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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 2nd November, 2018
Date of pronouncement: 20th May, 2019

\+ W.P.(C) 1841/2018 & CM APPLs. 7646/2018, 7648/2018

SPIEGEL VERLAG RUDOLF AUGSTEIN GmBH& Co KG
.....Petitioner

Through : Mr.Dhruv Dewan with Ms.Reena Choudhary, Ms.H.Choudhary and Ms.Y.Mehta, Advocates.

versus

GOVT OF NATIONAL CAPITAL TERRITORY OF DELHI & ANR. .....Respondents

Through : Mr.Parag Tripathi, Sr. Advocate with Mr. Suman Doval and Mr.Summet Pushkarna, Advocates.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**

1. This writ petition, at the instance of SpiegelVerlag Rudolf Augstein GmbH & Co KG, a company incorporated in Germany, assails an award, dated 3rd November, 2017, passed by the learned Labour Court, Karkardooma, Delhi.

2. The terms of reference, as formulated in the Order of Reference, dated 26th June, 2013, issued by the Deputy Labour Commissioner, Government of National Capital Territory of Delhi read thus:

> "Whether the action of management, terminating the services of worklady, Ms Padma Rao, D/o late Dr V. V. S. K. Rao w.e.f. 30/4/2012 by not renewing the contract agreement dated 1/5/1998 is legal and justified; and if no, to what relief is she entitled and what directions are necessary in this respect?."

The Impugned Award

3. The facts of the case, as set out in the Statement of Claim filed by Respondent No. 2,Ms. Padma Rao, before the Labour Court, may be set out thus:

(i) The following agreement was entered into, between the Petitionerand Respondent No. 2, on9th April, 1998:

> "Dear Ms. Rao,
>
> We are pleased to confirm the following agreement with you:
>
> 1. With effect of May 1, 1998, you will be a freelance employee of the SPIEGEL Publishers, Hamburg and will be based in New Delhi;
>
> 2. Your duties will be along the lines specified by us in our discussion; (reportage and other writing for SPIEGEL Publishers);
>
> 3. You will receive a monthly retainer of the Deutschmark 6000, which will include DM 2000 towards rent of your office/residence. The retainer will be transferred to you 12 times a year at the end of each month. You are required to pay taxes as per prevailing laws of the country you reside in.

4. Should you incur additional travel or entertainment expenses during the course of your work, which have been cleared by either the editors-in-chief of the foreign desk of DER SPIEGEL magazine, these will be reimbursed against receipts.

5. By payment of a retainer, SPIEGEL-Verlag automatically reserves all copyright over any work that you may be required to do under the requirements of paragraph 1.

6. This agreement can be terminated by both sides through a notice of 6 weeks at the end of an annual quarter. If not renewed by January 31, 2000, this agreement will end on April 30, 2000.

7. Any changes, additions to this agreement must be made in writing.

We would request you, to indicate your acceptance on the 2nd copy of this letter and send it back to us.

With best regards,

ElkaMahistedt
SPIEGEL-Verlag (SPIEGEL Publishing House)
Personnel Department"

(ii) Consequent upon, and following on, the above agreement dated 9th April, 1998, Respondent No. 2 rendered services, for the petitioner, till April 2012. During this entire period, from 1998 till April, 2012, the above agreement/contract, between the petitionerand Respondent No. 2, was renewed on year-to-year basis. However, the agreement was not renewed beyond April 2012. As a result, the relationship between the petitionerand Respondent No. 2 came to an end on 30th April, 2012.

(iii) Before the Labour Court, Respondent No. 2 sought to contend that the above agreement, dated 9th April, 1998, though styled as a "freelance employee" contract, was actually a permanent contract of employment, in support of which contention, Respondent No. 2 drew attention to the fact that (i) Respondent No. 2 used to report directly to the petitionerat Hamburg, (ii) the salary of Respondent No. 2 was paid by the Hamburg office of the petitioner, (iii) the duty timings of Respondent No. 2 were determined by the Hamburg office of the petitioner, (iv) Respondent No. 2 also used to vote in the elections held for the "Employee's Advisory Council", like all other permanent employees of the petitioner, (v) permission was required to be obtained, from the Hamburg office of the petitioner, for Respondent No. 2 to travel and (vi) permission was also needed, from the Hamburg office of the petitioner, for Respondent No. 2 to avail leave. Respondent No. 2 further contended that, though the petitionertreated her as a permanent employee while extracting work from her, she was not paid all the emoluments and perks given to permanent employees. This, she sought to contend, amounted to an unfair labour practice.

(iv) In December 2011, Respondent No. 2 filed a suit in the Labour Court at Hamburg, for declaration of her status as a permanent employee of the petitioner. *Vide* order dated 30th October, 2012, the Labour Court at Hamburg dismissed the claim of Respondent No. 2 as "not admissible", holding that there was "no legitimate interest to take legal action as regards

the present action." Nevertheless, the Labour Court granted monetary benefits/compensation to Respondent No. 2.

(v) The refusal, of the petitioner, to extend the contractual agreement, between Respondent No. 2 and itself, beyond April, 2012 was, it was alleged by Respondent No. 2, retaliatory in nature, in view of the award of the Labour Court at Hamburg, referred to hereinabove.

(vi) In September 2012, the petitionersent a permanent staffer to Delhi to assume Indian operations.

(vii) A legal notice, dated 28th January, 2013, was sent, by Respondent No. 2 to the petitioner, seeking extension of the contract between the petitionerand Respondent No. 2 and conferment of permanent status on her. The said legal notice failed to meet with any positive response from the petitioner, Respondent No. 2 approached the conciliation officer, for initiation of conciliation proceedings under Section 10 (2) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act") read with the provisions of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955 (hereinafter referred to as "the Working Journalists Act"). The matter was referred to conciliation.

(viii) Consequent on failure of the attempts at conciliation, Respondent No. 2 raised an industrial dispute, praying for

reinstatement in service with full back wages. The said dispute was referred to the Labour Court, and adjudicated *vide* the impugned Award dated 3rd November, 2017.

4. In its written statement, filed by the petitioner, by way of response to the Statement of Claim of Respondent No. 2 before the Labour Court, it was contended thus:

(i) There was no employer-employee relationship between the petitionerand Respondent No. 2. Respondent No. 2 was employed as a "freelancer", *vide* the agreement dated 9th April, 1998 *supra.*

(ii) The agreement dated 9th April, 1998 *supra* envisaged only a fixed term contractual relationship between the petitionerand Respondent No. 2.

(iii) Respondent No. 2 used to write articles for the "Der Spiegel" magazine, which were edited by the petitioner, and printed in Germany. However, the "Der Spiegel" magazine was not a "newspaper", within the meaning of Section 2(b) of the Working Journalists Act. As such, there could be no "industrial dispute", between the petitionerand Respondent No. 2, within the meaning of the expression as defined in clause (k) of Section 2 of the ID Act.

5. Rejoinder was filed, by Respondent No. 2, before the Labour Court.

6. The Labour Court framed the following issues, as arising for its consideration:

> "1. Whether the claim of the claimant is barred by *res judicata* as the issue in this case has already been decided by the competent court? OPM.
>
> 2. Whether there exists relationship of employer-employee between the claimant and the management? OPW
>
> 3. As per terms of reference. OPW
>
> 4. Relief."

7. Before the Labour Court, Respondent No. 2 examined herself as WW-1 and Sudhir Mohan Verma, a chartered accountant, as WW-2.No other defence witness was cited. She also produced, in her support, documents, which were exhibited as Ex. CW-1/A to CW-1/H.

8. In her affidavit-in-evidence, Respondent No. 2, testifying as WW-1, deposed that, *vide* agreement dated 1st May, 1998, she was appointed as South Asia correspondent for "Der Spiegel", a news magazine published by the petitioner, and that, since then, she had continuously and uninterruptedly rendered services till April, 2012, in the process having worked for 5110 days (14 years). This, she contended in her affidavit-in-evidence, entitled her to be regularised, in terms of the ID Act. She also alleged that, having worked for the petitionerfor 14 long years, her contract was not renewed only because she had chosen to approach the Labour Court at Hamburg.

9. Respondent No. 2 further deposed that, in September 2012, "a new correspondent, a fully paid German National on a permanent contract, was posted in New Delhi in the same position" as had been held by her. Respondent No. 2 further deposed thus:

> "15. I state that when I was in employment in the year 1998, I was being paid DM 4000/–, as gross emoluments. In addition, I was being paid DM 2000/- as a house rent allowance for residence-cum-office.
>
> 16. I state that the Respondent insisted that I must maintain an office-come-residence – so that the time difference between Hamburg and New Delhi does not disadvantage reporting topical news and breaking stories.
>
> 17. I state that though the Agreement dated 1st May, 1998 is styled as a 'freelance employee' contract, was in essence a permanent Employee Contract clearly stipulating my duties and responsibilities vis-à-vis writing and reporting.
>
> 18. I state that though I was assured on numerous occasions that I would be conferred the status of permanent employee in due course as the nature of my duties and responsibilities were that of permanent employee. However, on one pretext or another, the respondents kept delaying the process of making me permanent employee and deceitfully and designedly kept me on annual contract for 14 (fourteen) long years. Thus, depriving me of my legitimate dues for all these years.
>
> 19. I state that the permanent nature of the contract can be safely deduced and inferred from the fact that the entire intellectual property rights (IPR) i.e. copyright over the written original work has been retained, without my authorisation by M/s Spiegel-Verlag (Spiegel Publishers).

20. I state that for all these 14 years and like all other permanent employees of M/s Spiegel-Verlag (Spiegel Publishers), I was always allowed to vote in the yearly elections to the employee's advisory council/union elections ("Betriebsrat"). I state that the purpose of this union is to negotiate with the personnel department on behalf of employees. I would receive voting slip every year to cast my vote. Throughout these 14 years, I also held the German press card issued by the Association of German Magazine Publishers North e.V.

21. I state that I was directly reporting to M/s Spiegel-Verlag in Hamburg (Germany), my salary came from Hamburg as did that of my staff, my official day began at Hamburg time (12.30 or 13.30 IST) and carried on as long as Hamburg HQ was open.

22. I further state that the Contract and all the continuous renewal were drawn in Hamburg; to run or not to run my stories was decided in Hamburg, to travel in connection with the work, permission from Hamburg was required, to take a vacation, our client needed permission from Hamburg. Innutshellfor all purposes the I was a permanent employee of M/s. Spiegel-Verlag. I reported only and solely to the Senior Foreign Editor of the Spiegel published by the Newspaper Establishment – M/s Spiegel-Verlag. Documents evidencing permanent nature of the employment are exhibited as Exhibited. CW-1/C1 to C… (Pages 128 to 180 of the claim Petition)."

10. Respondent No. 2 further averred, in her affidavit-in-evidence, that she "was always considered as a permanent employee while taking work, but treated as contractual while paying for the work." It was further averred, in the said affidavit-in-evidence, that "the reason

for non-renewal given in February 2012 by telephone and again in July 2012 via email from Senior Foreign Editor was that due to financial constraints, M/s Spiegel-Verlag is closing down India operations", but that, in September 2012, the petitionersent a permanent staffer to New Delhi to resume Indian operations."

11. Respondent No. 2 was cross-examined by the petitioner. She reiterated, in the cross-examination, that "regularisation did not happen between 1998-2012 although it was promised verbally" acknowledging that "thus, in the absence of (her) regularisation, during the period 1998-2012 (she) continued as a contractual employee."

12. Regarding the premises at Golf Links, which she was occupying during her 14-year tenure, Respondent No. 2 submitted, in cross-examination, thus:

> "Spiegel asked me in the verbal discussion around April 98 to set up an office cum residence so that journalistic work does not suffer due to time difference. The 1st address was 91 Golf Links and 2nd was 101 Golf Links, New Delhi. These 2 addresses were taken on lease. The lessee was myself. Vol. But the lease had to be signed and stamped by Der Spiegel in Hamburg and money is transferred by them to the landlord. I can produce the lease deeds. The Der Spiegel was transferring the monthly lease rentals to the landlord by the electronic transfer. Apart from me there was a Researcher, peon, driver and other cleaning staff at these offices. Apart from me Spiegel had contract with the researcher however, no contract was there with peon, driver and other cleaning staff. While the researcher was paid by Spiegel, the other stuff was paid from office expenses

account. In the relevant period I had two bank accounts. In one account I used to receive my retainer salary and office expenses were received in other account. The money received as expenses was on fixed and was not actuals. The researcher was handling the office accounts and used to send a monthly statements to headquarter. If in a given month the actual office expenditure was less than the money transferred in the beginning of month for running the office, the excess would be carried forward for the next month. Although typical I will receive the same fixed amount next month. I have filed my tax returns throughout the period 1998-12. Although I need to check, the tax filings the money received from Spiegel has been shown as retainer/salary in my tax returns. I can place my tax return for the relevant period. I was supervising the work of the staff in the office. I had the ability to hire new staff and fire the existing staff. Vol. Only after seeking permission from Hamburg. It would be right to say that I was representative of Spiegel in south Asia/India during the relevant period.… Typically on every day during the relevant period I would read the Indian newspapers and would send a email containing story ideas in time for the editorial meeting in Hamburg. The Hamburg office will then decide which of my suggestions they want written as a story and then they would give me the instructions to do so. I would then research and interview and then write a story by the end of the week. My story was edited, discussed with me over phone, facts checked and published. … For any travel outside Delhi I would need permission of Hamburg office and expenses would be reimbursed to be additionally after I had borne them in the first instance. I did not have the freedom to decide the amount of salary payable to staff without clearance of Hamburg. ”

13. In further cross-examination, Respondent No. 2 denied the suggestion that she did not have to take permission from the petitionerbefore hiring or firing of the staff, as well as the suggestion

that she had freedom to decide the salary to be paid to them. She reiterated that she needed the permission of the petitionerbefore fixing the salary of the staff. She further emphasised that the maintaining of office-cum-residence was a mandatory requirement for her job.

14. WW-2 Sudhir Mohan Verma produced the income tax return, of Respondent No. 2, as evidence. The return was exhibited as Ex. CW-2/A. He further deposed that the income of Respondent No. 2 was only from the petitioner, and that, as the petitionerhad no place of business in India, it did not possess any PAN/TAN Number. A perusal of the Income Tax return, filed by Respondent No. 2 reveals that she had declared the nature of her business or profession as "author/writer", and had further stated that there had been no change in the nature of a business/profession, and that she was maintaining cash/bank book and ledger. It also revealed that Respondent No. 2 had declared the amount received by her, from the petitioner, as "professional receipts".

15. In his affidavit-in-evidence tendered on behalf of the petitioner, MW-1 Vinod Sahni deposed that, under the Income Tax Act, 1961, an Indian resident, earning salary from a foreign source, was required to declare the result and income as "salary", and not as "income from business or profession".

16. Having reconnoitered the evidence, the Labour Court returned the following findings:

(i) Re. Issue 1:

The Labour Court at Hamburg had not returned any findings, but had dismissed the petition of Respondent No. 2 as "not admissible". In the absence of any findings on merits, there could be no question of application of the principle *of res judicata*. In fact, it was the submission of the petitioner, before the Labour Court at Hamburg, that the petitionerof Respondent No. 2 was liable to be dismissed, as Indian law applied to the agreement between Respondent No. 2 and the petitioner. This issue was, therefore, decided against the petitioner, and in favour of Respondent No. 2.

(ii) Re. Issue 2:

The nature of employment is to be decided on the basis of the facts and circumstances of the case and the service conditions governing the employee, and not on the basis of the nomenclature attached to the employment. In view of the fact that (a) Respondent No. 2 worked only for the petitioner, (b) Respondent No. 2 was controlled by the petitioner, (c) Respondent No. 2 was reporting to the petitioner, (d) during the currency of her employment with the petitioner, Respondent No. 2 did not work for anyone else, and (e) Respondent No. 2 served the petitionerfor 14 long years, all of which were established and proved by Respondent No. 2 by evidence, in rebuttal whereof no evidence was led by the petitioner, the

relationship of employer-employee, between the petitionerand Respondent No. 2, stood established. This issue was also, therefore, answered in favour of Respondent No. 2, and against the petitioner.

(iii) Re. Issue 3

(a) The petitionerhad sought to contend that, as a contractual employee, Respondent No. 2 could not maintain any claim for permanent retention in the establishment of the petitioner. The services of Respondent No. 2, it was sought to be contended, had come to an end on the expiry of the agreement between the petitionerand Respondent No. 2. Legally, it was sought to be submitted by the petitioner, a contractual employee could be terminated as per the terms and conditions of the contract/agreement governing the relationship between the employee and the person employing her. The Labour Court, however, held that, as no evidence had been led by the petitioner, to substantiate its claim that it had to close its Indian operations owing to financial problems, the said claim could not be believed. Rather, it was observed, Respondent No. 2 had, in para 34 of her affidavit-in-evidence, specifically deposed that, in September 2012, the petitionerhad sent a permanent staffer to India, to resume Indian operations. Though Respondent No. 2 was cross-examined, at length, by the petitioner, no

suggestion was put, to her, regarding the said asseveration which, therefore, remained unrebutted and had, therefore, to be taken as admitted.

(b) In ***Bhuvnesh Kumar Dwivedi v. Hindalco Industries Ltd, (2014) 11 SCC 85***, the Supreme Court had held that re-appointing employees repeatedly on the same post, with artificial breaks, amounted to unfair labour practice. To the same effect was the judgment of this Court in***M/s Delhi Printing and Publishing Co. Ltd. v. Labour Court-VII, 2002 SCC Online Del 1448.*** The situation, in the present case, was better, in that, insofar as Respondent No. 2 was concerned, she had worked for 14 years without any break. As the post was still in existence, the petitionerhaving sent other staffers to man it, it was established that the services of Respondent No. 2 had been illegally terminated by the petitioner.

This issue was also, therefore, decided against the petitioner.

(iv) Re. Issue 4

As Respondent No. 2 had not averred that she had been unemployed since the date of her termination, and had not led any evidence to the said effect, she was not entitled to back wages.

In the circumstances, the impugned Award of the Labour Court directed reinstatement of Respondent No. 2 with all consequential benefits, but with no back wages.

The Petitioner's challenge

17. The petitionerhas sought to challenge the impugned Award of the Labour Court on the following grounds:

(i) The Labour Court erred in failing to consider that the contract between the petitionerand Respondent No. 2 clearly designated Respondent No. 2 as a "freelance" employee of the petitioner. Even while averring, candidly, that "the contract was admittedly extended 12 times on a year-on-year basis, and continued uninterruptedly for a period of 14 years", the petitionercontends that "Respondent No. 2 was never treated as a permanent employee of the petitioner".

(ii) Respondent No. 2 had admitted, in her cross-examination, that her regularisation had not taken place, during the period 1998 to 2012, though it was promised verbally and that, in the absence of such regularisation, during the said period, she continued as a contractual employee.

(iii) Respondent No. 2 had also "admitted, in her pleadings, that she 'was assured on numerous occasions that she would be conferred the status of permanent employee in due course' and that Respondent No. 2 'was always considered as a permanent

employee while taking work, but treated as contractual while paying for the work.'" This, it is submitted (in Ground E in the writ petition) "clearly evidences that both the parties recognised Respondent No. 2's status as a freelance employee of the petitionerand not as a permanent employee".

(iv) The fact that Respondent No. 2 chose not to work for any other organisation, during the currency of her employment with the petitioner, even though there was no such prohibition imposed by the petitioner, contractually or otherwise, would not entitle Respondent No. 2 to claim the status of an employee, "particularly when she had willingly endured the contractual extension for 12 years", which are recognised her as a freelancer.

(v) The finding, of the learned Labour Court, to the effect that the petitionerwas controlling Respondent No. 2, was not supported by any material on record. Rather, the record indicated that the petitionerwas never exercising control, over Respondent No. 2, so as to give rise to an employer-employee relationship between the petitionerand Respondent No. 2.

(vi) Respondent No. 2 had admitted, before the Hamburg Labour Court, that the contract, between the petitionerand her was, in Indian Law, a "contract for personal service". There was a distinction between a "contract for service" and "contract of service". The following passages, from the response, on

behalf of Respondent No. 2, to the petitioners letter dated 17th August, 2012, submitted before the Hamburg Labour Court, were emphasised by Mr. Dewan in this context:

> "It must be further noted, that one cannot speak of an office of the defendant to New Delhi, because the conditions stipulated by the Reserve Bank of India (RBI) Act for opening such an office – invisible form – were not fulfilled. According to this law, it is mandatory for foreign companies, which must feel they are active in – to get the permission of the RBI. This permission was never applied for by the defendant, because he himself did not regard the office-come-residence as an independent Spiegel office in India. Further and if the defendant wanted to set up an independent Spiegel-office in India, he would have had to additionally apply for the permission of India's Ministry of Information and Broadcasting. This too, was never applied for/adhered to.
>
> It is therefore to be noted, that the defendant purposely avoided setting up a Spiegel-office in India and agreed to a personal office (office-come-residents) of the respondent, that our client only happens to be a foreign correspondent of Indian origin living in India, who contributes to a foreign media house and who has, for this journalistic purpose, set up an office-come-residence in her flat.
>
> It follows, therefore, that due to the lack of an independent Spiegel-office in India, this circumstance, too, speaks against the applicability of the Indian Law on this case. Further, it must be pointed out, that according to India's 'Industrial Disputes Act' and due to the lack of the requisite permissions, the defendant had no presence of any kind in India, so that the disputed contract between the parties can, according to Indian Law, only be

described as a 'Contract for Personal Services', for which – according to Indian Law – the Indian law is not applicable."

(vii) The contract between the petitionerand Respondent No. 2 was for a fixed period, and was made determinable without notice by either side, unless renewed or amended prior to expiry. There was, therefore, no "element of permanency" in the engagement of Respondent No. 2 by the petitioner. My attention was invited, in this context, to Clause 6 of the agreement/contract between the petitionerand Respondent No. 2, which was to the said effect.

(viii) The contract between the petitionerand Respondent No. 2 assured her a "fixed monthly retainer", which was in the nature of a monthly fee, and not a salary.

(ix) Respondent No. 2 never enjoyed any of the benefits available to a permanent employee, such as overtime payment, annual bonus, medical insurance, pension, shares in the company or Social Security. Nor was she bound by any of the obligations cast upon a permanent employee.

(x) No fixed hours of work were prescribed, for Respondent No. 2, by the petitioner. The petitionerhad, in fact, absolutely no knowledge of what Respondent No. 2 was doing at any given point of time.

(xi) The property in which Respondent No. 2 had her office was rented by her. The lease agreements, which had been placed on record by Respondent No. 2, identified her as the lessee of the property, whereas the petitionermerely stood as the guarantor thereof.

(xii) The petitionerhad no contractual relationship with the peon, driver and cleaning staff hired by Respondent No. 2 in the office. It was admitted, by Respondent No. 2, that she was supervising the work of the said staff and that she had the ability to hire new staff and fire existing staff. Essentially, therefore, Respondent No. 2 was running her own office, independent of requisite control and supervision of the petitioner.

(xiii) Respondent No. 2 had, before the income tax authorities, declared that she was engaged in business/profession. She had filed her Income Tax returns in the said capacity, and not as a salaried employee. She was claiming deductions in the nature of business promotion, depreciation, printing and stationary, salaries, etc., which could not be claimed by a salaried employer, under Indian tax laws. Having been allowed the deductions permissible to a person who was earning her income from business/profession, she could not now see to classify herself as a salaried employee of the petitioner.

(xiv) One of the specific issues framed by the Hamburg Labour Court was whether the contractual relationship between

the petitionerand Respondent No. 2 was that of a casual employee or a regular employee. A categorical finding had been returned, by the said Labour Court, that the "parties legal relationship was terminated as of the lapse of 30 April 2012". This decision was never challenged by Respondent No. 2 and had attained finality. It was conclusive and binding between the parties, under Section 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC"). The Labour Court was, therefore, proscribed from hearing and adjudicating the same issue all over again.

(xv) The Labour Court had erred in failing to appreciate that the proceedings before it were also hit by the principle of issue estoppel, inasmuch as the Hamburg Labour Court had categorically held that the relationship between the petitionerand Respondent No. 2 had come to an end on 30th April, 2012. It was not open to Respondent No. 2, therefore, to reagitate this issue before the Labour Court India. The Labour Court in India had no jurisdiction to upset the finding of the Hamburg Labour Court. Mr. Dhruv Dewan emphasised, in this context, the fact that the prayer of Respondent No. 2, before the Hamburg Labour Court, was for determination of her legal status.

(xvi) The Labour Court had erred in failing to appreciate that the proceedings before it were not maintainable as Respondent No. 2 was not a "working journalist" within the meaning of section 2(f) of the Working Journalists Act. In order to establish

such relationship, the factum of employment needed to be proved. As Respondent No. 2 was never an employee of the petitioner, she could not be treated as a "working journalist". This issue had not been considered by the Labour Court. For this proposition, Mr. Dewan sought to place reliance on the judgment of the Supreme Court in ***Management of Express Newspapers ltd. v. B. Somayajulu, AIR 1964 SC 279***. He also invited my attention to Section 3 of the said Act.

(xvii) The Labour Court had also erred in failing to note that the petitionerwas not a "newspaper establishment" and that "Der Spiegel" was not a "newspaper" within the meaning of the Working Journalists Act. Neither was it registered, in India, under Section 5 of the Press and Registration of Books Act, 1867.

(xviii)Even if "Der Spiegel" was eligible to be regarded as a "newspaper", under the Working Journalists Act, the petitionercould not be regarded as a "newspaper establishment" under clause (d) of Section 2 of the said statute. Mr. Dewan invited my attention, in this context, to the stand of Respondent No. 2, as reflected in her rejoinder, dated 3rd July, 2012, to the response, of the petitioner, to her suit before the Labour Court in Hamburg, in which it was averred thus:

> "The court points so insofar to the fact, that the Defendant is headquartered in Hamburg but had a branch in New Delhi. The rooms in New Delhi were, in fact used by the Plaintiff for both office and for her residence.

> This office was not a branch, this office is also not registered in India, that is, the SPIEGEL Publishers are not, in keeping with local law, registered as an entity in India. Therefore it is only the Plaintiff, who represents the company in India.
>
> This is also confirmed by the fact that the letterhead, which was printed at the HQ in Hamburg for the Plaintiff, among other things bears the text: "Editorial Office 101 Golf Links, New Delhi" as well as Headquarters and Registration Court Hamburg HRA 617555 and Headquarters and Registration Code Hamburg HRB 13105."
>
> All matters pertaining to the contract signed with the Plaintiff are also decided by the Headquarters of the SPIEGEL in Hamburg.
>
> This proves, that firstly, the Defendant had no official office/branch in New Delhi and secondly, that it describes the Plaintiff as its official representative in India. This circumstance therewith speaks for the applicability of German law."

(xix) Mr. Dewan also referred to the affidavit-in-evidence of WW-1 Sudhir Mohan Verma, in which the said witnesses deposed that to his "knowledge and belief the Respondent- M/s Spiegel-Verlag (Der Spiegel) does not have a place of business in India, does not have a PAN or TAN and therefore was not deducting any Income Tax at Source." The petitioneredited, printed and published on articles in Germany, and had no presence, physical or otherwise, in India.

(xx) The Working Journalists Act did not have any extraterritorial effect. The proceedings before the Labour Court were not, therefore, maintainable.

(xxi) On merits, too, non-renewal of a contract of service would not amount to be illegal termination. As the contract between the petitionerand Respondent No. 2 stood terminated by efflux of time, the Labour Court erred in directing reinstatement of Respondent No. 2, which would amount to continuation of an expired contract, which was impermissible in law. Mr. Dewan also expressed uncertainty as to how the direction, of the Labour Court, in the impugned Award, for reinstatement of Respondent No. 2 along with consequential benefits, could work, especially pointing out that no period, to which Respondent No. 2 was required to be reinstated, was specified.

(xxii) It was never the petitioner's case, before the Labour Court, that it had closed its operations in India owing to financial constraints. The Labour Court, therefore, erred in holding that this stand, of the petitioner, had not been established.

18. Mr. Dewan placed reliance on the following decisions, in his support:

(i) ***Ram Nayan Shukla v. District Basic Education Officer, 1999 SCC (L&S) 631;***

(ii) ***Amtt Yadav v. Delhi Vidyut Board 2000 SCC Online Del 73;*** and

(iii) ***Vinod Pathak v. American Express Bank Ltd., 2015 SCC Online Del 12389***.

19. Arguing per contra, Mr. Parag Tripathi, learned Senior Counsel appearing for Respondent No. 2 initially drew my attention to the limited scope of interference, by Courts, exercising jurisdiction under Article 226 of the Constitution of India, with awards of Labour Courts, submitting that interference was warranted only in cases where the award was found to be perverse. Reliance was placed, for this purpose, on the judgments in ***General Manager, Oil and Natural Gas Commission Silchar v. Oil and Natural Gas Commission contractual workers Union,(2008) 12 SCC 275*** and ***Trambak Rubber Industries v.Nashik Workers Union and Ors., (2003) 6 SCC 416***.

20. Mr. Tripathi also sought to discountenance the reliance, by Mr.Dewan, on the proceedings before the Hamburg Labour Court, and the order, dated 30th October, 2012, passed by the said Court as a consequence thereof. At worst, submitted Mr. Tripathi, the said decision could amount to a pronouncement that, under German law, there was no employer-employee relationship between the petitionerand Respondent No. 2 and, even if there was, Respondent No. 2 was not entitled to any relief. Mr. Tripathi also sought to point out that the decision of the Hamburg Labour Court was not enforceable at law in India. Mr. Tripathi also pointed out, in this context, that, before the Hamburg Labour Court, the petitionerhad

itself sought to submit that Indian Law was applicable to the case, and had specifically contended that "the claims made by (the complainant) against the applicability of Indian Law are not comprehensible". He also pointed out that, in the same submissions, the petitioneradmitted that "the defendant maintained an office in New Delhi, India, in which the complainant worked", and that, though the house was used both as a residence and office of Respondent No. 2, that was at her own desire. The petitionerhad also admitted, in the said pleadings, that "several other employees worked in this office who were paid by" it, "particularly an office Assistant, first Raghu Varma till 2007 and since May 2008 Ms. Ekta Kapoor".

21. The use of the word "freelance", in the agreement/contract dated 9th April, 1998 *supra*, between the petitionerand Respondent No. 2, Mr. Tripathi would seek to submit, could not determine the juralrelationship between them. It was the substance of the relationship that mattered, he would submit, rather than the form thereof. Pointing out that Respondent No. 2 had worked, for the petitioner, for as many as 5110 days, Mr. Tripathi sought to rely on the paras, from the affidavit-in-evidence of Respondent No. 2, testifying as WW-1 before the Labour Court, which already stands extracted in para 9 hereinabove.

22. In this context, Mr. Tripathi also emphasised the fact that Respondent No. 2 had been issued identity cards and media accreditation cards, showing her as a journalist working with Der Spiegel. The fact of issuance of these cards, though pleaded by

Respondent No. 2 had not, it was pointed out, being repelled by the petitioner. In fact, submitted Mr. Tripathi, no evidence, whatsoever, had been led, by the petitioner, to substantiate its allegation that the relationship between the petitionerand Respondent No. 2 was purely contractual, and that it exercised no control over her.

23. Mr. Tripathi also relied on a communication, dated 18th November, 2010, from the petitionerto the Principal Information Officer, PIB, as well as a certificate, dated 25th October, 2011, issued by the petitioner, both of which were part of the record before the learned Labour Court. The communication dated 18th November, 2010 stated that Respondent No. 2, "holder of Government of India press accreditation card number 478, will continue to be our South Asia correspondent and chief of bureau in the year 2011" and, for that reason, sought renewal of her accreditation. Similarly, the certificate dated 25th October, 2011 certified that Respondent No. 2 "is working full-time as a reporter/researcher covering political and social events in India for the foreign Department of Der Spiegel, the German news weekly", and went on to state that "the magazine will take full responsibility for work and will, of course, carried the expenses which may occur". Again, for these reasons, renewal of her accreditation was sought.

24. In such circumstances, if the learned Labour Court held that there existed, between the petitionerand Respondent No. 2, the relationship of employer and employee, the finding could not be said to be tainted, in any manner, by perversity, as would justify interference, therewith, by this Court. Mr. Tripathi took me, in this

context, through various documents, produced by Respondent No. 2 as evidence in her support before the learned Labour Court, and sought to submit that these documents more than discharged the burden of proof, cast on her, to establish the relationship, between the petitionerand her, of employer and employee.

25. The income tax returns of Respondent No. 2, Mr. Tripathi would seek to submit, were totally irrelevant in determining the issue in controversy. Declarations contained in the said returns, Mr. Tripathi would submit, could only decide the entitlement, or otherwise, of Respondent No. 2, to deductions sought by her, and could not be used as substantive evidence to determine the nature of the relationship between her and the petitioner. The judgment in***M/sNew Era Impex (India) Pvt.Ltd. v. M/s Oriole Exports Pvt. Ltd., 2016 SCC Online 4352,*** he would submit, was distinguishable.

26. Expanding on the issue of the proceedings before the Hamburg Labour Court, Mr. Tripathi drew especial attention to the averments, in the pleadings of the petitionerbefore the said learned Court, already extracted hereinabove, in which the petitionerdiscountenanced the challenge, of Respondent No. 2, to the applicability, to the case, of Indian Law. He pointed out that it was further admitted, in the pleadings, that the office at New Delhi, where Respondent No. 2 worked, was maintained by the petitioner, and that it was being used as a residence at her own choice. The same pleadings also admitted the fact that several other employees, working in the said office, were also paid by the petitioner. In view thereof, Mr. Tripathi would seek to contend that it did not lie in the mouth of the petitionerto argue, before

this Court, or before the learned Labour Court below, that Respondent No. 2 was not its permanent employee. In any event, Mr. Tripathi would point out that, under Section 13(f) of the CPC, the order of the Hamburg Labour Court was unenforceable in India. Besides, the rights of Respondent No. 2, in Indian Law, could not be answered by the Labour Court at Hamburg.

27. The submission, of the petitioner, to the effect that it had not pleaded financial constraints as the basis for not renewing the employment of Respondent No. 2 was, Mr. Tripathi would seek to point out, erroneous, for which purpose my attention was invited to various pages of the evidence before the learned Labour Court.

28. Detailed written submissions have also been filed by the parties.

Analysis and findings

Scope of interference

29. I have already had occasion, in my earlier judgment s in, *inter alia*, ***D.T.C. v. Saroop Singh, 2017 SCC Online Del 10602*** and ***D.T.C. v. Bijender Singh, 2018 SCC Online Del 8852***, to opine on the limited scope of interference, by writ courts, with awards of Labour Courts and Industrial Tribunals. Paras 31 and 32 of the judgment in***Saroop Singh (supra)*** read thus:

> "31. This Court has, in its recent decision dated 21st July2017in ***D.D.A. v. MoolChand [W.P. (C) 9468 of 2004]***, delineated the following principles as emerging from the definitive judicial authorities on the subject,

regarding the scope of interference, under Article 226 of the Constitution of India, with the findings of the Labour Court/Industrial Tribunal:

> (i) The Labour Court/Industrial Tribunal is the final fact finding authority.
>
> (ii) The High Court, in exercise of its powers under Article 226/227, would not interfere with the findings of fact recorded by the Labour Court, unless the said findings are perverse, based on no evidence or based on illegal/unacceptable evidence.
>
> (iii) In the event that, for any of these reasons, the High Court feels that a case for interference is made out, it is mandatory for the High Court to record reasons for interfering with the findings of fact of the Labour Courts/Industrial Tribunal, before proceeding to do so.
>
> (iv) Adequacy of evidence cannot be looked into, while examining, in writ jurisdiction, the evidence of the Labour Court.
>
> (v) Neither would interference, by the writ court, with the findings of fact of the Labour Court, be justified on the ground that a different view might possibly be taken on the said facts.

30. On what constitutes "perversity", it is observed in paras 29 and 30 of the said decision, thus:

> *"*29.'Perversity', for its part, is attributed to a judicial/quasi judicial decision if the decision ignores/excludes relevant material, considers irrelevant/inadmissible material, is against the weight of evidence, or so outrageously defies logic

as to suffer from irrationality [***DamodarDass v. Sohan Devi, (2016) 3 SCC 78; S.R. Tiwari v. Union of India, (2013) 6 SCC 602; Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635; Kuldeep Singh v. Commissioner of Police, (1999) 2 SCC 10; GaminiBalaKoteswara Rao v. State of AP, (2009) 10 SCC 636; Babu v. State of Kerala, (2010) 9 SCC 189; Dr. Sunil Kumar Sambhudayal Gupta v. State of Maharashtra, (2010) 13 SCC 657****]*.

30. ***DamodarDass (Supra)***further postulates that in examining whether a decision is, or is not, perverse, the classic test, of the reasonable man's conclusion on the facts before the authority concerned would apply. The same decision also reiterates the trite position that inadequacy of evidence, or the possibility of reading the evidence in a different manner, would not amount to perversity."

31. In ***Bhuvnesh Kumar Dwivedi (supra)***, the Supreme Court holds, in para 22 of the report, thus:

"A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it."

32. Mr. Tripathi is, therefore, right in contending that, ordinarily, awards of Labour Courts and Industrial Tribunals are not readily subjected to judicial interference by writ courts. The present case would, therefore, had to be examined on the touchstone of the above decisions.

The effect of the order of the Hamburg Labour Court

33. It was sought to be pleaded, by Mr. Dewan , that, in view of the order, dated 30th October, 2012, passed by the Labour Court at Hamburg, the present writ petition was barred by the principles of *res judicata* and issue estoppel, and that this Court would be acting in excess of jurisdiction, were it to revisit issues on which the Labour Court of Hamburg had already returned findings.

34. A bare reading of the order, dated 30th October, 2012, passed by the Labour Court at Hamburg, demonstrates the inherent fallacy of this submission.

35. No doubt, the claim of Respondent No. 2, before the Labour Court at Hamburg was similar to that raised before the Labour Court in the present case. The "request" of Respondent No. 2, before the Labour Court at Hamburg, was recorded, in the Order dated 30th October, 2012 *supra*, as being "that the Court should declare that there exists a relationship between (*sic* of?) employer and employee between the parties with no fixed term".

36. It is necessary, here, to reproduce the decision of the Labour Court at Hamburg, *in extenso*, thus:

> " 1. *The action is inadmissible.*
>
> *There is no interest of the claimant to seek declaratory judgment as required under section 256(1) Code of Civil Procedure. According to that rule of Law, an action seeking a declaratory judgment finding on the existence or non-existence of a legal relationship may be brought where the claimant party has a legal interest in a judicial decision finding on the legal relationship. In any position of the procedure, the court, by virtue of his office, has to review the special interest of the claimant in a declaratory judgment under section 256(1) Code of Civil Procedure, being a prerequisite for a judgment on the merits. In doing so, the court does not, by virtue of his office, have to examine the facts. Instead, the claimant party has to state the required facts and prove them if necessary.*
>
> The Federal Labour Court, in its established practice, has found that actions brought by employees for declaratory judgments finding that the relationship between employer and employee exists between the parties, i.e., actions relating to the present situations, are admissible including when it turns out already in the course of the lawsuit on status that the parties will later argue about individual terms of employment.[Federal labour court (BAG),judgement of 03.03.1999 in case no. 5 AZR 275/9A, cited from juris] In such actions, the interest that a finding be made forthwith follows from the fact that if there exists a relationship between employer and employee, then the mandatory provisions of the law that shape a relationship between employer and employee will forthwith and not only in future apply to the parties contractual relationship notwithstanding the understandings they have reached. This also applies where a dispute over individual terms of employment is foreseeable. For purposes of procedural economy it would make little sense from the outset to burden a

lawsuit regarding the assessment of an employee status with contentious issues, say regarding the hourly scope of employment or the employees grouping, which are issues the parties typically clarified negotiations if the lawsuit has a positive outcome. An answer to questions that are crucial to an employee regarding the protection of their legal relationship under employment law must not be delayed by what is unavoidable extension of the matter in dispute. The status question is the fundamental question in such lawsuits; it is possible to pose the question, in advance, prior to a judicial decision.

These prerequisites are not met here.

In the matter at issue, the action is to seek a declaratory judgment on a legal relationship that has ended. Certainly, the claimant's action originally sought a declaratory judgment in regard to the presence. However, the party's legal relationship was terminated as of the lapse of 30 April 2012.

Had the parties' contractual relationship qualified as a relationship between employer and employee and if German law applied, such a relationship between employer and employee still would have ended as of the lapse of 30 April 2012. After all, the claimant did not file a request with the Labour Court for part-time control pursuant to section 17 Part-time and Temporary Employment Act. Pursuant to section 17 sentence 1 Part-time and Temporary Employment Act, an action has not been filed in time unless the request for relief, the statement of grounds for the action, or other circumstances given on the filing of the action indicate that the claimant seeks to claim that the relationship between employer and employee did not, by virtue of the fixed term agreed at atime,end as of the date provided for in that agreement.

This is definitely not the case here.

The claimant's request for relief dated 12 December 2011 is an ordinary request seeking a declaratory judgment on status. The fact that the request for relief includes the word "*unbefristet"* (with no fixed term") permits no different assessment.

Neither the request for relief nor the statement of grounds for the action or other circumstances given on the filing of the action indicate that the Claimant was seeking to claim that her "relationship between employer-employee" did not end by virtue of the "fixed term agreed on 24 February 2011 for the period ending 30 April 2012." No circumstances in support of such an interpretation can be found to exist. The statement of grounds for the action does not plead that the Claimant considered the party's most recent agreement to be an ineffective fixed-term agreement.

The Claimant has stated no continuing interest the declaration of which is to have implications for the presence or future.

Thus, there is no legitimate interest to take legal action as regards the present action."

(Emphasis supplied)

37. Section 256(1) of the German Code of Civil Procedure, 1877 (hereinafter referred to as "the German CPC") reads thus:

"**256. Action for acknowledgement**

(1) A complaint may be filed to establish the existence of non-existence of a legal relationship, to recognise a deed or to establish that it is false, if the plaintiff has a legitimate interest in having the legal relationship, or the authenticity of falsity of the deed, established by a judicial ruling at the court's earliest convenience."

38. Read in the backdrop of Section 256 (1) of the German CPC, it is clear that the Labour Court and Hamburg did not adjudicate on the issue, regarding which Respondent No. 2 had sought a declaratory judgment from it, i.e., regarding the existence of a relationship of employer and employee, between the petitionerand Respondent No. 2, with no fixed term. Section 256(1) of the German CPC permits a litigant to seek such a declaration of existence of a jural relationship, where "the plaintiff has a legitimate interest in having the legal relationship… established by a judicial ruling at the court's earliest convenience". The Labour Court at Hamburg has, in its Order dated 30th October, 2012 *supra,* opined that, as the relationship between the petitionerand Respondent No. 2 had ended, and, applying German law, even if a relationship of employer and employee had existed, between them, prior to 30th April, 2012, the said relationship would still have ended as on 30th April, 2012, and as there was no claim, by Respondent No. 2, for a declaration that the said relationship had not ended on 30th April, 2012, there "did not survive any continuing interest, in Respondent No. 2, for a declaration regarding the existence of the said relationship, which could be said to have implications for the presence or the future." This Court is not required to go into the correctness, or otherwise, of the said interpretation, or view, expressed by the Labour Court at Hamburg. Suffice it to state that, clearly, the Labour Court at Hamburg not think it appropriate to enter into the issue referred to it by Respondent No. 2,, regarding the issue of whether there had existed, between the petitionerand Respondent No. 2, a relationship of employer and employee.

39. The said issue may not have had any implications on the rights of Respondent No. 2, *vis-à-vis* the petitioner, in German law. They do, however, in the law that applies in this country. In case a workman is retrenched by an employer, in contravention of Section 25-F of the ID Act, labour Courts in India have to strike down the retrenchment as illegal, and all consequential benefits would, thereupon, enure in favour of the retrenched workman. It is a defence, to the management, in all such cases, to plead that there was no employer-employee relationship, between the management and the litigating workman. Such a defence has, predictably, been taken, in the present case, as well, by the petitioner, *vis-à-vis* Respondent No. 2. The determination of the nature of the relationship, between the petitionerand Respondent No. 2 in the present case is, therefore, necessary, before the Labour Court could arrive at a decision, regarding the merits of the claim of Respondent No. 2.

40. The Labour Court at Hamburg not having returned any finding on this issue, this Court would, therefore, in examining the said aspect, not be revisiting the decision of the Labour Court at Hamburg in any manner, or to any extent. The said objection, as voiced by Mr. Dewan, appearing for the petitioner, is, therefore, completely without merit and is, accordingly, rejected.

41. For the same reason, the pleas of *res judicata* and issue estoppel, as raised by the petitioner, have also to fail. It is well settled that it is only a decision which decides an issue, which can operate as *res judicata* for a future litigation. A four-judge bench of the Supreme

Court had, as far back as in ***Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332***, held thus, on the issue of *res judicata*, and Section 11 of the CPC, which governs the same:

> "A plain reading of Section 11 shows that to constitute a matter *res judicata*, the following conditions must be satisfied, namely—
>
> (i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;
>
> (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
>
> (iii) The parties must have litigated under the same title in the former suit;
>
> (iv) *The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised*; and
>
> (v) *The matter directly and substantially in issue in the subsequent suit* ***must have been heard and finally decided by the court*** *in the first suit*. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. *In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied*."
>
> (Emphasis supplied)

42. Though there is a subtle distinction between the principles of *res judicata* and issue estoppel, that distinction is based on the difference in the entity against which the issue would operate. In either case, the *sine qua non*, for the principle to apply, is that the issue must have been finally adjudicated by a court of competent jurisdiction. If that condition is satisfied, any other court is precluded, by operation of the principle of *res judicata*, from revisiting the issue, whereas either litigant, in the former litigation, is proscribed, by the principal of issue estoppel, from reagitating it. As such, *res judicata* operates as a fetter on the court, whereas issue estoppel operates as a fetter on the litigant. This distinction was tellingly, even if briefly, emphasised, by the Supreme Court, in ***Bhanu Kumar Jain v. Archana Kumar, (2005) 1 SCC 787***, in the following words:

> **29.** There is a distinction between "issue estoppel" and "res judicata". (See ***Thodayv. Thoday [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)]*** .)
>
> **30.** *Res judicata* debars a court from exercising its jurisdiction to determine the *lis* if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of *res judicata* creates a different kind of estoppel viz. estoppel by accord."
>
> (Emphasis supplied)

43. Inasmuch as the Labour Court at Hamburg did not decide any issue, and expressed no opinion on the jural relationship, existing between the petitionerand Respondent No. 2, the order, dated 30th October, 2012, of the Labour Court at Hamburg, cannot impact, in any

manner, the present litigation. The reliance, by Mr. Dewan, on the said order, as a basis to contend that Respondent No. 2 was estopped from maintaining the industrial dispute, which has resulted in the impugned Award, and that the Labour Court was, in turn, precluded from adjudicating on the said dispute, is, therefore, necessarily required to be characterised as misplaced and the objection of Mr. Dewan, founded thereon, is, accordingly, rejected.

Applicability of the Working Journalists Act:

44. The objection, of Mr. Dewan, to the fact that the Labour Court did not, in the present case, address the issue of applicability of the Working Journalists Act, is well taken. However, as the issue was argued, threadbare, before me, both on facts as well as in law, I proceed to examine the same on merits, instead of remitting the matter to the Labour Court for a decision thereon.

45. Section 3 of the Working Journalists Act, which makes the provisions, of the ID Act, applicable, *mutatis mutandis*, to working journalists covered by the Working Journalists Act, reads thus:

> "**3. Act 14 of 1947 to apply to working journalists. –**
>
> (1) The provisions of the Industrial Disputes Act, 1947 (14 of 1947) as in force for the time being, shall, subject to the modifications specified in sub- section (2), apply to, or in relation to, working journalists as they apply to, or in relation to, workmen within the meaning of that Act.

> (2) Section 25F of the aforesaid Act, in its application to working journalists, shall be construed as if in clause (a) thereof, for the period of notice referred to therein in relation to the retrenchment of workmen, the following periods of notice in relation to the retrenchment of a working journalist had been substituted, namely: –
>
> (a) 6 months, in the case of an editor, and
>
> (b) 3 months, in the case of any other working journalist."

46. "Working journalist" is defined in clause (f) of Section 2 of the Working Journalists Act, as meaning "a person whose principal avocation is that of a journalist and who is employed as such, either full-time or part-time, in, or in relation to, one or more newspaper establishments, and includes an editor, a leader-writer, news editor, sub- editor, feature-writer, copy-tester, reporter, the respondent, cartoonist, news-photographer and proof-reader, but does not include any such person who –

(i) is employed mainly in a managerial or administrative capacity, or

(ii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature".

47. That Respondent No. 2 was a journalist, is not, and cannot be, denied. Nor can it be denied that she was employed by the petitioner, as the letter, dated 9th April, 1998 *supra*, itself refers to her as a

"freelance employee" of the petitioner. Having thus designated her in its letter dated 9th April, 1998, it cannot lie in the mouth of the petitionerto contend, before this Court, that the respondent was not its employee. Significantly, it is not necessary, for a person to qualify to be regarded as a "working journalist", under the Working Journalists Act, to be employed *in* the newspaper establishment. It is sufficient if she, or he, is employed *in relation to* the said establishment. All persons, therefore, whose principal avocation is journalism, and who, though not employed in a newspaper establishment, are employed in relation to a newspaper establishment, would satisfy the definition of "working journalist", for the purpose of application of the Working Journalists Act.Every journalist, who is employed, in her/his capacity of journalist, by, or in relation to, a newspaper establishment, is, per definition, "working journalist", within the meaning of the Working Journalists Act, the only exceptions being in respect of persons falling under the categories contemplated by clauses (i) and (ii) in clause (f) of Section 2 of the Working Journalists Act *supra*. The petitionerdoes not seek to contend that Respondent No. 2 was employed in a managerial or a supervisory capacity.

48. The main contention, of Mr. Dewan, apropos the applicability, to the facts of the present case, of the Working Journalists Act, is not that Respondent No. 2 is not a "working journalist", as ordinarily understood, but that the petitioneris not a "newspaper establishment", within the meaning of the expression is used in the said Act.

49. "Newspaper establishment" is defined in clause (d) of Section 2 of the Working Journalists Act as meaning "an establishment under the control of any person or body of persons, whether incorporated or not, for the production or publication of one or more newspapers or for conducting any news agency or syndicate and includes newspaper establishments specified as one establishment under the Schedule". The explanation to the said clause clarifies that, for the purposes thereof, "(a) different departments, branches and centres of newspaper establishments shall be treated as parts thereof" and "(b) a printing press shall be deemed to be a newspaper establishment if the principal business thereof is to print newspaper". "Newspaper", in turn, is defined, in clause (b) of Section 2 of the Working Journalists Act as meaning "any printed periodical work containing public news or comments on public news", and as including "such other class of printed periodical work as may, from time to time, be notified in this behalf by the Central Government in the Official Gazette".

50. "Der Spiegel" is, admittedly, a printed periodical work, containing public news. It is, therefore, a "newspaper", within the meaning of clause (b) of Section 2 of the Working Journalists Act *supra*. Can, however, Respondent No. 2 be stated to be employed in a "newspaper establishment"?

51. The word "establishment" does not find definition, either in the Working Journalists Act, or in the ID act. Dealing with a similar situation, which involved the understanding of the expression "establishment" in the context of the Employees State Insurance Act,

1948 – which, like the ID Act and the Working Journalists Act, is a piece of social welfare legislation – the Supreme Court held thus, in ***Bangalore Turf Club Limited v. Regional Director, Employee State Insurance Corporation , (2014) 9 SCC 657***:

> "31. We may safely conclude that the literal rule of construction may be the primary approach to be utilised for interpretation of a statute and that words in the statute should in the first instance be given their meaning as understood in common parlance. However, *the ESI Act is a beneficial legislation. It seeks to provide social security to those workers as it encompasses. In the light of the cases referred above, it may be seen that the traditional approach can be substituted. A dictionary meaning may be attached to the words in a statute in preference over the traditional meaning*. However, for this purpose as well, the scheme, context and objects of the legislature must be taken into consideration. Taking into due consideration the nature and purpose of the ESI Act, the dictionary meaning as understood in the context of the said Act would be preferable to achieve the objects of the legislature.
>
> 34. In the absence of any definition as provided in the ESI Act, this Court may look into its dictionary meaning for guidance or as an aid of construction of the term "establishment". Dictionaries do define the meaning of a word as understood in common parlance:
>
> 34.1. According to *Black's Law Dictionary*, 7th Edn. (1999), the term "establishment" means, inter alia:
>
> > "*establishment*.— *n*. … (*2*) An institution or place of business."
>
> 34.2. According to *Words and Phrases*, Permanent Edn., Vol. 15, the term "establishment" has been held to mean, *inter alia*, the following:
>
> > "An establishment means a permanent commercial organisation or a manufacturing

establishment. ***Spielman v. Industrial Commission [295 NW 1 : 236 Wis 240 (1940)]*** **,** ***NW*** p. 4."

"An establishment is the place where one is permanently fixed for residence or business such as an office or place of business with its fixtures. ***Lorenzetti v. American Trust Co. [45 F Supp 128 (ND Cal 1942)] , F Supp p. 139.***"

34.3. According to *Corpus Juris Secundum*, Vol. LXXX, the term "establishment" has been explained as follows:

"*Establishment*.— … More specifically, a fixed place where business is conducted, or a place where the public is invited to come and have its work done; an institution or place of business with its fixtures and organised staff; any office or place of business, with its fixtures, the place in which one is permanently fixed for residence or business; a permanent commercial organisation, as a manufacturing establishment; the place of business or residence with grounds, fixtures, equipage, etc., with which one is fitted out; also that which serves for the carrying on of a business.…"

35. Therefore, it can be simply stated that an "establishment" is a term which can have a wide meaning. It would be any place where business is conducted, or in other words, it would be any place of business. Now the question arises whether a "race club" is in the nature of a place where business is conducted. To answer the same, the activities that are undertaken by the appellant Turf Club require to be noticed.

37. The term "establishment" would mean the place for transacting any business, trade or profession or work connected with or incidental or ancillary thereto. It is true that the definition in dictionaries is the conventional definition attributed to trade or commerce, but it cannot be wholly valid for the purpose of constructing social

> welfare legislation in a modern welfare State. The test of finding out whether professional activity falls within the meaning of the expression "establishment" is whether the activity is systematically and habitually undertaken for production or distribution of the goods or services to the community with the help of employees in the manner of a trade or business in such an undertaking. If a systematic economic or commercial activity is carried on in the premises, it would follow that the establishment at which such an activity is carried on is a "shop". This Court, in ***ESICorpn. v. Hyderabad Race Club, (2004) 6 SCC 191 : 2004 SCC (L&S) 855***, keeping in view the systematic commercial activity carried on by the club has held that the race club is an establishment within the meaning of the said expression as used in the notification issued under Section 1(5) of the ESI Act. Therefore, in our considered view, the view expressed by this Court is in consonance with the provisions of the ESI Act and also settled legal principles. Therefore, the said decision does not require reconsideration."
>
> (Underscoring supplied)

52. It is admitted, even by the petitioner, that Respondent No. 2 has been working as its South Asia correspondent for over 14 years, and that the rent for the premises, from which she has been functioning during the said period, has been paid for by the petitioner. In its pleadings before the Labour Court and Hamburg, the petitioneradmitted, further, that the office, at Golf Links, New Delhi, where Respondent No. 2 worked, was being maintained by the petitioner, and was being used as a residence by Respondent No. 2 at her own choice. It was further admitted, in the same pleadings, that several other employees, working in the said office, were also paid by the petitioner. Even in respect of the staff, employees in the said office, regarding whom Respondent No. 2 retained the right to hire,

and fire, permission, from the petitionerat Hamburg, had necessarily to be obtained before taking any such decision. The salaries paid to the said staff were also determined by the petitionerat Hamburg, and, though disbursed physically by Respondent No. 2, was subject to reimbursement by the petitionerat Hamburg. The asseverations, in this regard, as contained in the affidavit-in-evidence tendered by Respondent No. 2, testifying as WW-1, and her evidence, during trial, as well as cross-examination, cumulatively viewed, indicates, inescapably, that the premises at Golf Links, in which Respondent No. 2 lived and worked, were especially provided to her, by the petitioner, in order for her to discharge the duties towards the petitioner. No other work was being transacted from the said premises. It is also an admitted position that, during this entire period, Respondent No. 2 was the accredited South Asia correspondent of the petitioner. In these circumstances, the premises at Golf Links, from where Respondent No. 2 worked and discharged her duties as South Asiacorrespondent for the petitioner, necessarily constituted part of the petitioner's establishment. The plea, of Mr. Dewan, that the petitionercould not be said to have any "newspaper Establishment" in India is, therefore, rejected.

53. As Respondent No. 2 was a "working journalist", "Der Spiegel" was a "newspaper", and the premises occupied by Respondent No. 2 in New Delhi were part of the "newspaper establishment" of the petitioner, the provisions of the Working Journalists Act clearly applied to the present case.

54. It is true that the head office of the petitioneris in Hamburg, Germany. This fact, however, makes no difference, at all, to the present case. The petitioner, having elected to open an office, in New Delhi, in which it had placed its "South Asia correspondent", it was bound, *qua* the said establishment/office, by the laws of this country. Respondent No. 2, being an Indian citizen, working in India, and fulfilling the definition of "workman", as contained in the ID Act and of "working journalist" under the Working Journalists Act, was entitled, consequently, to the protection of both the said statutes. In applying the provisions of the Working Journalists Act, or the ID Act, to Respondent No. 2, therefore, the Court cannot be said to be according, to either of the said statutes, any extraterritorial application. The objection, of Mr. Dewan, on the said score, is also, therefore, without merit.

55. The seminal issue which arises for consideration in the present case is, however, the nature of employment, of Respondent No. 2 by the petitioner, and whether Respondent No. 2 could be said to have been illegally retrenched, by the petitioner, so as to entitle her to reinstatement.

56. The petitioner's contention is that the relationship between Respondent No. 2 and the petitionerwas expressly contractual in nature, continued on a year-to-year basis, but bearing no semblance to permanent employment. Being contractual in nature, the employment of Respondent No. 2 could be terminated, as the petitionerwould seek to contend, at any point of time, and the Labour Court, therefore, materially erred in holding that the termination of the said

relationship, which was but a natural consequence of the non-extension, by the petitioner, of the contract with Respondent No. 2 beyond 30th April, 2012, was illegal. According to the petitioner, there was no duty cast, on it, to continue to extend the contract of Respondent No. 2 in perpetuity, and Respondent No. 2 also continued in her employment in the full awareness of the fact that her relationship, which the petitioner, was, at all times, only contractual in nature, till the 30th of the next April.

57. Jurisprudentially, the submission of the petitionerdoes not pass muster. Indian law does not permit keeping of workmen indefinitely on contract basis, even if by providing artificial breaks. In ***Bhuvnesh Kumar Dwivedi (supra)***, the Supreme Court holds thus:

> "26.2. Secondly, the claim of the respondent that the appellant was a temporary worker is not acceptable to us. On perusal of facts, it is revealed that *his service has been terminated several times and he was subsequently employed again till his service was finally terminated on 27-7-1998. His brief periods of contracts with the respondent have been from 28-12-1992 to 28-12-1993 for the first time, from 3-4-1994 to 29-12-1994 for the second time, from 10-1-1995 to 5-1-1996 for the third time, from 16-1-1996 to 11-1-1997 for the fourth time, from 20-1-1997 to 21-1-1998 for the fifth time and from 27-1-1998 to 27-7-1998 for a final time at the end of which his service was terminated.*
>
> 27. *Very interestingly, the periods of service extends to close to 6 years save the artificial breaks made by the respondent with an oblique motive so as to retain the appellant as a temporary worker and deprive the appellant of his statutory right of permanent worker status. The aforesaid conduct of the respondent perpetuates "unfair labour practice" as defined under*

Section 2(ra) of the ID Act, which is not permissible in view of Sections 25-T and 25-U of the ID Act read with entry at Serial No. 10 in the Vth Schedule to the ID Act regarding unfair labour practices. Section 2(*ra*) reads thus:

> "**2.(*ra*)** '**unfair labour practice**' means any of the practices specified in the Fifth Schedule."

Further, Entry 10 of the Vth Schedule reads as under:

> "**5.** To discharge or dismiss workmen—
>
> ***
>
> **10.** To employ workmen as 'badlis', casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen."

28. The respondent, in order to mitigate its conduct towards the appellant has claimed that the appellant was appointed solely on contract basis, and his service has been terminated in the manner permissible under Section 2(oo)(bb) of the ID Act. However, we shall not accept this contention of the respondent for the following reasons:

28.1. Firstly, the respondent has not produced any material evidence on record before the Labour Court to prove that it meets all the required criteria under the Contract Labour (Regulation and Abolition) Act, 1970, to be eligible to employ employees on contractual basis which includes licence number, etc.

28.2. Secondly, the respondent could not produce any material evidence on record before the Labour Court to show that the appellant was employed for any particular project(s) on the completion of which his service has been terminated through non-renewal of his contract of employment.

> 29. Therefore, we deem it fit to construe that the appellant has rendered continuous service for six continuous years (save the artificially imposed break) as provided under Section 25-B of the ID Act and can therefore be subjected to retrenchment only through the procedure mentioned in the ID Act or the State Act in parimateria.
>
> 30. Therefore, we answer Point (ii) in favour of the appellant holding that the Labour Court was correct in holding that the action of the respondent employer is a clear case of retrenchment of the appellant, which action requires to comply with the mandatory requirement of the provisions of Section 6-N of the U.P. ID Act. Undisputedly, the same has not been complied with and therefore, the order of retrenchment has been rendered void ab initio in law."
>
> (Emphasis supplied)

58. Even in the letter, dated 9th April, 1998, which may be regarded as the *terminus a quo* of the relationship between the petitionerand Respondent No. 2, Respondent No. 2 is referred to as a "freelance *employee*" of the petitioner. There is a distinction between a person who is an employee *of* another, and a person who is employed *by* another. Employment of one person, *by* another, would conceivably cover all cases where money is paid by one, to another, for rendition of services. In contradistinction, if one is regarded as an employee *of* another, which indicates, clearly, the existence of a jural relationship of employee and employer, of the character of servant and master, between the two.

59. The letter dated 9th April, 1998 *supra* goes on, further, to identify the duties, of Respondent No. 2, *for Spiegel Publishers*, which, it is stated, would be "along the lines specified by us in our

discussion; reportage and other writing". For this, the communication goes on to state that Respondent No. 2 would receive a monthly retainer, along with a monthly payment towards the rent of the office/residence at New Delhi. This arrangement, notably, continued for 14 long years, and, in such circumstances, the inescapable conclusion is that the amount which was euphemistically being paid, month by month, to Respondent No. 2, as a "monthly retainer" was, to all intents and purposes, salary. The distinction, being sought to be drawn, by Mr. Dewan, between our "monthly retainership", which was being paid by the petitionerto Respondent No. 2, and salary is, therefore, too tenuous to pass legal muster.

60. In this context, one may profitably refer to Grounds C to E in the writ petition, which read thus:

> "C. FOR THAT the Ld. Labour Court failed to consider that the Contract clearly designated Respondent No 2 as a "Freelance" employee of Respondent No. 2 (*sic* the Petitioner). *The contract was admittedly extended to 12 times on a year-on-year-basis, and continued uninterruptedly for a period of 14 years*, and Respondent No 2 was never treated as a permanent employee of the Petitioner.
>
> D. FOR THAT the Ld. Labour Court also failed to appreciate the Respondent No 2 had herself admitted in her cross-examination that "It is correct that my regularisation did not happen between 1998-2012 *although it was promised verbally.* Thus, in the absence of my regularisation, during the period 1998-2012 I continued as a contractual employee…*"*
>
> E. FOR THAT the Ld. Labour Court failed to appreciate that Respondent No. 2 had herself admitted in her pleadings that Respondent No. 2 "*was assured on*

> *numerous occasions that she would be conferred the status of permanent employee in due course"* and that Respondent No. 2 "*was always considered as a permanent employee while taking work, but treated as contractual while paying for the work*". The same clearly evinces that both the parties recognise Respondent No. 2's status as a freelance employee of the Petitionerand not as a permanent employee. Further, Respondent No. 2 herself had all along treated herself as a freelancer from 1998 onwards and expressed reservation as to her nature of engagement only towards the end of 2010."
>
> (Emphasis supplied)

61. The above passages, from the record of cross-examination of Respondent No. 2, as carried out by the petitionerbefore the learned Labour Court, on which the petitionerseeks to place reliance, are significant and revealing in equal measure. The petitioner, by placing reliance on the said passages, without denying any part thereof, impliedly accepts everything that is stated in the said passages. The petitionerhas, thereby, admitted the fact that (i) the contract of Respondent No. 2 was extended 12 times on a year-to-year basis, (ii) the said contract *continued uninterruptedly for a period of 14 years*, (iii) the petitionerverbally promised to regularise Respondent No. 2, but did not do so, (iv) Respondent No. 2 was assured, on numerous occasions, by the petitioner, that she would be conferred the status of permanent employee in due course, and (v) while taking work, the petitionerwas always considering Respondent No. 2 as a permanent employee, but while making payment to her, was treated her a contractual employee. These depositions, by Respondent No. 2 in cross-examination before the learned Labour Court, have been relied upon, by the petitioner, in the writ petition, without denying any part

thereof. These facts, even by themselves, are sufficient to justify the finding, of the learned Labour Court, that Respondent No. 2 was, effectively, a permanent employee of the petitioner, entitled to be treated as such, and that the petitioner, by keeping her on contract uninterruptedly for 14 years, even without any artificial break, was clearly guilty of unfair labour practice.

62. Interestingly, in Ground F in the writ petition, the petitionercandidly, though, perhaps, unwittingly, seeks to rely on the fact that Respondent No. 2 "had willingly *endured* the contractual extension for 12 years". Having thus endured – as the petitioneritself admits – being continued on contract for 12 years (actually 14 years), the benefits, of such endurance, must, of needs, now enure, to her benefit, as well.

63. Much has been sought to be made of the use of the expression "freelance" in the agreement, dated 9th April, 1998, between the petitionerand Respondent No. 2. The learned Labour Court is, in this context, perfectly correct in observing that the nature of the jural relationship, between the petitionerand Respondent No. 2 would fall to be determined, not merely on the basis of the nomenclature, attributed to the said relationship, in the letter of appointment, but to the character of the employment, as borne out from facts. The communications, dated 4th July, 1998, 5th October, 1998, 6th October, 1998, 17th July, 2001, 30th September, 2002, 8th October, 2003, 6th October, 2004, 26th October, 2005, 12th November, 2007, 10th October, 2008 and 18th November, 2010 from the petitionerto the

Principal Information Officer, Press Information Bureau, the communication dated 7th September, 2005 from the petitionerto the Embassy of the USA at New Delhi, the communication dated 12th July, 2000 from the petitionerto the Director-General, ISPR, Islamabad and the certificate, dated 25th October, 2011, issued by the petitioner, all of which formed part of the record before the learned Labour Court below, clearly acknowledged that Respondent No. 2 was the accredited South Asia correspondent of the petitioner, and was based, for the said purpose, in New Delhi. The petitioneralso undertook to bear all expenses incidental thereto. Periodical requests, to the Press Information Bureau, for extension of the accreditation of Respondent No. 2, were made by the petitioner. Permission for Customs duty exemption, on the laptop, and other items being used by Respondent No. 2, for discharging her functions as South Asia correspondent of the petitioner, was also sought, by the petitioneritself. The tenor of these communications is clear and unmistakable. Not only was Respondent No. 2 the South Asia correspondent of the petitioner; she also appears to have been a much-valued correspondent, with the petitionergoing out of its way to ensure that her tenure was comfortable.

64. The character of the employment, of Respondent No. 2, by the petitioner, as being that of a regular employee, is also underscored by her having been (i) allowed to vote, in yearly elections, to the employee's advisory Council/Union, for which she received a voting slip every year, (ii) issued a German press card by the Association of German Magazine Publishers North e.V, (iii) directed to report,

directly, to the petitionerat Hamburg, (iv) disbursed salary directly from Hamburg, and (v) told to maintain her work timings as per the work timings at Hamburg. It is also borne out by the fact that the agreement, between the petitionerand Respondent No. 2 was drawn in Hamburg, the decision to run, or not to run, the stories of Respondent No. 2, was taken at Hamburg, and permission from Hamburg was required even to travel in connection with work. Besides, Respondent No. 2 reported solely to the Senior Foreign Editor of the petitioner-institution at Hamburg. The manner in which the petitionerused to function, as testified by her during cross-examination, and as extracted in para 12 *supra*, also indicates, clearly and unmistakably, that Respondent No. 2 was working as a paid employee of the petitioner, dedicated entirely to the work of the petitioner. The submission, of Mr. Dewan , that there was no embargo on Respondent No. 2 working for anyone else, and that, if she did not do so, it was of her own will and volition, is too facile to meet with approval; the character of the relationship between the petitionerand Respondent No. 2 was, clearly, such that Respondent No. 2 regarded herself, and the petitionerregarded Respondent No. 2, as working solely for the petitioner. These facts emerged from the evidence during trial, substantially from the examination-in-chief of Respondent No. 2, and her cross-examination by the petitioner, and, in the light thereof, the Labour Court could not be said to have acted illegally, far less with any hint of perversity, in holding that Respondent No. 2 was the employee of the petitioner, and of the petitioneralone. Reliance on the word 'freelance' cannot, in any manner, reflect the nature of her employment. In fact, the terms of the agreement, as stated above,

clearly indicate that the control over her working, the remuneration payable, the timings to be maintained as per work timings at Hamburg, travel which she had to undertake, only with the permission of the petitioner at Hamburg, duly to report to the senior officials at Hamburg, militate against the agreement being one of work as a 'freelance' as legally understood, as meaning "a self employed person offering services not under contract to any single employer" (Chambers 21st century Dictionary, Reprinted 1998). The Respondent No. 2 was admittedly not working for anyone else and, as far as her working is concerned, she was completely controlled by the petitioner's officials at Hamburg. The agreement that she was a 'freelancer', therefore fails. She has, therefore, also to be regarded as a "working journalist", within the meaning of the Working Journalists Act, and as a "workman" within the meaning of the ID Act.

65. Significantly, even in the letter dated 22nd February, 2012 *supra*, whereby the petitioner sought to inform Respondent No. 2 that her contract would not be extended beyond April 2012, it so states that Respondent No. 2 would not, therefore, be entitled to any "*monthly salary or fee thereafter*". The use of the words "monthly salary" indicates, unmistakably, that the petitioner recognised that Respondent No. 2 had been its salaried employee.

66. Apropos the Income Tax returns filed by Respondent No. 2, Mr. Tripathi has submitted that the manner in which Respondent No. 2 may have classified her income, in the said returns, and the deductions claimed on the basis thereof, cannot decide the jural relationship between her, and the petitioner. In case the petitionerwas,

in fact, paying salary to Respondent No. 2, that fact would not stand discountenanced by the declaration, by Respondent No. 2, of the amounts received, by her, from the petitioner, as income from business/profession, or by the claiming of deduction, by her, of the said amount, on that count. At worst, it could constitute the basis for the Income Tax authorities to deny the said deduction. In case Respondent No. 2 has already availed the benefit of the said deduction, that, too, cannot estop her from contending, in the present case, that she was a permanent employee of the petitioner, or at least entitled to be regarded as such.

67. The judgment, of a coordinate Single Bench of this Court in ***New Era Impex (India) Pvt Ltd,*** *Supra*, on which learned counsel for the petitionerseeks to place reliance, is clearly distinguishable. In the said case, the issue related to monies advanced by the plaintiff to the defendant. The fact of advancing of the monies was not in dispute. The defendant sought to contend that, though, in the financial books, the said amounts were described as advance, that was only by way of accounting convenience, whereas the amounts were actually in the nature of gift, given out of natural love and affection, and that they were never intended to be recovered as loan or repaid, which was the reason why neither of the companies that the on the said amounts as payable expense, or receivable income. It was in this context that the learned Single Judge, deciding the suit of the plaintiff, against the defendant, held that, once the defendant had characterised the amounts, received from the plaintiff, in its books of accounts, and before the taxation authorities, as advance, it could not be permitted to

urge, before the Civil Court, that the said money was a gift of love and affection. The learned Single Judge also observed that, under Section 122 of the Transfer of Property Act, 1882, a corporate entity could not make a gift without consideration or part with thisfund in such a manner. As against this, the controversy, in the present case, essentially revolves around the relationship, between the petitionerand Respondent No. 2. The fact of payment of monthly amounts, by the petitionerto Respondent No. 2, is not denied. The fact of discharge of duties, by Respondent No. 2, for the petitioner, for 14 years, also stands established. What falls for consideration, in such a situation, is whether the said amounts would be treated, not as salary, but only as a "monthly retainer". The income tax returns filed by Respondent No. 2 are only being relied upon, by the petitioner, to indicate that Respondent No. 2 had claimed deductions, on the said amounts, treating them as business from income/profession. The factual and legal backdrop of the controversy, in the present case, is entirely distinguishable from that which arose in ***New Era Impex (supra)***. Once all other factors, seen in the light of the applicable law, indicate that Respondent No. 2 was, in fact, being treated as a permanent employee of the petitioner, and was discharging duties as such, under the control of the petitionerand as per the details of the petitioner, for which Respondent No. 2 was receiving a monthly payment, twelve times a year, it would be facile to hold that the said payment was not "salary", irrespective of how Respondent No. 2 may, or may not, have treated the said amounts, while filing her income tax returns. The reliance, on the said returns, by the petitionerhas, therefore, to be necessarily characterised as misplaced.

68. It is trite law that an employer-employee relationship is to be inferred from the following four circumstances (the four-fold test):

(i) the authority which has made the appointment (here, the petitioner);

(ii) the source from which the salary/remuneration emanates (here, the petitioner);

(iii) controlof the employer over the employee in the performance of his functions, (here, the petitioner); and

(iv) the authority to terminate the employment (here, the petitioner, as has been done in the present case).

All these criteria clearly hold out the 'employer-employee' relationship between the petitioner and the Respondent No. 2.

Conclusion

69. In view of the above discussion, it cannot be said that the findings of the learned Labour Court below, or the order passed by it as a consequence thereof, suffers from any such inherent illegality, jurisdictional error, or perversity, as would justify interference, therewith, by this Court, in exercise of the limited jurisdiction conferred, on it, in such cases, by Article 226 of the Constitution of India. I find no reason to differ with the finding, of the Labour Court, to the effect that Respondent No. 2 was, in essence, a permanent employee of the petitioner and not a 'freelancer' and that, having

uninterruptedly served the petitioner, solely and to the exclusion of all others, for 14 years, even without any artificial break, the decision of the petitionerto summarily terminate its relationship with Respondent No.2, by refusing to review the agreement between them beyond 30th April, 2012, amounts to "retrenchment", within the meaning of Section 25-F of the ID Act, read with Section 3 of the Working Journalists Act. The said termination of employment has, therefore, to be characterised as illegal, and the learned Labour Court cannot be said to have fallen into error in so holding.

70. I was of the view that, possibly, an amicable resolution, to the controversy, could be achieved, for which purpose the parties were referred to mediation. However, the said efforts proved futile.

71. As a result, this Court has no option but to uphold the impugned Award of the learned Labour Court *in toto*.

72. The writ petition is, therefore, dismissed.

73. This judgment shall not, however, preclude the petitioner and Respondent No. 2 from continuing to explore the possibility of an amicable resolution of the differences between them.

74. No costs.

C. HARI SHANKAR, J

MAY 20, 2019/HJ