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We think, therefore, it is open to us to act under Regulation II of 1827, whether or no section 115 of the Civil Procedure Code applies. Consequently it is competent for us to issue such orders as the case may require. But I wish it to be clearly understood that it is only in a very exceptional case that I would be prepared to exercise such a power as this, more especially as normally we should act, if at all, under section 115. I regard, however, this particular case as a very exceptional one and as a very important one to the shipping world, and that consequently it is eminently one where we ought to interfere irrespective of the small amount involved, because to allow a contrary decision to remain might well result in much confusion.

I would, therefore, act under the Regulation, viz., II of 1827, and make the rule absolute, and discharge the order of the learned District Judge, and restore the decree of the Subordinate Judge, and direct the plaintiff to pay the costs throughout.

BLACKWELL, J. :—I agree.

Rule made absolute.

R. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

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THE AGENT, G. I. P. RAILWAY, BOMBAY (ORIGINAL OPPONENT), APPELLANT *v.* KASHINATH CHIMAJI (ORIGINAL APPLICANT), RESPONDENT.*

Workmen's Compensation Act (VIII of 1923), section 3, sub-section (1)—Injury by accident—"Arising out of employment"—Compensation—Notice.

A workman in the employ of G. I. P. Railway Company, on a salary of Rs. 25 a month, was sent on a message by one of the Company's Officers from Kalyan to Bombay. In Bombay he was directed by another of the Company's Officers to return to Kalyan. On the way back he travelled in an electric train which was to take him as far as Kurla. The door of the carriage in which he was travelling was open and he was standing at the entrance supporting himself on a vertical iron bar. The train gave a jerk while going up an incline and the workman fell down on the lines and received severe injuries which resulted in his death. Under section 30 of the Workmen's Compensation Act, 1923, the Commissioner awarded a sum of Rs. 750 as compensation

* First Appeal No. 291 of 1926.

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to the father and other relatives of the deceased. The Company having appealed against the decision to the High Court, it was contended (*a*) that the accident to the workman did not arise "out of his employment" within the meaning of section 3, clause (1) of the Act; (*b*) that the workman acted in wilful disobedience of a warning notice expressly framed for the purpose of securing the safety of workmen within proviso (*b*) (ii) to section 3 (1) of the Act; and (*c*) that notice was not given as soon as practicable after the happening of the event as required by the Act.

Held, on the facts (1) that, the door of the carriage being left open, the workman had not exposed himself to any greater risk than that to which an ordinary traveller in the train would have been exposed, and that the accident had arisen out of his employment within the meaning of section 3, sub-section 1, of the Act.

Lancashire and Yorkshire Railway v. *Highley*[1]; *Pomfret* v. *Lancashire and Yorkshire Railway*[2]; *Jibb* v. *Chadwick*[3]; *Brice* v. *Edward Lloyd, Limited*,[4] referred to.

(2) That the warning notice in question, if it was a rule at all, was one expressly framed for the purpose of securing the safety of passengers in general, and not of workmen.

(3) That the accident having occurred on January 16, 1926, the notice which was given on January 22, 1926, was sufficient notice under the Act.

APPEAL against the order of N. M. Patwardhan, Commissioner for Workmen's Compensation, Bombay.

The workman Ganpat Kashinath was in the employ of the G. I. P. Railway Company on Rs. 25 a month. He was employed as a coolie in the Engineering Department at Kalyan. On January 16, 1926, at about 8-30 a.m. the Head clerk in the Engineer's office sent Ganpat with an urgent message to his Officer, the Resident Engineer, who resided in the Fort, Bombay. Ganpat delivered the message to the Resident Engineer who told him to go back to Kalyan. On his return journey he took an electric train for the purpose of going as far as Kurla, not by the main route but by what was known as the Harbour Branch route, intending to proceed from Kurla by the regular steam train. He was standing in the carriage of the electric train, near the entrance, supporting himself on a vertical iron bar in the door way, when the train, going up the incline at Sandhurst Road New bridge, gave a sudden jerk, and the workman fell down on the lines and received severe injuries which resulted in his death. The deceased's father and mother,

(1) [1917] A. C. 352.
(2) [1903] 2 K. B. 718.
(3) [1915] 2 K. B. 94.
(4) [1909] 2 K. B. 804.

on January 22, 1926, gave notice of the accident to the Railway Company and thereafter applied to the Commissioner for Workmen's Compensation, claiming the sum of Rs. 750 as compensation in lump. The Railway Company opposed the application, contending, *inter alia*, that the accident which caused the injury had not arisen out of and in the course of his employment ; that the conduct of the workman in standing at the entrance of the carriage supporting himself on the vertical iron bar amounted to gross negligence and carelessness on his part and was in wilful disobedience of the notice and cautions put up in the electric cars ; that the said notice (" Don't stand near the door ") was put up to secure the safety of all passengers, including workmen ; and that the notice of the accident had not been given as soon as practicable after the happening thereof, in accordance with section 10 of the Workmen's Compensation Act.

The Commissioner held that the accident to the workman arose out of and in the course of his employment, that the accident was not attributable to the wilful disobedience of the workman of any rule expressly framed for the purpose of securing the safety of workmen, and that the notice of accident served six days later was sufficient in law. He, therefore, ordered the Company to pay compensation Rs. 750.

The Company appealed to the High Court.

Kanga, Advocate General, with *Little & Co.*, for the appellant.

S. R. Bakhale for *P. S. Bakhale*, for the respondent.

MARTEN, C. J. :—We understand that this is the first case to be brought before the High Court under the new Workmen's Compensation Act, 1923. I only hope that it is not going to be the forerunner of a large number of other cases, for, as we know, the English Workmen's Compensation Act has given rise to more litigation and more differences of opinion between various Judges than any legislation of modern times ; and with our present overcrowded list we

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are not in a position to stand any substantial increase of litigation.

The present case is an appeal by the G. I. P. Railway Company under section 30 of the Act, against an award of a sum of Rs. 750 by the Commissioner as lump compensation to the father and other relatives of the deceased. The question before us is whether the accident arose out of and in the course of the workman's employment within the meaning of section 3 of the Act. As has been clearly laid down in the English cases dealing with the same words, both those conditions must be satisfied, viz., the accident must be one arising out of the employment. It must also be in the course of the employment. And unless both those conditions are satisfied, the workman cannot bring his case within the Act.

Now in the present case the Company admits before us that the accident arose in the course of the workman's employment. But it is denied by them that it arose out of his employment. It is further contended by the Company that the workman acted in wilful disobedience of a rule expressly framed for the purpose of securing the safety of workmen within proviso (*b*) (*ii*) to section 3. It was also originally contended that he had no right to travel in the particular manner he did, and also that notice was not given as soon as practicable after the happening of the event as required by the Act.

The short facts are these. The workman was in the employ of the Company on Rs. 25 a month, and was employed at Kalyan. He was sent on a message by one of the Company's officers from Kalyan to Bombay. In Bombay he was directed by another of the Company's officers to return to Kalyan. On his way back he was travelling in an electric train as far as Kurla. While so travelling he, to follow the language of the plaint, being " a cooly under the Engineering Department on the 16th January 1926 received personal injury by accident arising out of and in the course of his

employment at the Sandhurst Road New Bridge. The cause of injury is that while he was standing at about 12-52 p.m. on the day mentioned at the entrance of the carriage of a train on the Harbour branch supporting himself on the vertical iron bar, the train while going up the bridge received a jerk, and as a result of that Ganpat fell down on the lines and died consequently." In their written statement the Company do not deny the facts as stated in the claim, except that they do deny that the accident arose out of and in the course of his employment.

Now taking the points one by one, first of all, as regards notice under section 10, the accident occurred on January 16, 1926, and notice was given on January 22, 1926. It was contended that this was not given as soon as practicable after the happening of the accident. But in my judgment that suggestion is entirely unfounded, when one considers the condition the man's family would be in after an accident such as this. Moreover, to give a notice under the Act, the family would no doubt have to consult some lawyer, for a layman cannot be expected to be familiar with his precise rights under this particular Act. I need not however pursue this point.

Then as regards the proviso to section 3 of the Act, that arises in this way. The Company have apparently issued certain warning notices in connection with these electric trains, which state, amongst other things, "Don't stand near the door." It is contended that this is a rule expressly framed for the purpose of securing the safety of workmen within section 3. In our opinion that is not a fair construction of section 3. The notice in question, if it is a rule at all, is one expressly framed for the purpose of securing the safety of passengers in general, and not for those of workmen. No doubt what section 5 primarily contemplates are certain rules or regulations in a factory for preventing, for instance, workmen coming within a particular dangerous area in the factory. And there are many other instances one can

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think of. Accordingly we do not think that the Company are protected by this proviso in the present case.

Then I may get rid of another argument they urged in the Court below. They said they had got another rule which prevented workmen going by the electric trains at all. It seems somewhat inconsistent with the point I have just dealt with, but at any rate it is a point which they made in the Court below, and which they have abandoned before us. There is, therefore, nothing in that point because they conceded that the workman was entitled to travel on the return journey by this particular electric train.

We, therefore, come to the question, which is really the crux of the case, as to whether, in acting as he did, the workman's accident arose out of his employment. Now in the first place, one has to see exactly what is the admitted evidence in the case. It was at first suggested to us—so I understood—that the learned Commissioner had acted without taking any evidence, and that this was an irregular procedure. But when one comes to look at the plaint and the written statement, it is clear that on those two documents—at any rate if one treats them as pleadings—there was no dispute as to how the accident arose. I have already read out what may be described as the plaint. I have already referred to what is called the written statement. So we may take it that the cause of injury was that while the workman was standing at the entrance of the carriage of this train supporting himself on the vertical iron bar, the train, while going up the bridge, received a jerk, and as a result of that Ganpat fell down on the lines and died consequently.

Why then did he fall out of the train in this way? The answer is that the door was open. In reply to certain questions put to him by the Bench, the learned Advocate General produced a rough sketch of the carriages used on these electric trains, which show that there were six doors in all, three on each side, and that in the middle of each door

there was a place called "vertical iron stanchion." The learned Advocate General stated (this of course is not in evidence) that the stanchion is not used for the purpose of shutting the doors or holding them in any way when they are shut, but that the stanchion comes inside the carriage when the doors are shut. He further stated that in practice these trains all run with the doors open, because it is not practicable for the Railway Company to find porters to shut the doors. It was at first further suggested that this was in accordance with the regulations of the Railway Board or other proper authorities. But when we asked for the Regulation to be produced, it was subsequently admitted that this procedure could not be justified under the regulations. Indeed I rather gather that in ordinary trains to travel deliberately with open doors is a matter which is prohibited under the regulations.

But later on in the case the learned Advocate General said that, though he had made these statements, they were not in evidence, and accordingly we must go by the evidence in the case. But taking the evidence as it stands, it is a reasonable inference that the door was open. That being so, I do not think we ought to infer that the workman opened that door. Still less ought we to do so after what we were told by counsel, who has made statements quite frankly to assist the Court, which cannot be entirely ignored.

Now that being so, was there evidence before the Commissioner on which he could find that this accident arose out of the employment of the workman ? We have here a case where the Company in effect invite passengers to use these carriages on the electric line. This particular carriage was left with the door in question, if not other doors, open. Presumably the passengers were entitled to consider that that was a safe mode in which to travel, if it was done deliberately by the Railway Company. There was a jerk in the train, and the traveller was thrown out. What added risk then did he expose himself to beyond what would

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so in the case of an ordinary traveller. This class of case is naturally near the line. But on the facts of the present case, I think there was evidence before the learned Commissioner on which he could properly find that the traveller in question, viz., the workman, did not take any greater risk than an ordinary traveller would do while travelling at the present time on one of these electric trains. I lay some stress on the fact that that door was left open. I think this has a material bearing on the circumstances of the present case.

We were referred to certain English authorities which have been naturally of great value to us in arriving at our conclusion, because they clearly bring out what is described as an added peril. For instance, in *Lancashire and Yorkshire Railway* v. *Highley*,[1] the workman in the course of his employment crossed the railway by an unauthorised way, and exposed himself to an added peril by going under the trucks of a standing goods train. The train moved and he was killed. It was held that although it was proper for him to cross the line at a particular place, he was exposing himself to an added peril by attempting to pass under the trucks in the way he did. But that was not entirely an accident arising out of his employment, and was not an ordinary risk of his employment, and consequently the Act did not apply.

Then in *Pomfret* v. *Lancashire and Yorkshire Railway*[2] the workman while travelling in a train in the course of his employment fell out of the train. The question arose as to whether the mere fact of his falling out of the train was sufficient to prove that it had arisen out of his employment. In other words, was he merely doing what an ordinary passenger might do ? At the first hearing before the Court of Appeal their Lordships differed ; Lord Justice Mathew took the view that the learned county Court Judge had "drawn the inference that the deceased did no more than an ordinary passenger in the train might do." But on the evidence in that particular case the other two Judges, viz.,

(1) [1917] A. C. 352. (2) [1903] 2 K. B. 718.

Collins M. R. and Lord Justice Stirling were not prepared to go as far as that on the then evidence, and accordingly the whole Court agreed in sending the case back to the county Court Judge. On remand certain further evidence was taken of the passengers in the train, and the county Court Judge said he could draw no other inference than that the accident occurred when the deceased was acting as an ordinary passenger would do. On that further finding the Court of Appeal came to the conclusion that there was evidence on which he could so find, and accordingly they refused to disturb the finding of the county Court Judge. But even then the accident itself was left in a condition of some doubt, for the Court only arrived at this rather tentative conclusion (p. 726) :—

"The evidence rather suggests that while the deceased was still standing up and was putting his basket in the rack the train began to move, and as it travelled rather unsteadily at starting the deceased lost his balance and fell against the window in the upper part of the door, and so fell out of the train."

Of course we have not got here, I take it, a door or a window like an ordinary English railway carriage. We have here a carriage with large openings and sliding doors such as are found in many electric trains in England.

Then another case cited was *Jibb* v. *Chadwick*.[1] There the workman tried to enter the train whilst in motion, and it was held that "the risk attaching to the attempt to enter a train in motion was not a risk reasonably incidental to the deceased's employment. He had exposed himself to an added risk by doing an unauthorised and illegal act, and the accident did not, therefore, arise out of the employment within section 1, sub-section 1, of the Act." In that action it was pointed out by Lord Justice Swinfen Eady in his judgment, quoting also a Scottish case to the same effect, that "the risk of entering a train in motion, which is prohibited by Act of Parliament, cannot be included or regarded as one of the risks of railway travelling."

[1] [1915] 2 K. B. 94.

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Then *Brice* v. *Edward Lloyd, Limited*[1] was a case where a workman employed at certain works climbed on to a hot water tank in the building to eat his supper. The tank was only partially covered in. On returning to his work the man fell into the tank and was scalded to death. The workmen were not allowed on the tank. There Lord Justice Kennedy said :—

"But where, as here, a man chooses to go to a dangerous place where he has no business to go, incurring a danger of his own choosing and one altogether outside any reasonable exercise of his employment, in my opinion, if he meets with an accident, it cannot be said that the accident arose out of his employment."

Here, if the carriage was a dangerous place, it was a dangerous place provided by his masters the Railway Company, viz., an electric coach on which the door in question, if not the other doors, was not properly shut. The fact that the man leaned against the stanchion for protection did not necessarily involve that he was negligent. He may have thought that that stanchion was put there expressly for the protection of passengers, and that he was safer in holding on to it than if he stood on some other part of the carriage without having anything to hold on to at all.

As regards the point whether the carriage at the time was crowded or not, as may often be the case, we have no evidence. But as it was in the middle of the day probably it was not.

Taking, however, the facts as we find them, we think there was evidence on which the Commissioner could arrive at the finding, which he did, viz., in effect that the applicants had discharged the onus of proof which lay upon them. It was contended that the learned Commissioner had misapprehended the onus of proof, and really put the onus on the Railway Company to show that they were not liable. With all respect I do not think that that suggestion is justified by the judgment of the learned Commissioner. It is quite clear from the cases to which allusion has already been made,

(1) [1909] 2 K. B. 804.

and which only state the ordinary well accepted procedure under this type of legislation, that the onus of proof is on the applicants to allege that they are entitled to the benefit of the Act.

Under these circumstances the appeal will be dismissed with costs.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

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BHAILAL NATHABHAI (ORIGINAL DEFENDANT), APPELLANT *v.* KALANSANG GULABSANG AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Tenant claiming permanent tenancy—Unsuccessful plea of permanent tenancy in suit brought in Mamlatdar's Court under Mamlatdars' Courts Act (Bombay Act II of 1906)—Tenant remaining in possession after decision—Such possession is not adverse in sense of substantiating plea of adverse possession.

The defendant was a tenant of the plaintiff. He claimed to be a permanent tenant. In 1898, the plaintiff brought a possessory suit against the defendant in the Mamlatdar's Court, when the defendant raised the plea of adverse possession. The plea was unsuccessful and the plaintiff obtained a decree. But the decree was not executed and the defendant continued in possession. In 1921, the plaintiff sued again to recover possession from the defendant who contended that his claim to permanent tenancy had ripened into a title by his assertion of adverse title since 1898 :—

Held, negativing the plea, that there was nothing to show that the defendant remained in possession in assertion of an adverse title after 1898, and that he could not base his title on prescription.

Mohammad Mumtaz Ali Khan v. *Mohan Singh*[1]; *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande*[2] and *Nainapillai Marakayar* v. *Ramanathan Chettiar*,[3] followed.

Budesab v. *Hanmanta*[4] and *Thakore Fatesingji* v. *Bamanji A. Dalal*,[5] distinguished.

SECOND APPEAL from the decision of F. X. DeSouza, District Judge of Ahmedabad, varying the decree passed by J. D. Rana, Subordinate Judge at Kaira.

* Second Appeal No. 800 of 1923.

(1) (1923) L. R. 50 I. A. 202.
(2) (1923) L. R. 50 I. A. 255.
(3) (1923) L. R. 51 I. A. 83.
(4) (1896) 21 Bom. 509.
(5) (1903) 27 Bom. 515.