

## **PRIVY COUNCIL**

Gujarat Ginning and Manufacturing Co. Ltd. Ahmedabad

Vs.

Motilal Hirabhai Spinning and Manufacturing Co., Ltd.

Privy Council Appeal No.56 of 1934  
(Lord Maugham J. Sir John Wallis and Sir George Rankin JJ.)

06.12.1935

### **JUDGMENT**

#### **LORD MAUGHAM J.**

1. The appellant company—the Gujarat Ginning and Manufacturing Co., Ltd.—appeal from an injunction granted by the District Judge at Ahmedabad and affirmed by the High Court of Bombay restraining them from interfering with the passage of railway wagons between the respondent's land and the line of the Bombay Baroda and Central India Railway upon railway lines laid down in the appellants' premises. Part of the order complained of requires the appellants to replace certain rails which they had taken up. The suit was brought by the Motilal Hirabhai Spinning, Weaving and Manufacturing Company, Limited (the respondents) in the Court of the Subordinate Judge at Ahmedabad on 29th June 1923. The trial Judge had dismissed the suit. A third company, the Gujarat Spinning and Weaving Company, Limited, has to be referred to and as its name is very similar to the name of the appellants, it will be referred to in this judgment as the "third company". The three companies just mentioned appear all to have been engaged in cotton manufacture, but it is not possible to form an opinion whether, and if so how far, they were rivals in business, or were in the habit of assisting one another, or were independent altogether.

2. In 1903 the three companies had for a long time been managed by the same firm of managing agents and from before that year until his death in 1913 the individual who in fact managed the affairs of all three companies was one Mansukhbhai. On his death in that year leaving an infant son, the business of all three companies was in fact managed by his brother and partner Jamnabhai until 1922, when Jamnabhai retired. Different agents were then appointed for the respondents and for the appellants and in

1923 the present suit and another suit to be hereafter mentioned were brought by the respondents. The railway siding which is the subject-matter of the dispute was applied for in 1903. It appears to have been completed and to have been brought into use about 1909. It continued to be used by all three companies until after 1922. From Ex. 30, a plan of the siding which has been put in evidence, it appears that at a point marked "L" on the plan, where the line of the Bombay Baroda and Central India Railway runs north from Ahmedabad station to Sabarmati, is the entrance into the siding. This is upon the land of the appellants and on the appellants' land the rails run towards the south to a turn-table at a point marked "E". They then run to the west past a point marked "A" to a point marked "X" where they cross the eastern-western boundary between plot 209 belonging to the appellants and plot 210 belonging to the respondents. They continue to the west beyond "X" to a point named "B" on the plaintiff company's land.

3. Between "A" and "X" already mentioned the lines, though on the land of the appellants, are very near to the boundary. As originally constructed the siding had another branch, running southwards from "E" to a point marked "G" near to the eastern boundary of the appellants' land. From "G" this branch of the siding went westwards as far as "H" on the land of the appellants and beyond "H" to "D" on the land of the respondents. At present however there is no dispute about this portion "G", "H", "D". The present dispute relates to the lines indicated by the letters "L", "E", "X", the question being whether the respondents have in some and what sense a right of passage for their wagons over "L", "E", "X" on the appellants' land. In 1903 the original application for a siding was by letters dated 15th October and 2nd November 1903. Both letters are written in the name of Jamnabhai Mansukhbhai, the agency firm, as agents for the appellants, whose name is at the head of the letters ; and in both the railway company is asked to give a siding "for our mill as well as the Gujarat Spinning and the Motilal Hirabhai Mill under our management." The Bombay Baroda and Central India Railway Company in June 1904, issued a memorandum of terms for the construction of sidings for the use of mills or other industries. This provided that the ordinary maintenance would be done by the railway "at the expense of the users of the siding" and that on the completion of the work, to formation level all permanent way material would be provided, laid and maintained by the railway. The users were to pay to the railway 6 per cent. per annum on the cost of all works except maintenance. In the event of the traffic being insufficient the railway company were to have the right to remove the permanent way materials unless the users should elect to pay extra. The siding was not to be used for any traffic other than that of the mill or

industry for which it was originally provided. There is a further provision that :

11. The Bombay Baroda and Central India Railway shall have the right to construct or allow to be constructed under similar terms any extension of the siding and to work traffic over the siding to or from the extension for which extension a separate agreement with the railway company shall be entered into by the new applicants.

4. There is a provision that the users of the siding were to provide a weighbridge and quarters for a weigh clerk and all labour necessary for weighing. The weigh clerk was to be a railway servant paid by the railway. As regards the responsibility for management, clause 14 provided

14. The users of all sidings constructed under these terms will have to provide for and bear costs of all operations within the sidings, except such shuntings by locomotives as the railway may undertake. They must see that railway rules and regulations for the working of such sidings are strictly attended to by their employees and they will be held responsible for any accidents or loss or damage that may ensue, on neglect or disobedience of these rules by their employees. It will be the duty of the users of the sidings to obtain all such rules and to see that their employees are acquainted with them.

5. Further, the users of the sidings shall be solely responsible for all damage done by their employees to railway wagons and railway property of any description, while in use on the sidings.

6. The appellants, by their managing agents on 1st November 1904, accepted the terms of this memorandum. By letter dated 15th February 1905, the appellants were asked by the railway to do the earth work for the length of sidings. This involved the preparation of the ground inside the press compound, that is in and out between the various mill offices and buildings. In May 1905 it was agreed by the appellants that the Railway Company, whose line was lower than the appellants' land, should grade the siding inside the railway boundary on condition that if at any time it should be found necessary, the railway could call upon the appellants to reduce the level of its land. On 6th September 1911, the Traffic Superintendent wrote to the appellants to say that he understood that goods would be allotted to five mills giving the names of the three companies already mentioned and two others of which nothing further is heard. He went on to give instructions for the management and control of the traffic upon the siding. The appellants were to send to the station master at Ahmedabad a requisition showing the number of wagons required on the following day. When empty wagons

were supplied a checker was to accompany them to see to the loading and sealing of the wagons. When loaded wagons got to the station at Ahmedabad they were to be weighed at the weighbridge and a railway receipt made out and given to a representative of the appellants who should call for it before 5 o'clock p.m. on the day of loading. The appellants were to undertake the loading and sealing of the wagons and were to bear the salary of the checker, namely Rs. 20 per mensem. These letters disclose the method by which the railway siding was controlled and managed by the appellants until 1922.

7. The appellants having, on the lands of all three companies, constructed the siding, save and in so far as this work was not done by the Bombay Baroda and Central India Railway Company itself, took no steps until 1913 to recover any part of the initial cost of the siding from the other companies; nor is there prior to that year any note or memorandum or other evidence of any agreement as to the contributions to be made by the respondents or the third company. In that year, however, a sum of Rs. 7,410 was debited in the appellants' books to the respondents as the respondents' quota of the expenses in respect of the siding. This charge included Rs. 1,916 for labour charges in respect of the respondents' goods, Rs. 1,428 for interest and a sum of Rs. 4,065 particularised thus: "In respect of rails 1,444 feet that were laid, calculated at the rate of Rs. 2-13-? per foot." The appellants debited themselves with Rs. 16,535 in respect of 5,874 feet of rails at the same rate. It now appears that 1,444 feet, which is the basis of the charge to the respondents, is the addition of 1,052 feet being the length of the rails from point A to point B on the plan, and 392 feet the length of the rails from H to D. The respondents are thus in a position to say that they have in fact been debited not only with the cost of construction between X to B on their own land, but also with the cost of construction between A and X, a part of the siding which is on the appellants' land, though close to the boundary of the respondents. There is in evidence a letter dated 25th September 1913, whereby the appellants write to the respondents explaining this charge of Rs. 7,410 and saying " Please credit to our account as of 1st July 1913." The respondents in their own account book comply with this request, entering the following explanation. :

In the year 1906 ' Siding ' was taken up in our mills, Rs. 33,648 being the total amount in respect thereof as well as the coolie charges for goods that arrived by railway, were carried forward as claimable under the siding account at your place up to the date 30th June 1913. The following amount out of it came to our share. Received a bill in respect thereof from you on the date 25th September

1930. This amount is credited on the strength of it.

8. As regards the initial capital expenditure incurred by the railway itself, this appears to have amounted to Rs. 5,364-8-0 and an annual payment was due to it of (a) interest at 6 per cent. upon this outlay and (b) maintenance charges fixed at the average annual rate of Rs. 89-4-0. In 1915 we find the railway charging the appellants a proportion of these amounts calculated upon the ratio between the number of wagons used by the appellants and the total number of wagons used by the 'Rajnagar siding' and the 'Gujarat siding'. The evidence to identify the name 'Rajnagar' with the respondent company's mill is not plain, but the respondent company cannot and do not claim to show that they have become liable to the railway for any future sums in respect of interest or maintenance charges independently of user of the siding by the respondents. When in 1923 the respondents and the appellants came under the management of different persons the position was not only that the appellants were exercising the active management and control of the siding and thus regulating the traffic of all the three companies, but the appellants were using a number of godowns on plot 210, part of the 'respondents' land near its eastern boundary. The respondents purported to put an end to the permission under which the appellants were storing certain materials on this portion of plot 210 and required the appellants to give them possession of the godowns which the appellants had built. This gave rise to a suit between the parties brought by the present respondents on 20th February 1923, which was dealt with on appeal by the High Court at Bombay shortly before it dealt with the present suit. This other case is reported as *Gujarat Ginning and Manufacturing Co. v. Motilal Hirabhai Spinning and Manufacturing Co. Ltd.*, The plaintiffs' case in that suit was to the effect that the two companies, while in the hands of the same manager, were using each other's things, articles, buildings and land, because of the friendly relations existing between them as neighbours, accordingly that no right arose to either party out of such user and it could be stopped at any time. This view, so far as regards that part of plot 210 on which the godowns were situated, did not prevail in the end. The High Court found that there was an irrevocable license either under section 54, Easements Act, 1882, or on the principle laid down in *Ramsden v. Dyson*, In the result the defendants accepted a lease upon terms which included the payment of a rent.

9. The appellants' retort to the demand that they should evacuate plot 210 was to give notice to the respondents terminating their user of the siding upon the appellants' land. Three months' notice was given to the respondents by letter, dated 8th March 1923, and upon the expiry of the three months the appellants refused to permit the respondents' wagons to pass over the appellants' land and tore up a certain portion of

the rails at a point on the appellants' land. Hence the present suit. In the trial Court the suit was dismissed upon the ground that the respondents had laid their case as a case of co-ownership in the siding, and that effect could not be given to any other form of claim. On appeal to the District Judge an attempt was made to amend the plaint in the manner now to be stated, but it does not appear that this was formally permitted:

Paragraph 11-A: The plaintiff company claims to be a co-owner of the siding, but if for any reason their co-ownership of the whole siding is not held proved then in the alternative the plaintiff company submits that the original application for the railway siding having been made for the use of the three mill companies and the siding having been granted by the railway company for the three mill companies and the management of the three companies having been at that time and for several years thereafter in the hands of the late Seth Mansukhbhai Bhagubhai, the senior partner in the firm of agents of the three companies, and the defendant company having demanded and received from the plaintiff company their share of the cost of the siding, there was an implied grant of the use of the portion of the siding passing through defendant's land and the defendant is now estopped from contesting the grant or stopping the use of this portion of the siding by the plaintiff in view of the fact that the plaintiff company has spent a large amount of money in the construction and maintenance of the portion of the siding on their own land, which portion has been allowed to be used by the defendant company to take their cloth, etc., to the cloth godown.

10. The learned District Judge has stated that only one finding of fact was disputed on the appeal, namely whether or not included in the 1,444 feet of rail which the respondents paid for is the line from A to X which is on the appellants' land. He found that this was the fact though "the point is not of much importance on the legal aspect of the case." The learned District Judge took the view that if the appellants were to obstruct the use of the siding by the other two companies, they would be liable in a suit for damages to the railway company quite apart from the rights of the companies inter se. He considered that, if the other mills had objected to a siding being given to the appellants alone, the railway company would in all probability have insisted upon a joint scheme. He regarded the agreement for a siding as having been made between the railway company, the appellants and the other two companies. He further considered that the demand of part of the cost of construction from the respondents had led to the respondents altering their position by laying rails on their premises and by paying for part of the work done on the appellants' land. In the result he held that if

the respondents' right could be put no higher than that of a license, it was an irrevocable license. He found however that the right was an easement within the definition of the Easements Act, 1882. Accordingly the learned District Judge granted the injunction which is now complained of and framed it in these terms :

A permanent injunction should be issued against the defendants (respondents) and their servants or their agents prohibiting them from causing any interference or obstruction when the plaintiffs and their agents shift the railway wagons from the siding acquired from the Bombay Baroda and Central India Railway to the plaintiff's compound, via the railway lines laid in the defendants' boundary limits, and further, the defendant-respondents should be ordered to replace at their own costs the rails of the siding, going westwards from the turn-table (marked 'E' in the plan), which were removed by the defendants, and restore the siding to its original condition. and if the defendants-respondents fail to do so, the plaintiffs-appellants can, at the cost of the defendants cause the rails removed to be laid again through Court and restore the siding to its original condition and that the defendants should be prohibited from removing any of the rails of this siding in future.

11. In the High Court Marten, C. J., held that the respondents had been given a license within the meaning of Sections 52 and 54, Easements Act, and that it was irrevocable under Section 60(b). He also held that upon principles of equity laid down in a line of cases beginning with (1866) 1 HL 129 (2), the respondents having relied upon an expectation that they would be given a right to use the siding on the appellants' land, the appellants could not terminate such user. He thought that there was considerable difficulty in saying that the right of the respondents amounted to an easement as there was here no definite agreement of which specific performance could be obtained or for breach of which damages could be given. The learned Chief Justice considered however that the injunction granted by the District Judge was not altogether fair to the appellants, unless it were coupled with some terms to be imposed on the respondents. On this view negotiations and arguments proceeded in the High Court for the purpose of settling an agreement whereby for a rent and upon certain terms the respondents were to be given a way-leave. In the end the appellants, regarding the terms as unreasonable, refused to enter into the agreement, whereupon the High Court dismissed the appellants' appeal, maintaining the injunction as granted by the District Judge. Murphy, J., who agreed with the order proposed by the learned Chief Justice, took the view that there was an implied agreement between the two mills by which the appellants' mill gave the respondents' mill a license to use the track traversing the

appellants' mill's ground. He too thought that the right, though in the nature of an easement, did not amount to one, and fell within the definition of a license; and that under Section 60(b), Easements Act, the license had become irrevocable because the licensee had been allowed to put up permanent structures.

12. Mr. Upjohn for the appellants before the Board disputes that the permissive user gave rise to any rights, but contends that if a license was at any time granted the license was revocable. He lays stress on the fact that the mutual arrangement, or pooling arrangement under which the siding was brought into use, involved many active duties of management and control and considerable expense on the part of the appellants. In the absence of a properly proved agreement complete as to all necessary terms, the appellants, in his submission, have parted with no rights whatever. Still less have they altered in position from that of land-owner adjoining the railway in a position of advantage vis-a-vis the other companies, to the position of owner of a servient tenement. Mr. Upjohn also criticises the terms of the injunction granted by the Courts below as being too wide and amounting to an actual preference given to the respondents' wagons upon the siding over the appellants' land. Mr. Gavin Simonds for the respondents, while not contending that the respondents' right amounted to an easement, contends that it did amount to a license; that the license was irrevocable under Section 60(b), Easements Act, and that in any case the facts entitle him to the benefit of the equitable doctrine of (1866) 1 HL 129 (2) and other cases of that kind.

13. The case having come before the High Court of Bombay on second appeal their Lordships are bound by the District Judge's findings of fact, but it is evident and it was not disputed that the matters in contest are questions as to the proper legal effect of proved facts and are therefore questions of law. The first question is whether the respondents are entitled under the Indian Easements Act (5 of 1882) to an irrevocable license to use the part of the siding on the appellants' land for the purpose of obtaining access with trucks and engines to the railway line. This depends on the provisions contained in section 52 (where a license is defined), section 54 (which provides that a grant of a license may be express or implied from the conduct of the grantor), and Section 60, which is in these terms :

A license may be revoked by the grantor unless-

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the license has executed a work of a permanent character and incurred expenses in the execution.

14. Their Lordships are willing to assume for the purposes of this appeal that the true

inference from the admitted act of Mansukhbhai as agent for the three companies in constructing sidings on the lands of the three companies is that the appellants acted as agents for the respondents in constructing the line on that company's land from "X" to "B," and that that part of the work may be regarded as work of a permanent character. Having regard to the subsequent apportionment of the expenses, it may be right also to infer that the respondents incurred expenses in the execution of that work. But their Lordships are unable to see any ground for the further contention that those works were executed while "acting upon the license." Those words must mean (see Section 52) acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not "act upon a license" if he does works and incurs expense upon his own property.

15. That he can do without anyone's license. It was suggested that the sub-section might be construed to include an acting on the promise or the statements by an alleged licensor from which the expectation of a license could reasonably be inferred. It may be observed that such words would require some explanation and qualification before they could properly find their way into a statute. Works done by the licensee on his own land may be done without the knowledge of the licensor, and it would be impossible to hold that the alleged licensor's land was bound in perpetuity (subject to Section 62) as the result of some works done by the alleged licensee on his own property of which the former was unaware. Moreover the section is not dealing with the effect of an express contract between the parties, but with the consequences to follow from a certain conduct on the part of the licensee which if done on the land of the licensor might well give the licensee rights against him. Their Lordships see no reason in these circumstances for departing from what appears to them to be the natural meaning of the words. The result is that Section 60(b) does not avail the respondents because there was no acting upon the license in the execution of works by them, and if the respondents are forced to make their claim on the footing of a license within the meaning of Section 52 Easements Act, that licence was revocable under the first words in Section 62 and it has been in fact revoked.

16. There remains the question whether the respondents are in a position to rely on an equitable doctrine and relying on that equity to call upon the Court to intervene for their protection in such a manner as it thinks fit. The doctrine in question is said to be that which was invoked in *Plimmer v. Mayor of Wellington*, and Both these authorities were considered by this Board in the recent case of (1931) AC 414 and their Lordships are therefore absolved from the task of explaining the grounds on which

these earlier authorities were decided. The precise point involved in the present case may be formulated as follows : Are the respondents in a position to establish that the conduct of the appellants at any time between 1903 and 1923 has been sufficient to justify the legal inference that they had by plain implication contracted that the license or way-leave to use the rails on the appellants' land would be perpetual ? It will be noted that this is an adaptation of the principle laid down in *Lala Beni Ram v. Kundan Lal*, by Lord Watson in delivering the judgment of the Board, a principle which was approved in the judgment in *Canadian Pacific Railway Co. v. The King*. The reference to a contract in the principle as stated does not mean that real consensus of mind between the two parties must be inferred to have existed, but that the conduct of the parties has been such that equity will presume the existence of such a contract as a matter of plain implication.

17. Their Lordships are unable to come to the conclusion that the respondents have established any such proposition. It is important to bear in mind that the appellants' land lies between the land of the respondents and the railway, and that the appellants on the one hand had no need to have a way-leave over the respondents' land, and on the other hand were apparently in a position to exact onerous terms from the respondents as a condition of granting them any license to cross the appellants' land. Their Lordships do not doubt that in a proper case an inference might be drawn from the acts of the common agent for two adjoining land-owners that the land-owners had entered into such a contract as is now in question for their mutual advantage. But in the present case the suggested arrangement was very clearly for the benefit of the respondents, and the only advantage which it is suggested that the appellants gained by it was that they were in a position to promise to the railway company some additional use of the siding. If there had been separate agents for the appellants and respondents it seems certain that if an agreement had been made there would have been provision for a way-leave rent to be paid by the respondents, and a clause giving control of the siding at all times to the appellants as already agreed with the railway company. Further, there might well have been a clause enabling the appellants to determine the license on notice if at any time they required to use the land for other purposes or in some other way.

18. In the absence of anything of this kind it seems to their Lordships that no agreement can have been come to in fact and that no agreement can be inferred as a matter of implication under which the license or way-leave was to be perpetual. The strong probability is that the use of the siding by the respondents, while there was a

common agent, was purely permissive, and that the payment by the respondents of the small sum of Rs. 4,065 in 1913 was thought by the common agent to be a fair charge to make against them, having regard to the use already had, the whole cost of which had hitherto been discharged by the appellants. In these circumstances their Lordships do not think that the respondents succeed in establishing any equity against the appellants, and the onus of doing so is clearly on them. Their Lordships will therefore humbly advise His Majesty to reverse the judgment appealed from, to discharge the injunction granted, and to dismiss the action; to order that the costs, if any, paid by the appellants under the decrees of the District Judge at Ahmedabad and of the High Court be repaid to the appellants by the respondents, and that the respondents do pay the costs of the appellants in all the Courts. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

Cases Referred.

1930, Bom 84=123 IC 481=53 Bom 792=31 Bom LR 1310.

(1866) 1 H L 129=19 Jur (NS) 506=14 WR 926.

(1881) 9 A C 699=53 LJPC 104=51 LT 475=49 JP 116

(1906) 21 All 496=26 IA 58=1906 AWN 245

(1931) A C 414=145 LT 129=100 LJPC 129