
(1908) 02 BOM CK 0020
In the Bombay High Court

Pestonji Jivanji

APPELLANT

Vs

Edulji Chinoy

RESPONDENT

Date of Decision : 12-02-1908

Acts Referred:

Citation : (1908) 10 BOMLR 287

Hon'ble Judges : Robertson, J;Collins, J;Arthur Wilson, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Arthur Wilson, J.—The controversy out of which this appeal arises lies between various members of the Parsi community, and relates to certain land situated in the Secunderabad Cantonment, on a portion of which stands a Parsi Tower of Silence.

2. In or about the year 1895 the respondents, purporting to act on behalf of the Parsi community, resolved to erect on the land in question a second Tower of Silence in addition to that already there. The appellants objected to this proceeding, claiming, as descendants, and representatives in title, of the original founders.

3. Negotiations for a settlement having failed, the appellants filed the present suit. They alleged that the founders were in their lifetime the owners of the land in question, and that the property had devolved upon themselves, and they proceeded to complain of the respondents' encroachment.

4. The respondents, who were defendants in the suit, asserted that the land had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of that community generally for all time, by the Cantonment Authority.

5. In the Courts in India the defendants further set up, that, if the grant had been to the founders, the latter had subsequently dedicated the land to the

purpose of the Parsi community generally. It was also contended that a title, good against the founders and their representatives, had been acquired by adverse possession. On both those points the Courts in India found against the defendants, and their Lordships have not been asked to review those findings. The sole question discussed on the argument of the appeal was that of the original title to the property.

6. The Judge who tried the case decided in favour of the plaintiff, now appellants, and granted an injunction. On appeal the Judicial Commissioner reversed that decision and dismissed the suit. Hence the present appeal.

7. The founders, already mentioned, were two brothers, Parsis, Pestonji Meherji, and Viccaji Meherji, who in 1837 and afterwards carried on business as bankers at Hyderabad and in other places. It appears from the correspondence that, at about that time, they had made up their minds to make Hyderabad their home, and they determined at the same time to establish a

8. Tower of Silence; for which purpose it was necessary both to obtain the ground on which the Tower could be built, and to establish the necessary priests for carrying on the services and ceremonies required by the Parsi religion.

9. It is clear that with regard to the establishment of priests everything was done by the brothers Pestonji and Viccaji. They found the proper persons, and arranged with them to come and settle at the spot to be selected. They undertook the responsibility for their salaries, though the priests were to be at liberty to receive fees for the performance of ceremonials from other Parsis.

10. Pestonji and Viccaji also, through their agent at Secunderabad made all the necessary arrangements for obtaining the site required. It is not necessary (sic) examine all the contemporary papers in evidence. The most important document relied upon by the plaintiffs is the following :-

Ijat asar Balkishta Reddy, Mucaddum of the Village of Bholuckpore, in the District of Hoosain Saugar, may you be well year 1248 Sal i.e. Fasli The reason of writing this is that the Bankers Pestonji and Viccaji having applied and Government having sanctioned the grant to them of the Hill which is near Gattula Naganna Kunta in the Devini Bhavi Kancha within the boundary of the said Village, for depositing bones, the Taluqudar Raja Bang Rao Bahadur has sent order and therefore it is hereby written that you deliver up the said Hill to the said Bankers Pestonji and Viccaji. Note that this is peremptory order in this matter. The date the 25th Rabiul-awal 1254 (i. e. June, 1838).

Ierahim Khan, Naid (In Persian), Peith Mashirabad.

11. This document was held by the Judge who tried the case to be a genuine document, a finding for which he assigned cogent reasons. The learned Judge who heard the case on appeal pointed out a variety of circumstances which he thought threw suspicion upon the document. But he did not overrule the finding of the first Court that it was genuine. Their Lordships see no sufficient reason

why they should reject that finding.

12. The next document of high importance is the following:-

This is to certify that the Parsis of Secunderabad have permission by order of Brigadier Wahab, C.B., Commanding Hyderabad Subsidiary Force to enclose the Hill by name Nomavunghutt for a Burying place, the circumference of which is about (18) eighteen hundred feet, and immediately adjoining the south end of Nawgauah's garden and near the public Bearer's line in rear of the Cantonment of Secunderabad.

This Hill is given for a Tower only to be built on its summit,

H.F.F. CONSIDINE, Assistant Q.M.-General, Hyderabad Subsidiary Force.
Assistant Q.M.-General's Office, Head-quarters Hyderabad Subsidiary Force.
Secunderabad, 15th January 1839.

13. That document was actually obtained on behalf of the two brothers, through their agent, but it is the matter upon which the respondents chiefly rest their case. Their contention is that that document formed the real root of title to the land in question, and that by its terms the grant was one to the Parsi community generally, and not to the two brothers personally.

14. Before examining these two documents and their relation one to the other, it is well to consider the authority from which each document issued, and the relation of those authorities one to the other. The first of the two documents clearly was issued by an officer of the Hyderabad State, and it purports to express a transaction, by which the State had assented to the grant of the land to the two brothers, and directed possession of it to be delivered to them. The second document purports to be issued by the authority of the Brigadier Commanding the Hyderabad Subsidiary Force, a Force which had its headquarters in the Secunderabad Cantonment.

15. The Establishment of the Subsidiary Force, and its modifications from time to time, may be collected from Aitchison's Treaties, Vol. 8, at and after p. 264, and from the various treaties and agreements which follow. It was a Force in the employment of the East India Company, and commanded by the Company's Officers, but maintained, by agreement, in Hyderabad Territory for the protection of the Nizam.

16. The research of Counsel was unable to discover any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the Military Commander on the other, with respect to the management, control, and disposition of the Cantonment and the land comprised in it. And it appears clear that no such treaty ever was in existence.

17. When the Nizam's Government admitted a British Force within its territory, and allotted to it the Secunderabad Cantonment as its Headquarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of

jurisdiction control, and management incident to maintaining the efficiency and the discipline of the troops, and the peace and good order and convenient use of the Cantonment. But it -would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate, in perpetuity, land forming part of the Cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military requirements. These considerations must be borne in mind in estimating the effect of the two documents which have been cited.

18. There appears to be no real difficulty in reconciling the two documents, and appreciating their effect. The first, emanating from the State, purports to deal with, and enforce, a grant of the land by the State to the two founders by name, and the delivery of possession to them. The second document, emanating from the Cantonment Authorities, does not deal with title or possession, but gives permission, to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land. These are matters obviously within the discretion of the commanding officer, for they might affect the convenient occupation of the Cantonment. The effect of the two documents is to show a good title in the founders, and not in the Parsi community.

19. What happened afterwards only confirms this view. The founders admittedly enclosed the land, and erected a Tower of Silence upon it, at their own expense. About the same time, or shortly afterwards, they erected a Fire Temple upon land which they acquired by private purchase, and endowed it.

20. The evidence as to the possession, management, and control of the Tower of Silence and of the land on which it stood, shows these to have been in the founders. The only question being who were the original grantees, the events of the early years, after the acquisition of the land and the erection of the Tower, are much more important than those of later years, when the circumstances of the parties had somewhat changed. And in those early years we find, from the correspondence, that the priests referred such difficulties or questions as arose for the orders of the founders, and obeyed those orders.

21. The founders certainly, down to the year 1863, bore the whole expense of the establishment, and all costs of maintenance and repair. During those years the Parsi community were not represented by any Committee, or other organization. Therefore during those years, the founders had no rivals in respect of possession and control; for the suggested possession and authority of the head priest is negatived by his own letters to the founders.

22. After 1863, the Parsi community from time to time subscribed money in aid of additions and improvements, and from 1882 onwards there was a Committee representing, in some sense, the community. But what happened in these later years can throw but little light upon the nature of the grant of, or soon after, 1837.

23. Their lordships are of opinion that the view of the case taken by the Judge

who tried it was correct. They will humbly advise His Majesty that the decree of the Judicial Commissioner should be discharged with costs, and that of the Court of the Superintendent restored. The respondents will pay the costs of this appeal.