

to which we were referred to show that this foreshore or any part of it is a market is too indefinite as to place, time and circumstance to show that the Chaupáti foreshore is in whole or in part a market place.

I also concur in the view that in applying the provisions of section 410 of the City of Bombay Municipal Act, the decision whether the Chaupáti foreshore between high and low watermark is within the City of Bombay is governed by the definition of "City of Bombay" contained in the Bombay General Clauses Act and not by certain provisions of the City of Bombay Municipal Act which divide "the City" into wards for electoral purposes. On this view of the case the accused has committed an offence punishable under the section cited, but the prosecution being avowedly instituted merely as a test case, a nominal fine is sufficient.

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APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* VAMANRAV NARAYAN CHIPLUNKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

August 16.

Cantonment property—Grant—Notice of resumption—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.

A certain plot known as No. 1, Queen's Gardens, situate within the limits of the Poona Cantonment, was in the year 1862 granted by the Commander-in-Chief of the Bombay Army to one Edalji Nasarvanji Colabavala under the terms of a General Order, dated the 31st July 1856. The 14th clause of the said General Order was in these terms:—

"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State.

"It is resumable at the pleasure of Government, but

"In all practicable cases one month's notice of resumption will be given, and

"The value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner."

* Appeal No. 27 of 1905.

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After the grant the grantee erected a bungalow on the plot and in the year 1874 sold the bungalow and all his interest in the land to Hari Ravji Chiplunkar who died in the year 1896 leaving a will under which he appointed defendants 1—3 as executors.

On the 19th October 1903 the Military authorities gave to defendant 1 a notice requiring him to deliver possession of the land to the Cantonment Magistrate on the 1st December following. The notice further stated that Government was prepared to pay defendant 1 Rs. 15,500 as compensation for all the buildings standing on the land, or if the defendant disputed the said amount, then such amount as may be determined by a Committee of Arbitration and that on defendant's failure to comply with the terms of the notice a suit in ejectment would be filed. The defendants having failed to comply with the notice, the Secretary of State for India in Council brought the present suit in the year 1904 to recover possession of the land claiming that "there is a right of resumption which is presently exercisable."

Defendants 1—3 denied the right and contended that the notice of resumption was not proper, and that the plaintiff had no right to resume the value of the buildings being not estimated by a committee.

Defendant 4, who was a lessee of defendants 1—3, expressed his willingness to abide by the orders of the Court as to giving up possession.

The Judge having dismissed the suit on the ground that the notice to give up possession was not proper and was not given to the proper parties, the plaintiff appealed.

Held, reversing the decree that the General Order stated in terms as clear as possible that no proprietary right was conferred by reason of a permission to occupy the ground which alone was granted, and that the ground continued the property of the State and was resumable at the pleasure of Government.

Held further, that the notice of resumption was not a condition precedent to the right of resumption. Even assuming that notice was a condition precedent, that provision had been satisfied by giving notice to one of the three executors who were joint occupants. The provision as to notice was nothing more than a statement of what will be done, when practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.

Held further, that though the value of the buildings erected had not been estimated by a committee, it was not a condition precedent to resumption, though, no doubt, the right to that payment would arise on resumption.

Secretary of State v. Jagan Prasad⁽¹⁾ distinguished.

APPEAL against the decision of A. Lucas, District Judge of Poona, in original suit No. 10 of 1904 brought by the Secretary of State for India in Council to recover possession of certain land, situate within the limits of the Poona Cantonment.

(1) (1894) 6 All. 148.

On the 1st November 1862 one Edalji Nasarvanji Colabavala having applied to the Military authorities for permission to occupy a certain piece of land, situate within the limits of the Poona Cantonment, for the purpose of erecting a dwelling house and out-houses, the Commander-in-Chief of the Bombay Army sanctioned the grant of a plot, which was then known as No. 27, Staff Lines, and subsequently as No. 2, Bund Lines, and latterly as No. 1, Queen's Gardens. The grant was made on the 11th December 1862 under Government Separate General Order of the 31st July 1856, which *inter alia* provided as follows:—

a.—An application must be made to the Officer Commanding the Station in form A for unoccupied ground to be built upon within Cantonment limits.

b.—When no objection occurs, the application is to be forwarded to the Commander-in-Chief who, if he approves, will submit it for the orders of Government.

c.—Permission to occupy such ground in a Military Cantonment confers no proprietary right, it continues the property of the State.

d.—It is resumable at the pleasure of Government, but

e.—In all practicable cases one month's notice of resumption will be given, and

f.—The value of the buildings which may have been erected thereon as estimated by a committee will be payable to the owner.

g.—Committees of Arbitration under this order are to be composed of 5 officers having no interest in the subject of reference specially selected for their judgment and experience and when practicable of not less than 10 years' standing, the owner being called in and allowed to name one member (if a Military Officer at the station).

h.—The value of buildings for compensation is to be determined as nearly as possible according to their actual value at the time. The value fixed being as nearly as can be ascertained the cost of constructing at the time being, a similar building.

The said plot was, thereupon, occupied by the said Edalji Nasarvanji Colabavala who erected a bungalow thereon. In the year 1874 the grantee sold the said bungalow and plot of ground to Hari Ravji Chiplunkar and the sale was sanctioned by the Major General Commanding the Poona Brigade in accordance with the Cantonment Regulations. The said Hari Ravji died in March 1896 having left a will under which he appointed Vamanrav Narayan Chiplunkar, Balvantrav Hari Chiplunkar and Ganpatrao *alias* Ganpatgir Bholagir, defendants 1, 2 and 3,

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as executors and they continued in possession of the bungalow and the plot.

On the 19th October 1903 the Deputy Adjutant-General, Bombay Command, under the direction of the Government of Bombay, gave on behalf of Government a notice to the executor Vamanrav Narayan Chiplunkar, defendant 1, requiring him on the 1st December following to quit and deliver up to the Cantonment Magistrate, Poona, possession of the said plot of ground and intimating that Government was prepared to pay him the sum of Rs. 15,500 as the value of all the buildings standing on the said plot, or if he disputed the said amount then such amount as might be determined by a Committee of Arbitration which would be constituted as provided in Chapter XX of the Cantonment Code, 1899, and that on defendant's failure to comply with the terms of the notice, a suit in ejectment would be filed. On the 28th November 1903 the Cantonment Magistrate, Poona, wrote to Vamanrav Narayan Chiplunkar, defendant 1, a memo stating that the latter should arrange to deliver charge of the premises on the 1st December. In reply to the said memo Vamanrav Narayan Chiplunkar informed the Cantonment Magistrate that he would not give up possession and that in case a suit in ejectment be instituted against him, he would defend the same.

The plaintiff, therefore, brought the present suit in the year 1904 alleging that the cause of action arose on the 1st December 1903 and that the defendants held the land on Military or Cantonment tenure under which the holder had no right of ownership over the ground, but merely a right of occupancy and the land was resumable at the pleasure of Government, compensation being given for any buildings standing upon it at the time of resumption. The plaintiff prayed that the defendants might be decreed to deliver up quiet and peaceable possession of the said plot of ground to the plaintiff and that the defendants or some of them might be decreed to pay to the plaintiff his costs of the suit. The suit was valued at Rs. 40,000.

Defendant 1, Vamanrav Narayan Chiplunkar, answered *inter alia* that he did not admit that the plot in suit was acquired or held by Colabavala under the kind of "tenure" described by

the plaintiff, nor had the defendant any knowledge of any such tenure as was described in the plaint as "Military or Cantonment tenure," that he did not admit that the plot was granted with any such reservation of the right of resumption in favour of Government, that he had no knowledge of the Cantonment Regulations referred to in the plaint nor had the deceased Hari Ravji notice of any such Regulations at the time of his purchase, nor had Colaba vala any such notice at the time of the grant, that the notice of resumption was not proper, that the plaintiff virtually asked for specific performance of an alleged unwritten undertaking not between the parties, as against the executors of Hari Ravji, a transferee who had paid money in good faith and without notice of the alleged reservation and who claimed under a registered document acted upon by the plaintiff, who was, therefore, not entitled to the relief claimed under the provisions of the Specific Relief Act; that the plaintiff was estopped from asserting any right to "resume" the land which had always been held and dealt with by defendants, Hari Ravji and his vendor, as their absolute property free from all liability to resumption and that in the event of the Court passing a decree as prayed for in the plaint, the defendant claimed Rs. 55,000 for the damage that will be caused to him.

Defendants 2 and 3, Balvantrav Hari Chiplunkar and Ganpatrao *alias* Ganpatgir Bholagir, stated that defendant 1 was not the managing executor, the provision in Hari Ravji's will being that all business should be transacted *jointly* and by *majority* of votes, that notice to defendant 1 was insufficient, that no notice was given to them, therefore, there was no cause of action and the plaintiff was not entitled to claim possession and that neither the Cantonment Act, 1889, nor the Cantonment Code, 1899, provided for the resumption of land and for the determination of compensation in such cases.

While the suit was proceeding defendant 2 died and his name was struck off as the right to sue did not survive against his heirs.

Defendant 4, Sir Dinshaw Manekji Petit, who was lessee under defendants 1-3, answered that he was willing to abide by the orders of the Court as to giving up possession and prayed

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that if the plaintiff was entitled to possession, reasonable time might be given to him to vacate.

The Judge found that the notice given by the plaintiff was not proper and was not given to proper parties. He, therefore, dismissed the suit without recording findings on other issues. The following are extracts from his judgment :—

Assuming then that Mr. Colabavala took the land on these conditions (*a, b, c, d, e, f, g, h*, mentioned above) and that his successors-in-title now hold it on the same conditions, it is to be determined on what terms plaintiff can claim that the present defendants shall vacate the land.

Mr. Nicholson (Government Solicitor who appeared for the plaintiff) would have me assume that there is no mutuality about the arrangement between plaintiff and defendants, that the plaintiff can put an end to the occupation at any time at his will and pleasure and that the question of compensation is a matter to be settled afterwards and is quite distinct from plaintiff's right to resume the land. This, as a Court of equity, I cannot allow to be a correct statement of the case. I must hold that the consideration for plaintiff allowing defendants to build on the land was that they should erect upon it a bungalow suitable for occupation by British Officers and should become liable to the rules in force within Cantonment limits many of which are of an irksome nature. Mr. Nicholson is unable to point out to me what is the nature of defendants' agreement with Government if it is not a contract pure and simple. I therefore decide that plaintiff and defendant are parties to a contract. Such being the case, in my opinion, it follows that before he can evict defendants plaintiff must

(1) if practicable give 1 month's notice of resumption, and

(2) pay or at all events show his willingness to pay compensation fixed by a committee constituted as shown above and calculated in the manner shown above.

* * * * *

I now turn to notice (B attached to the plaint) to see how far plaintiff has shown his willingness to compensate defendants according to the agreement between them when he demands that defendants shall vacate the land.

By paragraph 1 of the notice plaintiff calls upon defendants to quit and vacate the premises in suit on the first day of December next following. His offer as to compensation is contained in paragraph 2 which I will quote in full.

"And I hereby further under direction as aforesaid give you notice that Government offer and are prepared to pay you the sum of Rs. 15,500 as the value of all erections now standing on the land or if you dispute the amount of the said compensation then such amount as may be determined by a Committee of Arbitration which shall be constituted as provided by Chapter XX of the Cantonment Code, 1899."

In the event of his not complying with the terms of this notice defendant 1 is informed in paragraph 4 that an action in ejectment will be filed against him in the Poona District Court.

To this notice defendant 1 replied (*vide C* attached to the plaint) "I cannot grant the possession of No. 1, Queen's Gardens, as desired."

The question which now arises is was he justified in so replying or has he by so doing committed a breach of his contract? The notice given to him really amounts to the following:—

"Quit the land by December 1st, 1903. I offer you Rs. 15,500 for the building. If you won't accept that, the amount of compensation to be paid will be fixed by an Arbitration Committee constituted under Chapter XX of the Cantonment Code." Defendant 1 was, in fact, given an unconditional order to quit. But for the following reasons he is entitled to something much more than this. According to his agreement he is entitled to have the compensation to be paid to him first fixed in the manner laid down by the order of 1856 or to be given an opportunity of agreeing to the compensation being so fixed. He was not given any such opportunities but was told to quit unconditionally.

It does not appear how the sum of Rs. 15,500 was fixed but it is not contended that it was fixed in the manner prescribed by the order of 1856. If he did not accept Rs. 15,500 he was referred to a Committee that was never contemplated in the agreement between him and plaintiff. Moreover a Committee appointed under Chapter XX of the Cantonment Code has no powers to fix compensation in a case like this. I, therefore, hold that plaintiff has neither performed nor shown his willingness to perform the promises made by him, to the defendants and that until he has done this he has no cause of action against defendants for breach of contract by refusing to vacate the land as required by the notice to defendant 1.

Apart from the purely legal aspect of the case I am of opinion that on equitable grounds also plaintiff's suit must fail. It is quite conceivable that had defendant 1 been asked to accept compensation fixed in the manner prescribed by the order of 1856 he might in order to avoid the trouble and expense of litigation have accepted compensation so fixed even though he did not admit plaintiff's right to evict him. At all events it does not appear to me to be fair that plaintiff with inexhaustible resources at command should hurry the defendants into litigation without complying to the letter with the conditions of the agreement between them.

The plaintiff appealed.

Scott (Advocate General) with *Rao Bahadur V. J. Kirtikar*, Government Pleader, appeared for the appellant (plaintiff):—The action is one in trespass against persons who hold the land under a revocable license. Clause 14 of the General Order of July 1856 is quite clear on the point. According to the terms of that order the land was resumable at the pleasure of Government and notice to give possession was not at all necessary. In giving the notice which is now alleged to be insufficient, we did more than we

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were bound to do by the terms of the order. The defendants refused to quit, therefore, they lost all claim to the performance of our undertaking.

The Judge misunderstood the nature of our claim. He should have held that it was a case in trespass. The defendants held the land under permission revocable at the will of Government and Government having effected revocation by their notice of the 19th October 1903, the defendants became trespassers.

The determination and the payment of the amount of compensation was not a condition precedent to such revocation. In the case of *The Secretary of State for India v. Jagan Prasad*⁽¹⁾, in which the payment of compensation was held to be a condition precedent to ejectment, the Court did not dismiss the suit, but passed a decree empowering the Secretary of State to eject the defendant conditionally on his making a formal tender of the amount of compensation fixed by a Committee of Arbitrators. But in the present case payment of compensation is not a condition precedent to ejectment.

[JENKINS, C. J.:—Will you undertake not to execute the decree until the amount of compensation is determined?]

Yes, we will do that.

J. P. Souza appeared for respondent 1 (defendant 1).

G. S. Rao (and *Venkatrao Ramchandra*) appeared for respondent 2 (defendant 3):—The General Order of 1856 was not referred to in the notice given to one of the executors. It was put in afterwards. The grant was made to us by Government and it was the grant of a building site. Even if the General Order did apply to the land, the determination and payment of compensation as provided for in it are conditions precedent to the exercise by Government of the right of resumption. As long as there was no offer by the plaintiff to submit to a reference to arbitration, he could not exercise the right of resumption.

Next we contend that the notice was bad because it was given to only one out of the three executors. According to the will of the deceased Hari Ravji Chiplunkar all the three executors or a majority of them must join in doing an act.

H. C. Coyaji appeared for respondent 3 (defendant 4):—We do not contest the right of Government to eject. We are the

(1) (1884) 6 All. 148.

lessee of the bungalow under the executors and sufficient time should be allowed to us to vacate. We should not be saddled with plaintiff's costs.

JENKINS, C. J.:—The Secretary of State for India in Council has brought this suit to recover possession of cantonment property, claiming that there is a right of resumption which is presently exercisable.

The first three defendants deny this right, and, in a letter written by the first of them on the 30th November 1903, it is said "I cannot grant possession of No. 1, Queen's Gardens, as desired. If Government are advised, as they have hinted previously, to sue me for ejection, I will defend if any such suit is instituted, and hold Government responsible for all the cost appertaining to such suit or suits as they or I may be advised to institute or defend."

The 4th defendant is a lessee under the first three defendants, and by his written statement he has expressed his willingness to abide by the orders of the Court as to giving up possession.

The land was granted in the year 1862 to Mr. Edalji Nasarwanji Colabawalla, and it is common ground that the grant was made on the terms of the General Order of the 31st July 1856. Though this General Order was not mentioned in the correspondence previous to the institution of the suit or in the *plaint*, by common agreement the District Judge has disposed of the case on the footing of the rights of the parties being governed by that General Order.

Mr. Edalji Nasarwanji Colabawalla erected a bungalow on the land, and in 1874 he sold the bungalow and all his interest in the land to Mr. Hari Ravji. The first three defendants are Mr. Hari Ravji's executors.

Now the clause of the General Order applicable to this case is the 14th which is in these terms:—"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State.

"It is resumable at the pleasure of Government, but

"In all practicable cases one month's notice of resumption will be given, and

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"The value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner."

It is there stated in terms as clear as possible that no proprietary right is conferred by reason of a permission to occupy ground, and that it was only a permission to occupy ground that was granted is apparent from Exhibit (a) to the plaint. It is further stated with all possible clearness that the ground continues the property of the State and is resumable at the pleasure of the Government.

But Mr. Rao, on behalf of the first three defendants, contends before us that in the following sentence there is that which enables him to resist this claim. He says that one month's notice was not given, and that the value of the buildings has not been estimated or tendered. He says that one month's notice was not given, because notice was only given to one of the three executors; and he relies for the validity of this contention on a clause in Mr. Hari Ravji's will which, we are told, provides that the assent of the majority of the executors is required for any act. But no act is required of the executors in this case.

The position is that the three executors are joint occupants, and even if it be assumed that notice is a condition precedent to the right of resumption, that provision has been satisfied by the notice being given to one. But in our view of the case the giving of notice is not a condition precedent. It appears to us to be nothing more than a statement of what will be done, where practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.

Then it is said that inasmuch as the value of the buildings erected has not been estimated by a committee and so cannot be paid, no right to resume exists. But (in our opinion) payment is not made a condition precedent to resumption, though no doubt the right to that payment would arise on resumption. The case of *Secretary of State vs. Jagan Prasad* ⁽¹⁾ is clearly distinguishable because there it was expressly provided that the power of resumption was on giving one month's notice, and paying the value of such buildings.

(1) (1884) 6 All. 148.

But any difficulty there might be in this respect is met by the assent of the Advocate General to the proposal that any decree for possession shall not be executed without the special permission of the Court until the value of the buildings has been estimated in the manner provided by the General Order, and by his further undertaking as soon as possible after the execution of the decree to pay the sum that may be so estimated. We say 'without the special order of the Court' with a view to safe-guarding the plaintiff against any possible hitch, which we cannot now foresee, that might perhaps interfere with our intention that the plaintiff shall recover possession upon the terms to which the Advocate General has assented on his behalf.

In our opinion there should be a decree to that effect, and the decree of the lower Court should be reversed with costs to be borne by the first three defendants. There will be no order as to costs against defendant No. 4.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

GIRJABAI BHRATAR GANGADHAR BALKRISHNA BHAT THAKAR
(ORIGINAL PLAINTIFF), APPELLANT, v. RAGHUNATH *alias* TATYA
VISHWANATH (ORIGINAL DEFENDANT), RESPONDENT.*

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August 24.

Provincial Small Cause Court Act (IX of 1887), Sch. II, art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.

The plaintiff sued to recover three specific sums of money amounting to Rs. 447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant :—

Held, that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay.

SECOND Appeal from the decision of W. Baker, Assistant Judge of Poona, reversing the decree passed by G. V. Patwardhan, Subordinate Judge at Sáswad.

* Second appeal No. 183 of 1905.