

**The Municipal Corporation of the City of
Bombay and another** - - - - *Appellants,*

v.

The Great Indian Peninsula Railway Company *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 26TH OCTOBER, 1916.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD ATKINSON.

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, 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, among other things, "make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways, such arches, 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 compulsorily 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

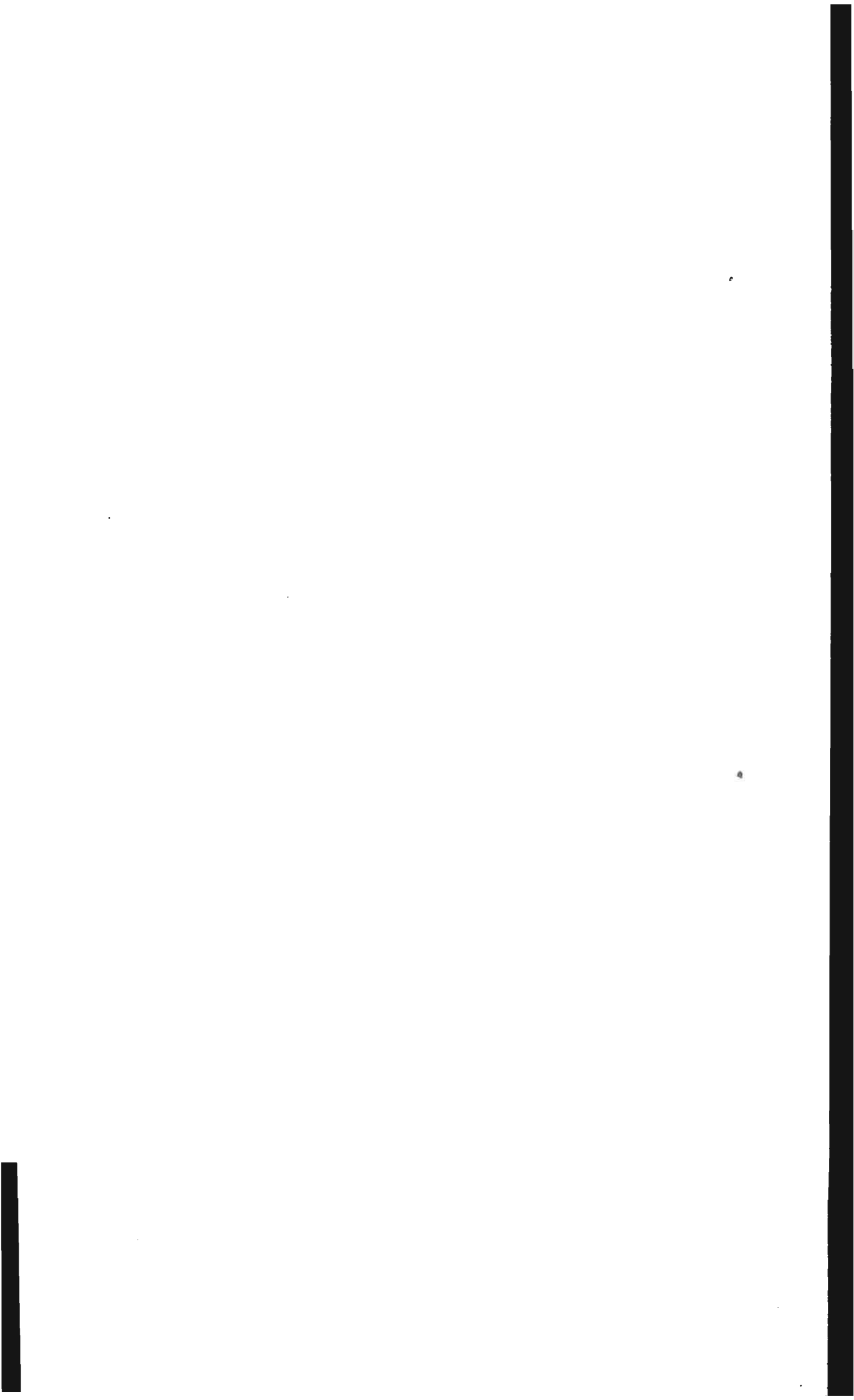
among the persons interested, he may take possession and then, under section 16, the land is to vest absolutely in the Government free from all encumbrances. It is conceded that "encumbrance" includes a right of passage. The taking possession by the collector would therefore, if the Act applies to the 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.

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.



In the Privy Council.

(No. 105 of 1915.)

THE MUNICIPAL CORPORATION OF
THE CITY OF BOMBAY AND
ANOTHER

v.

THE GREAT INDIAN PENINSULA
RAILWAY COMPANY.

DELIVERED BY VISCOUNT HALDANE.