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July 31.

M/S. KIRLOSKAR OIL ENGINES

v.

HANMANT LAXMAN BIBAWE

(P. B. GAGENDRAGADKAR, K. C. DAS GUPTA and J. R. MUDHOLKAR, JJ.)

Industrial Dispute—Master and servant—Workman concerned in dispute—Police scheme for providing watchman at request—Who is employer—Industrial Disputes Act, 1947 (14 of 1947), s. 33A.

The respondent was engaged by the appellant as a watchman under a scheme framed by the Police Department. His services were discharged pending an industrial dispute between the appellant and its workmen. The respondent complained to the Industrial Tribunal under s. 33A of the Industrial Disputes Act. The Tribunal accepted the application. The appellant contended that the respondent was not its employee. The scheme provides that private persons requiring the services of watchmen may apply to the District Superintendent of Police who supplies a watchman if one suitable is available under the scheme. The amount towards pay is recovered in advance each month by the District Superintendent of Police and credited to the watchman's fund. After deducting Rs. 250 towards the uniform supplied, the rest is paid by the police Department to the watchman. The Department requires the persons to whom the watchman is supplied to give a fortnight's notice if it is desired to dispense with the services of the watchman. The watchmen are mustered at the Police Station and their work supervised by the Police night patrol. They are under the disciplinary control of the District Superintendent of Police.

Held, that the decision of the question whether a person is the employee of another or not has to depend on the facts and circumstances of each individual case. The test as to who is entitled to tell the employee the way in which he is to do the work on which he is engaged though in a given case satisfactory it would be unreasonable to treat that test as the most satisfactory as a general rule. Having regard to all the relevant facts the respondent cannot be said to be the employee of the appellant and could not claim to be an industrial employee concerned in the pending Industrial Disputes.

Shivanandan Sharma v. *Punjab National Bank*, [1955] 1 S. C. R. 1427, referred to.

Docks & Harbour Board v. *Googinns and Griffith (Liverpool)* Ltd., [1947] A. C. 1, held inapplicable.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 523 of 1961.

Appeal by special leave from the award dated September 2, 1960, of the Industrial Tribunal, Maharashtra at Bombay in Complaint (I. T.) No. 38 of 1960.

I. N. Shroff, for the appellants.

K. R. Choudhri, for the respondent.

1962. July 31. The Judgment of the court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR, J.—The respondent Bibawe made an application to the Industrial Tribunal at Bombay under s. 33-A of the Industrial Disputes Act, 1947. He alleged that he had been employed by the appellant M/s. Kirloskar Oil Engines, Limited, as a watchman since July 21, 1958, and that he had been working as such watchman with the appellant and had become its permanent workman. On May 15, 1960, the Security Officer of the appellant Company intimated to him that he had been discharged from service with efect from that date. The respondent urged that at the time when this order of discharge was orally served on him, an industrial dispute was pending between the appellant and its employees before an Industrial Tribunal and as such the respondent could not be discharged by the appellant without obtaining the approval of the Industrial Tribunal. In other words, his case was that his discharge was in contravention of the provisions of s. 33 and that is the basis of his application under s. 33-A.

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The appellant denied that the respondent was its employee. It pleaded that the respondent's services had been made available to the appellant by an arrangement, the terms of which clearly indicated that even whilst the respondent was working as a watchman of the appellant, he was not the employee of the appellant in the legal sense. That being so, it was argued that s. 33 was not contravened and the application under s. 33-A was incompetent.

It would thus be seen that the narrow point of dispute between the parties before the Tribunal was whether or not the respondent was the appellant's employee and as such could be said to be a workman concerned in the dispute which was pending industrial adjudication at the time of his discharge. The Tribunal set forth the rival contention of the parties on this point and observed that it could not accept either of the extreme contentions taken by both the sides; even so in substance the Tribunal seems to have taken the view that s.33 had been contravened by the appellant and so an order has been passed directing the appellant to reinstate the respondent with full back wages from the date of his discharge. It is against this order that the appellant has come to this Court by special leave.

On behalf of the appellant Mr. Shroff contends that the view taken by the Tribunal that the respondent was the appellant's employee is plainly inconsistent with the scheme under which the respondent began to work as a watchman of the appellant and he argues that the oral evidence adduced by the parties in the present proceedings also show that the conclusion of the Tribunal is erroneous. In our opinion this contention is well founded and must be upheld.

Turning to the scheme under which the respondent was asked to do the work as a watchman by

the appellant, most of its material terms emphatically bring out the fact that the respondent cannot be treated as the appellant's employee and cannot claim the status of an industrial employee. It appears that the scheme has been evolved by which watchman are supplied by the police Department to different employers and this scheme was evolved because it was found that there was a demand for such watchman by private individuals. There are several paragraphs which set out the material terms and conditions of the scheme. The private person who require the services of watchman have to apply to the District Superintendent of Police. The District Superintendent of Police supplies a watchman if he thinks a suitable watchman is available. The amount on account of pay of the watchman is recovered per month in advance from the employer. This amount has to be credited to the Watchman Fund on receipt of advance bills submitted from the office of the Superintendent of Police. Out of the amount thus recovered from the employer Rs.5/8/- per month are deducted on account of the cost of clothing supplied and the balance is paid to the watchman. It is significant that the I.O.P. is authorised to vary this rate in any district under his control subject to the maximum of Rs. 30/- per annum. The work done by the watchman is supervised by the subordinate police, particularly at night by the night patrols who know where police watchmen are employed and look them up to see if they are alert. The men thus sent as watchmen are mustered for duty in the police section in which their emyloyer's bungalows are situated. They are paid by the Superintendent of Police direct like ordinary police. They are entirely under the departmental control and orders of Superintendent of Police and he alone can fine or punish them; the employers are not authorised to do so. In supplying watchmen the Superintendent has to be very

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careful to see that the employer who asks for a watchman is a person likely to be punctual in his payments and likely to pay without the amount having to be demanded and without correspondence. An employer is requested to give a fortnight's notice in case he wants to dispense with the service of the watchman. The credits on account of the pay of watchmen are made to the Watchman Fund. Under this system the Superintendent of Police is the agent through whom such watchmen are employed and he alone is vested with such powers as vest in a master over his servant, and he takes this special duty upon himself in the interest of the public safety which it is his duty to secure. These are the main features of the scheme under which the respondent's services were made available as watchman to the appellant.

It would be noticed that almost each one of these terms emphatically brings out the fact that though the respondent was working as a watchman of the appellant, strictly speaking in law the relationship of master and servant did not subsist between the two. The payment was not made directly by the appellant to the respondent. He could not supervise his work; he could not take any action against him in case his conduct was found to be unsatisfactory and in terms the scheme provides that it is the D. S. P. in whom the rights of the master vested qua persons like the respondent whose services were loaned to private individuals. In our opinion having regard to these terms of the scheme it is difficult to accept the view taken by the Tribunal that the respondent was an employee of the appellant, that he was an industrial employee and therefore he was a workman concerned in the dispute which was pending adjudication on the date of his discharge.

When we turn to the oral evidence, the position is just the same. The respondent gave evidence

in support of his case. He admitted that after he was selected he was instructed by the appellant to go the Police Office and take uniform so that he took the uniform from the Police Office. When he joined service he was asked to fill a form and it may be that whilst he was working as a watchman some orders may have been given to him by the appellant's officer. The respondent stated that when he took casual leave, sick leave and privilege leave he applied to the appellant; but this statement does not appear to be correct in view of the terms of the scheme to which we have already referred and in view of the categorical statement made by Mr. Chorpade the Sub-inspector. Mr. Chorpade stated that leave is sanctioned by the police office; though he added that if the watchman wants casual leave he sometimes makes application through the employer or direct to the office, so that it would not be correct to suggest that sick leave, privilege leave or casual leave were granted to the respondent as a matter of course by the appellant. The respondent admitted that he and the other watchmen were taken to the gate of Kirloskar Company by Police Jamadar when they were interviewed and he admitted that Mr. Pansare came once or twice a month and enquired with the management about the quality of the work of the watchmen. He also admitted that his wages were not decided by any talk between him and appellant. When we turn to the evidence of Mr. Chorpade we find that the terms of employment and the subsequent treatment of the respondent by the appellant as watchmen were all consistent with the condition of the system to which we have already referred. The uniform supplied to the watchmen is no doubt a little different from the constable's uniform, but it is prepared according to Rule 426 of The Police Manual. These watchmen are given buckle number and the uniform supplied

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to them cannot be worn by a private person. A Jamadar is posted at the Police Station and he supervises over all the watchmen employed. At the place of duty one senior watchman is asked to supervice the work of watchmen. The Jamadar at the Kirloskar Oil Engines is a senior watchman. His pay is fixed by the D.S.P. In factories where there are 10 or 15 watchmen the factory sends hajri of all watchmen to the Police Office in the first week of the month for the preceding month. In the police station there is muster roll for marking attendance. If the D.S.P. comes to know that the watchman's duty in not satisfactory he can withdraw him. The police staff also go for checking and if a watchman is found absent or indulging in undesirable activities he in withdrawn even without the consent of the owner. The power to withdraw vests in the D.S.P. and so is the power to transfer. It would thus be seen that this oral evidence also corroborates the conclusion which follows irresistibly from the conditions of the system under which the respondent's service was secured by the appellant. Therefore it seems to us that the Tribunal was in error in holding that the respondent is the appellant's employee.

For the respondent Mr. Chaudhury has referred to a decision of this Court in *Shivnandan Sharma v. The Punjab National Bank Limited.* (1) In that case this Court had occasion to consider the question as to the tests which should be applied in determining whether a particular person is the employee of another or not. In discussing this question this Court observed that the decision of such a question would always depend on the facts and circumstances of each individual case. Then a passage was quoted from the speech of Lord Porter in which Lord Porter observed:-

(1) [1955] 1 S.C.R. 1427, 1443.

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regared to the subject-matter under discussion but amongst the money tests suggested I think that the most satisfactory, by which to as certain who is the employer of any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged.

Naturally Mr. Choudhury very strongly relies on the last mentioned test and he contends that it is the appellant who used to tell the respondent the way in which he should do the work of watching and so the respondant should be taken to be the appellan't employee. In our opinion as Lord Porter himself has observed the decision of the question as to the relationship of employer and employee must be determined in the light of all relevant facts and circumstances and it would not be expedient to lay down any particular test as decisive in the matter. A test which may be important, and which may appear even as decisive in one set of circumstances, may not be importaut or decisive at all in the circumstances of other cases. It is true that Lord Porter's observation on which Dr. Chondhury relies some to treat the particular test as most satisfactory; but, with respect, though the said test may have been satisfactory in the facts of the case with which Lord Portar was dealing, it would, we think, be unreasonable to treat that test as most satisfactory in all cases as a general rule. Take, for instance the common case where an industrial establishment allots to the bungalows occupied by its officers gardeners and watchmen. These gardeners and watchmen are the

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employees of the industrial establishment, are paid by them and are subject to their control and supervision. Even so, in doing their work as gardeners and watchmen from day to day, they would naturally take orders from the establishment's officers who, for the time being, are in occupation of the bungalows. The officers in occupation of the bungalows may change from time to time and the watchmen and gardeners may also be transferred from one bungalow to another by the establishment. It is plain that though the watchmen and gardners would take their orders from the occupants of the bungalows, they can not be said to be the servants of the officers who occupy the bungalows during their tenure of office. It would thus be seen that the test as to who is entitled to tell the employee the way in which he is to do his work would completely break down in such a case. That is why we are not prepared to accept Mr. Choudhury's argument that this particular test is of universal application and can be held to be satisfactory in all cases.

In the present case, where the respondent became the watchman of the appellant under a scheme which has been evolved for supplying watchmen to private employers, the fact that the private employer may issue orders to the watchmen will not be an important consideration at all. It is the other terms and conditions of the system under which the arrangement has been made which may have to be borne in mind and it is in the light of all the relevant facts that one has to reach the final decision. Having regard to all the relevant facts in this case, we are satisfied that the respondent cannot be said to be an employee of the appellant; and so, he cannot claim to be an industrial employee and as such, a workman concerned in the above

industrial dispute pending adjudication at the relevant time,

The result is that the appeal must be allowed the order passed by the tribunal set aside and the respondent's application under s. 33-A is dismissed. There will be no order as to costs.

Appeal allowed.

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ABDUL MATEEN

v.

RAM KAILASH PANDEY AND OTHERS

(B. P. SINHA, C. J., K. N. WANCHOO, and J. C. SHAH, JJ.)

Motor Vehicles—stage carriage permits—Applications invited by Regional Transport Authority for two vacancies—Minister of Transport gave an additional permit—Whether legal—Scope of s. 64-A—Motor Vehicles Act, 1939, (4 *of* 1939), *as amended by Bihar Amendment Act No. XXVII of* 1950, *ss.* 47, 48, 57, 64, 64-*A*.

A new route was advertised by the Regional Transport Authority and applications were invited for two permanent stage carriage permits. The Regional Transport Authority granted the two permits to the appellant and another person. An appeal against that order failed. Sudhakar Sharma, one of the respondents, moved the High Court under Art. 226 and the order of the appellate authority was quashed. When the case went back to the Appellate Authority, the permit granted to the appellant was cancelled and was given to Sudhakar Sharma. The appellant made an application to the State Government under s. 64-A of the Motor Vehicles Act, 1939, as amended by the Bihar Amendment Act No. XXVII of 1950. The Minister of Transport upheld the order of the appellate authority cancelling the permit of the appellant and granting the same to Sudhakar Sharma, but granted an additional permit to the appellant. Ram Kailash Pandey filed a writ petition in the High Court challenging the order of the