1885.

HALIMBHÁI KARIMBHÁI v. SHANKER SÁI.

Council, "for good cause;" the cause being such as is contemplated in that section, as where an arbitrator "refuses or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date." The section also provides for the appointment of a new arbitrator or the supersession of the arbitration on the death of an arbitrator. No such objections as were stated in the applicant's application of the 17th June would have furnished a good and sufficient cause, under the present Code, for the appointment of a new arbitrator in the present case. The objections raised by the applicant could only be considered,—as the Subordinate Judge considered them,—after the award was submitted, and then only to the extent permitted by section 521 of the Code. No reason has been shown us for holding that the decision finally arrived at by the Subordinate Judge on the 16th July, 1884, was wrong.

We, therefore, discharge the rule *nisi* granted in this case, with costs.

Rule discharged.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1885. *December* 16.

G. I. P. RAILWAY COMPANY, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NOWROJI PESTANJI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Injunction—Right of way—Obstruction to right of way—Special damage—Injunction and not compensation granted.

The defendants closed a gateway leading across a level crossing of their railway over which there was a public right of way. The plaintiff alleged that by the closing of this gateway access to his bungalow during the monsoon was completely stopped; and he sued to have the gateway re-opened. The lower Appellate Court found that there was a public right of way over the level crossing; that it had been obstructed by the defendants; and that the plaintiff had suffered special damage by the obstruction. On special appeal to the High Court, it was contended by the defendants that the plaintiff was only entitled to compensation, and not to an injunction.

*Second Appeal, No. 296 of 1885.

1885.

G. I. P. RAILWAY COMPANY v. NOWROJI PESTANJI.

Held, that the inconvenience caused to the plaintiff was real and substantial; that the plaintiff was entitled to the user of the right of way in question, and under the circumstances to an injunction against its obstruction.

THIS was a second appeal from the decision of E. M. H. Fulton, Acting District Judge of Poona.

The plaintiff owned a bungalow situated to the north of the defendants' railway at Lonávla, egress from and access to which was afforded over the lines through a gateway at a level crossing. The defendants having closed this gateway, and opened a new one farther down the line, the plaintiff brought the present suit to have the old gateway re-opened, alleging that for more than twenty years he had been enjoying uninterruptedly the use of the gateway, and that the defendants having wrongfully closed it, the access to the bungalow had been altogether blocked.

In their written statement the defendants admitted the existence and removal of the gateway, but contended *(inter alia)* that the plaintiff had not uninterrupted use of the gateway for twenty years, nor had he acquired an easement over it; that the gateway was not erected for the use of the occupants of the plaintiff's bungalow; that the new gateway was erected at the suggestion and request of the people of the village of Bhangarvádi, communicated to the company through the Collector of Poona; and that this change of the gateway not having in any way affected the right of the plaintiff, he had no cause of action against the company.

The Subordinate Judge of Poona, who tried the suit, held the plaintiff entitled to the free use of the gateway, and directed it to be re-opened within one month from the date of the decree.

The defendants appealed to the District Judge, who modified the lower Court's decree. The following is a portion of his judgment:—

"* * * I find that plaintiff has no easement or private right of way across the railway.

"I have next to consider, whether under these circumstances he can maintain this action. I think he has undoubtedly suffered serious damage, special to himself, as owner of the bungalow. I have visited the land, and have little doubt as to the truth of the

1885.

G. I. P. RAILWAY COMPANY v. NOWROJI PESTANJI.

evidence of the witnesses, who say that during the monsoon the bungalow is, by the removal of the level-crossing, practically cut off from the outer world. Whether, during the fair season, there is serious inconvenience may be doubted, as the occupants of the bungalow can apparently get to Lonávla across the '*bund*' to the west of the house whilst the river is low. * * * *. I think, if the house were sold, the removal of this crossing would certainly reduce its price. Altogether it seems to me impossible to argue that to cut the plaintiff off from all access to his house during the greater part of the rains, and to compel him to take a detour of a mile to get to the municipal watertaps during the fair season, is not a special damage of a substantial kind which he suffers in excess of any inconvenience that the removal of the gate might cause to any member of the public who might happen to want to go that way—(see the case of *Raj Koomar Singh* v. *Sáhebzada Roy*(1)) * * *. Lastly, I have to consider whether, under the circumstances, an injunction should be granted * * *. Apart from the special powers conferred on railway companies by Acts of the Legislature, such companies appear to be in the same position as private owners of land; and as no statutory authority has been pointed out under which this gate could be closed, I must hold that, in doing it, defendants acted without authority. Under these circumstances, it seems to me to be a case for an injunction, because the damage done to the plaintiff is not one which can adequately be paid for in money. It renders his house useless for several months in the year * * * *. I modify the decree of the Subordinate Judge, and direct that defendants construct and maintain a level crossing in the place where existed the old level crossing opposite the plaintiff's bungalow, with gates suitable for the passage of foot passengers and *bhistis'* bullocks, and do permit the free use of such level crossing to all persons having occasion to go to or from the plaintiff's bungalow for themselves and for animals in their charge, subject to such restrictions as may be in accordance with any Act or Rules having the force of law that may from time to time be in force for the regulation of level crossing at places where railways are crossed by public roads. And I direct that

(1) I. L. R., 3 Calc., 20.

this order be carried out within three months from this date, and that within the said period the defendants do pay all the plaintiff's costs in both Courts."

The defendants preferred a second appeal to the High Court.

Russell for the appellants:—The plaintiff's bungalow was not in existence till after 1863, and the plaintiff, therefore, could not have acquired a prescriptive right to the use of the gateway by twenty years' uninterrupted user, the gate having been closed in 1883. The plaintiff's predecessor in title had no right of crossing the line, nor can plaintiff have it without the company's permission. There was a public way through the gate, and no private easement can be acquired over a public path: see Goddard on Easements, p. 102 (3rd ed.); *Queen* v. *Chorley*[1]. The removal of the gate was made at the desire and request of the villagers of Bhangarvádi, communicated to the company through the Collector of Poona, and not for the convenience or benefit of the company. The plaintiff has not established any special damages which alone would entitle him to an injunction. This is not a case for injunction, but, at the most, for damages. The injunction would cause great hardship and inconvenience to the company, and the Court, in the exercise of its discretion, should award damages only.

Pándurang Balibhadra (with *Ganpat Sadáshiv Ráv*) for the respondent:—The gateway was not removed at the request of all the villagers, but, on the contrary, many protested against its removal. In this case an injunction alone would give the respondent adequate relief. This is a way of necessity, and that it was a public way would not affect the respondent's right to its use—*Bayley* v. *Coles*[2]. This case shows that a way of necessity must be allowed, even if prescriptive right to it is not made out. The District Judge's finding should be upheld, as the respondent has suffered special damage, inasmuch as access to the bungalow is altogether stopped.

SARGENT, C.J.:—The Judge below found that the plaintiff had no easement over this level crossing. But he found also that there was a public right of way there; that it had been obstructed; and

(1) 12 Q. B. N. S., 515. (2) 5 Taunt. Rep., 311.

1885.

G. I. P. RAILWAY COMPANY v. NOWROJI PESTANJI.

that the plaintiff had suffered special damage by such obstruction. This being a special appeal, those findings are conclusive.

The plaintiff, then, has a right of action; but it is contended that he should not be granted an injunction, but compensation merely. This is urged on the ground of the great and insurmountable inconvenience which an injunction would occasion to the railway company. But it is to be remarked that this way had existed apparently without inconvenience to the railway company for many years before it was closed; and, moreover, that, when it was closed, it was closed, not by the railway company on their own motion, or for their own convenience, but at the instigation of the Collector, moved by the inhabitants of certain neighbouring villages, the Collector apparently thinking, as Collectors sometimes do, that he had full power to do anything that seemed desirable in the way of extinguishing one public way and opening another. It may be that if the Court saw that the damage caused to the plaintiff, by the act complained of, was unsubstantial and trifling, it might hesitate before imposing any obstacle in the way of the defendants, who are a railway company, and, as such, serving the interests of the general public. But we see no reason to doubt that the inconvenience caused to the plaintiff in this case is real and substantial. The plaintiff is entitled to the user of the way, and, therefore, the injunction must go against its obstruction.

Solicitors for the appellants:—Messrs. *Little, Smith, Frere and Nicholson.*