

1884
Judicial (~~193~~) Department.

Over SERIES.

G.O. No. 2032

DATED 13 - 8 - 1884

Confidential

[Despatch Abstract.]

Mr. John Wallace, late M.C.S.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

Opinion

Re. Wallace vs Government of Madras

1. The principal matter we are asked to consider is whether the High Court of Madras has jurisdiction under sections 2 and 3 of 39 & 40 Geo. III C. 79 to exercise with reference to the Governor of Madras and his Council the powers conferred by S: 5 of 21 Geo III C. 70 upon the Supreme Court at Fort William with reference to the Governor General and his Council -

In S: 2 of 39 and 40 Geo. III C. 79 it is recited that it may be expedient "that a Supreme Court of Judicature should be established at Madras, in the same form, and with the same powers and authorities, as that now subsisting, by virtue of the several Acts before mentioned, at Fort William in Bengal." The section then empowers the Crown to establish a Supreme Court at Madras, "with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdictions, both as to natives and British subjects, and to be invested with such power and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control" within the Presidency of Madras as the Supreme Court at Fort William was then invested with or subject to.

By S: 3 of the same Act it was provided that "the Governor and Council at Madras and the Governor General of Fort William aforesaid, shall enjoy the same exemption, and no other, from the authority of the said Supreme Court of Judicature to be there erected."

as is enjoyed by the said Governor General and Council at Fort William aforesaid, from the jurisdiction of the Supreme Court of Judicature there already by law established."

It appears from these two sections, as well as from the Charter of the Supreme Court of Madras, that while that Court was invested with all the powers of the Supreme Court of Calcutta, the Governor General and Council and the Governor and Council at Madras were granted a certain exemption from the authority of the Madras Court, which exemption was defined by reference to the exemption of the Governor General and Council from the authority of the Supreme Court of Calcutta. That exemption is contained in 21 Geo. III c. 70, which recites that dissension had arisen between the Supreme Court and the Governor General and Council, and proceeds (S: 1) to exempt the Governor General and Council from the jurisdiction of that Court in respect of their public Acts. It then, amongst other provisions on this subject, enacts that a person complaining of any oppression or injury committed by the Governor General or any member of the Council or by any person under the order of the Governor General and Council may have the benefit of the special procedure prescribed by the Section. The Section recites that its provisions are designed to prevent all abuse of the powers given to the Governor General and Council. The earlier statute, 13 Geo. III c. 63 S. 39 and 40, had provided that the Governor

Governor General and all other officers of Government, as well as judicial officers, should be punishable by the Court of Queen's Bench and had prescribed a certain procedure for obtaining evidence. It had also, by S: 15, exempted the Governor General and his Council from the Criminal Jurisdiction of the Supreme Court, except in case of treason or felony. The provisions of S. 40 as to obtaining evidence are applicable to all prosecutions in the Queen's Bench for offences committed in India and are not limited to the case of the Governor General and his Council. But an additional and special mode of procedure is provided by S: 5 of 21 Geo. III c. 70 which procedure appears to be limited to the case of the Governor General and Council and to have for its object the speedy correction of certain abuses which might be committed by persons exercising the supreme power in a country so far removed from the control of English tribunals as India then was. There is nothing to show that the Legislature recognised the same necessity for its special interposition in the case of a Government subordinate to the Governor General in Council. The provisions of S: 5 of 21 Geo. III c. 70 do not appear to us to come within the scope of the words relating to the exemption of the Governor General in Council in S: 3 of 39 & 40 Geo. III c. 79. It cannot, in our opinion, be held that the provisions in question are part of the limitations of the exemption.

exemption previously granted to the Governor
General and Council in S: 1 of that Act. The
powers granted by S: 5 to the Supreme Court
are special powers, which it would not enjoy
by virtue of its general jurisdiction so that
no exemption from the exercise of such
powers was required. we are therefore of
opinion that the provisions of S: 5 of 21
Geo. III C: 70 are not intended to be an excep-
tion to or restriction of the exemption granted
in S: 1, but are special provisions relating
solely to the Governor-General and his Council
and are not applicable to the Governor of
Madras and his Council.

The powers given by S: 5 of 21 Geo. III
C: 70 are practically obsolete (see *Cassely v. Ploverden*
1 Bouvier page 125, a case some-
what analogous) and unless they are clearly
applicable to the case in question, we think
the Court ought to decline to exercise such
powers. Should the High Court take a different
view the Government should protest against
its action, and, if necessary, appeal to the
Privy Council, and should, move the High
Court to certify the case for such appeal and
meanwhile to stay proceedings.

Should these measures fail the
Government should cross examine the
applicant's witnesses under protest, and
also under protest examine any witnesses
they may have in support of their case.
The evidence should be limited to
matters showing injury to the applicant and
objection should be duly taken to any
evidence

evidence which may be tendered regarding
other matters which are not a personal injury
to him. His petition is not confined to matters
of which he has a right to complain. The
matters complained of must be such as would
support a suit of prosecution for (See S: 5 of
21 Geo. III C: 70).
H. W. We do not feel able to advise more
fully in the present stage of this matter.

G. C. Paul.

A. Phillips.

21 July 84.

True copy
R. L. [unclear] [unclear]
Govt. Secy.

No. 793.

FROM

R. LEYCESTER UPTON, ESQUIRE,

Solicitor to the Government of India,

TO

The Chief Secretary to the
Government of Madras

Ootacamund

Dated Fort William, the 21st July 1884.

SIR,

Under direction of the Secretary to the Govt. of India in the Home Department, I have the honor to state that I have obtained the joint opinion of the Honble the Advocate General and the Standing Counsel to Government in this case, and have as desired by him today sent you a short abstract of such opinion as follows.

"Case Wallace versus Madras Govt. Advocate General and Standing Counsel advise that provisions of Section 5 Chapter 40 Twenty one George III apply only Governor General and Council as representing Supreme power and not applicable to Governor Madras and Council or other Subordinate Governments and their Council. Court has therefore no jurisdiction and should decline to exercise

In Jno 29/5/84

power. If Court thinks otherwise protest should
be made and appeal preferred to Privy Council.
High Court being moved to certify case for appeal
and stay proceedings. If these measures fail
proceedings must be allowed to go on under
protest evidence being limited to matters
showing injury to Wallace. Witnesses should
be cross examined and Government evidence
taken. Opinion following."

I now beg to forward a copy of their opinion
for information.

I have the honor to be,
Sir,

Your most Obedt Servt,

R. Lytton

Solicitor to the Govt of India

CONFIDENTIAL.

GOVERNMENT OF MADRAS.
JUDICIAL DEPARTMENT.

READ—the following paper :—

From R. LEYCESTER UPTON, Esq., Solicitor to the Government of India, to the Chief Secretary to the Government of Madras, Ootacamund, dated Fort William, 21st July 1884, No. 793.

Under direction of the Secretary to the Government of India in the Home Department, I have the honor to state that I have obtained the joint opinion of the Honorable the Advocate-General and the Standing Counsel to Government in this case, and have, as desired by him, to-day sent you a short abstract of such opinion as follows :—

“ Case Wallace *versus* Madras Government. Advocate-General and Standing Counsel advise that provisions of section 5, Chapter 70, Twenty-one George III, apply only Governor-General and Council, as representing supreme power, and not applicable to Governor Madras and Council or other subordinate Governments and their Council. Court has, therefore, no jurisdiction, and should decline to exercise powers. If Court thinks otherwise, protest should be made and appeal preferred to Privy Council. High Court being moved to certify case for appeal and stay proceedings. If these measures fail, proceedings must be allowed to go on under protest, evidence being limited to matters showing injury to Wallace. Witnesses should be cross-examined and Government evidence taken. Opinion following.”

2. I now beg to forward a copy of their opinion for information.

OPINION.

Re WALLACE *versus* GOVERNMENT OF MADRAS.

1. The principal matter we are asked to consider is, whether the High Court of Madras has jurisdiction under sections 2 and 3 of 39 and 40 George III, chapter 79, to exercise, with reference to the Governor of Madras and his Council, the powers conferred by section 5 of 21 George III, chapter 70, upon the supreme Court at Fort William with reference to the Governor-General and his Council.

In section 2 of 39 and 40 George III, chapter 79, it is recited that it may be expedient “ that a Supreme Court of Judicature should be established at Madras in the same form, and with the same powers and authorities, as that now subsisting, by virtue of the several Acts before mentioned, at Fort William in Bengal.” The section then empowers the Crown to establish a Supreme Court at Madras, “ with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdictions, both as to natives and British subjects, and to be invested with such power and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control,” within the Presidency of Madras as the Supreme Court at Fort William was then invested with or subject to.

By section 3 of the same Act, it was provided that “ the Governor and Council at Madras and the Governor-General of Fort William aforesaid shall enjoy the same exemption, and no other, from the authority of the said Supreme Court of Judicature to be there erected as is enjoyed by the said Governor-General and Council at Fort William aforesaid, from the jurisdiction of the Supreme Court of Judicature there already by law established.”

It appears from these two sections, as well as from the Charter of the Supreme Court of Madras, that, while that Court was invested with all the powers of the Supreme Court of Calcutta,

Re Mr. Wallace's case

27th July 1884
27 July /84

From
The Solicitor to Govt
No 793

CM 2935

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the Governor-General and Council and the Governor and Council at Madras were granted a certain exemption from the authority of the Madras Court, which exemption was defined by reference to the exemption of the Governor-General and Council from the authority of the Supreme Court of Calcutta. That exemption is contained in 21 George III, chapter 70, which recites that dissension had arisen between the Supreme Court and the Governor-General and Council, and proceeds (section 1) to exempt the Governor-General and Council from the jurisdiction of that Court in respect of their public acts. It then, amongst other provisions on this subject, enacts that a person complaining of any oppression or injury committed by the Governor-General or any member of the Council or by any person under the order of the Governor-General and Council may have the benefit of the special procedure prescribed by the section. The section recites that its provisions are designed to prevent all abuse of the powers given to the Governor-General and Council. The earlier statute, 13 George III, chapter 63, sections 39 and 40, had provided that the Governor-General and all other officers of Government, as well as judicial officers, should be punishable by the Court of Queen's Bench, and had prescribed a certain procedure for obtaining evidence. It had also, by section 15, exempted the Governor-General and his Council from the criminal jurisdiction of the Supreme Court, except in case of treason or felony. The provisions of section 40 as to obtaining evidence are applicable to all prosecutions in the Queen's Bench for offences committed in India, and are not limited to the case of the Governor-General and his Council. But an additional and special mode of procedure is provided by section 5 of 21 George III, chapter 70, which procedure appears to us to be limited to the case of the Governor-General and Council, and to have for its object the speedy correction of certain abuses which might be committed by persons exercising the supreme power in a country so far removed from the control of English tribunals as India then was. There is nothing to show that the Legislature recognised the same necessity for its special interposition in the case of a Government subordinate to the Governor-General in Council. The provisions of section 5 of 21 George III, chapter 70, do not appear to us to come within the scope of the words relating to the exemption of the Governor-General in Council in section 3 of 39 and 40 George III, chapter 79. It cannot, in our opinion, be held that the provisions in question are part of the limitations of the exemption previously granted to the Governor-General and Council in section 1 of that Act. The powers granted by section 5 to the Supreme Court are special powers, which it would not enjoy by virtue of its general jurisdiction, so that no exemption from the exercise of such powers was required; we are, therefore, of opinion that the provisions of section 5 of 21 George III, chapter 70, are not intended to be an exception to or restriction of the exemption granted in section 1, but are special provisions relating solely to the Governor-General and his Council, and are not applicable to the Governor of Madras and his Council.

2. The powers given by section 5 of 21 George III, chapter 70, are practically obsolete (*see* *Ouseley versus Plowden*, 1 Boulnois, page 145, a case somewhat analogous), and unless they are clearly applicable to the case in question, we think the Court ought to decline to exercise such powers. Should the High Court take a different view, the Government should protest against its action, and, if necessary, appeal to the Privy Council, and should move the High Court to certify the case for such appeal and meanwhile to stay proceedings.

Should these measures fail, the Government should cross-examine the applicant's witnesses under protest, and also under protest examine any witnesses they may have in support of their case.

3. The evidence should be limited to matters showing injury to the applicant and objection should be duly taken to any evidence which may be tendered regarding other matters which are not a personal injury to him. His petition is not confined to matters of which he has a right to complain. The matters complained of must be such as would support a suit or prosecution. (*See* section 5 of 21 George III, chapter 70.)

4. We do not feel able to advise more fully in the present stage of this matter.

21st July 1884.

(Signed) G. C. PAUL,
(") A. PHILLIPS.

(True Copy.)

(Signed) R. LEYCESTER UPTON,
Government Solicitor.

READ AGAIN Order of Government, dated
188 , No. Miscellaneous.

Order
13 Aug 1884
26.2032

Communicated
to the Advocate
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3
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Is this necessary?
if not — is it
desirable?
M.P.

Council Boy
4/8