

plaintiff are to be Rs. 36,000 instead of Rs. 38,000; in other respects, the decree under appeal is affirmed.

As to costs, each party will bear his own costs of the last day's hearing of the appeal, and all other costs in the appeal must be borne by the defendant-appellant.

Attorneys for the plaintiff: *Messrs. Payne & Co.*

Attorneys for the defendant: *Messrs. Captain and Vaidya.*

Appeal dismissed.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANTS), APPELLANTS, *v.* THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Indian Railways Act (IX of 1890), section 7—City of Bombay Municipal Act (Bombay Act III of 1888), sections 289, 293—Public streets—Vesting of public streets in Municipality—Laying railway lines under statutory authority over such streets—Land Acquisition Act (I of 1894), section 7—Proceedings under Land Acquisition Act unnecessary in case of such streets.

The Great Indian Peninsula Railway in constructing a line of railway known as the Harbour Branch Railway in the Island of Bombay laid down the lines of rails in a level-crossing across a public street known as Sewri Koliwada Road, vested in the Municipal Corporation of Bombay under section 289 of the City of Bombay Municipal Act, without permission granted by the Municipal Corporation. The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under section 293 of the City of Bombay Municipal Act or acquiring the land required for the level-crossing under the Land Acquisition Act, 1894.

* O. C. J. Appeal No. 17 of 1913; Suit No. 693 of 1912

1913.

SORABJI
HORMUSJI
v.
JAMSHEDJI
MERWANJI.

1913.

September 5.

1913.

G. I. P.
RAILWAY
COMPANY
v.

MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

Held that the statutory authority under section 7 of the Indian Railways Act was established and that the application of section 293 of the City of Bombay Municipal Act was excluded by the words "notwithstanding anything in any other enactment for the time being in force" in the first-mentioned section.

Held, further, that where a railway company wished to lay a line of railway upon and across a street it was neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land, because if the Government under section 7 of the Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from incumbrances and would then cease to be a portion of the street and the railway company would be unable to exercise the power given to it of constructing the railways upon and across the "street".

Held, further, that the effect of section 289 of the City of Bombay Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner was only to vest in that body such property as was necessary for the control, protection and maintenance of the street as a highway for public use.

In the year 1906 the Great Indian Peninsula Railway, having obtained the sanction of the Secretary of State for that purpose, were constructing a branch railway in Bombay, known as the Harbour Branch Railway, and desired for the purpose of that undertaking to lay their lines across a public street, namely the Sewri Koliwada Road, as such vested in the Municipal Corporation of Bombay. At first the Railway Company requested the permission of the Municipal Corporation. The laying of a temporary tram line across the street in question was sanctioned by the Municipal Corporation subject to certain conditions and correspondence ensued as to the terms on which permanent rails might be laid down. No agreement as to the terms to be imposed on the Railway Company having been arrived at finally the Railway Company informed the Municipal Corporation that it did not appear to them to be necessary that there should be any special agreement on the subject as the Railway Company were advised that they had the power under the Indian Railways Act to

construct lines of railway across the Sewri Koliwada Road without obtaining the permission of the Municipality or resorting to the Land Acquisition Act. The Railway Company thereafter completed the construction of their lines across the Sewri Koliwada Road without having obtained the permission of the Municipal Corporation.

The Municipal Corporation filed the present suit to obtain a declaration that the defendant Railway Company was not entitled to take possession of the public street upon which they had laid their permanent lines of railway, alleging that the defendant had no right to do what was done "without the permission of the plaintiff Corporation, and that having regard to the provisions of section 7 of the Indian Railways Act they had not any legal right to lay and maintain their said lines upon and across the said street, and in the absence of such permission can only obtain such right by acquiring the said land under the provisions of the Land Acquisition Act". The defendants' contention was "that they had the power under the Indian Railways Act to construct lines of railway across the Sewri Koliwada Road without obtaining the permission of the Municipality or resorting to the Land Acquisition Act".

The cause was tried by Beaman, J., on the 17th February 1913, when his Lordship granted the declaration sought on the following grounds.

BEAMAN, J.:—Notwithstanding the ingenious arguments of defendant's counsel the point seems too simple to allow of any doubt. Without enquiring how much or how little, under the term "street", vests under section 289 of the Municipal Act, enough certainly does (and this was almost conceded) to support an action for trespass against anyone interfering with the use of a public street as such. Section 293 expressly and designedly contemplates a case like this. No argument

1913.

G. I. P.
RAILWAY
COMPANY
v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

1913.

G. I. P.
RAILWAY
COMPANY
v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

has been attempted in support of what was foreshadowed in the first issue. That was abandoned. No permission has been granted. Then let me consider section 7 of the Railways Act. Is a public street "immovable property"? Certainly. Does this public street belong to the defendant-Company? Certainly not. The only question remaining to be answered is whether it is immovable property subject to the Land Acquisition Act. In my opinion, most surely it is: defendant contends that it is not, because it is already a public street, and that which is already public property cannot be acquired a second time for a second public purpose. I am not aware of any authority or of any reason upon which that proposition can be founded. I am referred to section 10 and section 14, the latter more emphatically, in support of this contention. I am unable to see how the section can have any bearing or relevancy. The former section merely deals with damage caused by the Company acting under section 7 and presupposes of course that it is acting under that section. It is said for the defendant-Company here, that it cannot be a trespasser because it is acting under statutory authority. That simply begs the question. If it is, *cadit questio*. If not, it is as much a trespasser as though section 7 were not there. Section 14 cannot possibly bear the artificial strain put upon it to support the defendant's argument. It merely deals with a numerous class of cases, of which this might have formed an example, had the Municipality acting under section 293 of its Act permitted the defendant Company to lay its rails without any conditions. I do not think that any of the cases cited for the defendant-Company are of any assistance. Nor do I think that I gain much from *Rangeley v. Midland Railway Co.*⁽¹⁾ upon which the plaintiff relies. That is certainly in point, and in

⁽¹⁾ (1868) L. R. 3 Ch. 306.

spite of the attempt of the defendant to distinguish between the provisions of section 84 of the Land Clauses Act in England and the provisions of the Land Acquisition Act, the case is a good enough authority upon the general principle. But here I do not feel in need of authority. I have the statutes and I have only to apply them to a simple set of admitted facts. Under those statutes the defendant-Company could make its private terms with the Municipality, or it could acquire the portion of the street it needed under the Land Acquisition Act. But until it has done one or the other it is clearly a trespasser upon the plaintiff's land. It does not seem to me to affect this conclusion in the least that there may be some doubt as to the quantum of interest the plaintiff has to sell in proceedings under the Land Acquisition Act. The plaintiffs do not press for any particular quantum of damages and it would be sufficient to award them Rs. 500 as damages for trespass and all costs of the suit. Declarations in terms of prayers (a) and (b) of the plaint and decree in terms of prayer (c) thereof.

The defendant Company appealed.

Binning with *Campbell* for the appellants :—The only question is whether a railway can lay its lines across a road without acquiring the road and without permission of the Municipality. Section 7 of the Indian Railways Act (IX of 1890) is taken from section 16 of the Railway Clauses Act of 1845. Our point is that we are not taking or acquiring the land. If we acquired the land we should acquire all the easements. We should stop the street. *Cole v. Miles*⁽¹⁾ and *Escott v. Newport Corporation*⁽²⁾ were cited.

Jardine with him *Strangman*, Advocate General, for the respondents :—Section 293 of the City of Bombay

⁽¹⁾ (1888) 57 L. J., M. C. 132.

⁽²⁾ [1904] 2 K. B. 369.

1913.

G. I. P.
RAILWAY
COMPANY

v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

1913.

G. I. P.
RAILWAY
COMPANY
v
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

Municipal Act should not be taken as overruled by the Indian Railways Act but should be read with it. We have an interest in the land. The provision in the Indian Railways Act as to the Land Acquisition Act was put in to prevent the Railway Company entering upon our land without paying for it.

SCOTT, C. J. :—This suit was instituted by the Municipal Corporation and Commissioner of Bombay against the Great Indian Peninsula Railway Company to establish that the defendant-Company could not lawfully maintain lines of railway across the Sewri Koliwada Road, a public street vested in the Corporation under section 289 of the Bombay City Municipal Act, without either obtaining permission granted by the Corporation and confirmed by Government under section 293 of the Municipal Act or acquiring the land required for the level-crossing under the Land Acquisition Act.

The defendant-Company pleaded that they had authority to make and maintain the lines of railway under section 7 of the Indian Railways Act (IX of 1890) which so far as is material is in the following terms :—

“(1) Subject to the provisions of this Act and, in the case of immovable property not belonging to the railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and, subject also, in the case of a railway company, to the provisions of any contract between the company and the Government, a railway administration may for the purpose of constructing a railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force,—

(a) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway, ways, passages, conduits, drains, piers, cuttings and fences as the railway administration thinks proper . . .

(2) The exercise of the powers conferred on a railway administration by sub-section (1) shall be subject to the control of the Governor General in Council."

It appears from Exhibit 1 that the scheme for the Bombay Port Trust Railway, to run from Sion down the east side of the Island to the Ballard Pier and to be constructed and worked by the defendant-Company, was prepared by the Company with the approval of the Secretary of State on the recommendation of the Government of India. The plan put in with Exhibit A shows the level-crossing in question as part of this scheme.

The learned trial Judge held that applying the statutes to the admitted facts the defendant-Company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act but until it had done one or the other it was a trespasser on Municipal land. His reasoning was—the public street is immovable property not belonging to the defendant-Company and subject to the Land Acquisition Act, therefore the defendant-Company cannot exercise the power given by section 7 of the Railways Act without first acquiring a portion of the street, which they have not done.

We are unable to agree with this view of the law. Where a railway company wishes to lay a line of rail way upon and across a street it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land. If the Government under section 7 of that Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from all incumbrances. The land would then cease to be portion of the street and the railway company would be unable to exercise the power given

1913.

G. I. P.
RAILWAY
COMPANY
v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

1913.

G. I. P.
RAILWAY
COMPANY
v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

to it of constructing the railways upon and across the "street".

The differences in the English and Indian Statute law upon the subject of railway construction are differences of procedure which do not render English decisions inapplicable to this case. In England the special undertaking is sanctioned by a special Act of Parliament: in India, by the sanction of the Governor General through the Home Department. Section 6 of the Railway Clauses Consolidation Act, 1845, provides that "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the Lands Clauses Consolidation Act" while the provisions of the special Act incorporate both the Lands Clauses and the Railway Clauses Consolidation Acts: for an example, see *Abraham v. Great Northern Railway Company*⁽¹⁾. The provisions of the Lands Clauses Act with regard to compulsory acquisition as interpreted by the House of Lords in *Great Western Railway Co. v. Swindon and Cheltenham Railway Co.*⁽²⁾ are substantially of the same extent as those under the Land Acquisition Act of 1890 as interpreted by section 3, (a) and (b), for Lord Watson at page 800 said: "Taking that (the Lands Clauses) Act *per se*, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are

⁽¹⁾ (1851) 16 Q. B. 586.

⁽²⁾ (1884) 9 App. Cas. 787.

not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorised works injuriously affected the dominant land to which the easements are attached. As for the land upon which the railway is to be constructed, the compulsory clauses of the general Act contemplate that the company shall take the soil itself, and not a mere right to use it in perpetuity." To the same effect is Lord FitzGerald's opinion expressed on page 792.

The effect of section 289 of the Bombay City Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control, protection and maintenance of the street as a highway for public use : see *Mayor, etc., of Tunbridge Wells v. Baird*⁽¹⁾.

The Judicial Committee have held that a Municipality in whom public ways were vested was not entitled to compensation in respect of portions of such ways taken by a tramway company under statutory powers : see *Municipal Council of Sydney v. Young*⁽²⁾.

Reference has been made for the respondents to section 290 of the Municipal Act which provides that whenever any public street or part of it is permanently closed the site may be disposed of as land vesting in the Corporation. That position does not arise in the present case but when it does arise it may have to be determined what it is that the Corporation is disposing of.

It is well established that a railway company acting under section 16 of the Railways Clauses Consolidation Act, 1845 (upon which section 7 of the Indian Railways

1913.

G. I. P.
RAILWAY
COMPANY
v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

⁽¹⁾ [1896] A. C. 434 at p. 442.

⁽²⁾ [1898] A. C. 457.

1913.

G. I. P.
RAILWAY
COMPANY
v.
MUNICIPAL
CORPORATION
OF THE
CITY OF
BOMBAY.

Act is closely modelled), by constructing a railway upon and across part of the bed of a navigable river or across a highway is doing what if done by an unauthorized person would be indictable as a nuisance: see *Abraham v. Great Northern Railway Company*⁽¹⁾ and *Oliver v. North Eastern Railway Co.*⁽²⁾. In the latter case the trial Judge told the Jury that as to the duty of the Railway Company with regard to the rails at the level-crossing they must consider the case as if the Company had had the express sanction of an Act of Parliament to put the rails there. In such a case the Company would have power to put down such rails as are necessary for the purposes of the line but the rails must be laid and kept so as to cause as little injury or danger as possible. A rule for new trial on the ground of misdirection was discharged. For a general statement of the obligations of persons interrupting highways under statutory authority see the judgment of Moulton, L. J., in *Hertfordshire County Council v. Great Eastern Railway*⁽³⁾.

In a case analogous to the present where the Corporation of a borough, being empowered by a local Act, which incorporated the Lands Clauses Acts, to erect and maintain "on, in, over, or under" any street in which their tramways were laid poles and posts for the purpose of working the tramways by mechanical power, erected a post for that purpose in the pavement of the street which at that point was the property of a neighbouring owner subject to the right of the public to use the same as a foot-path; it was held that the Corporation were not taking the land within the meaning of section 189 of the Lands Clauses Act, 1845, but were merely exercising statutory power in the nature of an easement

⁽¹⁾ (1851) 16 Q. B. 586.

⁽²⁾ (1874) L. R. 91 Q. B. 409.

⁽³⁾ [1909] 2 K. B. 403 at p. 412.

and an action for trespass could not be maintained against them : see *Escott v. Newport Corporation*⁽¹⁾.

The case of *Rangeley v. Midland Railway Co.*⁽²⁾, referred to by the learned trial Judge and relied upon by the respondents, decided that a railway company could not dedicate to the public the surface of a neighbour's land without first acquiring it under the Lands Clauses Act. It does not appear to us to support the plaintiff's position.

The statutory authority under section 7 of the Railways Act to lay the railway across the street without resort to the Land Acquisition Act being in our opinion established, the application of section 293 of the City of Bombay Municipal Act is excluded by the words "notwithstanding anything in any other enactment for the time being in force". The Railways Act, section 16, overrides the Municipal Act and the sole control over the railway administration is vested in the Governor General, see section 16 (2) and *Municipal Commissioner of Bombay v. G. I. P. Railway Company*⁽³⁾. The evidence so far as it goes indicates that the railway across the Sewri Koliwada Road has the approval of the controlling authority.

We, therefore, reverse the decree of the lower Court and allow the appeal dismissing the suit with costs throughout.

BATCHELOR, J. :—I quite agree.

Attorneys for the appellants : *Messrs. Little & Co.*

Attorneys for the respondents : *Messrs. Crawford Brown & Co.*

Appeal allowed.

H. S. C.

(1) [1904] 2 K. B. 369.

(2) (1868) L. R. 3 Ch. 306.

(3) (1909) 34 Bom. 252.