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during the pendency of a suit. None of those conditions are present here. The mere appointment of another guardian in other proceedings does not by itself divest the guardian *ad litem* of his position as guardian *ad litem*. He still continues to function. For these reasons, the order under appeal was right and this appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice King.

1935, February 12.

PERIYAKKAL (APPLICANT), APPELLANT,

v.

THE AGENT, SOUTH INDIAN RAILWAY Co., LIMITED, TRICHINOPOLY (OPPOSITE PARTY), RESPONDENT.*

Workmen's Compensation Act (VIII of 1923), sec. 2 (n)—"Workman"—Definition of—Exclusion of a person from—Conditions—Sec. 12 (1)—Railway company—Ordinary business of—Maintenance of its line, if part of.

A person, to be excluded from the definition of "workman" in section 2, clause (*n*), of the Workmen's Compensation Act, must not only be one "whose employment is of a casual nature" but also one "who is employed otherwise than for the purposes of the employer's trade or business". Both these qualifications must be present together. The mere fact that the injured man had been employed only for a few days at a time will not of itself remove him from the category of "workman".

The maintenance of its line is part of the ordinary business of a railway company in India within the meaning of section 12 (1) of the Workmen's Compensation Act.

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* Appeal Against Order No. 507 of 1932.

APPEAL against the order of the Court of the Commissioner for Workmen's Compensation, Madras, dated 13th May 1932 and made in Case No. 121 of 1931.

A. S. Srinivasa Ayyar for appellant.

S. S. Ramachandra Ayyar for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—This appeal is preferred by the widow of one Nanjappa Goundan against an order of the Commissioner for Workmen's Compensation disallowing her claim to compensation against the South Indian Railway Company in respect of the death of her husband. CURGENVEN J.

Nanjappa Goundan was a coolie working under a contractor employed by the Railway Company in the construction of a bridge on the Nilgiri Railway. For the purposes of this work, a trolly was loaded with stones and was in the charge of an employee of the South Indian Railway Company named Venkatarama Ayyar. The evidence of this man shows that at the place of loading three coolies got on to the trolly as well as himself. This, he says, was one in excess of the permitted number; nevertheless, when the trolly had proceeded a certain distance, another man got on, making four coolies as well as the driver. What then happened has not been clearly elucidated, but the driver was unable to apply the brake, perhaps because it got jammed by the stones, and lost control. He managed to jump off, but the coolies were thrown out, two were killed, of whom one was Nanjappa Goundan, and one received a severe injury to the leg.

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The learned Commissioner has dismissed the appellant's claim to compensation upon two grounds. He has found that the accident occurred owing to the wilful disobedience of the workman to an order expressly given. He has further found that the deceased man was a casual worker under the contractor, so that the claim cannot be enforced under the Act.

Section 3 (1) of the Workmen's Compensation Act contains a proviso that the employer shall not be liable in respect of an accident which is directly attributable to

> "the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen."

Among the rules regulating the driving of trollys is one which fixes the maximum human complement at a driver and two coolies. The driver says that, after two coolies had got on, he warned the third man not to do so, as it was against the rules, and gave the same warning to the fourth man. They got on in spite of this. It has been objected that the plea of disobedience to orders has not been set up in the written statement filed by the Railway Company and, further, that it has not been proved that the accident is "directly attributable" to the alleged disobedience. Apart from these objections, it is fatal to the success of this plea that no proof has been given that the deceased man was either the third or the fourth to get on to the trolly. The driver had no information to give upon this point. If he was one of the two coolies who first got on, plainly he was not guilty of any disobedience.

Secondly, the learned Commissioner, in dismissing the claims because the workmen were

"casual workers", has, we think, not correctly appreciated the definition of "workman" contained in section 2, clause (*n*), of the Act. A person, to be excluded from the definition, must not only be one "whose employment is of a casual nature" but also one "who is employed otherwise than for the purposes of the employer's trade or business". Both these qualifications must be present together. The mere fact relied upon by the Commissioner, therefore, that the injured men had been employed only for a few days at a time will not of itself remove them from the category of "workmen". That this is so has not been contested before us.

Thus upon the two points found against her by the learned Commissioner we think that the appellant must succeed. A third point, and so far as appears a new one, has been advanced before us on behalf of the Railway Company. We have been in some doubt whether we ought to allow it to be argued, but have decided that, as it is in the main a question of the construction of the Act, it will not be unfair to the appellant if we entertain it in appeal.

Sub-section 1 of section 12 provides that, where the principal—here the Railway Company—employs a contractor to execute any work "which is ordinarily part of the trade or business of the principal", he shall be liable in respect of a workman employed by the contractor as if the workman had been immediately employed by him. This raises the question whether the work which was being done in this case was "ordinarily" part of the trade or business of the principal. For the purpose of deciding this point we have to take it,

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in the absence of any evidence to the contrary, that the work being done to the bridge was in the nature, not of an original work, but of the maintenance or upkeep of the line. Is the maintenance of the line ordinarily part of the business of the Railway Company? For a negative answer to this question reliance has been placed upon the case of *Rabia* v. *The Agent, G.I.P. Railway*(1). The fatal injury dealt with in that case was caused to a workman employed by contractors working under the G.I.P. Railway, the work being the construction of a transmission line to carry electric power to various sub-stations on the railway. The workman was employed as a fitter to assist in the erection of the steel towers which would carry the overhead cable. The learned CHIEF JUSTICE expressed the view that the construction of these original works was not part of the ordinary trade or business of the G.I.P. Railway :

> "Their ordinary business is that of public carriers of passengers and goods, and not that of electrical engineers or of contractors for power stations or towers or cables or the general electrification of a railway line."

The other member of the Bench, MURPHY J., concurred in this opinion, adding that

> "the ordinary trade or business of the railway administration is the carriage of passengers and goods, and the maintenance of the line necessary for this purpose."

It will be seen that this case is far from deciding that the maintenance of its line is not part of the ordinary business of a railway company; nor do we think that the two English cases referred to by the learned Chief Justice, and which we have examined, lead us to that conclusion.

(1) (1928) I.L.R. 53 Bom. 203.

The English Act (section 4) contained a proviso which excluded

"any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on . . . . ".

In *Pearce* v. *London and South Western Railway*(1) it was held that alterations, repairs and paintings of suburban railway station buildings was work which could be so described. A similar view was expressed in *Wrigley* v. *Bagley & Wright* (2), where the operation consisted in putting a new driving wheel into the steam-engine belonging to a cotton-spinning factory. In the former case, it is true that upkeep as well as construction appears to have been involved, though both the learned Judges of the Court of Appeal who delivered judgments seem to have regarded the work as substantially one of construction. In the latter case, ROMER L.J. said:

"Putting a new driving wheel into an engine cannot be said to be part of, or a process in, the business of cotton spinners any more than building the factory in which they intend to carry on their business can be said to be a part of, or process in, that business."

This observation, we think, would remain true under the terms of the Indian Act. But it does not answer the question whether the maintenance of the line is part of the ordinary business of a railway company in India. It is common knowledge that railway companies in this country maintain a permanent staff of engineers, whose most indispensable duty it is to preserve the line and the rolling stock in serviceable condition, and who carry out, where necessary with the help of contractors, all operations necessary to

(1) [1900] 2 Q.B. 100. (2) [1901] 1 K.B. 780.

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that end. In the present case the driver of the trolly was an Assistant Inspector of the Railway, and doubtless the trolly itself was railway property. In such circumstances, it does not seem to us reasonable to hold, merely because the purpose for which a railway company exists is to carry passengers and goods, and not to undertake engineering works for their own sake, that where the invariable rule is for the company itself to keep its system in order, such work is not ordinarily part of its business. It is work which has to be done if the primary functions of the railway are to be performed, and it is work which constantly needs doing. Indeed, the business of keeping the line in order appears to us as normal and as essential a feature of the running of a railway as the issue of tickets or the handling of goods. This objection therefore fails.

We allow the appeal, set aside the Commissioner's order so far as it relates to the case of Nanjappa Goundan, and award to the appellant the sum of Rs. 630 which is the compensation payable under Schedule IV for the death of an adult in receipt of a monthly wage of Rupees 20. The respondent company will pay the appellant's costs in both Courts.

A.S.V.