complaint restraining Petitioners from terminating the services of Respondents therein without following due process of law and from implementing transfer orders, if issued, for 7 days. That interim order was challenged by the first Petitioner by filing Writ Petition No.10814 of 2023.

4) On 7 November 2022, an order was issued deputing the services of Respondent to Lucknow. Respondent filed Complaint (ULP) No.219 of 2022 challenging the deputation order dated 7 November 2022. The Industrial Court, Thane passed order dated 28 November 2022 granting interim relief of stay on the deputation order dated 7 November 2022. Petitioners filed Writ Petition No.2438 of 2023 challenging the interim order of the Industrial Court, Thane dated 28 November 2022. The Writ Petition was allowed by this Court by Judgment and Order dated 5 June 2023 setting aside the interim order of the Industrial Court. This Court however, accepted undertaking from the first Petitioner that the period of deputation shall not exceed six months and that Respondent would be re-posted at Mahape printing press at the end of deputation period of six months. Respondent completed the period of his deputation at Lucknow and was re-posted at Mahape Printing Press in December-2023. In the meantime, this Court allowed Writ Petition No. 10814 of 2023 set aside interim order dated 19 September 2022 passed by the Industrial Court giving blanket stay on termination and transfer by order dated 30 January 2024.

5) First Petitioner issued order dated 10 April 2024 promoting Respondent from the post of Senior Printer to the post of Supervisor in the production department and transferred him at Walunj Printing Press at Aurangabad in exigencies of company's work. Respondent filed Complaint (ULP) No.73 of 2024 in Industrial Court, Thane, challenging the promotion/transfer order dated 10 April 2024. Respondent sought interim stay to the promotion /transfer order by filing application at Exh.U-2. By

order dated 9 May 2024, the Industrial Court has allowed the Application at Exh. U-2 and has temporarily restrained Petitioners from giving effect to the promotion /transfer order till final decision of the complaint. Aggrieved by the order dated 9 May 2024, Petitioners have filed the present petition.

6) Dr. Chandrachud, the learned counsel appearing for the Petitioners would submit that the Industrial Court has erred in staying the promotion order of the Respondent, which is issued in exigencies of service. Inviting my attention to the terms of appointment order of Respondent, he would submit that Respondent bears transfer liability throughout India. That transfer being the condition of service, no fault can be found in the action of the Petitioners in transferring the Respondent on promotion at Aurangabad on the post of Supervisor. He would invite my attention to the email correspondence made by All India Production Head of Petitioner No.1 for replacement of Mr. Mallinath S. Dighe, Printer in Production Department at Aurangabad, who retired on 26 August 2023 and pointing out that Mr. Anil Sapre, Chief Associate-Production, Aurangabad is due for retirement on 30 June 2025. That the said email correspondence clearly bears out the administrative exigencies of the Petitioners to post Respondent at Aurangabad. That the transfer order also clearly states that the transfer on promotion is effected due to exigencies of company's work.

7) Dr. Chandrachud would submit that the Industrial Court has erroneously assumed that the transfer on promotion is an outcome of strained relationship between the management and the Respondent. That the

Industrial Court has erroneously held that previous litigation is bound to create grudge against Respondent. That the Industrial Court has not recorded any *prima facie* finding of malafide and that in absence thereof, the Industrial Court could not have interfered with the order of transfer on promotion. Dr. Chandrachud would further submit that the pleadings in the complaint from paragraph 5.3 to 5.6 relate to the events prior to Respondent's deputation at Lucknow and that the said events are already taken into consideration by this Court while delivering the judgment dated 5 June 2023. He would take me through various findings recorded by this Court while upholding deputation of Respondent at Lucknow.

8) Dr. Chandrachud would further submit that transfer is normal instance of service and once transferability is a condition of service, it is impermissible for the Industrial Court to interfere in the transfer order, which flows from expressed term of contract. That no case of malafide is pleaded or even *prima facie* made out from the pleadings in the complaint. That the burden of establishing malafides is very heavy as it is easy to level allegations of malafide, but difficult to prove the same. In support of his contentions, Dr. Chandrachud would rely upon judgment of the Apex Court in ***Rajendra Roy vs. Union of India and Anr.***[1], ***Rajneesh Khajuria vs. WOCKHARDT Limited and Anr.***[2] as well as judgments of this Court in ***Nitin Ganpat Dingankar vs. The Indian Express (P) Ltd. and Anr.***[3] and ***Cosmo Films Ltd., Aurangabad vs. Sunil Vasudeorao Deshmukh.***[4]

[1]. (1993) 1 SCC 148.
[2]. (2020) 3 SCC 86.
[3]. Writ Petition No.5066 of 2021 decided on 5 June 2023.
[4]. 2002(4) Mh.L.J. 709

9) Relying on judgment of the Apex Court in ***Brooke Bond India Private Ltd. vs. Workmen,*** [5] he would submit that promotion is a matter of discretion, which is required to be left to the employer and that therefore selecting Respondent for promotion despite availability of senior employees is something which cannot be questioned while deciding the issue of transfer. He would submit that there are valid reasons why the 7 senior employees to Respondent could not be promoted or transferred such as non-fulfillment of qualifications, their impending retirement, status as office bearers of Union, lack of experience, etc. He would therefore pray for setting aside impugned order passed by the Industrial Court.

10) *Per contra* Ms. Jane Cox, the learned counsel appearing for the Respondent would oppose the petition submitting that this Court need not entertain the petition, which merely challenges interim order passed by the Industrial Court. She would submit that the proper course of action would be to request the Industrial Court to decide the main complaint in an expeditious manner rather than going into the correctness of the interim order. She would submit that Respondent is being subjected to systematic harassment on account of the objections raised by him in the matter of conduct of elections of Union, which was heavily and ruthlessly dominated by the Petitioner-Management. That action against Respondent and other members of the group was predicted by filing Complaint (ULP) No.160 of 2022. That the said apprehension expressed in the said complaint was proved to be correct since Respondent was initially thrown out at far off place at Lucknow. An assurance

[5]. (1963) 1 LLJ 256

was given to this Court on affidavit that the deputation would not be for a duration longer than six months. That this Court set aside the interim order of Industrial Court in Complaint (ULP) No.219 of 2022 only on account of the said assurance for bringing back the Respondent at Mahape Printing Press after six months. That the impugned transfer order is issued within four months of Respondent's return from Lucknow. That at Lucknow Respondent was not given any work and was made to sit idle. That artificial exigency of service and need for Respondent's posting at Aurangabad is created through email correspondence by falsely appreciating Respondent's work at Lucknow. That the *malafides* involved in the impugned order of transfer are writ large and have rightly been appreciated by the Industrial Court.

11) Ms. Cox would further submit that Petitioners deliberately showed Respondent as having been promoted when in fact such promotion was virtually meaningless which grants hike of only couple of thousand rupees in monthly wages. That the order of transfer is sugar coated in the form of promotion, which Respondent has refused to accept. That Respondent was not even due for promotion as there are 7 senior employees, who are yet to be promoted. That there was no impediment on promotion of the said 7 employees as falsely sought to be suggested by the Petitioners. That the Industrial Court has rightly appreciated the factual position for the purpose of *prima facie* inferring impugned transfer order is an outcome of strained relationship between the parties. She would submit that there are two factions in the Union and the Petitioners are deliberately targeting the faction to which the Respondent belongs by taking selective action against those, who

showed audacity to contest elections against the faction of choice of management. She would pray for dismissal of the petition.

12) Rival contentions of the parties now fall for my consideration.

13) Petitioners have challenged interim order passed by the Industrial Court on Application at Exh.U-2 filed by the Respondent in Complaint (ULP) No.73 of 2024. By the impugned interim order, the Industrial Court has temporarily restrained Petitioner from giving effect to the promotion/ transfer order dated 10 April 2024 till final decision of the complaint. By order dated 10 April 2024, Respondent is shown to have been promoted from the post of Senior Printer to the post of Supervisor and has been posted in the production department of Petitioner No.1-Company at Walunj Printing Press, Aurangabad. The order is shown to have been issued in exigencies of company's work. The order dated 10 April 2024 increases the gross emoluments of Respondent from Rs. 57,687- to Rs.59,418/-. Additionally, special city compensatory allowance of Rs.4,500/- is granted to the Petitioner during duration of his services at Aurangabad. There is no dispute to the position that the contract of employment with the Respondent carries transfer liability throughout India. Paragraph 8 of the appointment order of the Respondent reads thus:

> 8) You are liable to be transferred to any place/department in India, in any of our branch offices, associate concerns or publications or allied offices in existence or to be established thereafter as and when necessary.

14) Respondent accordingly does not dispute that he is liable to be transferred and posted at any place /department in India in exigencies of service. Thus under the contract employment, Respondent bears transfer liability. The impugned order of transfer is thus not against the terms of contract of employment.

15) Petitioners have stated in the transfer order that the same is effected for exigencies of company's work. While ordinarily, Court/Tribunals cannot go into the issue of existence or otherwise of exigencies work of employer for effecting transfer, in the present case, Petitioners have produced documentary evidence to prove requirement of posting Respondent at Aurangabad. It is Petitioners' case that retirement of one of the employees at Aurangabad (Mr. Mallinath Dighe) on 28 June 2023 has triggered requirement for posting of a Senior Printer/Supervisor at Aurangabad. Petitioners have placed on record email correspondence by Mr. R.C. Malhotra, All India Production Head of Petitioner No. 1. It appears that the email correspondence begun from 18 July 2023, which mail reads thus :-

> "This has reference to the discussions I had with you last week when I requested you that early replacement should be provided at Aurangabad to maintain the print quality as in the absence of a Supervisor the chances are there that bad printed copies may escape and go to the market."

16) While it is not necessary to consider the entire email correspondence at this stage, it would be worthwhile to take note of Email dated 1 April 2024 addressed by Mr. R.C. Malhotra immediately before the transfer/promotion order, which reads thus:

> "This is in continuation to my many mails regarding the requirement of one trained Printer/ Supervisor at Aurangabad printing press. We have also often discussed this issue on the phone as well. As I have explained, there is a shortage of manpower at Aurangabad after the retirement of Mallinath Dighe. The present head of the Aurangabad press has litter over a year to go before he retires. The situation in Aurangabad will then become more critical. It is really important that we address this issue now.
>
> To recap, Mr. Mallinath S. Dighe (Printer-Production A'bad) retired on 28.6.2023. No replacement has been sent as yet. Mr. Anil Sapre (Chief Associate, Production, A'bad) who is heading the Production function at Aurangabad will be retiring on 30.6.2025. I am once again making this request in order to seek a replacement of Mr. Mallinath Dighe.
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> Further, there will be a need for a second line to manage the Production activities in Aurangabad Press in absence of Mr. Anil Sapre and who can help the team better address everyday printing issues in a timely manner. In this regard, I would like to suggest the name of Mr. Ganesh Rane (Sr. Printer, Production, Mahape) as not just a replacement for Mr. Mallinath Dighe but also a potential successor for Mr. Anil Sapre.
>
> Mr. Ganesh Rane was recently sent on deputation to Lucknow and I was favourably impressed by his work ethic and his knowledge of printing. His colleagues in Lucknow also speak very well of him. Lucknow, like Aurangabad is a small centre with similar printing press and printing schedules. I believe; Mr. Ganesh Rane would be a very good fit for Aurangabad.
>
> Mr. Ganesh Rane may be transferred to Aurangabad on promotion as a 'supervisor'. Adding this experienced Printer to our Aurangabad Production Team will definitely help in the smooth functioning of printing there.
>
> In the light of above, I kindly request your consideration for the above proposal. I hope this request will be granted before the second week of this month so that we can plan printing activities in an efficient manner.

17) Thus retirement of Mr. Mallinath Dighe (Printer-Production Aurangabad) on 28 June 2023 as well as impending retirement of Mr. Anil Sapre (Chief Associate, Production, Aurangabad) on 30 June 2025 are cited as reason for Respondent's posting at Aurangabad. In my view therefore,

prima facie case of existence of exigency for transfer of Respondent on promotion as Supervisor at Aurangabad is made out.

18) Once the case of existence of administrative exigency for employer for posting of the employee, who bears transfer liability is made out, the only ground which an order of transfer can be interfered by a Court or Tribunal is where a demonstrable case of existence of personal bias or *malafide* is made out. In other words, it then becomes necessary to prove that though exigency may exist, particular employee is selected for hostile discrimination on account of existence of personal bias or *malafides*.

19) The law relating to *malafides* in the matter of transfer is well settled by catena of judgments of the Apex Court. In ***E.P. Royappa v. State of T.N.***[6], Constitution Bench has held as under:

> 92. **Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.** Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. **The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.**

[6] (1974) 4 SCC 3

> Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up—these considerations are wholly irrelevant in judicial approach—but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent.
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> *(emphasis supplied)*

20) In ***Rajendra Roy*** (supra) the Apex Court has held in paragraph 7 as under:-

> 7. After considering the respective contentions of the parties, it appears to us that the appellant has not been able to substantiate that the impugned order of transfer was passed mala fide against him for an oblique purpose and/or for wrecking vengeance against him because the respondent No. 2 was anxious to get rid of him and he seized the opportunity of transferring him from Delhi to Calcutta by transferring Shri Patra back to Orissa from Calcutta. It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the order of transfer is not liable to be struck down. **Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification, the Court and the Tribunal should not interfere with the order of transfer. In a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department.** We are in agreement with the Central Administrative Tribunal that the appellant has not been able to lay any firm foundation to substantiate the case of malice or mala fide against the respondents is passing the impugned order of transfer. It does not appear to us that the appellant has been moved out just to get rid of him and the impugned order of transfer was passed mala fide by seizing an opportunity to transfer Shri Patra to Orissa from Calcutta. **It may not be always possible to establish malice in fact in a straight cut manner. In an appropriate case, it is possible to draw reasonable inference of mala fide action from the pleadings and antecedent facts and circumstances. But for such inference there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of insinuation and vague suggestions.** In this case, we are unable to draw any inference of mala fide action in transferring the appellant from the facts pleaded before the Tribunal. It appears that Shri Patra was transferred to Calcutta and after

> joining the post he had made representation on account of personal hardship. Such representation was considered and a decision was taken to transfer him back to Orissa region. As a result, a necessity arose to transfer an employee to Calcutta to replace Shri Patra. It cannot be reasonably contended by the appellant that he should have been spared and some one else would have been transferred. The appellant has not made any representation about the personal hardship to the department. As such there was no occasion for the department to consider such representation. This appeal, therefore, fails and is dismissed but we make no order as to costs. It is, however, made clear that the appellant will be free to make representation to the concerned department about personal hardship, if any, being suffered by the appellant in view of the impugned order. It is reasonably expected that if such representation is made, the same should be considered by the department as expeditiously as practicable.
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> *(emphasis supplied)*

21) In ***Rajneesh Khajuria*** (supra) the Apex Court, while drawing distinction between malice in law and malice in fact, has held malice in law could be inferred from doing a wrongful act intentionally without any just cause or excuse or without there being reasonable relationship to the purpose of exercise of statutory power. On the other hand, malice in fact can be inferred only if there is personal bias or oblique motive behind an administrative action. The Apex Court held in paragraphs 16,17, 19, 21 and 22 as under:-

> 16. **The act of transfer can be unfair labour practice if the transfer is actuated by mala fide. The allegations of mala fide have two facets – one malice in law and the other being malice in fact.** The challenge to the transfer is based upon malice in fact as it is an action taken by the employer on account of two officers present in Conference. In a judgment reported as State of Bihar & Anr. v. P.P. Sharma, IAS & Anr., this Court held that mala fide means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. **The plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.** As far as second aspect is concerned, there is a power of transfer vested in the employer in terms of letter of appointment. Even in terms of the provisions of the Act, the transfer by

itself cannot be said to be an act of unfair labour 6 1992 Supp (1) SCC 222 practice unless it is actuated by mala fide. Therefore, to sustain a plea of mala fide, there has to be an element of personal bias or an oblique motive. This Court held as under:

> "50. **Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith.** An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.
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> 51. The action taken must, therefore, be proved to have been made mala fide for such considerations.
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> Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.
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> 59. **Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power.** Malice in law is not established from the omission to consider some documents said to be relevant to the accused. Equally reporting the commission of a crime to the Station House Officer, cannot be held to be a colourable exercise of power with bad faith or fraud on power. It may be honest and bona fide exercise of power. There are no grounds made out or shown to us that the first information report was not lodged in good faith. State of Haryana v. Ch. Bhajan Lal [1992 Supp (1) SCC 335 : JT 1990 (4) SC 650] is an authority for the proposition that existence of deep seated political vendetta is not a ground to quash the FIR. Therein despite the

> attempt by the respondent to prove by affidavit evidence corroborated by documents of the mala fides and even on facts as alleged no offence was committed, this Court declined to go into those allegations and relegated the dispute for investigation. Unhesitatingly I hold that the findings of the High Court that FIR gets vitiated by the mala fides of the Administrator and the charge-sheets are the results of the mala fides of the informant or investigator, to say the least, is fantastic and obvious gross error of law.

17. **In another judgment reported as Prabodh Sagar v. Punjab State Electricity Board & Ors., it was held by this Court that the mere use of the expression "mala fide" would not by itself make the petition entertainable**. The Court held as under:

> "13. … Incidentally, be it noted that the expression "mala fide" is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. We ourselves feel it expedient to record that the petitioner has become more of a liability than an asset and in the event of there being such a situation vis-à-vis an employee, the employer will be within his liberty to take appropriate steps including the cessation of relationship between the employer and the employee. The service conditions of the Board's employees also provide for voluntary (sic compulsory) retirement, a person of the nature of the petitioner, as more fully detailed hereinbefore, cannot possibly be given any redress against the order of the Board for voluntary retirement. There must be factual support pertaining to the allegations of mala fides, unfortunately there is none. Mere user of the word "mala fide" by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion i.e. exactly what the High Court has done and that is the reason why the narration has been noted in this judgment in extenso. …"

19.**In a judgment reported as Union of India & Ors. v. Ashok Kumar & Ors., it has been held that allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility**. The Court held as under:

> "21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse

> by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts.(S.Pratap Singh v. State of Punjab (1964) 4 SCR 733). It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P. Royappa v. State of T.N., (1974) 4 SCC 3 courts would be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Rly. Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579.

21. The allegation in the complaint is that the transfer was actuated for the reason that the employee had raised voice against removal of Shri Khare from the venue of a Conference. The officers present in the said Conference were the Regional Manager or Sales Manager, whereas order of transfer was passed by Mr. Suresh Srinivasan, General Manager-HR. It is an admitted fact that there is power of transfer with the employer. The allegations are against the persons present in the Conference but there is no allegation against the person who has passed the order of transfer. None of the named persons including the person present in the Conference have been impleaded as parties to rebut such allegations. **Since the order of transfer is in terms of the letter of appointment, therefore, the mere fact that the employee was transferred will *per se* not make it mala fide. The allegations of mala fides are easier to levy than to prove.**

22. Therefore, the allegation that the transfer of the appellant was an act of unfair labour practice without impleading the person who is said to have acted in a mala fide manner is not sustainable.

(emphasis supplied)

22) The judgment of the Apex Court in ***Rajneesh Khajuria*** (supra) has been relied upon by the Single Judge of this Court (Coram: N.J. Jamadar, J.) while determining validity of transfer order of another employee of Petitioner No. 1 in ***Nitin Dingankar*** (supra) and this Court held in paragraph 10 to 17 as under:

> 10. The aforesaid conditions make it abundantly clear that the transferability was an expressed term of employment. If transferability is an express term of employment, the challenge to transfer order can only succeed if it could be shown that the transfer was either mala fide or in violation of any statutory prescription.
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> 11. In the case of ***VIP Industries Ltd. Vs. MaharashtraKamgar Karmachari Sanghatana and Ors. 2008 III CLR 22*** explaining the import of the judgment of the Supreme Court in the case of ***M/s. Kundan Sugal Mills V/s. Ziyauddin and Ors. AIR 1960 SC 650*** this Court enunciated that once the 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. A profitable reference can also be made to a judgment of the Supreme Court in the case of Pearlite Liners Pvt. Ltd. V/s. Manorama Sirsi, 2004 II CLR 965. The position in law which thus emerges is that in the absence of the term to the contrary in the contract of service, a transfer order is a normal incidence of service. In the absence of a term prohibiting the transfer of an employee, ordinarily the transfer orders can not be called in question. Where transferability is a condition of service, it would be impermissible for a Court or Tribunal to interdict an order of transfer which flows from the express term of the contract. Even in the absence of an express term of contract, the Court may embark upon an inquiry as to whether the transferability is an implied term of employment.
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> 13. Under Item 3 of Schedule-IV of the Act, 1971, the act of transfer of an employee would amount to an unfair labour practice if the transfer is actuated by mala fide. The concept of Mala fide has two facets; one, malice in law and the other, malice in fact. The term mala fide has a

definite juridical connotation. It envisages want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose.

14. In the case of State of Bihar and Another Vs. P.P. Sharma, IAS and Another7, the Supreme Court, observed that the determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive; and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

15. Following the aforesaid Judgment in the case of State of Bihar (Supra), the Supreme Court in a recent pronouncement in the case of Rajneesh Khajuria Vs. Wockhardt Ltd and Others8 on which reliance was placed by Dr. Chandrachud, observed that in terms of the provisions of the Act, 1971, the transfer by itself can not be said to be an act of unfair labour practice unless it is actuated by mala fide. Therefore, to sustain a plea of mala fide, there has to be an element of personal bias or an oblique motive.

16. It is also well recognized that the allegations of mala fide are easy to make than prove. In the case of Union Of India and Others Vs. Ashok Kumar and Others, the Supreme Court enunciated in clear terms that it cannot be overlooked that burden of establishing mala fide is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.

17. On the aforesaid touchstone, the plea of malafide attributed to the Respondents deserves to be appreciated. Ms. Patankar made an earnest endeavour to draw home the point that the transfer order was a counter blast to the grievances raised by the Petitioner in respect of his fitment under Majethia Wage Board. Attention of the Court was invited to a communications made by the Petitioner to Mr.Anilkumar Somji during the period 2012 to 2016.

23) In ***Cosmo Films Ltd.*** (supra) this Court held in paragraph 15 as under:

15. It is well established that when the transfer order, on the face of it, discloses that it is for the administrative exigencies, then unless it is established by cogent evidence on the part of the person accusing the employer of having adopted unfair labour practice in the matter of transfer, there cannot be any conclusion or inference against the

contention of the employer that the transfer is for administrative exigencies.

24) Thus, where an allegation of *malafides* in issuance of transfer order is raised, there is a heavy burden of establishing existence of such *malafides* on the person who alleges it. It is easy to make allegations of *malafides* but equally difficult to prove the same. Perusal of the averments made in the complaint filed by Respondent would indicate that no *malafides* are in fact pleaded in the complaint. It would be relevant to reproduce relevant paragraphs of the complaint in 5.2 to 5.7, 6, 7 and 8, which the Respondent has pleaded as under:-

> 5.2 In the Respondent establishment, Indian Express Newspapers' (Mumbai) Employees Union is functioning. This is internal Union by the employees within but, in fact, the decisions of the Union are heavily and ruthlessly dominated by the management of Respondent Company. Recently, elections of this Union were conducted by shri. Anil Somaji & shri. Nitin Jumde. Both of them are senior officers of the Respondent Company. Obviously this was direct interference of the Respondent Company in the functioning of the Union. It is submitted that there was a notice dated 15 July 22 signed by Shri Anil Somaji notifying schedule of election.
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> 5.3 It is further submitted that on 8th Aug 2022 Annual General Meeting of the union was held at Siddhivinayak Vishwast Mandal hall, in Airoli, Navi Mumbai. Strangely in this meeting two senior Managers of Respondents ie Shri Nitin Jumde, Respondent No.3 and HR Head Vipul Kalita were seated on the dais. The complainant and his co-workers took objection on the presence of the above named Managers. However it was stated that it is prerogative of Managing Committee to decide as to who should be invited on the dais in the meeting.
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> 5.4 It is further submitted that Shri Nitin Jumde presented himself as Election Officer and announced that there are twelve nomination forms received. Out of those 12-forms, he declared that nomination form of Shri Dinesh Rane for the post of President stands rejected. On this, the complainants and other workers objected and pointed out that nominations of several other members were not appearing in the list of Nominations. Further, there is no reason for rejecting

nomination of Shri Dinesh Rane. The complainant and other members objected to the election process being illegal and irregular. But ignoring these objections, Shri Nitin Jumde declared election of 11 members for Union Committee. Even thereafter Shri Vilas Kokate, Nitin Jumde and Vipul Kalita tried to give veiled threats to the complainant and his co-workers. The employees have also objected to this election process before the Competent Authority.

5.5. This is blatant interference of the Respondents in the functioning of the Union. The Complainant and his colleagues had therefore filed complaint (ULP) no. 160 of 2022 under the MRTU & PULP Act stating that "The complainant will be either transferred to some remote branches without any business exigencies or will be terrorized leveling false charges only to suppress any dissenting opinion in the union" After hearing the arguments on the Interim relief Application in particular apprehension of malafide transfer, the Hon'ble Court was pleased to protect the Complainant/s vide Order dated 19.09.2022 against victimizations and vindictive and malafide transfers by directing the Respondents to give 7 days clear notice before effecting any transfer. The Complainant craves liberty of the Hon'ble Court to file and refer the documents in Complaint (ULP) no. 160 of 2022 and those objecting election process as and when deemed necessary.

5.6. Thus as apprehended the respondents had taken Revenge full and vindictive action against the Complainant and had transferred him to Lucknow and Shri Vivek Sagvekar to Chandigarh. The respondents in their transfer letter had used word deputation instead of transfer to circumvent the order dated 19.09.2023 in Complaint (ULP) no. 160 of 2022. Obviously this was an attempt to mislead the Honorable industrial Court and subvert the judicial process. it is important to note that in those transfer/ deputation letters the nature of work also was altered and period of deputation was not specified. The complainant and his other transferred co-worker Shri Vivek sagvekar therefore filed complaint of unfair labour practice being complaint (ULP) no. 219 of 2022. The Hon'ble Industrial Court at Thane was pleased to stay these transfer orders. Thereafter, the respondents challenged this Stay Order in the Hon'ble High Court at Mumbai. The Hon'ble High Court saw sinister design of the respondents and when the Respondents pleaded that it's a pure deputation, The Hon'ble High Court ordered them to file affidavit with 6 months specific period of deputation. Accordingly after filing of affidavit, the Hon'ble High Court allowed the deputation and the Complainant had reported at Lucknow. But it was observed that there is in fact no any work for the Complainant. He was made to seat during entire period. As undertaken by respondent in the Hon'ble High Court, after completion of 6 month, the Complainant was brought back to original workplace at Mahape. The complainant came back in December 2023 after completion of 6 month period at Lucknow. This entire actual position at Lucknow has been submitted by the

Complainant to the Hon'ble Industrial Court at Thane by affirming affidavit while withdrawing the Complaint (ULP) no. 219 of 2022. The Complainant craves liberty of the Hon'ble Court to refer and rely upon the said affidavit filed in the Complaint (ULP) ne 219 of 2022.

5.7 Thereafter now again, under the guise of promotion, the respondents have transferred Complainant to Aurangabad without any reason. Obviously due to family difficulties, the complainant has declined to accept promotion. He has accordingly, written letter dated 11.04.2024 to the Respondent Company declining promotion and transfer. Annexed with List and marked as Annex. B, C respectively are true copies relieving letter dated 10.04.2024 and letter dated 11.04.2024 declining promotion.

6. Thus, the Respondents have again taken revengeful and vindictive action and have transferred the Complainant to Aurangabad. The respondents have used the word 'promotion' possibly to give veneer of fairness to entire vindictive and malicious intent. But this is again an attempt to mislead the Hon'ble Court and subvert the judicial process which must be strongly deprecated. The Complainant craves liberty of the Hon'ble Court to file and refer the additional documents in this regard as and when deemed necessary.

7.It is submitted that there are more senior workers than Complainant working in the Mahape plant. As such there is need of more manpower complement in the Mahape Press. Secondly the Respondents have not shown any need or business exigency for transfer of Complainants to Aurangabad.

8. The Complainants therefore urge the Hon'ble Court to note that if the earlier instances are taken into account it is clear that the complainant is subjected to harassment for his taking interests in the Union functioning. All these facts clearly demonstrate that this transfer under the guise of 'promotion' of the Complainant is not bonafide but is vindictive and malafide for his 'sin' of trying to participate in the decision making process of Union and liberate Union from interference of the Management. Annexed herewith marked as Annex. F is true copy of the Appointment letter of Complainant.

25) Thus, there are no specific allegations of personal bias or vengeance pleaded in the complaint. Respondent has sought to link the impugned transfer/promotion order to conduct of elections in the Annual General Meeting of the Union held on 8 August 2022. Again the allegations in paragraphs 5.3 and 5.4 of the complaint with regard to the role played by

Respondent in the said elections by the Petitioner-Management *qua* him are quite vague. It appears that Respondent did not contest the said elections. His contention is that faction of the Union, to which he belongs, was given discriminatory treatment by rejecting the nomination forms of the members of the said faction. The Respondent thereafter refers to his deputation at Lucknow, filing of Complaint (ULP) No.219 of 2022 and passing of interim order therein, and this Court's order dated 5 June 2023. These are the only allegations in the complaint, on the basis of which the impugned transfer order is sought to be branded as revengeful and vindictive. In my view *prima facie* there are no specific allegations of existence of personal bias in the mind of any particular official of the first Petitioner, on account of which the impugned transfer/promotion order is issued. No specific allegations are levelled against Petitioner Nos. 2 and 3, who are impleaded in person. The Industrial Court ought to have considered the pleadings in the Complaint for the purpose of forming *prima facie* opinion. In fact, the finding recorded by the Industrial Court would indicate that there is no specific finding of existence of *malafides* in the matter of issuance of transfer / promotion order. In my view therefore, in absence of pleadings relating to *malafides*, the Industrial Court ought not to have interfered in the impugned transfer order by staying the same during pendency of the Complaint.

26) Ms. Cox has submitted that it is virtually impossible to prove *malafides* by production of documentary evidence and that the existence of the same is required to be inferred from circumstances at this stage, by allowing Respondent to lead evidence at the trial of the Compliant. While Ms. Cox may not be entirely wrong in contending so, I am unable to find any pleadings

with regard to the existence of even circumstances from which *malafides* in the mind of a particular official to harass Respondent can be inferred. Respondent's deputation at Lucknow is sought to be linked with the impugned transfer /promotion order to suggest that repeated transfers are effected to take revenge against Respondent. Respondent's deputation at Lucknow has been upheld by this Court by judgment dated 5 June 2023. In fact some of the findings recorded by this Court (*N.J. Jamadar, J.*) in the judgment dated 5 June 2023 would apply *qua* the impugned order of transfer / promotion dated 10 April 2024. In the judgment dated 5 June 2023 this Court held in paragraphs 19, 20, 30 and 36 as under:-

> 19. Respondent No.1 was initially appointed as trainee "Semi-Skilled Baller" with effect from 1st April, 2003. Respondent No. 2 was initially appointed as "Senior Semi-Skilled Baller" with effect from 1" December, 2006. It is incontrovertible that transfer to any place/department in India in any of Petitioner No. 1's office, associate concern or publication or allied offices then in existence or to be established later, was an express term of employment of both Respondent Nos. 1 and 2 in the respective appointment orders.
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> 20. In the context of the express term of transferability, the challenge to the order of deputation as a mala fide exercise and an instrument of victimization deserves to be appreciated. The broad submission on behalf of the respondent Nos. 1 and 2 that the impugned orders dated 7th November, 2022, are, in effect, transfers and not "deputation", deserves to be considered first.
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> 31. This allegations, even if taken at par, in my view, relate to a matter of moment. There is substance in the submission of Mr. Khambata that the disputes were essentially between the groups of employees. Having regard to the nature of the dispute, it would be difficult to sustain the allegation of mala fide for a length of time. Moreover, the grievance raised by the complainants as regards to the election came to be rejected by the Sub-Registrar under the Bombay Industrial Relations Act, 1946, by an order dated 28th March, 2023. Thus, prima facie, in the context of a dispute between the group of employees over the rival claims to the office

> bearership of the Union, mala fide can hardly be attributed to the management.
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> xxx
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> 36. The conspectus of the aforesaid consideration is that, prima facie, the order of deputation does not seem to be actuated by mala fide. The learned Member Industrial Court lost sight of the pivotal fact that transferability was an essential term of employment. The deputation, in the circumstances of the case, appeared to be in pursuit of the optimum and better utilization of the available resources.

27) No doubt, shorter duration for six months was one of the reasons why this Court set aside the interim stay on order of deputation granted by the Industrial Court. At the same time, this Court did not find any substance in the allegations of *malafides* sought to be raised by the Respondent in relation to deputation order at Lucknow. In the present complaint, Respondent has repeated the very same allegations, which he raised while challenging deputation order at Lucknow. This Court has already repelled the objection of *malafides* based on conduct of elections of the Union in August 2022. In my view therefore, the reasonings in judgment dated 5 June 2023 in the case of the Respondent relating to his deputation at Lucknow would apply to the present case as well. The Industrial Court ought to have taken into consideration the said findings while deciding prayer for interim relief made by the Respondent.

28) Coming to the aspect of the promotion of Respondent, it must be observed that it is stage that Respondent is opposing his own promotion. One of the objections is that promotion is merely shown on papers, the real intention being to transfer the Respondent out of Mumbai. Though the

Annexure to the promotion order does not indicate sizable increase in the gross monthly emoluments, (from Rs.57,687 to Rs.59,418/-), it appears that an additional special city compensatory allowance of Rs. 4,500 would also be paid to Respondent during the duration of his stay at Aurangabad. The net raise in the emolument would be by Rs.6,231/- which amounts to roughly 11% hike.

29) So far as the objection of non-promotion of 7 senior employees, is concerned, the factual position about non promotion of 7 Senior Printers, who are senior to Respondent and working at Mahape, is not really disputed by Dr. Chandrachud. However, upon being queried by this Court, he has clarified that there are various reasons why the said 7 senior employees cannot be promoted or transferred at Aurangabad as Supervisor. In my view it is for the employer to decide as to who is a fit candidate to be promoted. If the said 7 employees feel aggrieved by their non-promotion, it is for them to make a grievance about their non-promotion. Respondent cannot insist that unless his senior counterparts are promoted, he must be continued on the old post of Senior Printer.

30) After considering the overall conspectus of the case I am of the view that no case was made out by the Respondent before the Industrial Court for grant of interim stay on the promotion-cum-transfer order. Transfer being incidence of service, the Industrial Court ought to have been loathe in routinely interfering in the same. The reasonings given by the learned Member of the Industrial Court for inferring existence of *prima facie* case do not inspire confidence. Mere filing of earlier litigation is not a reason to infer

existence of *malafides* for interdicting the order of the transfer. It was not necessary for the Petitioners to explain, as expected by the learned Member, as to whether transfer could be with earlier designation or retention could be effected at Mahape on promotional post. The learned Member has erred in holding that the documents filed by Petitioners creates doubt. It was not necessary for Petitioners to demonstrate past precedent for justifying the Respondent's transfer. Merely because the transfer is found to be exceptional, the same was not ground for learned Member to stay the same. It was not necessary for Petitioners to issue any administrative order for relieving Respondent from his office after denial of promotion by him. The finding of the learned Member that the management of the Petitioner-Company has issued transfer /promotional order as per their convenience is totally erroneous and unsustainable. In my view therefore, the impugned order passed by the learned Member of the Industrial Court is indefensible.

31) With the above findings, the judgment ought to end here by allowing the Petition and by setting aside the impugned order of the Industrial Court, requiring Respondent to report at Aurangabad forthwith. However upon this Court querying with Dr. Chandrachud as to whether there was possibility of retaining Respondent for some more time at Mumbai, after taking instructions from his clients, he has fairly pointed out that though substitute in place of Mr. Mallinath Dighe, Printer-Production, Aurangabad is immediately needed, the graver problem would arise when Mr. Anil Sapre, Chief Associate Production, Aurangabad retires on 30 June 2025. He has submitted that purely by way of indulgence, the first Petitioner can permit Respondent to be retained at Mahape, Navi Mumbai till January-2025.

However, after January-2025 posting of Respondent at production unit at Aurangabad is necessary so that he gets familiar with the production /printing related activities at Aurangabad before Mr. Sapre retires in June 2025. Therefore, though the Respondent has failed to make out any case for staying the transfer order during pendency of his complaint, the Respondent is permitted to work at Mahape, Navi Mumbai on the lower post of Senior Printer till 31 January 2025. He shall however, report on the promotional post of supervisor at Production Department, Walunj printing press, Aurangabad on 1 February 2025. It is however clarified that this concession is being made not because Respondent has been able to demonstrate any *prima facie* case for stay of the impugned transfer order, but so as to reduce the possible inconvenience to Respondent by enlarging the gap between the period of his return from Lucknow and reporting at Aurangabad.

32) Writ petition accordingly succeeds. Order dated 9 May 2024 passed by the Member, Industrial Court, Thane on application at Exh. U-2 filed in Complaint (ULP) No.73 of 2024 is set aside. However Respondent shall be retained at Mahape Printing Press, Navi Mumbai till 31 January 2025 on his current post of Senior Printer and shall join at Aurangabad on 1 February 2025. Needless to clarify that the observations in the judgment are *prima facie* and the Industrial Court shall decide the Complaint uninfluenced by the same.

33) The Writ petition is allowed in above terms. Rule is made absolute. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]