

party to get this application transferred to that Court by a proper application to the District Court.

Costs up to date to be costs in the application.

CRUMP, J.:—I concur.

*Order accordingly.*

R. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Crump.*

HARILAL LALLUBHAI (ORIGINAL PLAINTIFF), APPELLANT v. THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY (ORIGINAL DEFENDANT), RESPONDENT<sup>o</sup>.

*Indian Railways Act (IX of 1890), section 7—Level-crossing—Closing an old level crossing and opening a new one—Diverting a road—Powers of a Railway Company.*

Plaintiff owned a bungalow on the west side of the defendant's Railway close to a Station. To go over to the east side, there was a level-crossing near the plaintiff's bungalow. The Railway Company, owing to the necessity of increasing sidings near the station, closed the level-crossing and opened a new one at a distance of few yards from the plaintiff's bungalow. This diversion of the road caused much inconvenience to the plaintiff as he had to go a longer distance if he wished to cross the Railway, and on the way there was a dip which made it impossible for the plaintiff to get at the new level-crossing during the monsoon. The plaintiff, therefore, brought a suit against the Railway Company claiming a mandatory injunction directing the Company to have the old gateway at the level-crossing re-opened, and he relied on section 7 of the Indian Railways Act, 1890.

*Held*, dismissing the suit, that the Railway Company were well within their powers in closing the old level-crossing and they had fulfilled all the requirements which the law imposed on them to provide another level-crossing.

A Railway Company has under the Statute very wide powers in order to carry on its business for public purposes, and it has got to consider not only the

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convenience of individual owners of properties bordering near the line, but it has also got to consider the necessity for affording facilities to take the public who wish to travel on the Railway and send their goods by the Railway, and it cannot possibly consider separately the interest of each individual who happens to live in the neighbourhood of the Railway line.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmednagar, reversing the decree passed by S. J. Yajnik, Subordinate Judge at Nadiad.

Suit for an injunction.

The plaintiff was the owner of a bungalow on the west side of the B. B. & C. I. Railway close to Nadiad station. In order to get to Nadiad and to the Railway station, the plaintiff had to cross a level-crossing close to his bungalow. The Railway company was, however, obliged to close this old level-crossing owing to the opening of the Nadiad-Kapadvanj section of the Gujarat Railways and the extension of the Nadiad station yard for the junction and other arrangements and a new level-crossing was opened towards the North of the Nadiad station at a distance of about 350 feet from the plaintiff's bungalow. The plaintiff complained that the effect of this was to cut off reasonable access to his bungalow for part of the year owing to the existence of an abyss on the high road leading to the new level-crossing. The Railway Company having taken no notice of the plaintiff's complaint, he brought a suit against the company claiming a mandatory injunction directing the company to have the old gateway at the level-crossing re-opened or to have some other convenient way made by the defendant company for egress from and access to his bungalow.

The defendant company pleaded that under the Statute they were empowered to close the level-crossing and that they were not responsible for the condition of the road leading past plaintiff's bungalow to new road.

The Subordinate Judge found that the closing of the old level-crossing caused a special damage to the plaintiff and directed the Railway company to provide a turnstile in order to let the plaintiff cross on foot at the old spot.

On appeal, the District Judge reversed the decree and dismissed the plaintiff's suit holding that the closing of the old level-crossing was necessary for the purposes of the defendant company and that the question as to what other convenience should be given to the public in lieu of the closed way, was a matter for the consideration of the executive Government and not for Courts.

The plaintiff appealed to the High Court.

*I. N. Mehta* with *M. B. Dave*, for the appellant :—  
The main question is whether the Railway company was justified in diverting the road from the old level-crossing. Under section 7, clause (b) of the Indian Railways Act, 1890, a company has powers to divert any road or street but this power is qualified by clause (f) of the section and consequently diversion could only be done if it be "necessary for making, maintaining, altering or repairing and using the railway".

Section 7 of the Indian Railways Act corresponds to section 1 (b) of the English Railway Clauses Act of 1845 and it has been held in numerous English cases that such diversions could only be made if they are strictly necessary to enable the company to carry out the undertaking and therefore the right to make such a diversion could not be insisted on, where it is only convenient or economical for the company to do so : see *Pugh v. The Golden Valley Railway Company*<sup>(1)</sup>. Even if the diversion be necessary under section 7, the company is bound to provide a new crossing which is more convenient than

(1) (1880) 49 L. J. Ch. 721.

or equally convenient to the old crossing. The lower Court was, therefore, wrong in saying that once a diversion was necessary, what other convenience should be given to the public in lieu of the closed way is a matter for the consideration of the executive Government and not for the Courts. I submit that it is a matter for the company, but it is for the Courts to decide whether the discretion is properly exercised by the company or not; *Attorney-General v. Ely, Haddenham, and Sutton Railway Co.*<sup>(1)</sup>

In this case the company has provided a new level-crossing but it is at a great distance from the plaintiff's bungalow; the plaintiff and his family have to go a long way to cross through a ditch which is almost impassable during the monsoon. I submit that it is incumbent on the company to provide a decent road at least from the old level-crossing to the new level-crossing.

*Campbell* instructed by *Crawford Brown & Co.*, for the respondents, not called upon.

MACLEOD, C. J. :—The plaintiff, who is the owner of a bungalow on the west side of the B. B. & C. I. Railway close to the Nadiad station, brought this suit against the Railway Company claiming a mandatory injunction directing the company to have the old gateway at the level-crossing referred to in para. 2 of the plaint re-opened, or to have some other convenient way made by the defendant company for egress from and access to his bungalow or any other relief that the Court might deem fit with costs of the suit. The plan which has been produced shows the situation of the plaintiff's bungalow. The old level-crossing was at point A and the new level-crossing is at point D. Owing to the necessity of increasing sidings at Nadiad station, the Railway Company closed the level-crossing at A and diverted

<sup>(1)</sup> (1869) L.R. 4 Ch. 194.

the road to the crossing at the point D. It is obvious that point A was no longer a suitable place for a level-crossing where constant shunting would be going on, and those who wanted to cross the Railway would probably be much inconvenienced by having to wait until the line was clear. The plaintiff complains that he is inconvenienced because he has to go a longer distance if he wishes to cross the Railway, and he also complains that at the point B on the map there is a dip in the road which makes it impossible to get to the point C during the monsoon. The plaintiff relied upon the Indian Railways Act, section 7, but it is quite clear that that section affords him no assistance whatever. The Railway Company must necessarily under the Statute have very wide powers in order to carry on its business for public purposes, and it has got to consider not only the convenience of individual owners of properties bordering near the line, but it has also got to consider the necessity for affording facilities to the public who wish to travel on the Railway and send their goods by the Railway, and it cannot possibly consider separately the interests of each individual who happens to live in the neighbourhood of the Railway line. It is quite true that the plaintiff in this case may have to go a few hundred yards further than before if he wishes to cross the line to go over to the east side, and it seems to be admitted that there is a place in the road between his bungalow and the crossing at point D which certainly ought to be improved, but that is a matter for the road authorities and not for the Railway Company, and if the plaintiff, instead of wasting his time asking the Court to grant his preposterous demands, had represented his case to the road authorities, it is quite certain that a remedy would have been provided before now. In my opinion the decision of the learned District Judge was perfectly correct, and there can be no doubt that

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the Railway company were well within their powers in closing the level-crossing at the point A, and they had fulfilled all the requirements which the law imposed on them by providing another level-crossing at point D. The appeal, therefore, is dismissed with costs.

CRUMP, J. :—I concur.

*Decree confirmed.*

J. G. R.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.*

1919.

GANPATRAO APPAJI JAGTAP (ORIGINAL PLAINTIFF), APPELLANT v. BAPU BIN TUKARAM AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS<sup>o</sup>.

December 18.

*Indian Evidence Act (I of 1872), section 92, proviso 6—Sale-deed—Old document—Intention of parties—Extrinsic evidence, admissibility of—Such evidence can only be allowed if the terms of the document require explanation.*

In 1865, a possessory mortgage deed was passed in favour of the father of defendant No. 1. In 1867, the mortgagors sold by a document purporting to be a sale-deed the equity of redemption to the plaintiff's assignor. The plaintiff having sued for redemption of the mortgage of 1865, an issue was raised whether the transaction of 1867 was a mortgage or sale. Both the lower Courts were of opinion that on the wording of the document itself viewed in the light of certain surrounding circumstances as to the value of the property, inadequacy of consideration, &c., under proviso (6) of section 92 of the Evidence Act, 1872, the parties intended that the transaction was a mortgage. On appeal to the High Court,

*Held*, that the document of 1867 was termed a sale-deed and on the face of it it was anything except a sale-deed and the Courts should not have taken into consideration extrinsic evidence in construing the document.

On general principles it would be extremely undesirable, after the document had stood more than fifty years to allow evidence to be led to show that the document is not what appears on the face of it.

<sup>o</sup> Second Appeal No. 711 of 1918.