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PRIVY COUNCIL.*

KAIKHUSRU ADERJI GHASWALA AND OTHERS (DEFENDANTS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF).

1911.
May 18, 19, 23.
June 27.

[On appeal from the High Court of Judicature at Bombay.]

Cantonment Tenure—Cantonment Code of 1836 and 1850—Ownership of land in Poona Cantonment—Suit by Government for ejectment of tenant from premises within Cantonment limits—Private ownership in Cantonment, claim to—Presumption of ownership—Possession, effect of—Right of Government to resume land.

In a suit for ejectment of the appellants from premises within the limits of the Poona Cantonment, the Government as plaintiffs claimed that the land belonged to them, and was merely held by the defendants on military or cantonment tenure which entitled them to resume it at their pleasure subject to compensation for buildings which the tenants might have erected thereon. The defendants claimed the land as their private property on the ground that their predecessors in title were owners of the land at the time the Cantonment was established, and that nothing had happened since to vest the title in the Government; and while admitting that they were subject to military jurisdiction, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees. They also contended that being in actual possession of the land the onus was on the plaintiffs to rebut the presumption of ownership in fee attaching to the possession of land whether in a Cantonment or elsewhere. The title of the defendants was based on a document dated 27th August 1864 by which one Beyts, a Purser in the Indian Navy, certified that for the consi-

* *Present:*—LORD MACNAGHTEN, LORD ATKINSON, LORD ROBSON AND MR. AMEER ALI.

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deration therein mentioned he "handed over to Dorabjee Pestonjee all claim he had to the house, out-houses and premises generally, marked 23 Staff Lines, Poona Cantonment". This document was endorsed as "sanctioned" by the Brigadier-General Commanding.

Held, on a consideration of the mode of delimitation of the Poona Cantonment, the regulations affecting it, the arrangements made with the owners of the lands taken to indemnify them for the loss they sustained by being deprived of their rights of occupancy, and the other circumstances of the case, (1) that even if the defendants established that their house was built at, or before, the time the Cantonment was made, there was still a strong probability that they were duly compensated for the change in their position as owners to that of licensees; (2) that from the Regulations as summarised in Aitchison's Cantonment Code of 1836, and Jameson's Cantonment Code of 1850, it was clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities, and the permission of the Commanding Officer was necessary even for the letting or sale of the house so built.

It was therefore impossible to say that mere possession or occupation of the bungalow on this site afforded any presumption whatever that the defendants or their predecessors in title were owners in fee. The presumption was all the other way, and was strengthened by an examination of the history of the site itself which showed that the defendants' predecessors in title did not regard the property as differing in its tenure and terms from other property in the Cantonment. The defendants were, therefore, mere licensees and the land had been lawfully resumed by Government.

APPEAL from an interlocutory order (12th February 1908) of the High Court at Bombay, which directed the re-hearing of an appeal from a judgment and decree (22nd October 1904) of the Court of the District Judge of Poona which had dismissed the respondents' suit.

The suit was one for ejectment of the appellants, and the plaint, filed on 6th August 1903, after (in paragraph 1) describing the land claimed as "a Government plot of ground now known as No. 9 Arsenal Road (formerly as No. 23A, Staff Lines) situate within the limits of the Poona Cantonment" and stating the boundaries, continued (in paragraph 2): "this plot was formerly occupied as a site for a bungalow by one Mr. I. V. C. Beyts, a Purser in the Indian Navy, on Military or Cantonment tenure under which the holder has no right of ownership over the ground, but merely a right of occupancy,

and the land is resumable at the pleasure of Government, compensation being given for any buildings standing on it at the time of resumption. The house and out-houses standing on the said plot and all his interest in the said plot of ground were sold by the said Beyts to one Dorabji Pestanji Ghaswala on 27th August 1864, and the transfer of the occupancy of the said plot was sanctioned by the Brigadier-General for the time being commanding the Poona Brigade in accordance with Cantonment Regulations."

In paragraph 3 it was stated "that the said Dorabji Pestanji died, leaving his widow Sonabai, two sons named Aderji and Framji (defendant No. 2), and two daughters Jivanbai, the wife of one Jamsetji Maneckji Ghaswala, and Bachubai, the wife of Sorabji Nanabhoy Harda, as his heirs. Sonabai died about 10 years ago. Aderji died about a year ago, leaving his son Kaikhusru Aderji (defendant No. 1) as his heir and executor of his will. The third defendant is the second wife of Mr. Sorabji Edulji Ghaswala, who is dead, and whose first wife was a daughter of Dorabji Pestanji Ghaswala. Consequently she is added as a defendant." Paragraph 6 stated that "since the year 1899 the said plot has remained entirely vacant with the exception of a compound wall, an iron latrine and a small out-house and fountain in the compound, the market value of all which is about Rs. 500."

On 23rd March 1903 the Solicitor to Government under the direction of the Government of Bombay gave on behalf of Government and the Poona Cantonment Committee a notice to the first, second and third defendants and to Jivanbai and Bachubai, the daughters of Dorabji Pestanji, deceased, to quit and deliver up on 1st May 1903 to the Cantonment Magistrate, Poona, possession of the said property known as No. 9 Arsenal Road, and gave further notice that Government were prepared to pay the sum of Rs. 500 as the value of the erections then standing on the said ground, or such amount as might be determined by a Committee of arbitration constituted as provided in chapter 20 of the Cantonment Code of 1899. In reply to the notice to quit, the first, second and third defendants wrote

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to the Solicitor to Government a letter dated 20th April 1903 in which they stated that they disputed the rights of Government or anyone on their behalf to resume the said piece of land. Bachubai and Jivanbai also wrote letters dated 25th and 27th April 1903 in reply to the notice to quit that they had no interest of any sort in the said land.

The plaint further stated that the Cantonment Magistrate after giving notice of an appointment for that purpose duly attended at the property on 1st May 1903 to receive possession of the land, but the first defendant, who was present, refused to deliver possession; that the market value of the property was Rs. 18,000; and that the cause of action arose on the 1st May 1903. And the plaintiff prayed for possession, and for such further and other relief as the nature of the case might require.

The defendants in their written statements denied that the plot of land in suit belonged to the Government, that it was held on military or cantonment tenure and that they were liable to ejectment. They also alleged that the house standing on the plot of land was in ruins and no new house had been built owing to the prohibitive action of the Cantonment authorities. The third defendant further pleaded that the defendants and their predecessors in title had been in adverse possession, for more than 60 years, and that the suit was therefore barred by limitation.

On the issues framed on the pleadings the District Judge (Mr. Lucas) held on issue No. 2 that the land in question was not occupied on Military or Cantonment tenure by the defendants' predecessors in title; that the plaintiff had failed, therefore, to establish his title; that there was nothing on the record to show that the defendants or their predecessors in title had ever admitted that the land in suit was not their private property. He further held that the suit was barred by limitation; and made a decree dismissing the suit.

On appeal by the plaintiff, the High Court (RUSSELL and BATTY, JJ.) were of opinion that sufficient attention had not been given by the District Court to exhibit 71, one of the documents relied on by the plaintiff, and consequently its proper

effect as evidence had been lost sight of. The document (exhibit 71) was as follows :—

"I hereby certify that in consideration of having received the sum of Rupees (6,150) six thousand one hundred and fifty, I hand over to Dorabjee Pestanjee Esquire all claim I have to the house, out-houses and premises generally marked No. 23 Staff Lines, Poona Cantonment.

"Signed, sealed, and delivered at Poona this twenty-seventh day of August in the year of Our Lord one thousand, eight hundred and sixty-four.

(Sd.) I. V. C. BEYTS,
Purser of Her Majesty's late Indian Navy.

"Witnesses.

"(Sd.) W. WELLIS.
"(Sd.) H. V. FAULCONER.

"Sanctioned.

"Poona, 27th August 1864.

"(Sd.) F. C. HEATH,
Brigadier-General Commanding Poona Brigade."

The High Court, therefore, on 13th June 1906 remanded the case to the District Court for findings on the following issues :—

"1. What is the legal effect of exhibit 71?

"2. Does the use of the word 'sanctioned' therein imply that the occupation of the defendants and their predecessors in title was a permissive occupation, or how otherwise?

"3. Are the defendants in a position to rebut the *primâ facie* presumption arising on the face of the said exhibit?

"4. In what sense was the word 'sanction' used in exhibit 71 and understood generally according to the practice of the locality at the time of its execution?"

Either party was to be at liberty to adduce further evidence on the additional issues as they might be advised. Both parties having produced additional evidence, the District Court (of which the Judge was then Mr. Kincaid) found on the four issues as follows :—

"(1) Exhibit 71 evidences the sale of the house 23 Staff Lines (now No. 9 Arsenal Road) to Mr. Dorabji with the sanction of

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the military authorities and conferred permission on Mr. Dorabji to occupy the land in suit subject to Cantonment regulations.

"(2) The use of the word 'sanctioned' therein implies that the occupation of the defendants and their predecessors in title was a permissive occupation.

"(3) In the negative.

"(4) The word 'sanction' as used in exhibit 71 and as understood generally in 1864 meant the permission accorded by the military authorities to the sale of the bungalow and the out-houses on the land in dispute."

When the case came before the High Court after the remand it was heard by the same Judges as before and there was a difference of opinion between them.

RUSSELL, J. (then officiating Chief Justice) being of opinion that the plaintiff had proved the limited character of the defendants' occupation, whilst BATTY, J., came to the conclusion that the plaintiff had failed to establish a title to the land.

The following are the material portions of the judgments which were delivered on 29th July 1907 :—

RUSSELL, J. (officiating C. J.) :

"As regards the fourth issue, which runs as follows :—'In what sense was the word 'sanctioned' used in exhibit 71 and understood generally according to the practice of the locality at the time of its execution?' we have been assured by the Advocate General that it was found impossible for the plaintiff to obtain any evidence although every endeavour was made to do so, and such a possibility was certainly never contemplated either by my learned colleague or by myself. In his remand judgment, it will be observed, he says *inter alia* 'that the plaintiff should have been required to give formal evidence of practice, in the course of which he contends the word 'sanction' was used with the significance now attributed to it,' with which remark I concurred. I do not think that our remand judgment can be read in such a way as to have held that if such formal evidence were not given the plaintiff must necessarily fail. The use of the word 'formal' in the above passage from my learned colleague's judgment seems to me to bear out this view. This being so, it remains for us to say whether or not the view of Mr. Kincaid on the first issue : What is the legal effect of exhibit 71 ? is correct.

"It is not necessary to set out the terms of that exhibit over again as in my opinion it amounts to a surrender by Mr. Beyts of all his interest in No. 23 Staff Lines, Poona Cantonment, and an admittance of Dorabji Pestonji thereto.

"In the present case, the plaintiff puts in exhibit 71, wherein, it appears, that Dorabji Pestonji was admitted to the rights of Mr. Beyts in 23 Staff Lines in the Poona Cantonment. Now the use, therefore, of the words 'Poona Cantonment' in my opinion was notice to all persons being admitted to premises therein that 'Cantonment' had a peculiar meaning and implied a peculiar tenure. What that peculiar tenure was appears from the various exhibits which I now enumerate, Nos. 221, 222, 224, 249, 250, 254, 260, 264, 265, 266, 271, 274, 275, 276, 307, 364, 365(1). In addition to the exhibits put in before Mr. Lucas, on the remand herein the plaintiff also put in exhibit 382(2).

"Now, although it may be that the abovementioned Orders and Regulations may not have the force of law, still I am of opinion that all persons purporting to deal with the lands within the Cantonment must be taken to have had notice of those Orders and Regulations which, seeing the long period of years during which they had been promulgated, must have been known to every person desiring to acquire any rights to immoveable property within the Cantonment.

"In exhibit 51 (1828) and exhibit 53 (1830) the property in question is included in Cantonment limits."(3)

After referring to *Framji Dorabji Ghaswala* v. *Secretary of State for India*(4), and *Poona Cantonment Committee* v. *Dhondiram*(5), the judgment continued:—

"It is well settled that a purchaser is bound to inquire into the title to the land offered to him by his vendor, and will be affected with notice of all that he could have ascertained if he had made proper inquiries, whether his abstention from inquiry is due to voluntary waiver or waiver under contract (*Wilson* v. *Hart*(6), *Patman* v. *Harland*(7) cited in *In re Nisbet and Potts' Contract*(8)).

"As to adverse possession it, in my opinion, cannot apply in their case, because the possession of Beyts and his predecessors cannot be said ever to have been adverse to Government. As regards the land they are mere licensees.

"As pointed out by Mr. Kincaid, the Registers of 1856 (exhibit 176 of 1861, exhibit 177 of 1863 and exhibit 178) show that the various owners of the bungalows

(1) All these exhibits show that grants of land in Military Cantonments were totally contrary to the established practice therein; and that the permission given to erect houses on ground within such a Cantonment conferred no right of property whatever in the ground allotted for such erections.

(2) Regulations relating to Cantonments and Quarters, General Order, dated 31st July 1856.

(3) Exhibits 51 and 53 were plans of the Poona Cantonment made in the years respectively mentioned or thereabouts.

(4) (1897) P. J. p. 207.

(5) (1888) P. J. p. 170.

(6) (1866) L. R. 1 Ch. 463 (467).

(7) (1881) 17 Ch. D. 353 (355).

(8) [1905] 1 Ch. 391 (400); affirmed [1906] 1 Ch. 386.

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therein mentioned had registered their names and given the value and rental as prescribed by Rules 145 and 146, in exhibit 275, the rules of the 15th December 1851.

"Now, it seems to me that the owner of a house within the Cantonment on becoming such owner must be taken to have had notice of the Register and its terms, and, this being so, had he referred to the Register what would he have found? He would have found that the Register was headed: 'Register of all private buildings and ground enclosed on private account in the Cantonment of Poona.' Now, that refers in my opinion to two separate things: private buildings and ground enclosed on private account. 'Private buildings' means buildings owned by private persons. 'Ground enclosed on private account' means ground which Government had allowed not to be bought or transferred but merely to be enclosed on private account. Then, again, persons seeking to acquire rights over immoveable property in the Cantonment would have found that the house in dispute, which is No. 23 in the Registers 176, 177, 178 and No. 7 in exhibit 179 and 23 in exhibit 180 (where 'Sorabji' is evidently a mistake for 'Dorabji') had formed part of the original Cantonment. By 'Original Cantonment' is evidently meant that the limits of which were fixed on the 31st of March 1827. It will be remembered that those limits were fixed after the passing of Regulation XXII of 1827 which was passed on the 1st of January of that year.

"From the first argument of Mr. Raikes, it appears that prior to 1827 a Regulation had been passed in 1826 to a similar effect. Section 21 of the Regulation of 1827 shows clearly that no private property was to be included within the limits of the Cantonment and [exhibit 192, the Collector's letter of the 3rd of September 1826 to the Secretary to the Governor, shows the very great care which the then Collector was taking that no private property should be included within the Cantonment limits. The property in dispute in this case was within those limits.

"Great stress was laid upon the fact that it appears there was a bungalow upon the site in dispute prior to 1826, but I fail to see how that can be said to make any difference. It is difficult to suppose that, if the site in question and the bungalow upon it had been the private property of any individual, the authorities who were then marking out the limits of the Cantonment would have included it in the Cantonment limits.

"No doubt Mr. Raikes has been obliged to concede that he is not in a position to prove, although he did his best to do so by minute and elaborate analysis of the jamabandi chitis and documents produced by, and the evidence given by, Mr. Joglekar. Though it is not possible to prove to demonstration that every square yard of land within the Cantonment was actually and formally taken up by Government either by granting other land in substitution therefor or by waiving the assessment thereon (which was the principle upon which the Government was then acting), still in my opinion a jury would be justified in finding that the land in question had been duly and properly taken up by Government together with the other lands within the Cantonment limits, and it is not as if private owners of land, if any such there were, or houses within those limits had no one to protect their

interests because the letter from the then Collector that I have referred to above shows that that officer was fully alive to those interests and was not likely to allow them to be jeopardized as he would have to incur the responsibility therefor. And it is difficult to suppose that his predecessors would not have exercised the same care. If I am right in the construction that I have put upon exhibit 71, it appears to me that the onus was shifted from the plaintiff to the defendants and that they were bound to prove that the house and site in question had been the private property of their predecessors and had not been taken up by Government.

"There are, however, certain other circumstances which seem to me to show that the defendants were fully aware of the Cantonment Regulations and knew that they must comply with the terms thereof. The first of these is the correspondence during 1887 to 1890 relating to the re-thatching of the bungalow on the site in question. I refer to exhibits 99, 100, 101, 102, 103, 104 and 105. Again, in exhibit 106 in 1882, we have the application signed by Adarji Dorabji for the building of a fowl-shed. It appears to me that this application is entirely inconsistent with the idea that the defendants were the absolute owners of the land in question. Further, the correspondence exhibits 115, 116, 117, 118 shows that it was the bungalow, No. 9, Arsenal Road, which was mortgaged to Mr. Nathu and not the land. And the other exhibits regarding the removal of ruined out-houses are wholly inconsistent with the property being the absolute property of the defendants. Now, if the land in question was actually the property of the defendants and believed by them to be so, I cannot understand how they could have brought themselves to requesting sanction to put up the fowl-house from the Cantonment authorities, or how their mortgagee when he was told to put the property in repair did not at once say that 'it is the absolute property of my mortgagor and the Cantonment people have nothing to do with it.' Another point, although it is a minor one, appears in the following exhibits:—

"In No. 176 the sale-price is entered as Rs. 2,500, in 177 it is entered as Rs. 3,500 and in 178, 179 and 180 it is entered as Rs. 6,000; and in exhibit 71 Dorabji Pestonji paid apparently Rs. 6,150. Now, it is to my mind very difficult to believe that these prices were intended to cover the value of the land, for we find in the evidence before Mr. Lucas that at the present time the land alone is valued at Rs. 18,000, and no evidence has been given to show what would have been the value of this land in the year 1864.

"The next point to consider is: What is the meaning of the word 'sanctioned' in exhibit 71? and I apprehend that this Court must now put its own construction upon that word. The only meaning that I have been able to attribute to that word upon exhibit 71 is that in accordance with the Rules and Regulations then prevailing upon the subject the Brigadier-General permitted and ratified the surrender by Beyts and the admittance of Dorabji Pestonji. I cannot believe that it was intended to refer merely to the transfer of one name in place of another in the Register, for otherwise the Register would be a purely useless and unnecessary document. By the use of the word 'sanctioned' I take it what the Brigadier-General meant was that inasmuch as Mr. Beyts had surrendered all his rights to this Cantonment property the Brigadier-General was willing to substitute Dorabji

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Pestonji for him under the then prevailing orders and regulations, under which, as we know, it was entirely *ultra vires* for the Brigadier-General to allow or to connive at allowing the vendee of those rights to acquire any proprietary rights whatever in the land itself. No doubt, when we look at the precis of the various exhibits mentioned at page 426, we do find that in several instances sales or mortgages of bungalows with their out-houses, lands, gardens, etc., are sanctioned; and very great stress upon this fact was laid by the defendants' counsel and pleaders; and this fact has undoubtedly weighed considerably upon my learned colleague in the judgment which he is about to deliver. But in the first place the parcels in exhibit 71 are not described in the same terms as in those deeds, and if once it is established that the Commanding officers had no authority whatever to allow any proprietary rights in the lands themselves to be acquired by the transferees, the word 'sanctioned' or 'granted' in those deeds must in my opinion be held to have reference only to so much of the property comprised therein as the Commanding Officers had power to sanction or ratify. If I am right in this reading of the word 'sanctioned,' the fact that the plaintiff has found it impossible to adduce any evidence as to the practice with regard to which the word is used becomes of no importance.

"With regard to the 3rd issue remanded to Mr. Kincaid, I am of opinion that the defendants have wholly failed to rebut the *primâ facie* presumption arising on the face of exhibit 71.

"I need hardly say that I have had considerable hesitation in arriving at the above result and differing from the opinion of my learned colleague whose experience of cases of this sort is very much greater than mine; but I have formed a very strong opinion that the defendants' predecessor never acquired or paid for, or intended to acquire or pay for, or thought that he was acquiring or paying for any property in the land itself; and the rights that he acquired were rights only in and to buildings upon the site in question in 1864."

"BATTY, J.:—So far as the evidence in this case at present goes it fails, in my opinion, to establish the acquisition by Government of the land in question.

"The voluminous and elaborate evidence and arguments adduced to show that Government acquired large quantities of land within the limits of the Poona Cantonment fall short of proving the plaintiff's title in this, that admittedly the accuracy of the measurements as calculated can only be regarded as approximate. This evidence appearing inconclusive, it became necessary to consider the bearing on this case of exhibit 71, the document transferring to the defendants' father the interests of his vendor in the site in question. For the plaintiff it was contended that as transfers by grantees on Cantonment conditions require for their validity the permission of the Military authorities, therefore exhibit 71, bearing an endorsement of sanction by such authority, was in effect an admission by vendor and vendee that the transfer thereby evidenced required such sanction, and was the transfer of a title originating in a grant under Cantonment rules. What the plaintiff had to prove was not only that transfers of Cantonment grants were sanctioned, but that no transfers except those of Cantonment grants were ever sanctioned, or, in other words, that all sanctioned transfers were transfers of Canton-

ment grants. It was understood that the plaintiff was prepared to prove that sanction was in general acceptation understood as applicable only to Cantonment grants, and that it was therefore a matter of common knowledge that application for sanction involved an admission that the land transferred was held on Cantonment grant. The remand to the lower Court was allowed because the plaintiff's assertion that this was universally understood had been considered, and would, if established by evidence, or undisputed, prove an important element in the case. But in requiring that formal evidence should be adduced in the case it was meant that the assertion must be proved in regular form by evidence as distinguished from mere assertion in the plaint or arguments; and it was not intended to suggest that evidence was required merely as a matter of form and could be dispensed with if the construction contended for were shown to be a possible construction.

"The plaintiff, however, has adduced no evidence whatever on remand to show that the word 'sanctioned' was in general acceptation understood to amount to an admission that Cantonment conditions applied. The only evidence put in for the plaintiff is exhibit 382 containing regulations requiring the permission of the Military authorities to the transfer of Cantonment grants. The existence of such a rule only shows that applications for sanction might have been made and granted in compliance therewith. But it does not prove that every party to a transfer knew that an application of sanction could only be made for the purposes of that rule, and in reference to land held on Cantonment tenure. It is quite consistent with the existence of that rule that private dealing with land within Cantonment limits might have followed the practice known to be common on transfer of land within those limits, without any intention of admitting.

"Application of sanction could only be made for the purposes of that rule and in reference to land held on Cantonment tenure. If the practice of obtaining sanction to transfer in Cantonment limits was known to be the common practice, it is quite conceivable that such practice might be followed either in ignorance of its origin or *ex major cautela* by persons who had no intention of admitting thereby the title of Government to the land transferred. And what plaintiff had to prove was that everybody who followed that practice knew that he was thereby making such admission. The plaintiff has made no attempt to prove this. The defendant on the other hand refers the Court to the instances on the record in which sanction was sought and obtained for documents which purport on the face of them to transfer an absolute proprietary right in the land. It is impossible to hold that the general public, in accepting the endorsement of the word 'sanctioned' on documents, recognized that endorsement as a disclaimer of the proprietary rights asserted in those documents.

"It is quite possible that the assertion of proprietary title in such documents may have been groundless. But that is not the point. The assertion of those rights by the parties seems to me conclusive that they at least could not have regarded their acceptance of the word 'sanctioned' as an unequivocal admission that no such rights existed. It may be that sanction was obtained without any enquiry as to the purpose for which it was granted. But a failure to enquire

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carries no consequences of which another party can avail himself without proof of title in himself.

"It appears to me therefore that the defendant's predecessors in interest cannot be held to have admitted the title of Government by obtaining the endorsement of the word 'sanctioned' in exhibit 71, in the absence of evidence to show that such action was universally recognised as tantamount to such an admission.

"Then it has been suggested that as the old Regulations directed that no private property should be included in Cantonments, it should be presumed that the land in question was not private property on the maxim *omnia præsumuntur rite esse acta*. But that maxim applies only to the manner of performance, and the presumption it allows is that acts or duties proved to have been done, were done with due formality. It would not justify the inference that the act or duty (in this case that of excluding private property) had been performed.

"It has also been urged that as the intention of Government to acquire all land within these limits is proved, a presumption arises that Government actually did so. Intentions may be inferred from acts, but there is no rule that acts should be presumed from intentions. I am unable therefore after full consideration to hold that Government have disclosed any ground on which a private litigant could successfully claim ejectment. No doubt they have much land within Cantonment limits, but it is not impossible or improbable that private property which pre-existed also survived delimitation, and I do not think reprehensible recklessness in failing to preserve due record of the respective rights and interests of the state and of private owners can be admitted as a ground for requiring from the present plaintiff less cogent evidence than would be demanded from any other plaintiff suing in ejectment. If further evidence were available to throw more light in the matter, I should welcome the opportunity of further enquiry into a question which is certainly left in a very unsatisfactory condition. But in the evidence, as far as it goes, I cannot find grounds which in my opinion would be required in an ordinary suit for the ejectment of a person in possession of immoveable property with colour of title extending at least over half a century."

In consequence of this difference of opinion RUSSELL, J. (officiating C. J.), in the absence of BATTY, J., who had left Bombay, ordered the case to be referred to a third Judge. Against that order the defendants, on 14th August 1907, appealed, and on 12th February 1908 CHANDAVARKAR and KNIGHT, JJ., reversed it and directed that the original appeal should be placed before the Court for fresh hearing and disposal. The re-hearing was commenced before CHANDAVARKAR and HEATON, JJ., on 26th February 1908, and on 27th February an application was made by the defendants for leave to appeal to

His Majesty in Council against the order of 12th February 1908, but on 4th March 1908 CHANDAVARKAR and HEATON, JJ., refused the application.

The defendants Nos. 1 to 3 then applied to His Majesty in Council for special leave to appeal against the order of 12th February 1908, and on 4th July 1908 that application was granted upon terms that the order of 12th February 1908 should be "treated as if it had been a final decree on the merits, and the effect of the judgments of 29th July 1907 being treated as neutral, each party being considered as having one judgment in their favour" and liberty "being reserved to the parties on the hearing of this appeal to raise such questions of fact and law as they may be advised."

On this appeal,

DeGruyther, K. C., and *G. Considine O'Gorman* for the appellants contended that the respondent had wholly failed to prove that he had any title to the plot of land in suit, or the right to eject the appellants as he claimed. The onus being on him he had not discharged it. He stated that all the lands within Cantonment limits were the property of Government, that no private property was included when the delimitation of the Cantonment was made. But there were undoubtedly instances (exhibits 154 and 192 amongst others) in which private property was included, and the appellant's case was that his predecessors in title were the owners of the property in dispute before the Cantonment limits were fixed; and if compensation had been paid for it, as the respondent stated was the rule where any private property was included, there would have been some record of it; yet all that was now relied upon was the presumption that compensation was given which, it was submitted, was not sufficient. The principles of the later Land Acquisition Acts, if not the actual legislation, were enforced as long ago as 1820. Reference was made to the Bomay Gazetteer, Volume XVIII, part 2, pages 287, 291, 300, 301, 304, 305, and part 3, pages 353, 357. Bombay Regulation I of 1819 was the first Regulation to fix the limits of Cantonments, but in that legislation there was nothing to suggest

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any inquiry as to the persons to whom the land taken up belonged, or their rights; it provided only for the jurisdiction the Military authorities should have. In those early days of occupation by the British Government the mode of marking off land for a Cantonment no doubt often interfered with private rights in a way that was not intended, and could not be justified; and it could not be presumed that all things that should have been done were rightly done, when there was no proof that they had been done at all. No steps were ever taken to exclude private property until Bombay Regulation III of 1826, by section 21 of which private property was for the first time excluded, the inference being that previous to that date it had sometimes been included. Section 21 of Bombay Regulation XXII of 1827 was in similar terms. That was a direction to the executive and could not operate to confiscate private property which in neglect of such direction had been included in Cantonment limits; and no presumption that private property had been excluded could arise from the provisions of that Regulation. Legislation subsequent to 1827 suggested the inference that private land had been included in Cantonment limits. Reference was made to Bombay Act III of 1867, section 2; Act XIII of 1889, section 26 (as to Registration of immoveable property in Cantonments); the Cantonments Code, 1899, chapter XXII, section 76, and 89, clause (1), and sections 268, 269 to show that no presumption such as the respondent here desired to be drawn was ever made by the authors of that legislation. It was submitted therefore that it had not been shown that it was an essential ingredient of the Military or Cantonment tenure at the time of the occupation of the land that the holders of the land had no right of ownership in the ground, but merely a right of occupancy; and, therefore, that for the land in dispute, if resumable by Government, compensation should be paid to the appellants on the basis of its being their private property. The appellants moreover were in possession, and the onus was on the respondent of rebutting the presumption of ownership which attached to such possession. Further it was contended generally for the reasons given by Mr. Justice Batty that there had been no

admission by the appellants of the title of the respondent: exhibit 71 did not under the circumstances amount to such an admission. In any case the amount of compensation offered was not sufficient.

Cohen, K. C., A. M. Dunne and *E. M. Konstam* for the respondent contended that the land in dispute was within the limits of the Poona Cantonment, and had always been so since the limits were first fixed in 1827; that all land included within the limits so fixed had been ever since the property of Government; that the land in suit was first enclosed and built upon after it had been included as part of the Government land in the Cantonment, and was only so enclosed and built upon with the permission of the Military Authorities, and subject to the condition that the land remained the property of Government; and that the only rights possessed by the appellants were rights of occupancy subject to resumption by Government, compensation being paid by Government for any buildings standing upon the land. Reference was made to Ilbert's Government of India, page 42; Bombay Regulation I of 1819, section 4; Bombay Regulation III of 1826 (repealed by Bombay Regulation I of 1827 which did not come into force until September 1st, 1827); Bombay Regulation XXII of 1827, section 21; Aitchison's Cantonment Code, 1836, article 222; Jameson's Cantonment Code, 1850, rules 12, 129 and 139, 145 and 146, and appendix I, page 20; and Cantonments and Quarters Regulations, 1856, rules 14, 22 and 31. The Court may presume an official act to have been properly done. In the case of many administrative acts the Governor of Bombay in Council for the time being, and the officers subordinate to him carried out various requirements of section 21 of Bombay Regulation III of 1826 and of section 21 of Bombay Regulation XXII of 1827; and it was submitted that the inference to be drawn from these facts was that the substantive provisions of the same sections prohibiting private property from being included in Cantonment limits were also properly carried out. Evidence Act (I of 1872), section 114, clause (*e*); Taylor on Evidence, 10th Ed., section 147, page 147; Ameer Ali and

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Woodroffe on Evidence, page 68; *Jones* v. *Williams*[1]; and Arnould on Insurance, 8th Ed., section 725, page 885, were referred to. The appellants had failed to prove any title to the land in suit, or any such possession of the land in suit adverse to the respondent or his predecessors in title, the East India Company, as would give the appellants title by prescription, *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh*[2]. The transfer to the appellants by exhibit 71 was only of the bungalow and other buildings, not of the land. The Registers of the Poona Cantonment, the presence of the word "sanctioned," in exhibit 71 with the signature thereto of the General Officer Commanding the Poona Brigade, and other acts and proceedings with relation to the land in suit, as well as the admissions by the appellants and their predecessors in title showed that they never intended to purchase or acquire, and had never occupied, such land otherwise than by permission of the Government. They were besides estopped by section 116 of the Evidence Act (I of 1872) from disputing the respondent's title.

DeGruyther, K.C., in reply.

1911, JUNE 27TH:—The judgment of their Lordships was delivered by LORD ROBSON:—In form this is an appeal from an interlocutory order of the High Court of Bombay, dated the 12th February 1908, which directed the re-hearing of an appeal from a judgment and decree of the District Judge of Poona, dated the 22nd October 1904, in favour of the appellants, but by an Order of His late Majesty in Council it is in effect an appeal on the merits of the suit from a judgment of the High Court dated the 29th July 1907.

The action was brought by the respondent to eject the appellants from premises known as No. 9, Arsenal Road (formerly known as 23, Staff Lines) within the limits of the Poona Cantonment.

It was claimed on behalf of the Government of Bombay that the land belonged to them and was only held by the appellants on military or cantonment tenure, which entitled

(1) (1837) 2 M. & W. 326 (327). (2) (1860) 8 Moo. I. A. 199 (220).

the Government to resume it at their pleasure, subject to compensation for buildings which the tenants might have erected thereon. The appellants, on the other hand, claimed the land as their private property, and, while admitting that they were subject to military jurisdiction in the shape of properly authorised cantonment regulations, and to the Government right of appropriation, contended that they were entitled to compensation on a basis of private ownership, and not as mere licensees.

The title of the appellants began with a document dated the 27th August 1864, whereby one I. C. V. Beyts, a Purser in the Indian Navy, certified that for the consideration therein mentioned he "handed over to Dorabjee Pestonjee, Esq., all claim he had to the house, out-houses, and premises, generally marked 23, Staff Lines, Poona Cantonment." This document is endorsed as "sanctioned" by the Brigadier-General Commanding. Its wording appears on the whole to be more consistent with the contention of the Government that the interest of the tenant was that of a licensee of the land with a right to the buildings than with the private ownership in fee alleged by the appellants. The appellants, however, assert that the predecessors in title of Beyts were in fact owners of the land at the time the cantonment was established, and that nothing had since happened to vest the title in the Government. In support of this they produce a map of the cantonment dated the 8th February 1828, though possibly made in 1826, in which they show a house standing on the premises they identify with No. 9, Arsenal Road. They can say nothing as to the tenure on which that land was then held, nor by whom it had been granted, and can only ask the Court to infer that the plot was one of the private properties which they say existed there before the cantonment was formed. But, if that inference be not sustainable, then they contend that they are in actual possession of the land, and that the onus is on the respondent of rebutting the presumption of ownership in fee attaching to the possession of land whether in a cantonment or elsewhere.

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The Poona Cantonment dates from the year 1817, and was formed after the defeat of the Peishwa at the battle of Kirkee. In exercise of the right of conquest the military authorities at that time marked off a considerable area of land, about 5 square miles (which was cultivated or capable of cultivation only to a very slight extent), for the occupation and convenience of the troops. They soon set about to frame regulations for the appropriation and control of this area. Up to 1834 the Presidency of Bombay was governed by regulations made by the Governor in Council, and the first regulations affecting this cantonment appear to be those issued in 1819. By Bombay Regulation I of 1819, section 4, it is provided that the limits of the cantonments at which any corps or considerable detachment may be quartered shall be fixed by the Commanding Officer in concert with the Zillah Magistrate or Criminal Judge, and directing those authorities to report thereon to the Governor in Council. On the 14th September 1820 the Governor in Council directs the Commander-in-Chief to issue instructions carrying into immediate effect the provisions of Regulation I of 1819.

The precise delimitation of the Poona Cantonment was accordingly then commenced, and the correspondence during the years immediately ensuing (particularly a letter dated the 24th September 1822 from the Collector to the Commissioner) shows that the military authorities were making arrangements and agreements with the owners of the lands belonging to Poona such as would indemnify them for the loss they sustained by being deprived of their rights of occupancy. On the 4th May 1823 the Commissioner, Mr. Chaplin, writes to the Collector to inform him that the whole of the land which had been sketched out as necessary for the cantonment by the military authorities must be given up, and asking for a report on any arrangements that might in consequence be requisite for indemnifying the present holders of the land. It seems reasonably clear, therefore, that from the first the military authorities were conscious, as they would scarcely help being, of the inconvenience and risk of having absolute owners of land within the cantonment, and of the necessity for

propitiating them by proper settlements and compensation. Even if the appellant established that his house was built at or before the time the cantonment was formed, there is still, under the circumstances of the case, a strong probability that he was duly compensated along with other proprietors for the change in his position as owner to that of licensee. This probability is rendered stronger as the history of the Cantonment proceeds.

Bombay Regulation II of 1826, section 21, provides that the limits of cantonments shall be subject to the approval therein mentioned, and adds "in which limits private property is not to be included." Bombay Regulation XXII of 1827, section 21, is to the same effect.

On the 29th September 1827 a Government proclamation was issued for the information of the Poona district, notifying that the cantonment boundaries were fixed, prohibiting cultivation within that area, and warning all persons that the produce of such cultivation would be subject to appropriation without compensation.

It is unnecessary to go in detail through the numerous succeeding regulations which show how strictly the military authorities asserted their proprietary rights. They are summarised in Aitchison's Cantonment Code of 1836, and in Jameson's Cantonment Code of 1850, and they make it clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities. The permission of the Commanding Officer was necessary even for the sale or letting of this house thus built.

In this state of things it is impossible to say that mere possession or occupation of the bungalow on this site affords any presumption whatever that he or his predecessors in title were owners in fee. The presumption is all the other way, and that adverse presumption is strengthened when the history of the site comes to be examined. It has been traced

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to the year 1843, when it was occupied by an army surgeon. It afterwards came into the hands of a contractor, Nundram Sundarji, and in 1860 he is found petitioning the Commander-in-Chief against a proposal by the military authorities to remove his bungalow along with others for various reasons, which illustrated the limited and precarious character of his tenure. Again, in 1882, Adarji Dorabji applied for permission to build a fowl shed on the site, and duly obtained the sanction of the Commander-in-Chief. These circumstances tend to show that the appellants' predecessors in title did not regard the property as differing in its tenure and terms from other property in the cantonment.

Their Lordships are of opinion that the appellants are mere licensees, and that the land in question has been lawfully resumed by the Government, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: *The Solicitor, India Office.*

Appeal dismissed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Robertson.

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February 3.

In re GUARDIANS AND WARDS ACT (VIII OF 1890)

AND

In re BAI JAMNABAI, WIFE OF LILADHAR KHETSEY, A MINOR, AND HARIDAS NARANJI, PETITIONERS.

Guardians and Wards Act (VIII of 1890), section 12, clause 3 (b)—Power to order money to be paid into Court—Civil Procedure Code (Act V of 1908), section 141, Order XXXIX, rule 10, Order XL, rule 1.

H petitioned the Court under the Guardians and Wards Act, 1890, to be appointed guardian of the property of J, a minor; he also applied to the Court in the following terms:—

"In the meanwhile and pending these proceedings a receiver may be appointed to take charge of the amount of Rs. 4,141-9-1 due and payable to the minor by