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to be raiyati land and its status is *chhaparbandi*. But the change took place apparently about 1928 and will not validate a transaction regarding the land which was previously invalid. It was faintly contended that if relief under the bond could not be given to the plaintiff he might be permitted to amend his pleading and asked to be treated as a person who has by prescription acquired an absolute title as owner. For this purpose he might be permitted to amend his plaint by adding a prayer to be restored to possession of the house. I do not think that at this late stage the plaintiff can be allowed to make such an amendment which would alter the character of the suit to a degree which does not seem to be permissible.

In the result I would dismiss the appeal with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

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Feb., 12.

CIVIL REFERENCE.

Before Harries, C. J. and Chatterji, J.

BECHARAM MALLIK

v.

THE KHAS JOYRAMPUR COLLIERY.*

Workmen's Compensation Act, 1923 (*Act VIII of* 1923), *section* 3—*workman injured by accident while travelling in a motor omnibus—vehicle provided by employers being the only practical and reasonable means of access to colliery—absence of contractual obligation to use the vehicle—workman, whether entitled to compensation.*

* Civil Reference no. 3 of 1939, made by C. S. Jha, Esq., I.C.S., Commissioner under the Workmen's Compensation Act, Dhanbad, in his letter no. 3034-R., dated the 27th September, 1939.

Where a workman employed at a colliery is injured in an accident while travelling in a motor omnibus provided by his employers and being the only practical and reasonable means of access to the colliery, but the workman was under no contractual obligation to use the vehicle;

Held, that the workman was not injured as a result of an accident arising in the course of his employment and was, therefore, not entitled to a compensation under section 3 of the Workmen's Compensation Act, 1923.

St. Helens Colliery Company, Limited v. *Hewitson*(1), *Newton* v. *Guest, Keen and Nettlefolds, Limited*(2) and *Black* v. *Aitkenhead and Son*(3), followed.

Cremins v. *Guest, Keen and Nettlefolds, Limited*(4), not followed.

Reference under section 27 of the Workmen's Compensation Act, 1923.

The facts of the case material to this report are set out in the judgment of Harries, C. J.

U. N. Banarji, for the employers.

No one for the employee.

HARRIES, C. J.—This is a reference by the learned Commissioner under the Workmen's Compensation Act, Dhanbad, referring a question of law for the decision of this Court under section 27, Workmen's Compensation Act (VIII of 1923).

The facts giving rise to this reference can be shortly stated as follows:—

One Becharam Mallik was employed as a coal-miner at the Khas Joyrampur Colliery. Becharam Mallik lived in village Sarsakuli, which was at a distance of twenty-two or twenty-three miles from the colliery. Fifteen miles of this distance, however,

(1) ((1924) A. C. 59.
(2) (1926) 19 B. W. C. C. 119.
(3) (1938) 31 B. W. C. C. (supp.) 73.
(4) (1908) 1 K. B. 469.

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was ever a good motorable road, and the owners of the colliery provided a motor omnibus to transport their workmen to and from places situate along this motorable road.

On the 27th of December, 1938, Becharam Mallik was travelling in the motor bus going to his work at the colliery when he met with an accident. The learned Commissioner does not state the nature of the accident, but he says that the workman sustained severe injuries on his face and lips and was detained in hospital for fifteen or sixteen days as an indoor patient. The workman claimed compensation from his employers for the period during which he was incapacitated from working.

The learned Commissioner has found upon the evidence in the case that there was no written agreement between the workman and the employers whereby the latter were under any obligation to provide motor omnibuses. The learned Commissioner, however, was satisfied that there was an implied agreement that the colliery should provide omnibuses for the miners to take them to and from their homes. The learned Commissioner, however, states quite clearly that there was no obligation on the part of the miners to travel by the omnibus provided and that they were free to come to the colliery to work by whatever means they chose. He, however, adds that the motor omnibus provided by the colliery was the only reasonable and feasible means of transport available to the workers.

The learned Commissioner was faced with a number of English decisions, and if these are followed there can be no question that the workman is not entitled to compensation. The learned Commissioner, however, thought that as circumstances were somewhat different in India these English cases should not be made applicable in India. The Commissioner rightly points out that colliery workmen

in India are frequently very ignorant and illiterate people and are such that they cannot appreciate their legal rights. In the Commissioner's view it was most unlikely that Becharam Mallik had any idea that he was not bound by the terms of his contract to ride upon this omnibus. The learned Commissioner seems to have thought that English workmen had far greater knowledge of their rights and, therefore, different considerations might apply to India from those obtaining in England. In my view this Court cannot refuse to follow the English cases merely on the ground that the Indian workmen may be somewhat more illiterate and ignorant than the English workmen. The English cases may be distinguished if there is any real distinction between the Indian statute and the English one. The English statute, the Workmen's Compensation Act, 1925, section 1, is in these terms:—

"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer, shall subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained....."

The section giving the workman a right to compensation in India is section 3 of the Workmen's Compensation Act, 1923, and that is in these terms:

"If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter....."

It will be seen that the two sections giving the British and Indian workmen a right to compensation are in very similar terms. Both these sections provide that a workman shall be entitled to compensation if he sustains personal injury by accident arising out of and in the course of his employment. Accident alone does not give a workman a right to compensation. To entitle him to compensation at the hands of his employers, the accident must arise out of and in the course of the injured workman's employment. There

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is, therefore, no difference between the English and Indian statutes as to the type of accident which gives the workman a claim to compensation.

The question which has to be decided in this reference is whether or not the accident arose out of and in the course of Becharam Mallik's employment. The learned Commissioner was inclined to the view that the accident did arise out of and in the course of his employment. There can be no doubt that the view which prevailed in England until fairly recently was in favour of the workman's present contention. The leading case was *Cremins* v. *Guest, Keen and Nettlefolds, Limited*(1), in which it was held that the employment of a workman included the use of a train or other means of transport when by the terms of service there was an express or implied obligation on the part of employers to provide such means. As I have already stated, the learned Commissioner has found that there was an implied obligation on the part of the employers in the present case to provide an omnibus for the transport of the workmen. The case of *Cremins* v. *Guest, Keen and Nettlefolds, Limited*(1) was, however, considered by the House of Lords in the case of *St. Helens Colliery Company, Limited* v. *Hewitson*(2). In that case a workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home at *M*. By an agreement between the colliery company and the railway company the railway company agreed to provide special trains for the conveyance of the colliery company's workmen to and from the colliery and *M*, and the colliery company agreed to indemnify the railway company against claims by the workmen in respect of accident, injury or loss while using the trains. Any workman who desired to travel by these trains signed an agreement with the railway company releasing

(1) (1908) 1 K. B. 469.

(2) (1924) A. C. 59.

them from all claims in case of accident, and the colliery company then provided him with a pass and charged him a sum less than the full amount of the agreed fare, and this sum was deducted week by week from his wages. It was held by Lord Buckmaster, Lord Atkinson, Lord Wrenbury and Lord Carson (Lord Shaw dissenting) that, there being no obligation on the workman to use the train, the injury did not arise in the course of the employment within the meaning of the Workmen's Compensation Act, 1906 (now the Act of 1925). The case of *Cremins* v. *Guest, Keen and Nettlefolds*(1), already referred to, was expressly overruled. At page 66 Lord Buckmaster observed:

" The real question to my mind is whether, when he entered the train in the morning, it was in the course of his employment within the meaning of the Act. I find it difficult to fix the test by which this question can be answered in favour of the respondent. In the case of *Cremins* v. *Guest, Keen and Nettlefolds*(1) the circumstances are, as the Court of Appeal thought, indistinguishable from the present, and it is there stated that the phrase " in the course of his employment " is satisfied if the workman is in the place where the accident occurred by reason of an implied term of the contract of service that he should have the right, if not the obligation, to use the train. I find it difficult to accept this test. A man entitled by virtue of his contract of service to a holiday and a free ticket will equally be on his journey by virtue of the right obtained by his contract of service. But it seems to me difficult to say that an accident occurring to him in the train must be in the course of his employment. The workman was under no control in the present case, nor bound in any way either to use the train or, when he left, to obey directions; though he was where he was

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in consequence of his employment, I do not think it was in its course that the accident occurred."

Lord Buckmaster makes it plain that the workman is not in the course of his employment when he is riding in a vehicle provided by his employer unless by the terms of his contract he is bound to travel in that vehicle. In the case of *St. Helens Colliery Company, Limited* v. *Hewitson*(1) it was conceded that the workman was not bound to travel by the train provided, though the train was the most reasonable means of proceeding to the colliery.

The case of *St. Helens Colliery Company, Limited* v. *Hewitson*(1) was again considered by the House of Lords in *Newton* v. *Guest, Keen and Nettlefolds, Limited*(2). In this case a colliery labourer was employed by the respondents at their colliery. He lived three and a quarter miles from the colliery, which was on a high hill, the road from his house to the colliery being an open mountain road with ponds and bogs along the route. In winter thick fogs hung over the mountain. The respondents, over thirty years ago, to enable them to form a shift as early as 7 A.M., provided trains by which the miners could travel to the colliery. These trains were run by the Great Western Railway Company, under an agreement between them and the respondents. The colliery agent in evidence said that the men were expected to travel by these trains. The coaches and platform were owned by the respondents. On October 18, 1923, the workman, whilst crossing the line about 5-35 A.M. to join one of these trains to travel to the colliery, was knocked down by a light engine, and, as a result of the injuries he received, his left leg had to be amputated. The County Court Judge found that the only practicable and reasonable means of access to the colliery for the applicant was

(1) (1924) A. C. 59.
(2) (1926) 19 B. W. C. C. 119.

the train provided by the respondents, and held that it was therefore the man's duty to travel by this train and consequently that the accident arose out of and in the course of his employment. The House of Lords, however, held that there was no evidence on which it could be found that it was part of the workman's duty to use the train whenever he went to and from the mine, and therefore it formed no part of his contract of employment. The accident consequently did not arise in the course of his employment.

In *Newton's* case(1) the learned County Court Judge had summed up the facts in these words:—

"After considering all the evidence, I have come to the conclusion that the only way in which the respondents were able to work the Fochriw colliery effectively, was by providing trains to take the large number of workmen living in and around Merthyr, who were employed at the colliery, to and from the colliery.....
Under all the circumstances I am satisfied that the trains were the only practical and reasonable means of access to the colliery for the large number of men living in and around Merthyr working on the morning shift; and consequently, that Newton, when crossing the line to the train, was in the act of using the only reasonable and practical means of access open to him when he met with the accident."

At the opening of his judgment Viscount Cave, L.C., said:—

"The facts in this case have been found by the learned County Court Judge, and there is no dispute whatever about them. The question which your Lordships have to determine is what is the proper legal inference from those facts."

It will be seen that in *Newton's* case(1) the conveyance provided by the employers was the only

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reasonable and practical means of arriving at the colliery. That is also the case here. The learned Commissioner has found that the motor omnibus upon which the workman was injured afforded the only practical means of arriving at the colliery. However, in *Newton's* case(1) the House of Lords held that even if the vehicle provided the only practical means of access to the colliery, yet it could not be inferred from that that a workman was legally bound by his contract of service to use that vehicle. As pointed out by Lord Cave at page 127,

"I do not think that there is any evidence on which it could be found that it was part of his contract that he should use the train whenever he went to or from the mine, or that it was his duty to use the means of access so provided for him. If on any occasion he had declined to travel by the train, it is impossible to say that he would have been committing a breach of his contract, or that he had broken the terms on which he was employed. It seems to me that a finding to that effect would be really straining the facts in order to come to a conclusion in favour of the appellant."

It seems to me that in the present case it would be impossible to say that, if Becharam Mallik did not travel by the omnibus provided for him, he would be breaking the terms of his contract of service. If he wished to cycle to the colliery, inconvenient as that might be, it would be no breach of his contract, and the employers could not complain. In my view the present case is indistinguishable in principle from the case of *Newton* v. *Guest, Keen and Nettlefolds, Limited*(1).

The two cases of the House of Lords to which I have referred have been followed by the English and Scotch Courts on numerous occasions. The case of

(1) (1926) 19 B. W. C. C. 119.

Black v. *Aitkenhead and Son*(1) is a case very similar to the present case. In *Black's* case(1), a workman while engaged on work at a distance from his home was conveyed over part of the distance on a motor lorry which was provided by his employers. There was no express contract between the workman and his employers for the use of this conveyance; but, before accepting the job, the workman knew that the lorry would be provided free of cost, and he would not have accepted the offer of employment if it had not been available. This free conveyance was entirely optional, but it was used by employees who resided at a distance from the work. There was no direct transport connection between the workman's home and place of work, and travel by the ordinary route would have materially increased both the cost and the time of the journey. While being conveyed to his work, the workman fell from the lorry and was killed. It was held by the Court of Session that as the workman was not under any contractual obligation to use the lorry, his death while he was proceeding to his work on that conveyance was not the result of an accident arising in the course of his employment.

The Scotch case follows the principles laid down in the House of Lords cases and, in my view, must be followed in the present case. As the words of the English and Indian statutes are similar, it appears to me that the construction placed upon the English statute by the House of Lords must be the construction which this Court must place upon the words of the Indian statute. The question in India is the same as in England and that is, did the accident arise in the course of the man's employment? If the workman was under no obligation to use the lorry but could use it or not as he felt inclined, then he was under no obligation to his employer to use the conveyance and, therefore, he could not be said to be acting in the course of his employment when he was injured.

(1) (1938) 31 B. W. C. C. (Suppl) 73.

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In my judgment Becharam Mallik is not entitled to compensation on the facts of this case and I would answer the reference accordingly.

CHATTERJI, J.—I entirely agree.

S.A.K.

Order accordingly.

HARRIES, C.J.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

1940.

Feb., 15.

PRABHU RAM

v.

MAHARAJADHIRAJ SIR KAMESHWAR PRASAD SINGH BAHADUR.*

Landlord and Tenant—mortgage of eight-annas share in a tenure in favour of landlord—mortgage decree—rent decrees by landlord for rent of entire tenure—execution of mortgage decree—rent charge notified—purchase by landlord—sale, effect of—whole liability under decrees for rent, whether discharged—decree-holder, whether entitled to proceed against the other half of the tenure—Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 60 *and* 82—*matters relating to discharge, execution and satisfaction of decree must be determined by executing court—separate suit barred—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 47.

The appellants had an eight-annas share in a certain tenure the other half of which had been mortgaged by their co-sharers to the landlord who obtained a mortgage decree. The landlord also obtained rent decrees against the appellants and their co-sharers for the rent of the entire tenure, and when he executed his mortgage decree, he put up the half share of his mortgagors to sale and notified at the time of the sale that the properties were being sold subject to a charge for rent under four decrees. The decree-holder himself became the purchaser of that eight-annas share. Thereafter

* Appeals from Appellate Order nos. 247 and 248 of 1939, from an order of Maulavi Saiyid Ahmad, Subordinate Judge at Monghyr, dated the 31st May, 1939, modifying an order of Babu Tribhuwan Nath Singh, Munsif of Monghyr, dated the 8th February, 1939.