PRIVY COUNCIL.

KESSOWJI ISSUR (PLAINTIFF) *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANTS).

P. C.*
1907.
April 24.
May 9.

[On appeal from the High Court of Judicature at Bombay.]

Civil Procedure Code (Act XIV of 1882), sections 568, 623—Discovery of fresh evidence—Laches—Negligence—Dismissal of application for review—Additional evidence on appeal—Evidence taken preliminary to hearing of appeal on the merits—Suit for damages for injuries on railway—Appeal decided not on evidence at trial but on observations of Judges at presentation of scene and events of accident on another night than that on which accident occurred.

The legitimate occasion for section 568 of the Civil Procedure Code (XIV of 1882) is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it: that is the subject of the separate enactment in section 623.

Section 623 exacts very strict conditions, so as to prevent litigants being negligent and enjoins the Court to require the facts as to the absence of negligence to be strictly proved. Where the defendants on the day after judgment had been given against them discovered fresh evidence which with diligence they might under the circumstances have obtained before or during the trial of the suit, and even after such discovery delayed for two weeks before making an application for review of judgment; *Held* that the application was rightly dismissed.

On an appeal on the merits of the case being filed the appellate Court without recording any reason as required by section 568 of the Code allowed such further evidence to be taken, not after the appeal on the merits had been heard and the evidence as it stood had been examined by the Judges but on special and preliminary application. *Held* that the appellate Court had no jurisdiction to admit the additional evidence, that it was wrongly admitted and must be disregarded.

The plaintiff sued the defendants, a Railway Company, for damages for injuries sustained by him when alighting from a carriage which overshot the platform of a station at night, and the evidence on the question of what light there was either natural or artificial, on the night in question being conflicting, it was suggested during the hearing of the case on appeal and agreed to by the counsel for the parties that the Judges should visit the scene of the accident under conditions approximating as nearly as possible to those which prevailed

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

when the plaintiff met with his injuries. This was done, the Judges and the legal advisers of the parties went to the station where a presentation of the scene and events of the accident was gone through by which the Judges were enabled to make a thorough investigation of the material conditions accompanying the accident. They formed their own opinion on the question of the sufficiency or otherwise of the light and gave judgment in accordance with them, reversing the decision of the Court which tried the case.

Held that such procedure was illegal. The result of it was that the appeal was decided not on the testimony given at the trial as to what took place on the night of the accident, but by the Judges' observation of what they saw on another night altogether; and the decision based on it was set aside, the judgment of the first Court being restored.

APPEAL from a judgment and decree (December 23rd, 1904) of the High Court at Bombay which reversed on appeal a judgment and decree (July 14th, 1904) of one of the Judges of the same Court sitting in exercise of the Original Civil Jurisdiction of the Court.

The suit out of which this appeal arose was brought by the appellant for damages for injuries sustained by him on 30th March 1903 through the negligence of the respondent Company. For the purposes of the report the facts are sufficiently stated in their Lordships' judgment. The plaintiff stated in his plaint that he was employed by several mill companies in Bombay as muccadam, and in the course of his evidence in the case he stated that he lost his business with these mill companies and therefore his income in consequence of the injuries he received through the defendants' negligence. At the trial of the case on the original side of the High Court (TYABJI, J.) the plaintiff on 14th July 1904 obtained a decree for Rs. 24,000 as damages.

On 28th July 1904 the defendants applied for a review of judgment, on the ground that since the judgment was delivered, namely on 15th July 1904, "they had discovered new and important matter and evidence which after the exercise of due diligence was not within their knowledge and could not be procured at the time when the decree was passed."

The new matter and evidence referred to related to the circumstances under which the plaintiff was dismissed from his employment as muccadum of the Century Spinning and Manufacturing Company, the Textile Manufacturing Company, and

the Bombay Dyeing Company; and the affidavit and documents filed with the petition for review stated "that the plaintiff had been dismissed from his employment with the companies above-named at the beginning of January 1904 for reasons not in the remotest degree connected with the alleged accident on the railway"; thus contradicting the plaintiff's evidence at the trial of the case.

The application for review was dismissed on 4th August 1904.

On 11th August the defendants appealed on the whole case from the judgment and decree of Mr. Justice Tyabji. In paragraph 25 of their memorandum of appeal they submitted

"That under all the circumstances of the case they should be given an opportunity of adducing evidence to show that the plaintiff was dismissed from his employment by the said mills owing to complaints regarding his receipt of illegal gratifications or defalcations and not because of his inability to attend to his business owing to his injuries, more especially having regard to the facts that the said evidence to a large extent consists of letters written by and to the Solicitors of the plaintiff and presumably in their possession at the time of the trial and not disclosed, and that the learned Judge largely based his judgment upon the fact that he considered the plaintiff to have given his evidence frankly and spoke the truth to the best of his ability."

thus raising the same questions which were sought to be raised by the review.

On 27th September 1904 the defendants applied to be allowed to produce further evidence on the question raised in the above paragraph, and their application was on 30th September granted by the Appellate Court; but no reason as required by section 568 of the Code of Civil Procedure was recorded for allowing such further evidence to be given.

The further evidence was taken and was commented on in the Appellate Court (SIR L. JENKINS, C. J., and BATCHELOR, J.) its effect being stated by the Court to be "there is an end to the possibility of relying upon the plaintiff's testimony."

The Appellate Court adopted the same conclusions of fact on the merits of the case as the first Court had done, namely that the carriage did overshoot the level of the platform; that the stoppage of the train was an invitation to alight; and that the plaintiff's injuries were received by a shock or fall on alighting

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

and not by a fall after he had alighted. But they considered that these facts

"though a necessary ground-work of the plaintiff's case do not by themselves suffice to establish negligence against the company. It is essential for the plaintiff to go further and show that the situation in which he was placed by the invitation to alight at the particular spot exposed him to danger which was not visible and apparent, or that he was invited to alight in an unsafe and improper place."

After citing decisions to show this, the judgment proceeded as follows :—

"The result of these decisions seems to me to leave no reasonable doubt as to what is the law upon the point in question. Mere overshooting, even with an invitation to alight, is not necessarily or by itself negligence; to constitute negligence there must be on the part of the Railway Company some further act or omission which exposes the passenger to a danger not visible and apparent, in other words, such a danger as a passenger of ordinary caution could not reasonably be expected to avoid. In the present suit this additional element is alleged by the plaintiff to exist in this circumstance that the slope was in complete darkness when his carriage drew up against it. The allegation is denied by the defendants and their witnesses, who assert that there was sufficient natural light to allow the plaintiff to descend with safety. It is not now alleged that the company's lamps on the platform threw any real light on the slope. Whether or not there was any day light, is on the record a matter of great nicety. The oral evidence is conflicting, and the learned Judge of the Court below has apparently decided the point upon a consideration of the almanac, which cannot be regarded as a satisfactory guide. The train is shown to have reached Sion station at 6-52 P.M. (local time), and on that day the sun set at 6-12. If we add 40 minutes, the usual interval allowed for civil twilight, it will be seen that the calculation still leaves it uncertain whether there was any real light or not, for upon the almanac the arrival of the train would be coincident with the expiration of twilight. Owing to this difficulty and to the vital importance of settling it with certainty, it was suggested that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. This suggestion was welcomed by counsel on both sides, and after communication with the local observatory it was agreed that on the evening of the 8th December at forty minutes after sunset the conditions now in question would be, as nearly as possible, exactly reproduced. At that time, therefore, attended by the legal advisers of both parties, we visited Sion station with the result that we are clearly of opinion that the plaintiff's accident must be attributed to his own carelessness and that the company cannot be held liable for negligence. By the courtesy of the Railway Company we were provided at Sion with the

same carriage in which the plaintiff was travelling on the 30th March, and we were thus enabled to make a thorough investigation of the material conditions accompanying the accident. In the first place it was noticeable that twilight had by no means completely ceased so that the plaintiff's allegation that it was 'pitch dark' must be rejected as untrue. It appeared to us that a passenger of ordinary carefulness would have had no difficulty in alighting safely even though he had nothing but the twilight to guide him. But in fact there was a far better light, namely the light from the lamps in the carriage and the neighbouring compartments of the train; and as it is admitted, even by the plaintiff himself, that on the evening of the accident the interior of the train was lighted in the usual way, this circumstance supplies us with evidence of a very weighty character. It must be remembered that in this country, where the whole side of a railway carriage is virtually an open window, the interior lamps project a great deal of light on the land bordering on the train, and after repeated experiments, made with all reasonable allowance due to our being forewarned, we were satisfied not only that the general lamps of the interior of the train threw sufficient light upon the landing place, but that this place was specially and amply lighted from the lamp of the particular compartment. For the mere opening of the carriage door, the necessary preliminary to descending, projects the light of this lamp clearly and distinctly on the space below, and even though that space be one or one and a half feet lower than usual, we feel assured that no passenger possessing fair eye-sight could fail to alight with safety. We are distinctly of opinion that there was nothing which could be called danger, either concealed or visible. This opinion receives confirmation from the undisputed fact that no mishap occurred to any of the passengers who alighted from the third class compartment ahead of the plaintiff's carriage and who in consequence must have been brought up at a greater height above the landing place than the plaintiff: though they had a greater height to descend it is not denied that they descended safely."

In the result, the Appellate Court reversed the decree of TYABJI, J., and dismissed the suit with costs. On this appeal

Cohen, K. C. and *DeGruyther* for the appellant contended that on the facts of the case which had been adopted by both Courts below negligence had been shown on the part of the Railway Company. Reference was made to *Bridges* v. *Directors, &c., of North London Railway Company*(1) and *London and North-Western Railway Company* v. *Walker*(2). The additional evidence admitted by the Appellate Court was taken in violation of section 568 of the Civil Procedure Code: it was taken before that

(1) (1874) L. R. 7 H. L. 213. (2) [1903] A. C. 239.

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

Court was in a position to say that it was "required" within the meaning of that section; and no reason was recorded for taking additional evidence. It was done therefore without jurisdiction and the evidence was not admissible. The finding upon such evidence to the effect that it made reliance on the appellant's testimony impossible was quite unwarranted and erroneous. The results of the visit of the Judges trying the appeal to the locality where the accident happened was inadmissible as evidence in the case: it was not merely a view of the locality but a presentation or rehearsal, of the occurrences at the time the appellant received his injuries, at which the Judges assisted. It was setting up a new case, and introducing new matters in place of the evidence of the witnesses who saw the accident on 30th March 1903, which was the only legal evidence, as to the condition of the light at the time, on which the Court of Appeal should have acted, and which could not be disregarded in favour of a consideration of a state of affairs existing at the time of the local investigation on 8th December 1904. All the procedure at the local investigation was, it was submitted null and void.

Sir R. Finlay, K. C., and *Tyrrell Paine* for the respondents contended that the Appellate Court were entitled in their discretion to allow the additional evidence to be taken: the words of section 568 "for any substantial cause," were wide enough to include this case. The Court had jurisdiction to take the course they did notwithstanding the refusal of the application for review: sections 623 and 629 of the Civil Procedure Code were referred to. The Appellate Court was right in holding that the facts did not necessarily establish negligence on the part of the respondents; and they were entitled to come to the conclusion that there was sufficient light at the time of the accident to enable the appellant to alight safely if he had used due care and diligence. The course taken by agreement of the parties in leaving the matter in the hands of the Court for a local inspection amounted to a submission to arbitration. There was no suggestion by either side that the circumstances at the time of the investigation by the Judges differed in any way from those at the time the accident happened. The Appellate Court wished to view the locality to enable them to decide

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

upon the evidence as to the amount of light there was when the accident occurred. Both parties agreed and the decision was upon a question of fact. The fact that the appellant did not lose his employment by reason of the accident would reduce the damages materially: the Appellate Court was right in deciding that against him; and in no case should he get the amount given him by the first Court.

Cohen, K. C., replied. The course taken in visiting the locality by agreement of parties did not amount to a reference to arbitration; section 306 of the Civil Procedure Code was referred to: it was an unwarranted course of procedure.

1907, May 9th.—The judgment of their Lordships was delivered by

LORD ROBERTSON:—The appellant was plaintiff in a suit against the respondents, for damages for personal injuries alleged to have been sustained through their negligence. He was a passenger in a train of theirs from Bombay to Sion Station, and his case was that, on the evening in question, the train overshot the platform at Sion and the passengers, on the implied invitation of the respondents, alighted where the train stopped; that at this place it was dark and there were no lamps; that no warning was given to the appellant that the train had passed the platform or that special care must be taken in descending; that the appellant fell heavily, and was seriously injured, and for long disabled from business. There was no dispute as to the nature of the injuries.

The case went to trial, the respondents denying liability; evidence was led at great length and the trial lasted 10 days. The result was that the learned Judge who tried the case gave the appellant Rs. 24,000; and it is sufficient at present to say that the judgment presents a careful and complete analysis of the evidence.

Cases of overshooting the platform and resulting accidents to passengers have so frequently been tried and considered that no question of law arises for determination. The present case is only remarkable because the respondents (in the teeth of the written report of the Sion stationmaster, made the day after the

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

accident, that the train had overshot the platform) maintained at the trial and adduced witnesses, including this very station-master, to prove the contrary and that the passengers duly alighted at the platform. This fatal course was really to give away the case; it was proved to the satisfaction, even of the Appellate Court, that the train did overshoot; and the respondents, by this perverse attitude, were disabled from maintaining any intelligible theory as to the conditions under which the passengers actually alighted. They could not pretend that the passengers were warned to take care, and all their evidence as to lamps applied to a place where the accident did not happen. It may be noted in passing that the darkness which in fact prevailed is proved by a piece of real evidence to which sufficient weight has not been given, *viz.*, that when it became known that a man was lying hurt, lights were brought from the station.

From the description of the case now given, it is clear that the case was a commonplace and plainsailing one and required no *deus ex machina*, and that it was very deliberately investigated. Its subsequent course, however, was destined to be untoward.

Fourteen days after the judgment of Mr. Justice Tyabji, the respondents applied to him for a review of his judgment, on the ground that, since the trial, there had come to the respondents' knowledge new and important evidence, which was, in short, that one of the employers of the appellant said that the appellant had lost the employment of the informant's firm owing to causes unconnected with the accident, whereas in evidence the appellant had ascribed this loss to the accident.

Now the Code of Civil Procedure permits such applications for review on the ground of such discovery, but it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence—it enjoins the Judge to require the facts as to the absence of negligence to be strictly proved; and it makes the Judge who tried the case final on such applications. The remedy is allowed (section 623) to "any person considering himself aggrieved . . . who from the discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge, or

could not be produced by him at the time when the decree was passed . . . or for any other sufficient reason." And, by section 626, "no such application shall be granted on the ground of discovery of new matter . . . without strict proof of such allegation." In the present instance the Judge refused the application, and it is manifest that the circumstances rendered it inadmissible.

The appellant had in his plaint described himself as muccadum of several mill companies; there was no doubt of his identity and as to his employment; in the witness box he was explicit and even copious as to his loss of the agencies in question, to such an extent that the respondents objected to some of his books being produced; he was cross-examined on the subject; and this took place on 17th June 1904, the first day of a trial which did not conclude till 2nd July 1904, and took place at Bombay, the scene of the transactions in question.

It is obvious that if the respondents had desired to inform themselves before or even during the trial as to this man's loss of business, all they had to do was to step round and see his employers; and it would be *pessimi exempli* if provisions for review were perverted to supply such omissions.

After their failure to get review, the respondents appealed to the Appellate Court on the whole case; and the 25th reason of appeal was that they should be given the opportunity of adducing further evidence, which had been refused by Mr. Justice Tyabji on their application for review.

Having got into the Appellate Court the respondents gave notice of an application for permission to examine the man Wadia, whose information had founded their application to Mr. Justice Tyabji, and this application was supported by affidavit, just as in the Court below. The Appellate Court heard the application, and on 30th September 1904, granted it, or rather, with greater latitude, ordered that "further evidence" be taken; and taken it was, before one of the Appellate Judges, not merely Wadia, about whom the application was made, but several other witnesses being examined for the respondents, and the appellant being examined for himself.

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

Now, at this stage the question is, under what jurisdiction was this fresh evidence taken by the Appellate Court? They had, as has been noticed, no jurisdiction to reverse the refusal of Mr. Justice Tyabji, appeal from his decision being excluded by statute. The 568th section of the Code of Civil Procedure can alone be looked to for sanction of this proceeding; but when its terms are examined, they will be found inapplicable. The part of the section which alone is colourably relevant is: "If the Appellate Court requires," which plainly means needs, or finds needful, "any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial reason, the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined." The section goes on: "Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission."

Now, this evidence was admitted by the order of 30th September 1904, and that order states no reason for such admission. *Primâ facie*, therefore, this was not done under the 568th section. But, further, the ultimate judgment of the Appellate Court puts it beyond doubt that in fact the learned Judges were simply reviewing and reversing Mr. Justice Tyabji's refusal of review, for they frankly narrate that refusal, and go on to say: "On the case coming up in appeal it appeared to us desirable that the further inquiry invited should be undertaken." On this phraseology, "in appeal," it must be observed that the further evidence was ordered not after the appeal on the merits had been heard, and the evidence as it stood had been examined by the Judges, but on special and preliminary application. This is important, because the legitimate occasion for section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a dicovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in section 623.

On these grounds it appears to their Lordships that the Appellate Court had no jurisdiction to admit this evidence, that

it was wrongly admitted and does not form part of the evidence in this appeal. It must, therefore, be disregarded. The evidence, however, was necessarily read and commented on; and, in fairness to the appellant, their Lordships think it right to add that they do not agree in the following analysis of it which is taken from the judgment of the Appellate Court: "The result may be stated in a single sentence. There is an end to the possibility of relying upon the plaintiff's testimony."

The appeal having been heard on its merits, there ensued what, it may be hoped, is an unprecedented chapter in appellate procedure. The Court seems to have adopted the view that the train had overshot the platform, and to have considered that the *crux* of the case was the question of light, and this question, of course, was a complex one, what light came from the sky and what from artificial sources—the station lamps having been the artificial light relied on by the respondents. The course taken by the Appellate Court had better be described in their own language:—

"Owing to this difficulty and to the vital importance of settling it with certainty, it was suggested that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. This suggestion was welcomed by counsel on the both sides, and after communication with the local observatory it was agreed that on the evening of the 8th December at 40 minutes after sunset the conditions now in question would be, as nearly as possible, exactly reproduced. At the time, therefore, attended by the legal advisers of both parties, we visited Sion Station, with the result that we are clearly of opinion that the plaintiff's accident must be attributed to his own carelessness and that the company cannot be held liable for negligence. By the courtesy of the Railway Company we were provided at Sion with the same carriage in which the plaintiff was travelling on the 30th March, and we were thus enabled to make a thorough investigation of the material conditions accompanying the accident."

The result was that it became manifest to the two learned Judges that "a passenger of ordinary carefulness would have had no difficulty in alighting safely, even though he had nothing but the twilight to guide him. But, in fact, there was a far better light, namely the light from the lamps in the carriage," and "this place was specially and amply lighted from the lamp of the particular compartment."

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

The practical result was that the appeal was allowed and the suit dismissed, the case being decided, not on the testimony given at the trial as to what took place on the night of the accident, but by the Judges' observation of what they saw on another night altogether. Their Lordships find it impossible to admit the legitimacy of such procedure or the soundness of such conclusions. Even if the question of light could be isolated from the rest of the case, there was no ground whatever for despairing of sound results being yielded by a careful analysis of the evidence, and, in fact, this was demonstrated by the excellent judgment of the trial Judge. On the other hand, the method actually adopted is subject to the most palpable objections and fallacies.

It was suggested by one of the learned counsel for the respondents (in irreconcileable inconsistence with the leading argument) that this proceeding was so remote from regular judicial methods as to constitute an arbitration, and that the result was not appealable. Their Lordships do not think that appellant is shown to have done anything to exclude his appeal. In the judgment it is stated that counsel on both sides welcomed the "suggestion," which is thus traced, in its inception, to the Bench. But the "suggestion" was "that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries."

Their Lordships do not approve of such a suggestion; but even if it had been tentatively carried out, it did not necessarily follow that the Court would cast to the winds the legal evidence in the case, and decide on impressions arising on the concerted representation. It would be too strict to hold that it is the duty of counsel, at their peril, to restrain Judges within the *curæus curiæ*, and to insist on their abstaining from experiments which to some may prove too alluring to admit of adherence to legal *media concludendi*.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Appellate Court reversed with costs, and the judgment of Mr. Justice

Tyabji restored. The respondents will pay the costs of the appeal.

1907.

KESSOWJI ISSUR v. G. I. P. RAILWAY COMPANY.

Appeal allowed.

Solicitors for the appellant—*Messrs. Payne & Lattey.*

Solicitors for the respondents—*Messrs. White, Borrett & Co.*

J. V. W.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

KRISHNAPPA BIN VENKRADDI (ORIGINAL DEFENDANT 2), APPELLANT, *v.* SHIVAPPA BIN TIMARADDI (ORIGINAL PLAINTIFF), RESPONDENT.*

1907. *March* 12.

Transfer of Property Act (IV of 1882), section 52—Civil Procedure Code (Act XIV of 1882)—Contentious suit—Active prosecution—Non-service of the summons on the defendant—Transfer of property by the defendant—Lis pendens.

Section 52 of the Transfer of Property Act (IV of 1882) imposes two conditions—(*a*) the existence of a contentious suit and (*b*) that the transfer should be during its active prosecution in a Court of the kind described in the section.

Semble: Every real suit (as distinguished from a collusive one), to which the Civil Procedure Code (Act XIV of 1882) applies, is *primâ facie* contentious.

According to the Civil Procedure Code the essentials of a suit are—(1) opposing parties, (2) a subject in dispute, (3) a cause of action, and (4) a demand of relief.

If there is no inaction on the plaintiff's part, the suit would be contentious, notwithstanding the fact that the service of the summons could not be effected on the defendant.

A suit cannot be said to be non-contentious merely because the decree therein is passed *ex parte*.

Annamalai Chettiar v. *Malayandi Appaya Naik*(1) followed. *Upendra Chandra Singh* v. *Mohri Lal Marwari*(2) not followed.

The defendant having transferred his property to another during the active prosecution of the suit but before the service of the summons,

Held, that the doctrine of *lis pendens* applied.

* Second Appeal No. 141 of 1906.

(1) (1906) 29 Mad. 426. (2) (1904) 31 Cal. 745.