APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Sharpe.

1938

Mar. 7.

SINGH *v.* BURMA RAILWAYS.*

Workmen's Compensation Act, ss. 23, 32—Rule 38 and proviso (b)*—Evidence of witness on commission—No power in Commissioner to issue commission—No sworn statement by witness—No authorized person to record evidence—Evidence inadmissible.*

Under the Workmen's Compensation Act a Commissioner has no jurisdiction to issue a commission for the examination of witnesses. S. 23 of the Act invests the Commissioner with powers of the Civil Court under the Code of Civil Procedure only for the purpose of taking evidence on oath and enforcing the attendance of witnesses, and compelling production of documents and material objects. Order 26 of the Civil Procedure Code is not mentioned in rule 38 of the Rules relating to procedure and made in exercise of the powers conferred by s. 32 of the Act, and proviso (*b*) to rule 38 cannot be read as authorising the Commissioner to adopt a rule of procedure entirely outside and unconnected with the scope of the rules of procedure laid down by the Rules.

Taylor v. *Cripps*, 30 T.L.R. 616, referred to.

Attention called by Sharpe J. to other procedural errors committed prior to the hearing of the case, and the importance of adhering to the Rules.

Bhattacharyya for the appellant.

Surridge for the respondents.

MYA BU, J.—This is an appeal against an order passed by the Commissioner for Workmen's Compensation, Insein, disallowing the appellant's claim for compensation for an alleged total disablement resulting from an injury received in the course of his employment as a spring-smith in the Loco Workshop of the Burma Railways at Insein on the 29th January 1936. Against such an order an appeal lies to this Court under section 30 (*1*) (*a*) of the Workmen's Compensation Act, provided a substantial question of law is involved in the appeal. The question of law which has

* Civil Misc. Appeal No. 36 of 1937 from the order of the Commissioner, Insein, in Workmen's Compensation Case No. 7 of 1936.

1938

SINGH v. BURMA RAILWAYS.

MYA BU, J.

been put forward as a ground of this appeal is that the Commissioner based his finding on inadmissible evidence.

The issues of fact between the appellant and the Burma Railways are (1) whether the eyesight of the appellant is permanently lost and if so (2) whether it is the result of the alleged accident. That an accident did occur to the appellant arising out of and in the course of his employment, was not disputed by or on behalf of the respondents whose case is, *vide* the evidence of Dr. Prasad of the medical department of Burma Railways, to the effect that the accident did not cause direct injury to the eyeball but caused a punctured wound on the left lower eyelid only of the appellant with conjunctivitis of the left eyeball. The Chief Medical Officer, Burma Railways, gave evidence to the effect that he examined the appellant's eye on or about the 22nd December 1936,—the alleged accident having occurred on the 29th January, 1936—but found no trace of injury having previously occurred to the eyeball and was unable to detect any deterioration of vision. He however sent the appellant to be further examined by Colonel Cormack who was then Ophthalmic Surgeon at the General Hospital, Rangoon.

The evidence of the Chief Medical Officer was contrary to that of the private Ophthalmic Surgeon whose evidence was adduced by the appellant in support of his case. In that state of the evidence the Commissioner considered it essential, for the proper decision of the case, to have the evidence of Colonel Cormack who, at the time, was Officiating Inspector-General of Civil Hospitals, with headquarters at Rangoon. The learned Commissioner, however, came to the conclusion that the personal attendance of Colonel Cormack might be dispensed with and, with the consent of both parties, decided to have Colonel

Cormack examined on interrogatories and cross-interrogatories. Interrogatories were drawn up and filed before the Commissioner on behalf of the respondents. They were forwarded to Colonel Cormack, who answered them as per Exhibit 3. On receipt of these answers the learned advocate for the appellant drew up cross-interrogatories, which were sent to Colonel Cormack, who answered them as in Exhibit 5. These answers confirmed the opinion expressed by the Chief Medical Officer, Burma Railways, in his evidence, and militated against the weight of the opinion expressed by Dr. V. R. Patel, the private Ophthalmic Surgeon, who gave evidence in support of the appellant's allegation as to his vision.

The learned Commissioner in his judgment observed

"It is of course difficult to come to a decision when the doctors do not agree . . . I can see no reason for not accepting the evidence of Dr. Carrier and Colonel Cormack."

These observations show that the learned Commissioner was materially influenced by the opinion of Colonel Cormack in arriving at his conclusions upon the issues of fact.

It is contended on behalf of the appellants, that the answers given by Colonel Cormack to the interrogatories and cross-interrogatories are not admissible as evidence inasmuch as the Commissioner has no jurisdiction to issue a commission for the examination of witnesses. There is considerable force in this contention, which, in my opinion, must be upheld. There is nothing in the body of the Act which empowers or authorises the Commissioner to have evidence taken on commission. Section 23 invests the Commissioner with powers of the civil Court, under the Code of Civil Procedure only for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling production

1938

SINGH v. BURMA RAILWAYS.

MYA BU, J.

of documents and material objects. In Part V of the rules, made in exercise of the powers conferred by section 32 of the Act, there appear rules of procedure to be followed by the Commissioners in the disposal of cases under the Act. Rule 38 of these rules enacts

"Save as otherwise expressly provided in the Act or these rules, the following provisions of the First Schedule to the Code of Civil Procedure, 1908, namely those contained in Order V rules 9 to 30 ; Order VII, rules 9 to 18 ; Order IX ; Order XIII ; Order XVI ; Order XVII ; and Order XXIII, rules 1 & 2 shall apply to proceedings before commissioners, in so far as they may be applicable thereto."

There are two provisos to that rule one of which runs as follows :

"(*b*) The Commissioner may, for sufficient reason, proceed otherwise than in accordance with the said provisions, if he is satisfied that the interests of the parties will not thereby be prejudiced."

Order 26 of the Civil Procedure Code which contains rules with reference to Commissions to examine witnesses is not mentioned in rule 38. This omission, in my opinion, indicates the want of power or jurisdiction in the Commissioner to issue commissions to examine witnesses. Therefore the issue of commission for obtaining the evidence of Colonel Cormack was *ultra vires* of the Commissioner, and the answers given by him to the interrogatories and cross-interrogatories cannot be received as legal evidence. I am reinforced in this conclusion by the decision of the Court of Appeal in *Taylor* v. *Cripps* (1) which deals with the question of jurisdiction of a County Court Judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1906. The circumstances of that case were such as would justify a

(1) (1913) 14 T.L.R. 616.

County Court Judge's order to have the appellant's evidence to be taken on commission or before an examiner if the Judge had jurisdiction to make such an order but it was held that the Judge had no jurisdiction to make such an order. Proviso (*b*) to rule 38 cannot, in my opinion, be read as authorising the Commissioner to adopt a rule of procedure entirely outside and unconnected with the scope of the rules of procedure laid down by the rules.

There is another ground for holding that the answers given by Col. Cormack to the interrogatories and cross-interrogatories were not legally admissible as evidence. The answers were not recorded before any Court or any Officer examining the witness on commission. Interrogatories were forwarded direct to Col. Cormack by means of a letter of request and Col. Cormack also forwarded his answers to the Commissioner in the form of a letter in compliance with the request. The answers were not made on oath. Section 5 of the Oaths Act 1873 provides that oaths or affirmations shall be made by all witnesses, that is to say all persons who may lawfully be examined by any Court. This mandate was not observed in this case. The omission to observe this mandate is not sufficient to invalidate the proceedings or render inadmissible any evidence, but in the present case the evidence of Col. Cormack was not only not given on oath but it was not recorded by any person authorized to record the evidence. The answers given by Col. Cormack are not admissible as evidence, and from the judgment of the learned Commissioner it is clear that he treated the so-called evidence of Col. Cormack as the main pivot in the case.

For these reasons, the order of the Commissioner for Workmen's Compensation, Insein, disallowing the appellant's claim is set aside and the case will be remanded to the Commissioner for Workmen's

1938

SINGH v. BURMA RAILWAYS.

MYA BU, J.

Compensation, Insein, to proceed to record such evidence as the parties may desire to adduce according to law, and upon such evidence together with the evidence which had already been taken before the passing of the order under appeal to dispose of the case according to law.

Each party must bear its own costs of this appeal.

SHARPE, J.—On the 29th January 1936 the Appellant, who was then employed by the respondents as a spring-smith in their Locomotive Workshop at Insein, received an injury to his left eye. As a result of that injury he was away from work for about a month and after resuming work at the end of February he continued in the respondents' employ until the 30th September 1936, when he was discharged on the ground, so the respondents then said, of "reduction of staff". The appellant asked the respondents' Agent for re-instatement or compensation but the latter regretted that nothing could be done for the appellant who, he now said, was "rightly discharged on the ground of comparative inefficiency." The appellant, I would point out, had been continuously employed by the respondents since January 1926. The appellant placed the matter in the hands of a pleader who wrote to the respondents claiming compensation for his client under the Workmen's Compensation Act (to which I will hereafter refer as "the Act"). It does not appear whether the respondents made any reply to that letter; at any rate, on the 10th December 1936, the appellant filed an application for compensation before the Commissioner for Workmen's Compensation, Insein.

In that application, which was in proper form according to the Act and the Rules made thereunder, the appellant alleged that the "result of the injury sustained by (him) arising out of and in course of his employment is a permanent partial disablement of vision

of left eye and an almost total disablement of the vision of the right eye."

Part V of the Rules made under the Act very carefully lay down the procedure to be adopted by Commissioners in the disposal of cases under the Act. By Rule 20 the Commissioner may cause the applicant to be examined, and by Rule 21 he may, after considering the application and the result of any such examination of the applicant, summarily dismiss the application. If he does not so dismiss the application, the Commissioner may, by Rule 22, require the applicant to produce evidence in support of his application before calling upon any other party; and, if the applicant then fails to make out a case for the relief claimed, the Commissioner may dismiss his application. It will be seen that Rules 20, 21 and 22 contain a number of provisions which are permissive and not obligatory, but Rule 21 does not give the Commissioner any power to dismiss the application summarily unless the applicant has been examined (because he has first to consider the application *and* the result of any examination of the applicant under Rule 20); nor does Rule 22 give him any power of summary dismissal unless he has called upon the applicant to produce evidence in support of his application. So that, although the Commissioner need not either have the applicant examined (under Rule 20) or require him to produce evidence (under Rule 22), yet he cannot dismiss the application summarily unless he either has the applicant examined or requires him to produce evidence. Rule 23 requires the Commissioner to give notice to the opposite party, if the application is not dismissed under Rule 21 or Rule 22; which also means, of course, that the Commissioner must give such notice to the opposite party if he neither has the applicant examined nor requires him to produce evidence.

1938

SINGH
v.
BURMA
RAILWAYS.

SHARPE, J.

In the present case although he directed the applicant to appear before him on the 5th January 1937 (which the latter did), the Commissioner neither had him examined nor required him to produce evidence, but directed notice to issue to the respondents. Although there is nothing inherently irregular in this procedure, it does appear that it was unnecessary for the applicant and his Pleader to be required to attend before the Commissioner at that stage, unless the applicant was then to be examined or had been required to produce evidence, which this applicant had not. In my opinion, if a Commissioner is not going to avail himself of the power given him under either Rule 20 or Rule 22, he ought to issue notice to the opposite party straightaway and not put the applicant to the necessity of an unnecessary attendance before him.

As I have said, the procedure so adopted by the Commissioner was not inherently irregular ; but he then proceeded to commit more than one error in procedure which was a serious and substantial error. When a Commissioner has issued notice to the opposite party, the latter may, and if so required by the Commissioner shall, file a written statement. That is the effect of Rule 24 (1). Rule 24 (2) provides that if the opposite party contests the claim the Commissioner may, and, if no written statement has been filed, shall examine him upon the claim.

In the present case, after the Commissioner had issued notice to the respondents, the latter did not voluntarily file a written statement and the Commissioner did not require them to do so. On the 18th January 1937 the case was called, both parties appeared, and the respondents contested the claim. Therefore, under Rule 24 (2), it then became and was the Commissioner's duty to examine the respondents (which in this case means their proper representative), and to reduce the

result of the examination to writing, in accordance with the express direction contained in Rule 24 (2). The Commissioner did not do so, such omission was to my mind a substantial error in procedure the serious result of which will appear in a moment when I refer to the issues which were framed.

Rule 25 (1) requires the Commissioner to frame the issues after considering any written statement and the result of any examination of the parties. Owing to the course which he had adopted in this case, the Commissioner did not have before him the result of any examination of the parties, and, as the respondents had not chosen to file any written statement (and they were perfectly entitled not to file one in this case, if they so desired, as the Commissioner had not required them to do so) the Commissioner had not before him those materials which the Rules say, and rightly say, are necessary materials upon which to settle the issues. Nevertheless the Commissioner proceeded to settle the issues without the proper materials, and here again he committed a serious procedural error. His own Diary entry of the 18th January 1937, *viz.* "There is some dispute about the eye sight of the applicant", employs extremely loose phraseology, which was, however, the almost inevitable result of a failure to take the prescribed steps to ascertain what the respondents' case exactly was. Of the two issues specifically framed, the first takes no account of the fact that the applicant was alleging a different disability in regard to each eye. Nor did the Commissioner, in recording the issues, distinguish those which concerned points of fact and those which concerned points of law, as he was required to do by Rule 25 (2).

I have called attention to these procedural errors because it is of the utmost importance that the Rules should be carefully adhered to. It is, however,

1938

SINGH v. BURMA RAILWAYS.

SHARPE, J.

unnecessary for me to base my decision upon such irregularities prior to the hearing, because during the hearing itself there was an even more serious error committed by the Commissioner. During the course of the hearing the Commissioner improperly received the "evidence" of Colonel Cormack, if "evidence" is the right word to use when referring to the documents signed by Colonel Cormack which clearly influenced the Commissioner in arriving at the conclusion which he did. My learned Brother has so fully and clearly dealt with this further aspect of the case in his judgment that I need say no more than that I entirely agree with all he has said upon the subject. For that reason alone this case must go back to be dealt with according to law.

I agree that the appeal must be allowed, the Commissioner's order set aside, and the case remanded; each party to bear its own costs of this appeal.