

(1997) 08 BOM CK 0033

In the Bombay High Court

Case No : O.O.C.J. Writ Petition No. 1539 of 1996

Ballubhai Javerbhai Panchal

APPELLANT

Vs

Sandesh Limited and Another

RESPONDENT

Date of Decision : 13-08-1997

Acts Referred:

Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 — Section 10, 2, 3

Citation : (1997) 08 BOM CK 0033

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Mr. R.J. Kochar, for the Appellant; Mr. K.S. Bapat, for the Respondent

Judgement

R.M. Lodha, J.—The petitioner Ballubhai Javerbhai Panchal impugns the order dated 16.11.1995 passed by the Industrial Court, Maharashtra at Bombay in Reference (II) No. 479 of 1982 whereby the said Industrial Court rejected the reference.

2. In the reference made by the Government of Maharashtra u/s 10 of the Industrial Disputes Act, 1947 the industrial dispute referred for adjudication between the parties was whether Shri Ballubhai J. Panchal should be reinstated with full back wages and continuity of service with effect from 8.3.1965.

3. The said industrial dispute arises from the facts which are narrated briefly herein. According to the petitioner he was appointed on 31.12.1958 by respondent no. 1 as news photographer vide appointment order of the even date effective from 15.1.1959. The Petitioner was appointed for Cine Weekly "Chitrajyot" published by respondent no. 1 on monthly remuneration of Rs. 100/- including all allowances. According to the order dated 31.12.1958 besides the above amount, the petitioner was to be given Rs. 5/- for each photographs sent by the petitioner and published by respondent no. 1 "Chitrajyot". The petitioner was to send the respondent no. 1 exclusive news and special features and he was not allowed to work for any other paper of Ahmedabad. The petitioner claims

that his work was found highly satisfactory by the respondent no. 1 would accept for publication photographs from the petitioner of the minimum value of Rs. 300/- per month and that the petitioner would be paid a sum of Rs. 400/- per month on an average including monthly salary of Rs. 100/-. He was sending photographs of various film functions, film actors and actresses and events that took place at various shooting locations. He also used to forward the respondent no. 1 various news items pertaining to film industry and special features in that regard. The petitioner claims that he was a working journalist as defined under the Working Journalists (Condition of Service) and Miscellaneous Provisions Act, 1955 (for short "the Act of 1955"). In or about November 1964, there was an exchange between the petitioner and the Chairman of respondent no. 1 over his demand for increasing his salary. By the letter dated 26.11.1964 the 1st respondent informed the petitioner to discontinue the arrangement of the petitioner sending the 1st respondent various news items at Ahmedabad and only the arrangement of sending photograph was to continue. This act of the respondent no. 1 according to the petitioner, was an act of victimization for raising a demand for increase in salary. On 8.3.1965, the respondent no. 1 informed the petitioner that he should not send the photographs and the arrangement with the petitioner was terminated. The petitioner raised the grievance by sending the notice through his Advocate on 24.5.1965 to the respondent no. 1 to which reply was received by the petitioner whereby the respondent no. 1 denied the claim of the petitioner. After receipt of the reply in the month of June 1965, the petitioner filed a Civil suit in the Court of Bombay City Civil Court, Mumbai, inter alia, challenging his termination as illegal, void and of no effect and also for recovery of salary, travelling allowance and charges for photographs. The respondent no. 1 raised the objection of jurisdiction of Civil Court to decide and try the issues raised by the petitioner in the suit and the Bombay City Civil Court by the order dated 28.2.1978 dismissed the suit on the ground that it had no jurisdiction in the matter. It appears that the petitioner filed a complaint on 23.3.78 before the Government Labour Officer and invoked the machinery under Industrial Disputes Act, 1947. The matter was taken up in conciliation but that failed and failure report was submitted. The State Government however, on 24.4.1979 refused to refer the dispute raised by the petitioner for adjudication to the Industrial Tribunal. The Petitioner challenged the action of the State Government in refusing to refer the dispute for adjudication by filing the writ petitioner before this Court. This Court on 25.6.1979 allowed the writ petition, set aside the order dated 24.4.79 passed by the State Government and directed the State Government to make the reference of this industrial dispute raised by the petitioner. In view of the directions given by this Court, the State Government referred the dispute of the petitioner seeking reinstatement with full back wages to the Industrial Tribunal. The petitioner filed a statement of claim to which written statement was filed by Respondent No. 1. The petitioner filed his affidavit accompanying by number of documents. He was cross-examined on behalf of respondent No. 1 Shri K. C. Shah and P. G. Joshi were examined as witnesses on behalf of the respondent

no. 1. As observed above, the Industrial Court by the impugned award dated 16.11.1995, rejected the reference on the ground that the petitioner has failed to establish the relationship of employer and employee with respondent no. 1.

4. Mr. Kochar, the learned counsel appearing for the petitioner, argued the matter at quite some length and emphasised that the Industrial Court has not adverted to various documents submitted by the petitioner alongwith his affidavit. He argued that if the Industrial Court had referred to these documents, relationship of employer and employee was fully established. According to the learned counsel for petitioner, the petitioner was able to establish before the Industrial Tribunal that he was working journalist under the Act of 1955. In the alternative, the learned counsel for the petitioner submitted that the petitioner was newspaper employee and, therefore, also the termination was bad and even if it is held that the petitioner was not newspaper employee, the petitioner proved that he was a workman and since the termination was in violation of mandatory provisions of Section 25F of the Industrial Disputes Act, the termination was bad in law.

5. On the other hand, Mr. Bapat, the learned counsel appearing for the respondent no. 1 supported the order passed by the Industrial Tribunal. He read the entire cross-examination of the petitioner to bring home the point that according to the evidence of the petitioner himself the respondent no. 1 was not his sole employer and, therefore, the Industrial Tribunal did not commit any error in rejecting the reference. In support of his contention he relied upon the decision of the Apex Court in *The Management of Express Newspapers Ltd. Vs. B. Somayajulu and Others*, . The learned counsel for respondent no. 1 also urged that at no point of time any case was set up by the petitioner that he was newspaper employee or workman simpliciter under the Industrial Disputes Act and, therefore, neither any evidence was led to that effect nor the Industrial Court adverted to those questions. The learned counsel for the respondent no. 1 also urged that even if it be assumed that there was relationship of employer and employee between the respondent no. 1 and the petitioner and that termination was bad in law, the fact that the alleged termination of 1965 was referred for adjudication for the first time in the year 1976 and by that time the petitioner has already attained the age of superannuation, he was not entitled to any relief whatsoever.

6. I have given my thoughtful consideration to the rival contentions raised by the learned counsel for the parties and perused the impugned awards as well as the relevant available record.

7. The petitioner has placed on record his appointment order dated 31.12.1958 as Exhibit "A" along with the writ petition which reads thus :

"We have pleasure to appoint you as our Part-Time representative and Photographer at Bombay on and from 15/1/59 for our Cine Weekly "CHITRAJYOT" on monthly remuneration of Rs. 100/- (Rupees One hundred only)

including all allowances.

Besides the above amount will be given Rs. 5/- for each photographs sent by you and published by us.

You will have to send us exclusive news and special features, you will not be allowed to work for any other paper of Ahmedabad."

Referring to the expression "appoint", "exclusive news" will not be allowed to work for any other paper of Ahmedabad" and "remuneration", the learned counsel for the petitioner sought to urge that the petitioner was appointed as part time representative photographer by the respondent no. 1 and that clearly established the relationship of employer and employee between the parties and that the petitioner is covered by the definition of working journalist u/s 2(f) of the Act of 1955 as was existing at the relevant time. The learned counsel for the petitioner read some documents which have not been annexed with the writ petition but which according to him were annexed alongwith his affidavit. In my view the expression "appoint", "monthly remuneration", "exclusive news" and "will not be allowed to work for any other paper of Ahmedabad" in the appointment letter cannot lead to the conclusion that the petitioner is working journalist within the meaning of Section 2(f) of the Act of 1955. To establish relationship of employer and employee, the petitioner who claims to be journalist was required to establish the nature of the duties, directions and control by the respondent no. 1 and that the employer was the sole employer. The cross-examination of the petitioner demolishes the entire case set up by the petitioner in the statement of claim and the submission made in the affidavit alongwith large number of documents annexed with the affidavit. In his cross-examination the petitioner admitted that he was working as freelancer photographer for Chitralok earlier to the arrangement with Chitrajyot, published by respondent no. 1. He admitted that as a photographer he used to take the photographs of the cinestars for various functions and also used to send the photographs to other magazines namely, Chitrapat, Maoujama, Screen, and Shama of Delhi. He was paid by these magazines per photograph. After joining with the Chitrajyot, he continued the said activities except that he stopped sending photographs to Chitralok. He also admitted in his cross-examination that when he was attending to Chitrajyot he continued to send photographs to all magazines except Chitralok of Gujarat Samachar at Ahmedabad. He sought to explain his activities as freelancer photographer by stating that by freelancer he meant that he was not attached to any particular paper. He also admitted in his cross-examination that he was not enjoying other service benefits of the employees employed by respondent no. 1 nor his work was supervised by anybody. The aforesaid statements made by the petitioner in the cross-examination leave no manner of doubt that the petitioner failed to prove that respondent no. 1 was his sole employer. On the other hand, it is seen from the cross-examination of the petitioner that he was working for large number of the film magazines. There was no supervision by the respondent no. 1 and he used to attend the functions

as freelancer photographer on his own on getting the information and invitation. The petitioner failed to establish the manner of the Control over the work done by him. He used to attend the functions of his own and there were no directions from the respondent no. 1.

8. The working journalist is defined u/s 2(f) of the Act of 1955 which reads thus :

"Working journalist", means a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to, any newspaper establishment, and includes an editor, a leader-writer, news editor, sub-editor, feature-writer, copy-setter, reporter, correspondent, 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.

9. By Section 3 of the Act of 1955, the provisions of the Industrial Disputes Act were made applicable to working journalists subject to modification of the provisions of Section 25F of the Industrial Disputes Act. The definition of the "working journalist" occurring in Section 2(b) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Act 1 of 1955) came up for interpretation before the Apex Court in Express Newspapers (supra). The definition of working journalist under the Act No. 1 of 1955 was followed by the present Act of 1955 i.e., Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (No. 45 of 1955). The Apex Court in Express Newspapers observed that the definition prescribed by Section 2(f) of the definition prescribed by Section 2(b) of the earlier Act i.e. Act No. 1 of 1955 and so for the purpose of case in hand before the Apex Court, it was observed that whatever was said about the scope and effect of the definition, of Section 2(b) in the earlier Act No. 1 of 1955 will apply to the definition presented by Section 2(f) of the latter Act i.e. Act No. 45 of 1955. On construction of the said definition the Apex Court observed that the definition of the working journalist consist of two parts, the first part provides what the working journalist means and the second part brings within its purview by an artificial extension certain specified categories of newspaper employees. The Apex Court emphasised that the first condition is that he must be a journalist whose principle avocation is that of a journalist and the second condition is that he must be employed as such in, or in relation to any establishment. By elaborating the second condition, the Apex Court observed that if such person seeks the status of working journalist, he must prove his employment because that alone would create a relationship of employer and employee between him and the newspaper establishment. The Apex Court highlighted that in the context, employment must necessarily postulate exclusive employment and he cannot serve two employers. The Apex Court of course clarified that the sole employment may be whole time or part

time. Paragraphs 8, 9 and 10 of the said report read thus :

(8) In dealing with the question as to whether the respondent can be said to be a working journalist, it is necessary to read the definition prescribed by S. 2(b) of the Act :

"Working journalist means a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to, any establishment for the production or publication of a newspaper or in or in, relation to, any news agency or syndicate supplying material for publication in any newspaper, and includes an editor, a leader-writer, news-editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, 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, exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature".

It is plain that the definition prescribed by S. 2(b) consists of two parts; the first part provides what a working journalist means, and the second part brings within its purview by an artificial extension certain specified categories of newspaper employees. It would be noticed that the first part provides for two conditions which must be satisfied by a journalist before he can be held to be a working journalist. The first condition is that he must be a journalist whose principal avocation is that of a journalist, and the second condition is that he must be employed as such in, or in relation to, any establishment as there specified. The first question arises for our decisions is whether the two conditions thus prescribed by the first part of the definition govern the categories of newspaper employees included in the definition by the artificial extension made by the including clause. The High Court has taken the view that the categories of employees who are included in the definition by name, need not satisfy the two conditions prescribed by the first part. The argument is that since a correspondent, for instance, has been named in the second clause, the whole object of the legislature was to make him a working journalist without requiring to satisfy the two conditions prescribed by the first part. In our opinion, this construction is plainly erroneous. The object of the second clause was to make it clear that the employees specified in that clause are journalist and nothing more. The word "journalist" has not been defined in the Act and the legislature seems to have thought that disputes may arise as to whether a particular newspaper employee was a journalist or not. There can, of course, be no difficulty about an editor or a leader-writer, or a news editor or a sub-editor being regarded as a journalist; but it was apparently apprehended that a difficulty may arise, for instance, in the case of a correspondent, at a proof reader, a cartoonist, a reporter, a copy-tester, or a feature writer, and so, the legislature took the precaution of providing specifically that the employees enumerated in the latter

clause are to be regarded as journalists for the purpose of the definition prescribed by S. 2(b). The object of the artificial extension made by the including clause is not to dispense with the two main conditions prescribed by the definition before a journalist can be regarded as a working journalist. There can be no doubt that even the employees falling under the extended meaning must be employed as such. It is thus obvious that the second requirement prescribed by the first clause that the journalist must be employed as such in, or in relation to, any establishment for the production or publication of a newspaper, as therein specified, has to be satisfied by the employees falling under the latter clause, because unless there was an employment by the newspaper establishment, no relationship of employer and employee can arise, and the journalists specified in the latter clause could not, therefore, claim the status of working journalist qua the employer who manages the journal in question. Once it is realised that the test of employment must govern employees specified in the latter clause, it would become clear that the High Court was in error in assuming that the extended artificial definition of the working journalist dispensed with both the conditions prescribed by the first part of the said definition. That is why we think the extension was made by the word "includes" only for the purpose of removing any doubt as to whether the persons specified in the said clause are journalist or not. What is true about the conditions as to employment is equally true about the other condition that a journalist can be a working journalist only where it is shown that journalism is his principal avocation. In other words, the position is that whenever an employee working in the newspaper establishment claim the status of a working journalist he has to establish first that he is a journalist, and then that journalism is his principal avocation and he has been employed as such journalist. In proving the fact that he is a journalist, the employees specified in the latter clause need not prove anything more than this that they fall under one or the other category specified in the said clause. But that only proves their status as journalist; they have still further to show that their principal avocation is that of a journalist and that they have been employed as such by the newspaper establishment in question.

(9) That takes us to the question as to what is meant by avocation ? The High Court thought that the dictionary meaning of the word "avocation" which showed that it meant "a distraction or diversion from one's regular employment", could be adopted in the context of S. 2(b). In support of this view, the High Court has cited a passage from Fowler in Modern English Usage. Fowler says :

Avocation originally, a calling away, an interruption, a distraction, was for some time commonly used as a synonym for vocation or calling, with which it is properly in antithesis. This misuse is now less common, and the word is generally used in the plural, a person's avocation being the things he devotes time to, his pursuits or engagements in general, the affairs he has to see to, his vocation as such is neither excluded from nor necessarily included in, his avocation."

Applying this dictionary meaning of the word "avocation" the High Court has held

that even if the respondent has to satisfy the first condition prescribed by the first part of S. 2(b), it can be held that he satisfied the said text, because the work of a correspondent in his case be safely said to be his principal avocation in the sense of distraction or diversion from his regular employment. In our opinion, in applying mechanically the dictionary meaning of the word "avocation" without due regard to the context of S. 2(b) the High Court has adopted a somewhat pedantic approach. One has merely to read the definition to realise the word "avocation" used in S. 2(b) cannot possibly mean a distraction or diversion from one's regular employment. On the contrary, it plainly means one's vocation, calling or profession. The plain idea underlying S. 2(b) is that if a person is doing the work, say of a correspondent, and at the time is pursuing some other calling or profession, say that of a lawyer, it is only where his calling as a journalist can be said to be his principal calling as a journalist can be said to be his principal calling that the status of a working journalist can be assigned to him. That being the plain object of S. 2(b), it would we think, be on the whole, inappropriate to adopt the dictionary or the etymological meaning of the word "avocation" in construing S. 2(b). We ought to add that Mr. Menon who appeared for the respondent did not attempt to support the approach adopted by the High Court in dealing with this point. Therefore, when a question arises as to whether a journalist can be said to be a working journalist, it has to be shown that journalism of whatever kind contemplated by S. 2(b) is the principal avocation of the person claiming the status of a working journalist and that naturally would involve an enquiry as to the gains made by him by pursuing the career of a journalist as compared with the gains made by him by the pursuit of other callings or professions, it is obvious that this test will be merely academic and of no significance in the case of full time journalists, because in such cases the obvious presumption would be that their full time employment is their principal avocation and no question of comparing their income from journalism with income from other sources can arise. In fact the status of such full time journalist as working journalist will not be affected even if in some cases the income received by them from such employment may be found to be less than, say for instance, the income from their ancestral property. This test assume significance and importance only in the case of journalist who are employed on part time basis.

10. Reverting to the second requirement of employment which we have already seen must obviously govern the employees falling under the latter part of S. 2(b) if they seek the status of working journalists, it is plain that an employment must be proved, because that alone will create a relationship of employer and employee between them and the newspaper establishment. Unless there is an employment, there can be conditions of service and there would be no scope for making any claim under the Act. Thus the requirement of employment postulates conditions of service agreed between the parties subject to which the relationship of master and servant comes into existence. In the context, employment, because a working journalist cannot serve two employers, for that would be

inconsistent with the benefits which he is entitled to claim from his employer under the Act. Take the benefit of retrenchment compensation, or gratuity, or hours of work, or leave, how is it possible for a journalist to claim these benefits from two or more employers ? The whole scheme of the Act by which the provisions of the Industrial Disputes Act have been made applicable to working journalists, necessarily assumes the relationship of employer and employee and that must mean exclusive employment by the employer on terms and conditions of service agreed between the parties. Normally, employment contemplated by S. 2(b) would be full time employment; but part time employment is not excluded from S. 2(b) either. Most of the employees falling under the first clause of S. 2(b) or even under the artificial extension prescribed by the later clause of S. 2(b) would be full time employees. But it is theoretically that a news photographer, for instance, or a cartoonist may not necessary be a full time employee. The modern trend of newspaper establishment appears to be to have on their rolls full time employees alone as working journalists; but on a fair construction of S. 2(b), we do not think it would be possible to hold that a part time employee who satisfies the test prescribed by S. 2(b) can be excluded from its purview merely because his employment is part time."

10. The question, therefore, arises that applying the tests laid down by the Apex Court, can it be said that the petitioner has established that he was working journalist. Even if it assumed that the petitioner proved that he was journalist and his principal avocation was that of the journalist, the second requirement of exclusive employment has not been established by the petitioner and therefore, the petitioner cannot be held to be working journalist. A news photographer may not be full time employee. He may be part time employed by the newspaper establishment but if the said newspaper establishment is the one and the only employer, obviously such news photographer would be a working journalist but from the evidence on record it is not established that for petitioner there is only one employer. Obviously such a person cannot and will not fall within the category of working journalist. In the present case, I have already referred to the cross-examination of the petitioner wherein he admitted that he was attending the functions as the freelancer photographer on his own on getting information and invitation and that he was sending the photographs to all magazines except Chitralok to which he was sending earlier to the joining the Chitrajyot, the publication of respondent no. 1. He admitted that by freelancer he meant that he was not attached to a particular paper. The petitioner, therefore, cannot be said to have established that respondent no. 1 was his sole employer and the appreciation of the evidence by the Tribunal cannot be faulted.

11. The learned counsel for the petitioner urged that earlier to the raising of the industrial dispute, the petitioner has filed a suit and in the said suit the Civil Court held that it had no jurisdiction because the petitioner was covered under the Act of 1955, and therefore, in the present proceedings the Industrial Tribunal could not have held that the petitioner was not working journalists. The argument of the learned counsel for the petitioner apparently is without any

substance. Whether the civil court has jurisdiction or not has not been decided on the basis of the averments made in the plaint and since the petitioner who filed the suit in the plaint set out a case that he was working journalist covered under the Act of 1955, the civil Court held that on the basis of the said pleadings, it had no jurisdiction and jurisdiction of civil court was impliedly barred and excluded. The said finding given by the Civil Court was not based on the admission of the respondent no. 1 that the petitioner was working journalist as was sought to be made out by the learned counsel for the petitioner. As a matter of fact in paragraph 8 of the written statement, the respondent no. 1 clearly denied that the petitioner was governed by Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 and the rules framed thereunder. There was no admission by the respondent no. 1 in the written statement that the petitioner was working journalist. It was for the petitioner to establish before the Industrial Tribunal that he was working journalist which he failed to establish and the finding recorded by the Industrial Tribunal cannot be said to be unjustified on the basis of the petitioner's own statement in the cross-examination.

12. The contentions raised by the learned counsel for the petitioner in the alternative that even if the petitioner is held not to be working journalist, he was newspaper employee under the Act of 1955 or was workman under the Industrial Disputes Act cannot be accepted because the entire case of the petitioner in the statement of claim before the Industrial Tribunal was that he was working journalist and governed by Act of 1955 and in view of violation of the provisions of Sec. 25 of the Act of 1947 as amended by the Act of 1955, his termination was not in law. The petitioner therefore cannot be permitted to make out a new case before this Court in writ petition under Art. 226 of the Constitution of India that even if the petitioner is not held to be a working journalist he is newspaper employee under the Act of 1955 or workman under the Act of 1947. Once the relationship of employer and employee has not been established by the petitioner in the context of sec. 2(f) of the Act of 1955, the petitioner cannot fall back on the case which was neither pleaded before the Tribunal nor urged.

13. Even if, for arguments sake, it is assumed that petitioner was working journalist, in my view, in the facts and circumstances of the case, the petitioner cannot be held entitled to any relief. Admittedly, the petitioner's service came to an end on 8.3.1965. For the first time the petitioner approached the Government Labour Officer and invoked the conciliation machinery under the Industrial Disputes Act on 23.3.1979 i.e. after 14 years of his alleged termination. There is no dispute that by that time on petitioner's own showing he had attained age of superannuation. Laches and delay are the circumstances which are taken note of in all sorts of litigation and disputes. It is true that the petitioner filed the civil suit challenging the termination in the year 1965 itself and the said suit was dismissed on the ground that the Civil Court has no jurisdiction on 29.10.1978 but the fact of the matter is that a wrong remedy was chosen by the petitioner on his own for which the respondent No. 1 cannot be blamed nor can he be made

to suffer for the wrong remedy availed of by the petitioner. Even at the date of making reference, the petitioner was not entitled to any reinstatement on petitioner's own showing. In this view of the matter also, the impugned order does not call for any interference.

14. The writ petition accordingly has no merit and is dismissed with no order as to costs.