This being so, the ancient maxim " Once a highway, always a highway " must prevail, and I hold that the obstruction of the Gowan was not according to law, and that plaintiffs have a right to the relief claimed. The original Court's decree must, therefore, be reversed, and the plaintiffs given the decree which has been set out in the learned Chief Justice's judgment.

Decree reversed.

B. G. R.

APPELLATE CIVIL.

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

1928
October 1

RABIA, WIDOW OF MAHOMED TAHIR, APPLICANT *v.* THE AGENT, G. I. P. RAILWAY, OPPOSITE PARTY—MESSRS. W. T. HENLEY'S TELEGRAPH WORKS, CONTRACTORS WITH THE OPPOSITE PARTY.*

Workmen's Compensation Act (VIII of 1923), sections 12 and 2 (2)—Meaning of " part of ordinary trade or business "—Erection of steel towers near the Railway line whether part of the ordinary trade or business of the railway—Exercise of statutory powers by the Railway Co.—State railway whether a department of Government.

The G. I. P. Railway entered into a contract with a company under which the latter was to construct a transmission line to carry electric power to various sub-stations on the railway. The deceased was employed by the contractors as a fitter whose work was to assist in the erection of steel towers to carry the overhead cable. These towers were not erected on the railway track but on land adjacent thereto. While carrying materials from the store near a station to the site of work he was knocked down by a train and killed. The mother as a dependent of the deceased applied for compensation from the G. I. P. Railway under section 12 of the Workmen's Compensation Act. The Commissioner referred the matter to the High Court under section 27 of the Act :

Held, (1) that the setting up of an overhead electric cable for the purpose of transmitting electrical power to the railway was not ordinarily part of the trade or business of the principal, viz., the G. I. P. Railway, under section 12 of the Workmen's Compensation Act :

Pearce v. *London and South Western Railway*[1] and *Wrigley* v. *Bagley & Right*,[2] referred to ;

(2) that in constructing such an overhead electric cable the Railway Company was exercising and performing the powers and duties conferred upon it by statute ;

*Civil Reference No. 11 of 1928 made by the Commissioner for Workmen's Compensation, Bombay, under section 27 of the Indian Workmen's Compensation Act.

[1] [1900] 2 Q.B. 100.

[2] [1901] 1 K. B. 780.

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(3) that a state railway was a department of the Government within the meaning of section 2 (2) of the Indian Workmen's Compensation Act of 1923.

The word " ordinarily " in section 12 of the Act applied just as much to a Government department as it does to any other principal.

THIS was a reference made by J. F. Jennings, Commissioner for Workmen's Compensation, Bombay, under section 27 of the Workmen's Compensation Act VIII of 1923.

The G. I. P. Railway Company, in connection with the electrification of their line, were building a Power Station near Kalyan and were constructing a transmission line to carry electric power to various substations on the railway. The work of constructing this transmission line had been entrusted on a contract to Messrs. W. T. Henley's Telegraph Works and the deceased Usman Mahomed was employed by Messrs. Henley's as a fitter. His work was to assist in the erection of the steel towers which would carry the overhead cable. These towers were not erected on the railway track but on land adjacent thereto. While carrying materials from the Store near Kalyan Station to the site of the work he was knocked down by a train and killed on March 26, 1928. Rabia Mahomed, the mother of the deceased, claimed compensation from the G. I. P. Railway on the ground that she was a dependent of the deceased Usman, a workman who was employed by the G. I. P. Railway and who was killed as the result of an accident arising out of and in the course of the employment of the Railway Company. Notice was issued to the G. I. P. Railway to deposit compensation under section 8 (1) of the Workmen's Compensation Act of 1923, but before the hearing of the case the G. I. P. Railway claimed to be indemnified as against their contractors Messrs. Henley & Co., under section 12 (2) of Act of 1923. Notice in Form J was duly issued to the contractors who duly appeared at

the hearing. The railway company was not represented. At the hearing the contractors took the preliminary objection that the applicant was not entitled to be compensated by the G. I. P. Railway Company because the work which was being carried out by the contractors was not ordinarily part of the trade or business of the principal. The Commissioner at first raised two issues, (1) whether the applicant was employed by the contractor or directly by the company, (2) if under a contractor whether the railway company was liable as principal under section 12. The Commissioner found on the first issue that the deceased was in fact employed by Messrs. Henley and not by the railway company; that as regards issue No. 2 he was of opinion that the setting up of an overhead electric cable for the purpose of transmitting electrical power to the railway was not ordinarily part of the trade or business of the principal and so the railway company was not liable under section 12 of the Workmen's Compensation Act. In construing the meaning of the words "ordinarily part of the trade or business of the principal" in section 12 the Commissioner relied upon the English case *Pearce* v. *London and South Western Railway*.[1] The Commissioner however raised further issues in view of section 2 (2) of the Workmen's Compensation Act, viz., (3) whether the G. I. P. Railway was empowered to construct an overhead electric cable and (4) whether the G. I. P. Railway was a department of the Government within the meaning of section 2 (2) of Workmen's Compensation Act. On these issues the Commissioner was of opinion that the G. I. P. Railway Company in constructing the work in question was exercising powers conferred upon it by law and that the G. I. P. Railway was a department of the Government within the meaning of section 2 (2)

[1] [1900] 2 Q. B. 100.

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of the Act. As a result of these findings he came to the conclusion that although the erection of an overhead cable was not ordinarily part of the trade or business of a railway company and that therefore the workman could not recover against the railway company under section 12, yet as the railway company was exercising and performing powers and duties conferred upon it by statute and was a department of the Government, the exercise and performance of those powers and duties were by virtue of section 2 (2) deemed to be the trade or business of such authority or department. The workman was therefore entitled to recover compensation from the railway company provided the deceased workman was a workman within the meaning of section 2 (1) (*n*) of the Act. The Commissioner submitted three questions for the decision of the High Court under section 27 of the Workmen's Compensation Act, which were :—

(*a*) Is the work of constructing an overhead electric cable in the circumstances set out in paragraph 2 of the reference ordinarily part of the trade or business of a railway?

(*b*) In constructing such an overhead electric cable is the Railway Company exercising and performing the powers and duties conferred upon it by Statute? and

(*c*) Is a State Railway a department of the Government within the meaning of section 2 (2) of the Workmen's Compensation Act of 1923?

A. A. Adârkar, and *K. R. Bhende*, for the applicant.

Binning, with Messrs. *Little & Co.*, for the opposite party.

MARTEN, C. J. :—In this reference the question whether the G. I. P. Railway are liable to the representatives of the deceased workman depends on the word " ordinarily " in section 12 (1) of the Workmen's Compensation Act, 1923. The G. I. P. Railway gave out certain work to a contractor, and the question arises whether the execution of that work was " ordinarily part of the trade or business of the principal," namely, the G. I. P. Railway.

The work in question was the erection of steel towers to carry overhead cables in connection with the electrification of the G. I. P. Railway line beyond Kalyan. Hitherto the motive power beyond Kalyan has been steam, or oil, and the line is now to be electrified. The precise facts as found by the Commissioner are:—

"The G. I. P. Railway, in connection with the electrification of their line are building a Power Station near Kalyan and are constructing a transmission line to carry electric power to various sub-stations on the railway. The work of constructing this transmission line has been entrusted on a contract to Messrs. W. T. Henley's Telegraph Works and the deceased was employed by Messrs. Henley's as a fitter. His work was to assist in the erection of the steel towers which will carry the overhead cable. These towers are not erected on the railway track but on land adjacent thereto, the distance from the railway lines varying from 400 to 700 feet. While carrying material from the store near Kalyan Station to the site of the work he was knocked down by a train and killed."

It may be noted that these particular steel towers are not on the railway track itself, but are 400 to 700 feet therefrom. Further they are for the purpose of carrying the overhead cable from the Kalyan Power Station to various sub-stations on the railway, and though it is not so specifically stated it may be taken that this particular cable line will be used for supplying sub-stations and not for supplying electric current direct to the train as it proceeds along the running track. For the latter purpose there will be a separate system either overhead or by means of a third rail.

Was then the erection of these steel towers near the railway line part of the ordinary trade or business of the G. I. P. Railway? In my judgment it was not. The ordinary business of this railway is the public carriage of passengers and goods by means of locomotives and carriages or trucks over the railway line. The supply of motive power to these locomotives, I agree, is necessary. But, I think, that the construction of the original works which will be necessary to convey that power is not part of the ordinary trade or business of the G. I. P. Railway. In other words, their ordinary

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business is that of public carriers of passengers and goods, and not that of electrical engineers or of contractors for power stations or towers or cables or the general electrification of a railway line.

Some assistance on this point is obtained from the English authorities, but it must be borne in mind that the English Workmen's Compensation Act, 1897, contained a particular proviso which was repealed by the Act of 1906, and which is different from the words "ordinarily part of the trade or business" that we have in the Indian Act. Under section 4 of the Act of 1897, dealing with contracting this proviso was as follows:—

"This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively."

Consequently, in *Pearce* v. *London and South Western Railway*,[1] it was held that alterations, repairs and paintings of a suburban railway station was work "which was merely ancillary or incidental to, and was no part of, or process in, the trade or business" of the railway company within the meaning of section 4 of the 1897 Act. Accordingly it was held that the railway company were not liable to pay compensation to the workman of a contractor, who had contracted with them to do such work, in respect of an injury occasioned to the workman in the execution of it. Collins, L. J., there said (p. 102):—

"The primary business of a railway company is to carry passengers and goods. The erection of stations does not appear to me to be any part of, or process in, that business. I am not aware of any legal obligation upon railway companies, apart from any special obligations imposed by particular Acts, to erect railway stations at intermediate places. It is a matter in their discretion."

Lord Justice Vaughan Williams at p. 103 said:—

"I will assume for the purposes of this case that, as suggested by him, (appellant's counsel) this station is an essential part of the railway, and also

[1] [1900] 2 Q.B. 100.

that there was an obligation on the company to construct the station. On that hypothesis it still seems to me clear that the work of constructing it is merely ancillary or incidental to and is not a part of or process in the business which the company carry on within the meaning of section 4 of the Workmen's Compensation Act, 1897."

Another case is *Wrigley* v. *Bagley & Wright*,[1] where the head-note runs thus :—

" A firm of engineers contracted with the owners of a cotton-spinning factory to put a new driving wheel into the steam-engine belonging to the factory. While engaged in the work of fixing the new wheel, a workman employed by the engineers met with an accident which caused his death :—

Held, that, the work being merely ancillary or incidental to, and no part of, or process in, the business of the owners of the cotton-spinning factory, the case did not come within section 4 of the Workmen's Compensation Act, 1897; and therefore that a dependent of the deceased workman was not entitled to compensation under the Act against the owners of the cotton-spinning factory."

Lord Justice Collins there said (p. 783) :—

" The reason of such a provision (namely, section 4) obviously is that, if a person substitutes another for himself to do that which is his own business, he ought not to escape the liability which would have been imposed upon him, if he had done it himself, towards the workmen employed in that business. The concluding part of the section is inserted to show clearly that it is not intended to apply to a case where a contractor is employed by a person to do that which forms no part of, or process in, that person's business."

And the judgment ends—

" Putting a new driving wheel into an engine used in a cotton-spinning factory cannot, I think, be described as part of, or a process in, the business of cotton spinning."

Romer, L. J., in agreeing says (p. 784) :—

" Putting a new driving wheel into an engine cannot be said to be part of, or a process in, the business of cotton spinners any more than building the factory in which they intend to carry on their business can be said to be a part of, or process in, that business."

In the present case, we have the process of building, namely, the erection of the steel towers, and if the analogy of this last-mentioned case is to be followed, then the erection of these towers as opposed to their use when built is not part of the ordinary trade or business of the railway any more than the putting of a new driving wheel into the engine was part of the business of the owners of the cotton-spinning factory.

[1] [1901] 1 K.B. 780

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Therefore so far as the English authorities go, although the wording of the English Acts differs from the Indian Act, yet they do tend to show that there is a clear distinction between the erection of a building or machinery and its use when erected, and that such erection may form no part of the primary business of the principal concerned. This indeed was the conclusion which the learned Commissioner found on this part of the case, namely, that the setting up of an overhead electric cable for the purpose of transmitting electrical power to the Railway was not ordinarily part of the trade or business of the principal in question, viz., the G. I. P. Railway.

The Commissioner, however, eventually decided in favour of the representatives of the workman on a totally different point. It was based on this that the G. I. P. Railway is now a State Railway, and that consequently under the definition in section 2 (2) " the exercise and performance of the powers and duties of a local authority or of any department of the Government shall, for the purpose of this Act, unless a contrary intention appears, be deemed to be the trade or business of such authority or department." Stopping there, that is quite clear and no argument to the contrary has been presented to us. The object of this definition, however, was to prevent any contention to the effect that a Government department does not carry on a trade or business. But I am quite unable to accept the deduction which the Commissioner draws from those premises. In my judgment the word " ordinarily " in section 12 applies just as much to a Government department as it does to any other principal. Consequently, assuming that the running of the G. I. P. Railway and the construction of these steel towers are part of the trade or business of the Government Department in question, yet it still remains to be considered whether

the particular work contracted out to these contractors is *ordinarily* part of the trade or business of the principal. For the reasons already given in my judgment it is not *ordinarily* part of their trade or business. Consequently in this respect, the decision of the Commissioner cannot, I think, be upheld. It follows that in my judgment the appeal must be allowed and that the issues submitted to us should be answered as follows :—

(*a*) No as regards the G. I. P. Railway.

(*b*) Yes as regards the G. I. P. Railway.

(*c*) Yes as regards the G. I. P. Railway.

I make this qualification because we are not concerned with any other Railway Company except the G. I. P. Railway, and accordingly I do not propose to answer the questions in the general form in which they have been submitted to us.

It is not necessary for us nor is it part of our duty to inquire why the applicants sued the G. I. P. Railway instead of the contractors, Messrs. W. T. Henley's, but we may express the hope that as this case is regarded—so we understand—as a test case, the parties concerned may see their way to give a reasonable compensation to the dependents of this unfortunate deceased workman, although so far as the present case goes, it appears to us that there is no legal liability on the G. I. P. Railway, whether or no there is on the contractors Messrs. Henley's who are not before us.

MURPHY, J. :—This is reference made by the Commissioner under section 27 of the Workmen's Compensation Act (VIII of 1923). Three points have been submitted for decision by this Court. They are detailed at the end of the learned Commissioner's Judgment.

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The main point in the reference is as to the meaning which we should assign to the word " ordinarily " used in section 12 (1) of the Act. The claimant's son was admittedly killed by being run over by a passing train, when in the employ of Messrs. W. T. Henley's Telegraph Works, who were contractors working for the Railway Administration in erecting steel towers intended to carry the current required for electrifying the line between Kalyan and Karjat. The point is, whether the carrying out of this work can be said to be included in the expression " ordinarily part of the trade or business " of the Railway Administration. I agree with the view just expressed in the judgment delivered by the learned Chief Justice that this meaning cannot be assigned to the expression in question. The ordinary trade or business of the Railway Administration is the carriage of passengers and goods, and the maintenance of the line necessary for this purpose.

Mr. Binning has insisted that, though possibly when the Railway Administration takes over these particular towers their maintenance will be part of its trade or business, the distinction really lies in the fact that the work has not yet been completed, or handed over but is actually in the hands of the contractors. In other words, the contractors were carrying out this work as part of their ordinary trade, or business. The position of the Railway Administration is, that when the work is ultimately completed it will take it over. They are in really much the same position, as against the contractors, as they would be against other contractors who might supply them with Railway sleepers or similar material. In other words, the stage at which they can use these towers has not yet been reached, and until it has been the Railway Administration cannot be said to have been connected with this work as part of their trade or business. This is the view which has

been taken in the English cases which have been cited in the learned Chief Justice's judgment. Under the old English Act, which has since been amended, there was a saving clause in the words "ancillary or incidental to the trade or business" and the cases which have been cited by the learned Commissioner really bear on the interpretation of these words. I think that the effect of the word "ordinarily" used in section 12 (1) of the Indian Act is very similar.

On the other two points I also agree with the judgment just delivered by the learned Chief Justice. Section 2 (2) was intended to include Government departments which are engaged in work with a commercial object, but I do not think it imposes on such a Government department a duty other than that imposed on private traders or corporations, so as to deprive such a department of the saving contained in section 12 (1).

I concur in the answers which have been given to the reference in the judgment of His Lordship the learned Chief Justice.

Answers accordingly.

B. G. R.

PRIVY COUNCIL.

YELLAPPA RAMAPPA AND OTHERS (DEFENDANTS) *v.* TIPPANNA (PLAINTIFF).

J. C.*
1928
November 16

[On Appeal from the High Court at Bombay]

Hindu Law—Partition—Presumption that family continues joint—Effect of lapse of time—Presumption rebutted by facts—Exclusion from joint family—Indian Limitation Act (IX of 1908), Schedule I, Article 127.

The strength of the presumption that a Hindu joint family continues to be joint necessarily varies in each case. The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family the presumption becomes weaker and weaker.

In 1917 the respondent sued the appellants alleging that he was joint with them, and claiming a partition of police service lands in their joint possession.

Present: Lord Shaw, Lord Blanesburgh and Sir John Wallis.