

1947

Present: Windham J.

CATHIRANA FERNANDO, Appellant, and COORAY &
CO., Respondents.

S. C. 1,207—Workmen's Compensation C 3/106/45.

*Workmen's Compensation Ordinance, s. 48—Adequacy or sufficiency of
evidence—Point of law—Right of appeal.*

The question of sufficiency or adequacy of evidence is not a point
of law such as is appealable under section 48 of the Workmen's
Compensation Ordinance.

(1945) 30 O. L. W. 89.

APPEAL from an award of the Commissioner of Labour made under the Workmen's Compensation Ordinance.

M. M. Kumarakulasingham with *T. A. de S. Wijesundere*, for the appellant.

J. A. L. Cooray, for the respondent.

Cur. adv. vult.

December 10, 1947. WINDHAM J.—

This is an appeal by the widow of a deceased workman against the inadequacy of an award of the Commissioner of Labour made in her favour against the respondent company, in whose employ the deceased met his death. Only the amount of the award is in issue, the respondents having admitted liability.

The learned Commissioner had on December 17, 1946, made a decree *nisi* in favour of the appellant in the amount of Rs. 3,500. On January 17, 1947, being satisfied from a letter addressed to him by the respondents dated January 6, that their non-appearance in the *ex parte* proceedings was satisfactorily accounted for, he revoked the decree *nisi*, and on March 12, 1947, he proceeded to reopen the proceedings *inter partes*, and after hearing evidence on both sides he delivered his final award on September 9, 1947, in the appellant's favour in the amount of Rs. 900.

The first ground sought to be argued on appeal is that the learned Commissioner erred in making his order of January 17 revoking the decree *nisi*, in that he failed to comply with the requirements of section 86 of the Civil Procedure Code (applicable by virtue of paragraph 20 of the Workmen's Compensation Regulations, 1935) with regard to the setting aside of decree *nisi*. This argument cannot be entertained on its merits, however, for the present appeal is not against the order of January 17 setting aside the decree *nisi*, but against the final order of September 9, 1947. The appeal is expressed to be against the later order, and when it was lodged an appeal against the order of January 17 was in any case long out of time. An appeal could have been lodged against that order, but it was not. Nor was any objection taken to it, either upon its delivery, when the appellant was unrepresented, or upon March 12, 1947, at the opening of the proceedings *inter partes*, when the appellant was represented. This ground of appeal accordingly fails.

The second ground of appeal is directed to the merits of the award of September 9, 1947, and the main contention is that the learned Commissioner erred in accepting, as the evidence of the deceased's "monthly wages" upon which he based his award, the testimony of the individual, one Manuel Fernando, by whom the deceased had been employed on behalf of the respondent company at the time of his death. This witness, called for the respondents, had in the *ex parte* proceedings given evidence for the appellant which differed from that given by him for the respondents in the proceedings *inter partes*. The learned Commissioner accepted the later evidence, as to the average monthly earnings of a

workmen employed by him for the same work as the deceased during the twelve months preceding the accident, which the witness supported by production of books, the entries in which, he said, he had supervised, and he rejected (it must be presumed) the evidence of the appellant with regard to the deceased's actual earnings, which placed the earnings at a considerably higher figure. It was admitted that the deceased, who was a temporary toddy tapper, had been employed by the respondents for only 21 days preceding his death. In these circumstances I consider that the learned Commissioner rightly applied the provisions of section 7(1) (b) of the Workmen's Compensation Ordinance in calculating the "monthly wages" of the deceased; nor do I find any error in his calculations under that section, based on the evidence of the witness Fernando. With regard to the question whether the Commissioner was right in accepting the evidence of Fernando, and in particular in admitting the latter's books, the entries in which Fernando did not say that he "kept" but merely that he "supervised", I consider that this is a question of sufficiency or adequacy of evidence, and not a point of law such as is appealable under section 48 of the Workmen's Compensation Ordinance.

For these reasons the appeal is dismissed.

Appeal dismissed.