FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Mosely, Mr. Justice Dunkley, Mr. Justice Sharpe, and Mr. Justice Blagden.

KHAIROJ JAMA *v.* MATARDIN AND OTHERS.*

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June 26.

Workmen's compensation—Accident arising out of the employment—Work within the employment—Question of negligence irrelevant—Employer's liability for compensation—Conditions for non-liability—Workmen's Compensation Act, s. 3 (1), proviso (ii).

When the work which a workman is seeking to do is found to be within his employment the question of negligence, great or small, is irrelevant ; and no amount of negligence in doing an employment job can change the workman's action into a non-employment job.

Harris v. *Associated Portland Cement Manufacturers, Ltd.*, (1939) A.C. 71, referred to.

In order that an employer may escape liability for compensation under s. 3 (*1*), proviso (*b*) (ii) of the Workmen's Compensation Act seven distinct conditions must be fulfilled, *viz.*, (1) an order or rule must have been given or framed : a mere warning or disclaimer of responsibility is not enough ; (2) its substantial purpose must have been that of securing the safety of workmen as such ; (3) the order or rule must contain words which on the face of them fairly and clearly indicate that its purpose is that of securing the safety of workmen : otherwise it is not " expressly " so given or framed ; (4) its terms must have been brought to the notice of the individual workman who is injured, for he cannot be said to " wilfully " disobey an order of which he is unaware ; (5) it must have been disobeyed ; (6) the disobedience must have been wilful, not merely negligent or due to a mistaken mode of doing a particular task, or due to a wrong decision in an emergency, but deliberate ; (7) the accident must have been directly attributable to the disobedience.

Maung Ba Tun v. *U Ohn Khin*, [1938] Ran. 299, distinguished.

De for the applicant. The facts of the case establish that the accident arose out of and in the course of the workman's employment. In such a case the question of negligence does not arise. *Harris* v. *Associated Portland Cement Manufacturers* (1). In order to escape liability under s. 3 (*1*), proviso (*b*) (ii) of the Workmen's Compensation Act the employer must establish that (1) an order was given for the purpose of securing the safety of workmen (2) the order was given

* Civil Misc. Appeal No. 64 of 1939 from the order of the Commissioner for Workmen's Compensation, Thayetmyo, in Case No. 3 of 1939.

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"expressly" for the safety of the workmen and (3) it was brought to the knowledge of the workman who is injured (4) the workman wilfully disobeyed the order and (5) the accident is directly attributable to such disobedience.

A general order or general rules of safety or a mere warning will not satisfy the requirements of the statute. An order that an employé shall not do, or interfere with, the work of another is not an order for securing the safety of a workman. The order must be given to the workman and he must know that the order is meant for his safety. A man cannot be said to wilfully disobey an order if he is not aware of it. The conditions of proviso (ii) are more stringent than those of proviso (iii). In the latter case it is sufficient that the workman has knowledge of the safety device.

Urmila Dasi v. *Tata Iron & Steel Co.* (1) ; *Agent, G.I.P. Railway* v. *Kashinath* (2) ; *Johnson* v. *Marshall Sons & Co., Ltd.* (3) ; *Smith* v. *Fife Coal Co., Ltd.* (4).

K. C. Sanyal for the respondents. All employees were enjoined to do their own work and not to interfere with that of another. The object of the rule was to prevent accidents. It is true that a workman must have knowledge of the order, but the statute does not say that the purpose or object of the order should be explained to him. In the present case the engine driver had no business to leave the engine room and meddle with a grindstone in another room.

Maung Ba Tun v. *U Ohn Khin* (5) ; *Barnes* v. *Nunnery Colliery Co.* (6).

ROBERTS, C.J.—The applicant Khairoj Jama was employed as an engine driver at the cotton mill of

(1) I.L.R. 8 Pat. 24.
(2) I.L.R. 52 Bom. 45.
(3) (1906) A.C. 409.
(4) (1914) A.C. 723.
(5) [1938] Ran. 299.
(6) 105 T.L.R. 961.

Matardin and two other respondents at Thayetmyo and on the 24th of March last he found that a new water pump for his engine was leaking. Accordingly, he went to a workshop near the engine room to sharpen an iron peg on a grindstone, hoping, by means of the sharpened peg, to nail down a piece of corrugated iron over the leak. The revolving belt of the grindstone fell off and caused him injury breaking his right arm. He claimed compensation from his employers.

No issue was framed as to whether the accident arose out of and in the course of his employment as a workman and we think such an issue should have been framed. However, on the facts proved or admitted before the Commissioner, it is clear what the applicant was doing at the material time was being done on his employers' premises, during his employers' time, and obviously for his employers' purpose and not his own. As was stated by Lord Atkin in *Harris* v. *Associated Portland Cement Manufacturers* (1), "no amount of negligence in doing an employment job can change the workmen's action into a non-employment job." It is therefore clear that, had there been an issue framed as to whether the accident arose out of and in the course of the workman's employment, it would have been answered in the affirmative.

The written statement of the respondents is difficult to follow, but it appears to set up that the appellant had been expressly ordered to perform his own duties as an engine driver only and not to do anything which was unconnected with his own work and not to go into any part of the mill other than the engine room. The provisions of section 3 (*1*), proviso (*b*) (ii), of the Workmen's Compensation Act were not expressly set up by way of defence; but an issue was framed as though that defence had been expressly pleaded.

(1) (1939) A.C. 71, 76.

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Having framed this issue, the learned Commissioner referred to the case of *Maung Ba Tun* v. *U Ohn Khin* (1) and came to the conclusion that he was obliged to refuse compensation to the applicant upon the authority of that decision. But, as has been pointed out to us in the course of argument by my brother Mosely, who was one of the members of the Bench in *Maung Ba Tun*'s case, the question whether the rule was expressly framed for the purpose of securing the safety of the workman was not argued in *Maung Ba Tun* v. *U Ohn Khin* (1); as the context shows, the second paragraph at page 302 of the report of the judgment there was not meant to be a detailed exposition of the language and meaning of the proviso, which had been already quoted at length at page 300; it was merely a very short statement of the difference between the English and the Burma Acts, and the emphasis was on the words "wilful disobedience" as opposed to "serious and wilful misconduct" and the words "sole question" as the context shows referred to that distinction.

We have no doubt that, had the question of the construction of the words "to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen" been argued in that case, as it has been in this, the decision of that Court would have in no way differed from our decision in the present case; but the point was not taken before them.

In the present case there was no evidence upon which the Commissioner could find that the disobedience of the applicant, if any, fell within the mischief of section 3 (*1*), proviso (*b*) (ii), of the Act.

It is perhaps desirable to observe that, before this proviso can operate in an employer's favour, each of seven distinct conditions must be satisfied. *First*, an

(1) [1938] Ran. 299.

order or rule must have been given or framed : a mere warning or disclaimer of responsibility is not enough. *Secondly*, its purpose—perhaps not necessarily its sole purpose, but at all events its substantial purpose—must have been that of securing the safety of workmen as such. *Thirdly*, though probably it need not say so in the precise terms the Legislature has chosen, the order or rule must contain words which on the face of them fairly and clearly indicate that its purpose is that of securing the safety of workmen : otherwise it is not "expressly" so given or framed. *Fourthly*, its terms must have been brought to the notice of the individual workman who is injured, for you cannot "wilfully" disobey an order of which you are unaware. *Fifthly*, it must have been disobeyed. *Sixthly*, the disobedience must have been wilful—neither, for example, merely negligent, nor due to a mistaken mode of doing a particular task, nor due to a wrong decision in an emergency, but deliberate. *Seventhly*, the accident must have been directly attributable to the disobedience.

We have, accordingly, come to the conclusion that upon the pleadings here and in view of the fact that the defence under this sub-section was never proved (and, for that matter, it was never satisfactorily raised upon the pleadings), the case must go back to the Commissioner with the intimation that the respondents are liable to pay compensation, for him to decide the remaining issues and assess the amount of compensation. The respondents must pay the costs of this appeal, advocate's fee fifteen gold mohurs.

MOSELY, J.—I agree.

DUNKLEY, J.—I agree.

SHARPE, J.—I agree.

BLAGDEN, J.—I agree.