M.R.O. 1—39,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 248 Press ~~Mis.~~

138-139

Dated 17 — 2 — ~~19~~ 86.2

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Not to be folded or roughly handled

Proceedings of the Madras Government, Judicial Department, 17th February 1862.

No. 138. Read the following letter from T. SYDNEY SMYTH, Esq., Advocate General; to the Chief Secretary to Government, Fort Saint George, dated 5th February 1862.

I beg to bring to the notice of His Excellency the Governor in Council, two cases, in which, as appears to me, the interests of Government have been needlessly placed in jeopardy, and a very considerable amount of trouble entailed on their Law Officers.

2. One Sarawana Moottoo Pillay has lately entered into several Contracts with the Commissariat for Arrack, Oil, Rice, &c., and deposited various Government Promissory Notes with that Office as security for the fulfilment of his Contracts.

3. Government would naturally suppose that the Commissariat, receiving these Government Securities from the Contractor, would regard them as his only; and regard itself as bound to return them to him on the termination of the Contract; and cautiously avoid acknowledging any third parties as having any right or interest in the Securities so deposited. Such certainly, and such only, was its legal liability; and as it was one which it could by no means get rid of, it was obviously most undesirable to entangle itself in any additional liability.

4. The Contractor however had accounts and engagements with the Mercantile Bank, and addressed to its Agent, Mr. Geddes, various letters acknowledging certain liabilities, and making certain promises (but only in his own name, on his own behalf, and to be performed by himself) respecting the Securities he had so deposited with the Commissariat.

5. The Mercantile Bank forwarded several of the Contractor's letters to the Commissariat, and much correspondence, and some personal communication, ensued between Mr. Geddes, and Captain Newlyn, Deputy Assistant Commissary General; who, on the 6th August 1860, gave Mr. Geddes a written undertaking, that, as regarded Rupees 15,000 of those deposited Securities, the Commissariat "would not pay them to the Contractor or his Agent as long as the Mercantile "Bank had a lien on the amount."

6. Thus, as regards these Rupees 15,000, the Contractor as the depositor, and the Mercantile Bank by the above undertaking, had now each a right of action against Government,

7. The Contract being terminated, the Bank claimed these Securities from the Commissary General on the 8th November 1861; and the Contractor on the 16th November claimed them also, and commenced an action of Trover against the Secretary of State.

8. On the 28th November the case was laid before me, and I advised an application to the Court to make the Contractor and the Bank interplead; though I was very doubtful of success, on the ground that the claim of each party was founded on the direct act of the Commissariat; the rule being that in such cases, generally speaking, the Courts will not grant an Interpleader.

9. The only chance for success was, if I could make out that Captain Newlyn's engagement with the Bank was made at the request, or with the assent of the Contractor; but this was to be made out solely by argument and inference; for there was no letter from the Contractor to Captain Newlyn, and no evidence of any personal request or assent on the Contractor's part.

10. Accordingly the Court hesitated very much about granting me even a Rule Nisi; and I saw clearly that the only chance of success for Government lay in what might turn up when cause was shewn against the Rule.

11. Fortunately, on shewing cause, the Bank came in, and produced additional evidence (till then wholly unknown to me or to the Commissariat) on which the Court made the Rule absolute, and ordered the costs of Government to be paid out of the Fund; which, I must say, was more than I had expected—though certainly in accordance with the equity of the case.

12. Government will perceive how narrow an escape it has had of having to pay Rupees 15,000 twice over, besides considerable costs. All Officers who enter into Contracts on behalf of Government ought carefully to remember that they ought never to enter into any correspondence or discussion with any one respecting right, title or interest of any one but the Contractor, in or to the money or Government Promissory Notes deposited by him as security for the fulfilment of a Contract.

13. The other case relates to the action of ejectment brought on the 5th September last against the Secretary of State for the Poliem or Poliput of Ankoosagherry in the Zillah of Salem; and amended on the 15th November last, confining the action to certain lands other than the Poliem.

14. My opinions dated 26th September, 21st December and 4th January have, I believe, been before Government and the Board of Revenue.

15. I was at first clearly of opinion that the Supreme Court had no jurisdiction, the claim being confined to the Poliem, and the disposal of that by the Government being an act of State.

16. It was only long afterwards that I was informed that the Collector had taken possession, not only of the Poliem, but also, of private lands and personal property, not included in or belonging to the Poliem, which quite altered the case, and could not possibly be defended as an act of State.

17. Still I was of opinion that the next course for Government was to take no notice of the action; but I advised that the Collector should give notice to all claimants, that he was ready to deliver up all the private property to whoever should produce Letters of Administration or a Certificate under Act 27 of 1860.

18. The Government Pleader in the Sudr Court, as I afterwards learned, had also been consulted, and had given similar advice. It would be better, when that Officer and I are both referred to on the same matter, that each of us should be apprized of it; otherwise, on some accidental difference in the statements made to each, we might possibly advise inconsistent courses, and so prejudice the interests of Government.

19. I naturally supposed that the joint advice of myself and the Government Pleader would have been acted on, as I learned that the claimant had obtained Letters of Administration, and I was therefore not a little surprised to find that a Bill had been filed by her on the Equity side of the Court against the Secretary of State, on the 31st January 1862 in respect of this very property, alleging that the Collector refused to deliver it to her.

20. Upon making inquiry through the Government Solicitor, I learned (demi officially) on the 3rd instant from the Secretary of the Revenue Board, that the Collector states that "he "has not made over the private lands or property as yet; *for*, just as he was preparing to make "over the property to the Plaintiff's Vakeel, he received *a letter* from the Civil Judge of Salem "requesting him to retain the property."

21. The result of the Collector's thus acting, contrary to the advice of the Law Officers, on a mere request, by letter, of the Civil Judge, is this Equity Suit against the Secretary of State, whose defence must now be that he never authorized the act; that it is the unauthorized (and, in legal sense, the wrongful) act of the Collector, who must be personally answerable.

22. The Collector adds that the Civil Judge's letter was written on the application of the Vakeel of a rival claimant, who had filed a Plaint for the Poliput and the private property; but that the Judge had not disposed of the Plaintiff's petition praying him to attach the property.

23. This disposal of legal business by private letters, is I believe not unfrequent, but it is certainly not very regular, and is very hazardous. An Attachment, or Injunction, or Order of Court, would have been a valid authority, and might have been pleaded as a defence; but both the Collector and the Civil Judge ought to know that a private letter is no authority, and cannot be pleaded as a defence.

24. I have no official information before me on the subject, and the matter may perhaps admit of a satisfactory explanation. If so, I should be glad to receive it as early as possible, with a view to the course to be adopted. The Secretary of State must appear and answer the Bill; for the Court clearly has jurisdiction.

25. I would submit however that Government ought not to be exposed to actions, and its Law Officers to the trouble of defending them merely from acts done contrary to their express

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advice, and that in such cases the party or parties in fault ought to bear the costs both of Government and of their Law Officers.

No. 139. ORDER THEREON, 17th February 1862, No. 248.

Paragraphs 1 to 12 will be referred to the Military Department—and the rest of this letter to the Revenue Department.

2. Paragraphs 13 to 25 will also be referred to the Sudder Court for the explanation of the Civil Judge of Salem.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. F. Cartledge.

Shakspeare to me that the advice of the Advocate Genl
a Council referred be acted upon both by the
Military & Civil Depts – Officers who
wilfully entangle the Govt in proceedings whose
cause to go with No 248 – 17th February 1862.
have to make good
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" Sudder Court
" Rev: Dept.