

PRIVY COUNCIL.*

MUNICIPAL CORPORATION OF CITY OF BOMBAY (PLAINTIFFS) v.
GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANTS).

P. C.

1916.

[On appeal from the High Court of Judicature of Bombay.]

July 31 ;
August 1 ;
October 26.

Railways Act (IX of 1890), section 7 (as amended by Act IX of 1896)—City of Bombay Municipal Act, 1888, section 289—Laying railway lines by Railway administration across public street vested in Municipality—Land Acquisition Act (I of 1894), provisions of, inapplicable.

Section 7 of the Indian Railways Act, 1890 (as amended by Act IX of 1896) enacts "(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.....a railway administration may for the purpose of constructing a railway.....notwithstanding anything in any other enactment for the time being in force, make or construct in, upon, across, under or over any lands, or any streets.....lines of railway.....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." The respondents constructed railway lines across a street vested in, and under the control of the appellants by virtue of the provisions of the City of Bombay Municipal Act, 1888. In a suit by the appellants for a declaration that the respondents were not legally entitled to lay lines of railway across such street without either obtaining their permission, or acquiring the street under the provisions of the Land Acquisition Act, 1894,

Held (affirming the decision of the High Court on appeal dismissing the suit) that the taking the railway on the level across the street was not acquisition of immovable property within the meaning of section 7 of the Indian Railways Act, 1890, as amended. The provisions of the Land Acquisition Act were not so expressed as to cut down the power conferred by that section on the respondents to carry a line of railway across a street subject to the control of their powers by the Governor-General; and that Act was inapplicable to such a case.

APPEAL 105 of 1915 from a decree (5th September 1913) of the High Court at Bombay in its Appellate

* *Present.*—The Lord Chancellor (Lord Buckmaster), Viscount Haldane and Lord Atkinson.

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Jurisdiction, which reversed a decree (17th February 1913) of the same Court in the exercise of its Original Civil Jurisdiction.

The question for determination in this appeal was whether by virtue of the provisions of section 7 of the Indian Railways Act (IX of 1890) as amended by section 1 of Act IX of 1896 the respondents were entitled to make and maintain lines of railway on the level across the Sewri-Koliwada Road, which was a public street by virtue of section 289 of the City of Bombay Municipal Act (Bombay Act III of 1888) vested in the appellant Corporation, and under the control of the appellant Commissioner, without either obtaining permission from the Corporation, or acquiring under the Land Acquisition Act (I of 1894), so much of the said street as was occupied by the level crossing.

The facts of the case are sufficiently stated in the report of the appeal to the High Court (SIR BASIL SCOTT C. J. and BATCHELOR J.) which will be found in I. L. R. 38 Bom. 565, where the judgment of BEAMAN J. the Trial Judge is also set out.

The appellate Court reversed the decision of the trial Judge who had given the plaintiffs (appellants) a decree.

The appeal to the Privy Council was heard in March, but was now re-argued by order of the Judicial Committee.

P. O. Lawrence K. C. and *Sheldon* for the appellants contended that the respondents were not by law entitled to construct a railway across a street which did not belong to them but was a public street vested by section 289 of the City of Bombay Municipal Act, 1888, in the appellants without either obtaining leave

from them to do so, or acquiring the land under the Land Acquisition Act, 1894. Whether or not they had a title in the subsoil was immaterial for the purpose of the argument, the fact that under the Act they owned the surface soil being sufficient. Reference was made to *Mayor &c. of Tunbridge Wells v. Baird*;⁽¹⁾ *Foley's Charity Trustees v. Dudley Corporation*;⁽²⁾ *Attorney General v. Logan*;⁽³⁾ and sections 289, 290 and 296 of the City of the Bombay Municipal Act, 1888. The action of the respondents in laying the lines was an act of trespass. The power given them under section 7 of the Indian Railways Act, 1890 (as amended by section 1 of Act. IX of 1896), if not acted on with the appellants' consent, should have been exercised only after proceedings under the Land Acquisition Act, 1894, to acquire the land necessary for the purpose of laying rails across the street; the definition of "land" in section 3 of that Act including benefits to arise out of land gave the right to merely cross the street by putting down rails. Though by section 16 of the Act land acquired vests free from any incumbrances and the case of *Manmatha Nath Mitter v. The Secretary of State for India in Council*⁽⁴⁾ decided that any public rights over it ceased on its acquisition, yet under later sections of the Act such rights could be preserved. Sections 13 and 14 only have effect after the construction of the railway. Cases decided and relied on by the High Court on appeal as to the right of a railway in England to cross a road were not applicable here owing to the difference of the law in England which required express powers to that effect in a special Act. The General Clauses Consolidation Act of 1897, the definition of "Local Government" and sections 38 and 39 were referred to. The decision of

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(1) [1896] A. C. 434 at p. 439.

(3) [1891] 2 Q. B. 100 at p. 102.

(2) [1910] 1 K. B. 317 at p. 322.

(4) (1897) 25 Cal. 194.

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the Court of first instance, it was submitted, was correct.

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Sir R. Finlay K. C. and *Tyrrell T. Paine* for the respondents contended that what they had done was with the authority of the statutory powers conferred upon them by the Indian Railways Act, 1890, of which reference was made to section 7, which, it was submitted, gave them power, subject to liability to payment of compensation under section 10, to carry lines by a level crossing over a public street without either permission of the appellants, or acquiring any portion of the street under the Land Acquisition Act being necessary; the right to lay lines across the street not being "an acquisition" of immoveable property within the meaning of that section; and the provisions of the Act being inapplicable where the crossing of a street by railway lines was necessary. In such a case section 7 of the Indian Railways Act gives sufficient powers. There was no provision made in the Land Acquisition Act for the acquisition of an easement alone: *Shyam Chunder Mardraj v. Secretary of State for India*⁽¹⁾ and *Great Western Railway Co. v. Swindon & Cheltenham Railway Co.*⁽²⁾ were referred to. Land can be acquired with an easement attached to it, but as, under section 16, it is acquired without incumbrances, a public right would be extinguished: see *Taylor v. Collector of Purnea*.⁽³⁾ Sections 13 and 14 of the Indian Railways Act show that public rights survive, the safety and convenience of the public being thereby preserved. The appellants had no title to the land of the street in question which they could dispose of under the Land Acquisition Act; *Municipal Council of Sydney v. Young*.⁽⁴⁾ Reference was also made to the Indian Railways Act,

⁽¹⁾ (1908) 35 Cal. 525.

⁽²⁾ (1884) 9 App. Cas. 787.

⁽³⁾ (1887) 14 Cal. 423 at pp. 427, 428, 429, 434.

⁽⁴⁾ [1898] A. C. 457.

1890, sections 87 and 104. The decision of the High Court appealed from was correct and should be upheld.

P. O. Lawrence, K. C. replied.

1916, October 26th :—The judgment of their Lordships was delivered by

VISCOUNT HALDANE :—The point to be decided on this appeal is whether the respondents in constructing certain lines of railway on the level across the Sewri-Koliwada Road in Bombay, being a public street there under the control of the Municipal Commissioner for the City, have the right to do so without either obtaining permission from the appellant corporation or acquiring under “The Land Acquisition Act, 1894,” so much of the street as is occupied by the level crossing. Beaman J., who tried the action in which the question arose, gave judgment for the appellants, and ordered the restoration of the land with damages. The High Court at Bombay reversed this judgment and dismissed the action.

The question now to be decided is whether the respondents had the right they claimed by virtue of “The Indian Railways Act, 1890,” and to answer this question it is necessary to examine the provisions of that Act. The scheme of the Act differs from that of the General Railway Acts in this country, the sections of which are made to apply only if they are brought into operation by a special Act authorising the construction and control of the railway. The Indian Act places the exercise of the powers conferred by it under the control of the executive in the person of the Governor-General in Council, who thus takes the place of Parliament in this country in authorising such powers to be exercised. Section 7 enacts that subject to the provisions of the Act and, in the case of immovable property not belonging to the railway administration,

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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, railway administration may, for the purpose of constructing a railway, or the accommodation or other works connected therewith, among other things, "make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways,.....sucharches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway," &c. (the words "lines of railway" being added by section 1 of Act IX of 1896) as the railway administration thinks proper. The railway administration is, by section 10, to do as little damage as possible in the exercise of these powers, and compensation is to be paid for any damage caused by the exercise thereof. By section 11 the railway administration is to make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, among other things convenient crossings and passages over the railway. By section 13 the Governor-General may require fences to be provided, and also suitable gates, &c., at places where the railway crosses a public road on the level, and may require the railway administration to employ persons to open and shut such gates. By section 14 where the railway has been made across a public road on the level, the Governor-General may, if it appears to him to be necessary for the public safety, require the construction of a bridge or arch or other works for diminishing danger. By section 104 railway servants commit a punishable offence if they keep a level crossing closed against the public.

The railway, which was duly authorised by the Governor-General, has as already stated been made to cross

on the level a road in the area of Bombay City. This road is vested in the appellants under "The City of Bombay Municipal Act, 1888," and the effect of such vesting is that, like an Urban Authority under the Public Health Act in this country, they have the surface and a portion of the sub-soil vested in them in such a fashion as to enable them to bring an action for trespass.

The real point that arises is whether, under the words quoted from section 7 of the Indian Railways Act, which make the powers conferred by that section subject to any enactment in force for the acquisition of land for public purposes and for companies, it was necessary for the respondent before making the crossing to comply with the provisions of the Act which was then in force, "The Land Acquisition Act, 1894," passed four years after the Indian Railways Act. The Land Acquisition Act by section 3 defines land as including benefits to arise out of land, and a person interested as including a person interested in an easement affecting the land. The early parts of the Act (II to VI inclusive) enable the Local Government to acquire land compulsarily for public purposes. When the Collector, who is the official designated to do so, has ascertained the compensation to be allowed and the proper apportionment among the persons interested, he may take possession and then, under section 16, the land is to vest absolutely in the Government free from all encumbrances. It is conceded that "encumbrance" includes a right of passage. The taking possession by the Collector would, therefore, if the Act applies to the present case, extinguish the rights of the public to cross the railway by the road in controversy. Moreover, none of the provisions relating to compensation cover the case of members of the public, who naturally do not come within the provision for compensation contained in section 11.

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Part VII of the Act enables the Local Government to authorise companies generally to acquire land for useful public purposes by availing themselves of the provisions in the earlier parts, but section 39 provides that this power shall not be put in force unless the previous assent of the Local Government has been obtained, and unless an agreement has been entered into by the company with the Secretary of State for India.

It appears to their Lordships that the provisions of this Act are not so expressed as to cut down the power conferred by section 7 of the Indian Railways Act on a railway company in India to carry a line of railway across a street, subject to the control of their powers by the Governor-General. The latter Act in such a case contemplates the right of the public being kept alive. Section 13 enables the Governor-General to direct the provision by the railway administration of suitable gates, bars, &c., where the railway crosses a public road on the level. Section 14 gives him power to require the provision of bridges or arches where he deems it necessary, or such other works as will remove or diminish the danger arising from the level crossing. These sections show that the right of the public to cross the railway so laid on the level is contemplated as continuing. Section 104 makes it a criminal offence to keep the level crossing closed against the public, and raises the same inference. The Acquisition of Land Act does not repeal these sections, and it appears to their Lordships that the taking of the railway on the level across a public highway is accordingly not an acquisition of immovable property within the meaning of this Act. To hold otherwise would be to hold that the right of the public to cross was extinguished under section 16, or, again, that when one railway crossed another—a possibility expressly contemplated by section 7 of the Indian Railways Act—the second was bound to

purchase part of the permanent way of the first, conclusions which their Lordships regard as inadmissible. It may well be that when a railway company takes land for a station or for a tunnel or a cutting, the provisions of the Act apply, on the ground that this is an acquisition of land. But the sections in the Indian Railways Act to which they have referred in their opinion show that what has been done in this case is excluded by that Act from possessing this character, notwithstanding that theoretically a benefit arising out of land, within the words of section 3 of the other Act, might in a different context be held to have been acquired. This has probably been done because the interference with the surface is small and the public advantage is great. They think that it was intended by the Indian Railways Act to give the Governor-General power to authorise the crossing, in place of leaving the conferring of such a power to a special Statute, as would be the case in England, where the General Lands and Railways Clauses Acts do not authorise the compulsory taking of mere easements. The Governor-General has, under section 10 and other sections, ample power to impose conditions for compensation and for the protection of the public.

For these reasons their Lordships will humbly advise His Majesty that the judgment of the High Court at Bombay was right, and that this appeal should be dismissed with costs.

Solicitors for the appellants : Messrs. *Cameron, Kemm & Co.*

Solicitors for the respondents : Messrs. *White, Borrett & Black.*

Appeal dismissed.

J. V. W.