1943 *Present :* **de Kretser J.**

ARNOLIS HAMY, Appellant, *and* ALAGAN, Respondent.

207—C. R. Hatton, 4,870.

Action for damages—Injury to workman—Action based on negligence—Contributory negligence of plaintiff.

In an action to recover damages for injury caused to a workman, which was based on the negligence of his employer, the plaintiff is not entitled to succeed, where he has himself been guilty of contributory negligence.

APPEAL from a judgment of the Commissioner of Requests, Hatton.

H. W. Jayewardene, for defendant, appellant.

F. A. Tisseverasinghe (with him *P. Malalgoda*), for plaintiff, respondent.

March 26, 1943. DE KRETSER J.—

The plaintiff is undoubtedly entitled to much sympathy. He has lost four fingers of his left hand and has endured pain and suffering and loss. It is not questioned that the damages are reasonable. But the facts must be looked at quite dispassionately. The defendant is a mason who had taken a contract some years ago to erect some buildings on an estate. He required stone for his work and apparently he was allowed to take these from the estate. Plaintiff has been employed under him for about five years and as far as one can see he was paid by

the quantity, *i.e.*, at Rs. 5 per cube. His evidence that he was paid 60 or 65 cents a day seems to be clearly untrue. He got in the aid of his witness Adaikkan, paying him at Rs. 4.50 a cube. Adaikkan was not employed by defendant but by the plaintiff, which suggests that plaintiff had a free hand. One Bempy Singho was employed to break large blocks of stone at Rs. 3 per hundred blocks. The work had gone for five years at least and plaintiff knew the conditions of work. He and Bempy Singho had been warned to take all precautions. Others did similar work. The accident occurred on January 4, 1942. Plaintiff had then been working on this particular job for five days. He had been requested to break 20 cubes more. There is a suggestion that he was to break small stones for concrete work, and plaintiff seems to have accepted it. It would be convenient for him to handle small stones for this purpose.

On January 2, defendant noticed that they had changed their venue of work and were working lower down a hill near a stream. Plaintiff says it was a convenient spot to break small stones for concrete work. The defendant advised them to work higher up where they had been working and where others also worked. Adaikkan says, "The defendant did not ask us to break metal at this spot but higher up". This supports defendant's evidence that he had told them to break near the road higher up. Adaikkan also says that defendant told the plaintiff to break "where there is room".

On the 3rd, according to Bempy, he told the plaintiff not to break metal at that spot. This was not put to plaintiff or Adaikkan but Bempy was a witness for plaintiff, and seems anxious to shift responsibility on to the defendant or else on to the superintendent. According to plaintiff, on the 4th about midday the other labourers had gone from their work but he and Adaikkan were still at work. Bempy came along, had a chew of betel, fixed a handle to a hammer and went higher up. His mission was obvious. Adaikkan supports plaintiff, but Bempy places the meeting on the 3rd and alleges that he did not know the two were at work at that spot at that hour. Adaikkan, who had just given the evidence I have stated, tried to bring himself into line by saying that Bempy did not know they were there as he believed they had gone for their meals. He could not say this unless Bempy had said so subsequently or they had told him they were just going. He also says that if they knew Bempy was breaking stones at the top they would not have remained where they were. He had told the Police that he knew Bempy was breaking stones on the hill. Quite clearly they knew but remained in spite of advice to move elsewhere.

A biggish stone got dislodged and began to roll down the hill. Bempy does not explain how it happened. When blocks had accumulated they used to be rolled down the hill, two men being posted to warn people and cries being raised as each stone started on its career. This practice ought to have been known to the plaintiff. On this occasion Bempy called out. Plaintiff says he heard "someone" shouting "stone". Adaikkan says he heard no shout. But though plaintiff heard the shout and ought to have known what it meant, especially

as he had seen Bempy go up the hill shortly before, hammer in hand, he does not say what lookout he kept and what steps he took to protect himself. He made the significant statement in his examination-in-chief that he heard the shout of "stone" but could not hear more owing to the noise of water. It looks like a qualification of a statement unguardedly made or an apology for his own delay. Eventually the stone crushed his hand. To the Police he said no one was to blame. Defendant said that though both Bempy and plaintiff were paid by the job he considered them his workmen. No pleading and no issue raised the question of either being an independent contractor but it finds a passing reference in the judgment and was one of the main points in appeal. The other was that both were employed in a common employment, and certain cases were cited. No pleading nor issue had been raised on this question either and it finds no place in the judgment. It was urged that the work was of a dangerous nature and defendant's admission was relied upon. No issue had been raised on this point either. Defendant's admission must be taken at its proper worth. There would be danger in quite common types of work but the work may not be *per se* dangerous. In fact this work had gone on for a considerable time and there is no evidence of a previous accident. As far as I can gather, small boulders would be broken *in situ*. Possibly they occasionally got dislodged.

To the Police the plaintiff said Bempy was "loosening" stones. It is not clear whether this was before or after he had used his hammer nor how the stones were loosened. I visualize stones being broken on a hill a little above a public road and passers-by being warned when stones, after being broken, were sent down. These stones would ordinarily come to rest on the road and be transported from there. Plaintiff instead of working above the road was working down near a stream to suit his own convenience.

The trial judge held that Bempy had been negligent in not providing for the contingency of a stone slipping down, and he held that defendant had given no instructions to plaintiff not to work there, but that even if he had, he was still liable. Defendant petitioned for leave to appeal and this was allowed and the appeal filed at the same time was heard together with the application. Had I been satisfied with the judgment on the facts I should not have given leave to appeal, and I do not propose to discuss, questions of law now raised and of considerable difficulty without a trial on proper issues.

I shall accept the finding that Bempy was negligent and that he was defendant's servant, and that defendant would be *prima facie* liable, but I cannot accept the finding that plaintiff was not guilty of contributory negligence. He had elected to use his freedom of choice and to work where he did in spite of being advised not to do so. He had been advised where to work, and to work where there was space: apparently where the possibility of accidental injury would be avoidable. He knew what Bempy was doing but continued with his work. He had heard the shout of warning, he ought to have known what it meant, but he was not alert and did not take shelter, apparently trusting to the stone not coming his way or waiting till too late. The final cause of his injury was his neglect to take an elementary precaution. It is not surprising he said

at once that no one was to blame. Plaintiff may have his remedy under the Workmen's Compensation Ordinance, but I do not think he is entitled to succeed in an action based on negligence.

I allow the appeal, set aside the decree and dismiss plaintiff's action with costs of the action and of the appeal. I hope defendant will not recover the costs awarded and that he will see to it that the plaintiff is compensated.

Appeal allowed.