Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kessowji Issur v. *The Great Indian Peninsula Railway Company from the High Court of Judicature at Bombay; delivered the 9th May* 1907.

Present at the Hearing:

Lord Robertson.
Lord Collins.
Sir Arthur Wilson.

[*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 carefu and complete analysis of the evidence.

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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 accident, that the train had overshot the platform) maintained at the trial and adduced witnesses, including this very stationmaster, 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.

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 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.

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 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 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."

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."

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 the 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 *cursus 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.