was the occupier of land. It has been held by the Madras High Court in *Queen-Empress* v. *Achutha*[1] that no obligation under section 45 of the Criminal Procedure Code attaches to the occupant of a house in a village. The suicide of the accused's daughter-in-law amounts to an unnatural death within the meaning of section 45 (1) (*d*) of the Code of Criminal Procedure, and therefore any person who falls within the definition in that section would be bound to give notice of it. But, in the absence of any distinct finding that the accused is the owner or occupier of land, or otherwise falls within the class of persons mentioned at the commencement of that section, section 45 will have no application. I agree, therefore, that the conviction should be set aside.

Conviction set aside.

J. G. R.

[1] (1888) 12 Mad. 92.

APPELLATE CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Murphy.

ARDESAR JIVANJI MISTRI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* AIMAI KUVARJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*

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Public Highway—Long user—Presumption as to dedication to the public—Right of the Government to stop or divert such highway—Land Revenue Code (Bom. Act V of 1879), section 37—Persons having special interest in preservation of such right of way competent to sue—Civil Procedure Code (Act V of 1908), section 91 (2).

Plaintiffs Nos. 1, 2 and 3 were owners of lands adjoining a *gowan* or public passage. From time immemorial this *gowan* was used as a public cart road till 1920, when the Government (defendant No. 2) sold the said passage to defendant No. 1, who included it in his own land and erected a building thereon which encroached upon this *gowan*. After giving notice to defendant No. 1 to remove the obstruction the plaintiffs filed a suit against defendant No. 1 and the Government (defendant No. 2) for removal of the encroachment and obstruction to the public passage. They also obtained an order giving them liberty to sue on behalf of themselves and their fellow villagers:

Held, (1) that the passage in dispute being used as a public cart-road from time immemorial was a public highway and its dedication to the public may be presumed from long user:

*First Appeal No. 266 of 1925 from the decree passed by B. N. Sanjana, Joint Subordinate Judge at Thana, in Suit No. 6 of 1922.

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Muhammad Rustom Ali v. *Municipal Committee of Karnal*[1] and *Poole* v. *Huskinson*,[2] referred to;

(2) that the Government had no right to stop, divert or dispose of the *gowan* under section 37 of the Land Revenue Code:

(3) that the Government had no power to divert existing public highways in the village:

(4) that plaintiffs Nos. 1 and 2 having their lands adjoining this public passage had a special interest in the preservation of the right of way which would enable them to maintain on their own account an action to prevent its encroachment under section 91 (2) of the Civil Procedure Code, 1908:

Raj Koomar Singh v. *Sahebzada Roy*,[3] referred to;

(5) that plaintiff No. 3 cannot maintain this suit without the consent of the Advocate General as he had no special interest in the preservation of the *gowan*;

(6) that plaintiffs Nos. 1 and 2 and other members of the public had a right to use the *gowan* and that the Government (defendant No. 2) was only entitled to sell the same subject to such public rights of passage.

THERE was a *gowan* (public passage) leading to the village of Gundowli. The said *gowan* was in existence from time immemorial and was used as a cart-way by the villagers of the Gundowli village and other surrounding villages. In 1920 the Government sold this passage to one Hormusji Dorabji Guzdar (defendant No. 1), who included it into his land and erected a building thereon which encroached upon this *gowan*; he also blocked the said passage at both the ends. The plaintiffs were owners of the lands adjoining this *gowan*. On January 3, 1921, they applied to the Collector of Bombay Suburban District for removal of the aforesaid encroachment and obstruction but the Collector gave a reply to the effect that the said *gowan* was sold by the Government to defendant No. 1. The plaintiffs thereupon appealed to the Commissioner, Bombay Suburban Division, and then to the Government without any success. In September 1921 the plaintiffs gave a notice to defendant No. 1 calling upon him to remove the said obstruction and not to make any further encroachments, but defendant No. 1 made further encroachments thereby

[1] (1919) 22 Bom. L. R. 563. [2] (1843) 11 M. & W. 827.
[3] (1877) 3 Cal. 20.

blocking up the said *gowan*. The plaintiffs thereupon filed the present suit against defendant No. 1 and the Secretary of State for India, on behalf of all the villagers of Gundowli for removal of the encroachment and obstruction complained of and for other reliefs.

The trial Court dismissed the suit. The plaintiffs appealed to the High Court.

A. G. Desai, for the appellants.

Ratanlal Ranchhoddas, with *Shroff & Co.*, for respondent No. 5.

R. W. Desai, for respondent No. 9.

MARTEN, C. J. :—This is an appeal from the judgment of the learned Subordinate Judge dismissing the plaintiffs' suit for the removal of an encroachment and obstruction to what is alleged to be a Gowan or public passage. The learned Judge held that there was or had been a public passage at any rate up to the time of construction of another road about the year 1910, but that Government had in effect an inherent right to stop up or divert any public road and that consequently they were entitled to stop this Gowan and to sell it to the original defendant No. 1 for a cash consideration.

This finding raises a question of considerable public importance. But I should also mention that one of the defences raised was that no public right of way ever existed, and even if it did, the action was defective because the consent of the Advocate General or Collector had not been obtained under section 91 of the Civil Procedure Code.

The *locus in quo* is well shown on the plan Exhibit 67. There are three plaintiffs. Plaintiff No. 1 Ardesar Jiwanji Mistry owns plots 10/2 and 13/1 on that map. They adjoin the disputed passage which runs from X on the Kurla-Versova road to the point Y in the village. The second plaintiff Benedicto Demello is the owner of

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plots 10/1 and 13/2, which are to the north of the plaintiff No. 1's land. Plot No. 10/1 adjoins the disputed right of way. The third plaintiff, however, has his lands some way further off, namely, plot 18 in the north of the village. It does not abut on the passage in question. As regards the point Y, if one goes south-westwards from Y one reaches the point Z on the Kurla-Versova road. It was along this line ZY that the new road was constructed in about 1910. One main contention of the defendants is that by construction of that new road the public right of way in the old road thereupon ceased.

Now first of all on the facts as to whether there was a public right of way over the passage XY, to my mind the evidence is overwhelming, and shows conclusively that there was such a public right of way. The evidence proves that it was an ancient cart track which was the only main access to and from the Kurla-Versova road for the villagers of Gundowli and of Mogre beyond. When this cart road came to the point Y, it branched right and left, the right hand branch leading towards the centre of the village of Gundowli and the left branch going towards the other village of Mogre. It is hardly necessary, I think, to refer in any detail to the evidence. but I may instance Mr. E. F. Gomes, Exhibit 76, President of the District and Taluka Local Board and an Honorary Magistrate. He says :—

" The passage in question was an old zigzag cart road. It existed from the time of my first knowledge of the village which was about 20 or 25 years back. There are two lamps at X and Y."

Then plaintiff No. 2 whose age is 50 says that his ancestors owned Pardi No. 10 and that he knew of this passage from the time of his infancy, that carts used to pass by this Gowan before the new road XY was constructed and that it was the only cart road. Then one of the few witnesses for the defendants, a man of 65, stated in cross-examination : " The Gowan was

the old cart way for the whole village. I used to notice it from my young age." The old witness Bapu Hiru, Exhibit 84, who gives his age as about 75 or 80, states that the Gowan was the only road to reach Rami's house. and also the only road to reach the other houses in the village, and that there was no other way to go to the village in cart except this Gowan prior to the making of the new road. I may also refer to the formal request Exhibit 92 made on May 29, 1920, by the Assistant Collector, E. W. Perry, to the Collector in which he (the Assistant Collector) himself refers to this passage as a Gowan. He says :—

"The Gowan is not needed as there are tracks to Gundowli village on the south of the plot and 30 yards to the north of it and also adequate lateral communication in the Gaothan behind."

He then asks leave to sell that particular passage to Mr. Gazdar, the original defendant No. 1.

Counsel for the Crown referred us to the decision of their Lordships of the Privy Council in *Muhammad Rustom Ali* v. *Municipal Committee of Karnal*[1] to show what is necessary to infer "dedication to the public." In that case the dispute arose over an enclosed courtyard. The point at issue was whether the yard was a public street and that depended on whether there was a public right of way over it. Admittedly the place was enclosed by gates, and from page 566 it appears to be clear that there was no user of such long duration from which an inference of such a dedication would naturally arise.

In the present case, on the contrary, the evidence proves conclusively that so far as living memory goes this passage has been used as a public cart road. Under these circumstances the correct inference to draw is that it has been so used from time immemorial, and that at all material dates in question in this suit it was a public

[1] (1919) 22 Bom. L. R. 563.

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highway. In using the expression public highway, I do not overlook what is stated in the case just cited, namely, the quotation from *Poole* v. *Huskinson*,[1] where it is said (p. 830) :—

> "There may be a dedication to the public for a limited purpose, as for a footway, horse-way, or drift-way; but there cannot be a dedication to a limited part of the public."

Now the present case, in one aspect of it, has been put by the plaintiff as if the right of way was limited to the villagers of this particular village of Gundowli or possibly extended to one or two surrounding villages. But on the whole I do not think it correct to limit the way in this manner. I think the correct conclusion of fact is that it was a public highway in the ordinary sense of the word. So far then as dedication is necessary I would hold that dedication must be presumed from long user.

And while I am on this branch of the case I will deal with the point under section 91 of the Civil Procedure Code. On my finding that there was here a public highway then it would follow, I think, that ordinarily the consent of the Advocate General or the Collector would be necessary under section 91 just as it would be necessary to join the Attorney General or to sue on his relation in the English Courts. But there is an exception, viz., section 91 (2) which says :—

> "Nothing shall be deemed to limit or otherwise affect any right of suit which may exist independently."

Now it is clearly established on the authorities that if once you find that the plaintiff is specially damnified by the obstruction of a public thoroughfare, then he may bring his action without the consent in this country of the Advocate General. One authority for this proposition will be found in the Full Bench case, *Raj Koomar Singh* v. *Sahebzada Roy*.[2] There the question

[1] (1843) 11 M. & W. 827.

[2] (1877) 3 Cal. 20.

referred to was whether when a civil Court finds that an obstruction to a public road caused a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it although the Advocate General is not a party. The answer was in the affirmative, following English decisions to the same effect.

Do then the plaintiffs come within the exception supposing they establish the rest of their case? In my opinion the plaintiffs Nos. 1 and 2 do. Their respective lands adjoin this public passage, and, therefore, from any part of their land they can go on to this passage by foot or by cart, and thence take the shortest way southwards to the main road and on towards Versova. Similarly it enables them to go northwards up the passage to the point Y on their way to the village of Mogre if they are so minded. To my mind it is no answer to say that they can get to Versova by going to the point Y, and then to the point Z and then to the point X, or in other words by going round two sides of a triangle instead of one. Nor do I see why these plaintiffs should thus be obliged to take their carts or their persons over this extra 80 or 100 yards. Further when the passage is blocked up at both ends as it is now, it follows that the person at the bottom of the plot 10/1 would be practically land-locked unless he went over other portions of 10/1. This might seriously affect the owner of 10/1 hereafter if he wished to cut up that plot into building lots. Nor do I think it sufficient to say that the back foot-path to some of these plots might enable them to reach the point X on the Versova road. If they have thus got an extra back passage so much the better. It appears at best to be only a foot-path and not a cart road. And I fail to see why they should be deprived of having the benefit of this front cart road as well. Therefore I would hold that these

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particular plaintiffs have a special interest in the preservation of the right of way which would enable them within the authorities to maintain on their own account an action to prevent its encroachment.

In saying this I appreciate that they have obtained leave to sue on behalf of themselves and all other villagers of this particular village. But the title to the plaint at any rate is in their individual names. And it is, I think, clear on the pleadings that they claim rights in themselves although their fellow-villagers are alleged to have similar rights. I think, therefore, that in a case of this sort from the districts we ought not to stand too strictly on the precise form of the pleadings, but that we should take the suit as if it involved a claim by these plaintiffs in the alternative in their individual capacity as being members of the public specially injured by the defendants' interference with this public right of way and that if necessary any formal amendment for giving effect to that alternative plea should be deemed to have been made.

When, however, we come to plaintiff No. 3 he stands on a different footing. As I have already stated his land is not even abutting on this passage. It is some distance away, and unless one is prepared to hold that all the villagers of this village have a special interest in the preservation of this passage I think it difficult to uphold his right to sue without the consent of the Advocate General. On the whole he has failed to satisfy me that he has a special interest within the meaning of the authorities, and accordingly so far as he is concerned I think he cannot maintain this suit. But this does not I think prove fatal to his co-plaintiffs. Order I, rule 4, Civil Procedure Code, enables the Court to give judgment for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to. There are also other

rules which enable us to prevent a claim being defeated merely by some misjoinder which can be cured by a proper amendment.

On my findings then that there was a public right of way and that the plaintiffs Nos. 1 and 2 having a special interest in it can sue, what defence is there left for consideration? The one put forward is a very striking one, viz., that Government have an inherent right to block any public road they like. Strange to say this contention is based on section 37 of the Bombay Land Revenue Code of 1879. That section provides that all public roads and all lands wherever situated, "which are not the property of individuals . . . and except in so far as any rights of such persons may be established in or over the same" are thereby declared to be the property of Government. The section then proceeds: "and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorised by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting." I draw particular attention to these concluding words for the protection of public and other rights of way.

Now the argument presented to us is that at the date when this new road ZY was built the old public highway XY including the soil thereunder was vested in Government. But as all public highways were vested in Government it was for Government to decide what should be a public road and what should not, and accordingly in 1910 they decided that the road ZY should be the public road for this village and that the old road XY should not. Therefore, it is argued that on the construction by Government of the new road, *ipso facto* all public rights in the old road ended. I have great difficulty in even stating this proposition because it

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seems to me to involve so many hopeless contentions. In the first place there was no disposal in 1910 of the old cart road. All that was done was to construct a new road some little way off. Further if there was any "disposal" of anything, such disposal must under section 37 be subject to the "rights of way, and all other rights of the public or of individuals legally subsisting." Therefore the public rights of way here could not be and were not affected by any alleged disposal or theoretical disposal that took place in 1910 or by any actual disposal, namely, by sale to the original defendant No. 1 in 1921.

The question of course is not as to who is entitled to the soil of the old cart road. That of course vested in Government up to the date of the sale, and doubtless it is now vested in the purchaser the original defendant No. 1 or his representatives. The question we have to decide is whether the public right of way over the soil has in any way been affected. And here I may cite one of the most familiar of English legal principles, namely, "Once a highway, always a highway." In England no rights are more keenly upheld and contested in country districts than the rights of the public over public highways of various descriptions. Indeed societies exist for the sole object of preserving the numerous highways whether for carriages or for foot passengers which are part of the advantages of life in England. The only manner in which a public highway can there be stopped up or diverted is under special statutory powers for the purpose.

I appreciate that one may imagine a foreign country where some autocratic sovereign may say: "I will make such public roads as I like and I will stop up such public roads as I like." But even if one goes further and imagines that in former days the Government of India or the Government of Bombay or any predecessor was

such an autocratic sovereign, yet nowadays their powers have been expressly limited by section 37 of the Land Revenue Code, for they can only be exercised subject to the rights of way of the public. That being so Government nowadays at any rate have no power to take any step in violation of the rights thereby expressly reserved to the public, for to my mind section 37 is perfectly clear in preserving for the benefit of the public any public rights of way.

Then it was said that in Municipal areas there is a statutory power to stop up streets, and, therefore, we must imply that power in districts outside such areas as well. That again to my mind is a hopelessly inconsistent argument. If in Municipal areas it was necessary to confer that power upon a Municipality by statute, then outside those areas it must be also conferred by statute if at all on those who are to exercise this alleged power. But in fact no such statutory power is given outside those areas. On the contrary the general power of disposal under section 37 is expressly limited by the proviso "subject to the rights of the public."

Next it was alleged that this particular cart road comes within the area of a Local Board. No point of that sort was raised in the Court below. However we looked at section 50 of the Bombay Local Boards Act, 1923, which was relied on and found that it has no bearing on the case. It merely provides that it is the duty of Local Boards to make adequate provisions for *inter alia* (*a*) "the construction of roads and other means of communication and the maintenance and repair of all roads and other means of communication vesting in them." But how that section can be twisted to mean that the Local Boards are thereby empowered to stop up and divert high-roads, I am quite unable to see.

An attempt was also made in the course of the argument by counsel for the Crown to show that Government

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had let out at certain times a part of the passage. But when the evidence on the point came to be looked at, it became quite clear that nothing of that sort took place in fact. Nor was any contention to that effect raised in the Court below.

The main point on which the learned Judge arrived at his conclusion in favour of the defendants was as follows :—

"There must obviously exist some authority somewhere, in the interest of the public, to divert public roads. Outside Municipal area it must necessarily vest in Government in virtue of their general power as custodiary of public rights and interest. I am, therefore, inclined to hold that a mere diversion of a public road by Government in an area not within the Municipal jurisdiction of any local body cannot give any private individual a right of action."

With all due deference to the learned Judge I would hold that as a matter of law these propositions are wholly unsound. In my judgment Government have no such power to divert existing public highways. Consequently if they wish to obtain it, then, in my opinion, legislation is necessary, and in that event safeguards may be imposed, such as exist at present in England on application to the Quarter Sessions for diverting a highway.

Then it was said that the learned Judge had exercised his discretion and had held that it was merely a case of *injuria sine damno* and, therefore, he would not grant any declaration or injunction. But with all respect to the learned Judge this discretion is a judicial discretion to be exercised on well recognized principles, and on the findings that I have arrived at I have no hesitation in holding that the declaration and the injunction asked for ought to be granted in favour of plaintiffs Nos. 1 and 2.

There is one further point, namely, as regards the successors of the original defendant No. 1 who was the purchaser from Government. They point to the plan and say that they have erected a substantial building

on a portion of this public highway, and it would be hardship on them to order it to be pulled down and that they have left a passage 10 feet wide for the public to go along. In fact the passage XY has been blocked up at both ends but I assume the obstructions at the ends can easily be removed. Now what counsel alleges is that in the Court below he took up a non-contentious attitude and merely stated that he got the land from Government. But unfortunately the evidence does not show that his clients constructed these buildings or a substantial portion of them before notice was given by the plaintiffs. The plaintiffs alleged in the plaint that they gave a formal notice in September 1921. This is not denied in the pleadings and must be taken to be correct. But the defendant No. 1 has not put forward any evidence to show what was the condition of his building in September 1921. That being so we cannot assume in his favour that the whole of the building or even a substantial part of it was erected before the plaintiffs in any way interfered. Under these circumstances it seems to me that a mandatory injunction must be granted. Also, I think, it is not sufficient to say that a ten feet passage has been left. The public are entitled to use the whole of this passage and I fail to see what right this defendant has to block at that particular point about half the passage.

That being so it follows in my judgment that this appeal must be allowed and there must be a declaration that the property in suit was a public passage and that the plaintiffs Nos. 1 and 2 and other members of the public have a right to use the same and that defendant No. 2 was only entitled to sell the same subject to such public rights of passage. Then there will be mandatory injunction on the present defendants Nos. 1 (a) to (e) to remove the encroachments and obstructions on the passage and to set the passage free and that both those

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defendants and defendant No. 2 be permanently restrained from interfering in the use and enjoyment thereof by plaintiffs Nos. 1 and 2. The defendants must pay the costs of this suit throughout including this appeal of plaintiffs Nos. 1 and 2. So far as the plaintiff No. 3 is concerned the suit will be dismissed but without costs having regard to many false defences having been raised.

MURPHY, J. :—The only point for decision really is, whether the learned Judge of the Court below was right in holding that, although the cart track within the village site of Gundowli, marked XY in Exhibit 67, the map in the case, was a public road and had been used for the purposes of the villagers and of persons coming to the village, for a very great number of years, it had ceased to be one when a new Local Board road was made, giving similar access to the village, though at another point; and that plaintiffs were consequently not entitled to the relief prayed for which was for a declaration that they had a right to use this road and to have the obstructions made in it by defendant No. 1 removed. It appears that the new Local Board road was constructed about 15 years before suit; but the old road, or Gowan, was not then closed, but continued to be used by some of the villagers probably because it was a short cut to the village, and to the main road, which runs near this place. In 1920, on the application of defendant No. 1 to the Collector, it was thought that the old Gowan or cart track was no longer needed by the villagers, and since the ownership of all roads vests in Government under section 37 of the Bombay Land Revenue Code, it was sold to defendant No. 1 at the price of Rs. 3-8-0 per square yard. There is no doubt on the evidence that the Gowan was a public road till the new road was constructed, for it was the only cart track from the village

to the main Kurla-Versova road at this point, and the evidence shows that it was fenced off from the private properties on both sides. After the Collector's permission had been obtained, the defendant No. 1, Mr. Gazdar, included the land within the boundaries of his own adjacent property, and it appears from the plan that a corner of his larger building and a good deal of the smaller one are on part of the site of the old cart track.

Both plaintiffs Nos. 1 and 2 own lands which are adjacent to the Gowan. Plaintiff No. 3 has only a general interest in the question, as a villager, as his property is far away in the centre of the village.

The learned Judge of the Court below presumed that, on the construction of the new Local Board road, the plaintiffs' interest and rights in the old road were extinguished, and that Government had then a right to sell the land to any private person who wished to buy it. He relies on section 37 of the Bombay Land Revenue Code, for his view of the law on the point. It is true that that section vests the ownership of the soil of all roads in Government; but the section itself contains a saving as regards the rights of individuals and rights of way, and does not contain any power to close any road, or to substitute one road for another. It is also true that, in certain cases, by the authority of some statutes, such as the District Municipal Act, powers have been taken to close roads when necessary and so to obstruct rights of way. But there is no similar provision in the Bombay Land Revenue Code, or in any enactment, such as the District Local Boards Act which could relate to a village, such as this one, where there is no Municipality or Notified Area Committee in existence, and defendant's learned pleader was unable to quote any authority to justify the learned Judge's decree on this point. On the contrary, it is clear that

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the road in question was a public one, and that Government not having reserved to themselves any power to close public roads which have been in existence from time immemorial, it could not close this one, or allow it to be closed, in the manner this has been done.

The learned Judge was also of the opinion that the suit was not maintainable under sections 91 and 93 of the Civil Procedure Code. On the facts, it seems to me that this was not a correct view to take, for I think the plaintiffs Nos. 1 and 2 come within sub-section (2) of section 91. Their boundaries ran with the old cart track, and their enjoyment of open access to it was specially affected by having the ownership of the land adjacent to this side of their properties transferred from the public to a private owner and having it put to another use. This change considerably affects the value of the adjacent property. In their cases the defendants' actions constitute, not only a public nuisance, but also an infringement of private rights.

In the case of plaintiff No. 3, it cannot be said that he had any right of suit, his position being similar to that of his fellow villagers who have only been generally inconvenienced, and not otherwise affected. I think that plaintiffs Nos. 1 and 2 were competent to maintain this suit and that plaintiff No. 3 was not, and I agree for this reason with the view taken on this point by the learned Chief Justice.

The final position, therefore, is that defendants Nos. 1 and 2 have been unable to show that the cart track was not a public road. In fact, the evidence is overwhelmingly against their contention, and there can be no doubt that the Gowan was one of the old village roads. Defendants have also failed to establish any authority by which the old cart track could legally have been closed, whether an alternative for it was or was not provided for the plaintiffs' use.

This being so, the ancient maxim " Once a highway, always a highway " must prevail, and I hold that the obstruction of the Gowan was not according to law, and that plaintiffs have a right to the relief claimed. The original Court's decree must, therefore, be reversed, and the plaintiffs given the decree which has been set out in the learned Chief Justice's judgment.

Decree reversed.

B. G. R.

APPELLATE CIVIL.

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Murphy.

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October 1

RABIA, WIDOW OF MAHOMED TAHIR, APPLICANT *v.* THE AGENT, G. I. P. RAILWAY, OPPOSITE PARTY—MESSRS. W. T. HENLEY'S TELEGRAPH WORKS, CONTRACTORS WITH THE OPPOSITE PARTY.*

Workmen's Compensation Act (VIII of 1923), sections 12 and 2 (2)—Meaning of " part of ordinary trade or business "—Erection of steel towers near the Railway line whether part of the ordinary trade or business of the railway—Exercise of statutory powers by the Railway Co.—State railway whether a department of Government.

The G. I. P. Railway entered into a contract with a company under which the latter was to construct a transmission line to carry electric power to various sub-stations on the railway. The deceased was employed by the contractors as a fitter whose work was to assist in the erection of steel towers to carry the overhead cable. These towers were not erected on the railway track but on land adjacent thereto. While carrying materials from the store near a station to the site of work he was knocked down by a train and killed. The mother as a dependent of the deceased applied for compensation from the G. I. P. Railway under section 12 of the Workmen's Compensation Act. The Commissioner referred the matter to the High Court under section 27 of the Act :

Held, (1) that the setting up of an overhead electric cable for the purpose of transmitting electrical power to the railway was not ordinarily part of the trade or business of the principal, viz., the G. I. P. Railway, under section 12 of the Workmen's Compensation Act :

Pearce v. *London and South Western Railway*[1] and *Wrigley* v. *Bagley & Right*,[2] referred to ;

(2) that in constructing such an overhead electric cable the Railway Company was exercising and performing the powers and duties conferred upon it by statute ;

*Civil Reference No. 11 of 1928 made by the Commissioner for Workmen's Compensation, Bombay, under section 27 of the Indian Workmen's Compensation Act.

[1] [1900] 2 Q.B. 100.

[2] [1901] 1 K. B. 780.