

mortgagee who during the period between the time when he filed the suit to enforce his security and the date of the sale has been deprived of the interest and profits which otherwise might have accrued to him if he had been in possession of the proceeds of the sale during that period. It is upon that ground and not upon the footing that a mortgagee by deposit of title deeds possesses a substantive right to the rents and profits of the property subject to the mortgage that the Courts in England from the earliest times have allocated to the mortgagee the rents in the hands of the receiver that have accrued after the order appointing the receiver was made.

For these reasons the order passed by Leach J., in my opinion, was correct. The appeal fails and must be dismissed with costs ten gold mohurs.

BA U, J.—I agree.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.*

### THE BOMBAY BURMA TRADING CORPORATION, LTD.

*v.*

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*Workmen's Compensation Act (VIII of 1923 and XV of 1933), s. 3—Wilful disobedience of order—Employer's liability—Injury caused through duties arrogated by the workman.*

Under s. 3 (a) (1) of the Workmen's Compensation Act where the death of a workman is due to his wilful disobedience of an order given to him in connection with work that the workman has been employed to perform, the wilful disobedience of the workman will not deprive his dependants from recovering compensation from his employer. But the employer is not liable

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\* Civil Misc. Appeal No. 112 of 1935 from the order of the Commissioner in Case No. 2 of 1935.

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for injuries caused through the workman arrogating to himself duties which he was neither engaged, nor entitled to, perform.

*Barnes v. Nunnery Colliery Co.* (1912) A.C. 44; *Wilson & Clyde Coal Co. v. M'Ferrin*, (1926) A.C. 377—*referred to*.

A workman was employed by the appellants as a cooly whose duty it was to assist and attend upon the driver of an elephant belonging to the appellants. On one occasion the elephant, which was of uncertain temper, was shackled and let loose to graze in the jungle. The driver being ill the workman and two other coolies were sent out to find him. They were expressly ordered not to attempt to catch the animal, much less to unshackle and ride him. The workman and his companions found the elephant, but instead of returning and reporting the elephant's whereabouts and in disobedience of the express order given to him the workman approached the elephant, unshackled and rode upon him. A few moments later the elephant threw him down, and killed him with his tusks. The respondent as a dependant claimed compensation.

*Held*, disallowing the claim, that the workman met his death by an accident caused through doing an act which he was not employed to do, and that the injury which caused his death was not due to an accident "arising out of and in the course of his employment."

*Clark* for the appellants.

No appearance for the respondent.

PAGE, C.J.—This is an appeal under section 30 of the Workmen's Compensation Act (VIII of 1923) as amended. From a statement of facts, which the respondent agreed to accept, it appears that the deceased workman Maung Me Gyi was employed by the appellants as a cooly whose duty it was to assist and attend upon the driver of an elephant belonging to the appellants. This elephant was of uncertain temper, and on the 19th May had been shackled and let loose to graze in the jungle.

Now, the driver of the elephant happened to be ill, and the *taw-gaung* in charge of the camp ordered Maung Me Gyi to go out into the jungle with two other elephant coolies in order to find out where the elephant was. Maung Me Gyi was expressly ordered not to attempt to catch the animal, much less to unshackle and ride him. On the following day the three men found the elephant in the jungle

in the Chin Hills, and in accordance with the terms of their employment it was their duty to return to the camp and report the place where the elephant was. Instead of doing so, however, the deceased Maung Me Gyi wilfully disobeyed the express orders given to him, approached the elephant, unshackled him and got up upon him with the intention of riding him. A few moments later he was thrown off by the elephant who attacked and killed him with his tusks. In these circumstances the Commissioner for Workmen's Compensation at Pakōkku has passed an order granting compensation to the alleged dependants of the deceased workman. The question that arises is whether in passing that order the Commissioner did not misdirect himself in law.

Now, by reason of the amendment of the Workmen's Compensation Act, effected by Act XV of 1933, in cases where the death of the workman is due to his wilful disobedience of an order given to him in connection with work that the workman has been employed to perform the wilful disobedience of the workman will not deprive his dependants from recovering compensation from his employer. But in every case, before it becomes incumbent upon the employer to bring himself within the proviso to section 3, the applicant for compensation must prove that the injury is within the ambit of section 3 (a) (1), and it is well-settled law that where a workman receives personal injuries by an accident caused through the workman "arrogating to himself duties which he was neither engaged, nor entitled, to perform"—[*per* Lord Dunedin in *Wilson & Clyde Coal Co. and M'Ferrin* (1)]—or, as put by Lord Loreburn in *Barnes v. Nunnery*

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*Colliery Co.* (1) "if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do",—the employer is not liable to pay compensation under the Act; because in such a case the injury was not caused to the workman by an "accident arising out of and in the course of his employment." It is manifest from the agreed statement of facts in the present case, that the deceased Maung Me Gyi met his death by an accident caused through doing an act which he was not employed to do, and that in the circumstances the injury which caused his death was not due to an accident "arising out of and in the course of his employment."

For these reasons, in my opinion, the appeal must be allowed, and the order of the Commissioner for Workmen's Compensation is set aside.

BA U, J.—I agree.

### SPECIAL BENCH (CIVIL).

*Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Ba U, and Mr. Justice Leach.*

1936  
 Mar. 30.

S.C. VENKANNA

v.

MANGAMMAL.\*

*Receiver, appointment of—Mortgage suit—Appointment whenever just and convenient—Interest in arrear—Value of property more than mortgage debt—Civil Procedure Code (Act V of 1908), O. 40, r. 1.*

The Court will appoint a receiver in a mortgage suit, as in a suit of any other nature, when it is just and convenient to do so. Normally, when the interest is in arrear a receiver will be appointed as of course at the instance of the mortgagee. The fact that the property is more than

(1) (1912) A.C. 44.

\* Civil Misc. Appeal No. 18 of 1936 from the order of this Court on the Original Side in Civil Regular No. 321 of 1935.