Privy Council Appeal No. 48 *of* 1947

Governor-General in Council, represented by the General Manager, South Indian Railway- - - - *Appellant*

v.

The Municipal Council, Madura, through its Commissioner - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JUNE, 1948

Present at the Hearing:

LORD SIMONDS

LORD OAKSEY

SIR JOHN BEAUMONT

[*Delivered by* LORD SIMONDS]

In this appeal, which is brought from a judgment of the High Court of Judicature at Madras affirming a judgment of the principal Subordinate Judge at Madura, two main questions arise for consideration. The first, which turns upon the true meaning and effect of certain sections of the Indian Railways Act (IX of 1890), is whether in the circumstances of the case and upon a true construction of that Act and particularly of the proviso contained in s. 11 (3) (*b*) thereof the Provincial Government of Madras had power to issue a requisition to the South Indian Railway Company, which will be referred to as "the Railway," to enlarge at its own cost one of its culverts from a water way of 6 feet to one of 20 feet as a further or additional accommodation work for the use (as the appellant alleges) of the respondent, the Municipal Council of Madura. The second question, which only arises if the Provincial Government had no such power, is whether the Railway is under and by virtue of the provisions of section 70 of the Indian Contract Act (IX of 1872) entitled to recover from the respondent the cost of such enlargement.

The original plaintiff in the suit was the Railway but by an Order made on the 31st August, 1944, while the appeal was pending in the High Court the Governor-General in Council was substituted as the appellant. The respondent is a statutory body governed by the provisions of the Madras District Municipalities Act (Madras Act V of 1920) and under that Act (by s. 61) all public streets, sewers, drains, drainage works, tunnels and culverts within the municipal limits and (by s. 125) all public water courses as therein defined are vested in the respondent. By s. 137 it is required to provide and maintain a sufficient system of public drains and by s. 162 to maintain and repair public streets and bridges.

In or about 1902 the Railway constructed a branch railway line between Madura and Manamadura. This line meets at right angles at a point called in the proceedings Mile J 309/16 a water channel known as the

Anuppanadi surplus channel which flows through the south part of the Madura municipality from the Anuppanadi tank carrying the surplus water of the tank and the storm and sewage water of several municipal drains which run into the channel.

At the time of making the branch line the Railway provided a culvert 6 feet wide over this channel as an accommodation work under s. 11 (1) (*b*) of the Railway Act. The surrounding land was then agricultural land and was only at a later date absorbed into the growing town of Madura. It cannot, as their Lordships think, be doubted that the culvert was at the time of its construction approved by the local Collector on behalf of the Madras Government, and that it was then considered adequate appears to be conclusively established by the letter written by the Collector of Madura to the Agent of the Railway on the 14th December, 1937, in which he says, " The culvert which was found sufficient in 1902 when the line ran through agriculturist land is not sufficient now that the town has extended to the railway."

But in November, 1936, when the River Vagai, with which the channel is connected, was in heavy flood, the channel and the railway culvert were unable to discharge the surplus water as it came down, the surrounding lands were flooded and some damage was caused to roads and huts. Accordingly the respondent made representations to the Collector of Madura referring (inter alia) to the insufficiency of the channel and culvert in question in this case and stating that, unless sufficient protective works were carried out by the Public Works Department, flood damage within the town could not be prevented.

Upon this there followed a correspondence between the respondent, the Railway, the Collector and the Provincial Government, which their Lordships think it unnecessary to discuss in detail. It culminated in an Order of the 26th November, 1938, by which the Provincial Government of Madras purporting to act " in exercise of the special powers vested in them under clause (*b*) of subs. (3) of section 11 of the Indian Railways Act " issued to the Railway the requisition already referred to requiring the Railway to widen the ventway in the culvert to a depth of five feet and to a width of twenty feet at the cost of the Railway within six months from the date of the requisition. It must however be stated, as relevant to the second question that arises on this appeal, that at all times both before and after the requisition the Railway denied its liability, protested that the requisition was illegal and ultra vires, and asserted that it was only prepared to carry out the work without prejudice to its claim to be repaid the cost either by the Government or by the respondent or both. To the respondent also the Railway wrote that the expense of the work was being incurred under protest, that it was not intended to be and was not being done gratuitously or voluntarily and that proceedings would be taken against the respondent or the Government or both for recovery of the cost. It was, nevertheless, made clear to the Railway that both the respondent and the Government repudiated all liability for such expense. It was in these circumstances that the Railway executed the necessary work of widening the culvert and, having done so, instituted its suit in the Court of the Subordinate Judge at Madura against the respondent, claiming the sum of Rs. 16,222-5-0 as the cost of that work. It does not appear that any claim was made against the Government.

The suit was dismissed by the learned Subordinate Judge, who held that the requisition was not ultra vires and that, even if it was, the Railway could not rely on s. 70 of the Indian Contract Act. This decision was on both points affirmed by the High Court consisting of Sir Lionel Leach C.J. and Lakshmana Rao J.

Their Lordships are of opinion that the decision upon the second point is clearly right. The appellant can only succeed on this point if he establishes that the Railway lawfully did the work for the respondent, not intending to do so gratuitously, and that the respondent enjoys the benefit thereof. It may be conceded that the work was lawfully done and that the Railway did not intend to do it gratuitously. But their

Lordships agree with the learned Judges of the High Court in thinking that the work was not done for the respondent nor does the respondent enjoy the benefit of it within the meaning of the section. The Railway executed the work for no other reason than that it was ordered to do so by the Government and presumably thought it politic to obey the order rather than challenge its validity. The respondent throughout denied its liability to meet any expense. It is true that the first suggestion of further protective works, which ultimately took the form (inter alia) of an enlargement of the culvert, came from the respondent, but the Railway was left in no doubt that, if it executed this work at the requisition of the Government, the respondent would not pay for it. It would in their Lordships' opinion, put an extravagant construction upon s. 70 of the Indian Contract Act to hold that in such circumstances the work was done by the Railway for the respondent. Nor does the respondent enjoy the benefit of the work except in an indirect sense: substantially the persons who derive a benefit are the owners and occupiers of the buildings and land in the locality. Upon this point their Lordships cannot usefully add anything to the judgment of the High Court with which they are fully in accord.

A decision upon this point is sufficient to dispose of the appeal. But the question of general importance which arises upon the first point was fully argued and their Lordships think it proper since here they have come to a different conclusion from that reached by the High Court, to state their opinion upon it.

It is necessary to refer to two sections only of the Indian Railways Act, which can conveniently be set out here.

" 11.—(1) A railway administration shall make and maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, namely:—

(*a*) such and so many convenient crossings, bridges, arches, culverts and passages over, under or by the sides of, or leading to or from, the railway as may, in the opinion of the Provincial Government, be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway is made; and

(*b*) all necessary arches, tunnels, culverts, drains, water-courses or other passages, over or under or by the sides of the railway, of such dimensions as will, in the opinion of the Provincial Government, be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be.

(2) Subject to the other provisions of this Act, the works specified in clauses (*a*) and (*b*) of subsection (1) shall be made during or immediately after the laying out or formation of the railway over the lands traversed thereby and in such manner as to cause as little damage or inconvenience as possible to persons interested in the lands or affected by the works.

(3) The foregoing provisions of this section are subject to the following provisos, namely:—

(*a*) a railway administration shall not be required to make any accommodation works in such a manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners and occupiers of the lands have agreed to receive and have been paid compensation in consideration of their not requiring the works to be made;

(*b*) save as hereinafter in this Chapter provided, a railway administration shall not, except on the requisition of the Provincial Government, be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of ten years from the date on which the railway passing through the lands was first opened for public traffic;

(*c*) where a railway administration has provided suitable accommodation for the crossing of a road or stream, and the road or stream is afterwards diverted by the act or neglect of the person having the control thereof, the administration shall not be compelled to provide other accommodation for the crossing of the road or stream.

(4) The Provincial Government may appoint a time for the commencement of any work to be executed under subsection (1), and if for fourteen days next after that time the railway administration fails to commence the work or, having commenced it, fails to proceed diligently to execute it in a sufficient manner, the Provincial Government may execute it and recover from the railway administration the cost incurred by it in the execution thereof.

12. If an owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the Provincial Government or a local authority desires to construct a public road or other work across, under or over a railway, he or it, as the case may be, may at any time require the railway administration to make at his or its expense such further accommodations works as he or it thinks necessary and are agreed to by the railway administration or as, in case of difference of opinion, may be authorised by the general controlling authority."

The provisions which for the purpose of this case appear to demand particular examination are in section 11 (1) (*b*), section 11 (3) (*b*) and section 12. But it is important to observe upon the general structure of s. 11 that subsection (3) of section 11 contains nothing more than provisos on the two preceding subsections, and in this connection the well established rule of construction must be borne in mind which was thus stated by Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society* [1897] A.C. 647 at 652 " I am perfectly clear that, if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso." What then do subsections (1) and (2) of s. 11, upon which subsection (3) contains provisos, enact? They appear to be unambiguous. The obligation imposed upon the Railway, so far as relevant for the present purpose, is to make and maintain a culvert which will in the opinion of the Provincial Government be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway or as nearly so as may be. It is clear that the obligation under subsection (1) is to be measured by the conditions existing at the time of the making of the railway. The words " as freely etc." set the standard and define the obligation. The adjoining owner is not to be injuriously affected by the construction of the railway: the status quo is to be preserved. The nature of the works having been prescribed by subsection (1), the time within which they are to be carried out is laid down by subsection (2). Then come the provisos in subsection (3). The proviso in (*a*) is a qualification upon the statutory obligation for the benefit of the railway. So also is the proviso in (*c*). It is the proviso in (*b*) that is immediately relevant and it must first be observed that it is in form negative. It does not purport to vest any new rights in any person or to impose any new duty upon the railway. Whence then arises the obligation of the railway, for which the respondent contends to make accommodation works, the standard of which is determined not by the conditions existing at the making of the railway but by those which come into existence at a later date? It must be conceded that it can only arise, if at all, from an affirmative which is to be implied from the negative. And this affirmative must amount to no less than a new obligation upon the Railway, at the instance of the adjoining owner within 10 years or of the Provincial Government for all time, at its own cost to make accommodation works rendered necessary or convenient by a change of conditions which has taken place after the railway has been constructed. Their Lordships cannot accept such an implication as a fair interpretation of the proviso, unless it is otherwise meaningless. But it is by no means impossible to give meaning and effect to the proviso without

doing violence to its language and to the canon of construction to which reference has been made. For the " further or additional accommodation works " mentioned in the subsection may be required not because those originally constructed have become insufficient owing to a change of conditions, but because the adjoining landowner has miscalculated what the conditions originally existing would demand for the commodious use of his land, and is given an opportunity within a limited time of making a fresh demand. Nor would it be unreasonable in the circumstances which prevail in large parts of India that an unlimited time should be given to the Government to require that the same standard should be established and maintained. Therefore, as it appears to their Lordships, s. 11 (3) (*b*) ought not, even if it stood alone, to be given the wide meaning ascribed to it by the High Court.

But it further appears to them that some assistance is given to this view by the language of s.12. That section clearly is intended to cover works which the Railway is not bound to construct under s.11. For they are works which are to be erected at the expense of the adjoining owner or the Government. It is difficult to see what scope the section can have, if under s.11 (3) (*b*) the Government can for all time requisition such further or additional accommodation works as the commodious use of adjoining land may from time to time with altering conditions require. There is however a clear reconciliation between the sections if the former relates only to such works as the physical conditions and use of the land at the time of construction of the railway required.

Their Lordships therefore come to the conclusion that the construction of the Railway Act, for which the appellant contends, is correct. In coming to this conclusion they have had strict regard to the language of that Act. In the course of the argument before the Board and in the Courts of India the appellant has relied largely on decisions in the English Courts upon the similar but by no means identical provisions of the Railway Clauses Consolidation Act 1845, and particularly upon *Rhondda and Swansea Railway Coy.* v. *Talbot* [1897] 2 Ch. 131 and *G.W.R.* v. *Talbot* 1902 2 Ch 759. From these decisions valuable guidance is to be obtained, but their Lordships agree with the learned Chief Justice in thinking that the difference in the language of the relevant statutes and in the conditions in which they are to be applied makes it dangerous to rely on them as authorities and they prefer to base their opinion upon the interpretation of the Indian Act alone.

Upon this part of the case one further point must be mentioned. The High Court, affirming in this matter also the decision of the Subordinate Judge, held that the widening of the culvert to 20 feet was a work which was as necessary in 1902 as it was in 1938 and that therefore upon any construction of the Act the requisition of the Government in the latter year was valid. It appears to their Lordships that this finding ignores the fact and indeed the admission, to which reference has been made, that it was only the change of conditions which made the enlargement of the culvert necessary. It may well be that, if in 1902 the town of Madura had reached its present size, the result would be different. But the evidence is conclusive that the culvert made in 1902 enabled the water to be carried " as freely from or to the lands lying near or affected by the railway as before the making of the railway " and that, had the conditions remained unchanged, no enlargement would have been wanted.

For the reasons which have already been stated, the respondent succeeding on the second point, though failing on the first, is entitled to have the appeal dismissed with costs and their Lordships will humbly advise His Majesty accordingly.

(62287) Wt. 8062—31 180 7/48 D L. G. 338

In the Privy Council

GOVERNOR-GENERAL IN COUNCIL, REPRESENTED BY THE GENERAL MANAGER, SOUTH INDIAN RAILWAY

v.

THE MUNICIPAL COUNCIL, MADURA, THROUGH ITS COMMISSIONER

[DELIVERED BY LORD SIMONDS]

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