

MADRAS RECORD OFFICE.

Government of Madras.

Political DEPARTMENT

G.O. No.	254	<u>PRESS</u> <u>ACT</u>
Dated	13. 4. 45	1957

Not to be folded or roughly handled

No. 1. From THOMAS SYDNEY SMYTH, Esq., Advocate General ; to the Chief Secretary to Government, Fort Saint George, dated 5th April 1859.

SIR,

With reference to the subject of the interview which I had on Friday last with His Excellency the Governor in Council, I have much pleasure in forwarding for the information of His Excellency in Council a copy of my notes of various intimations of the Judges opinions, delivered yesterday at my request by the Chief Justice and the Puisne Judge, respecting the grounds upon which, generally speaking, they thought that costs, where given at all, ought to be given ; and the grounds which they considered would disentitle claimants to costs. They also favored me with an intimation of their present opinion—subject of course to be affected by any new evidence that may be discovered or adduced on the subject—respecting the accounts put forward by Gholam Mahomed, (*alias* Sharfood Dowlah) and Salarool Moolk, the son and son-in-law of the Dewan) as the true account of the receipts and disbursements of the last 19 months, of the late Nabob's life, the amount of which exceeds 77 Lakhs of Rupees; (exclusive of the Punjum Hissa) and which profess to be balanced all to a sum of Rupees 7-6-5 !

2. As to these accounts it will be observed the Judges concur in saying that, at present, they see no reason to consider them other than correct accounts of the transactions to which they relate, nor, at present, do they see any reason to say that these accounts were not regularly kept (meaning, as I understood then, written or made up at the dates to which they respectively relate) and forwarded to the Nabob's Treasury in his life time.

3. I regret that the Judges have taken this view of these accounts, for my own strong conviction is that the facts are just the reverse, *viz.*, that the whole of these 19 months accounts were written after the Nabob's decease (Nursingbhan Lallah picked out 8 months, of them which he told the Court he wrote, by order, after the Nabob's death)—were written upon the Dewan's demanding accounts of these 19 months receipts and disbursements in consequence of finding that none such were in the Treasury—were then lodged in the Treasury by the Dewan's order at various periods between one and two months after the Nabob's death—and were written by various Mootsuddies merely from the dictation of Gholam Mahomed, without the production at the time of one single voucher, though formerly the vouchers used to be shown to, or left with, the Mootsuddies who were ordered to prepare the accounts. The whole of the information collected by, and all the reports I have received from the Government Agent, Dr. Balfour, are distinct and express upon the point that these accounts were prepared, written, and lodged in the Treasury after the Nabob's death. In the first case tried this term the Dewan swore expressly that none of these 19 months accounts were in the Treasury at the time of the Nabob's death ; that he thereupon called for them, received them as and when I have described,and sent them to the Treasury. Seenavassa Row, the keeper of the Records swore also that none of these accounts reached the Treasury during the Nabob's life, that none could be received into or given out from the Treasury without the Dewan's order, and that he received these 19 months accounts for the first time after the Nabob's death. Nursingbhan Lallah, as I have already said swore that he wrote 8 months accounts, *viz.*, for June, July, August, September and December 1854, and for January, February and March 1855, after the Nabob's death which occurred on the 7th October 1855. Besides all this I produced a letter from the Nabob to Gholam Mahomed, dated 4th September 1855, complaining that notwithstanding his repeated demands, no accounts had been furnished to him for above a year, but that he was always put off with excuses, and threatening serious consequences if the accounts were not furnished within 15 days. The answer to this letter admitted the delay, but urged as excuse that the accounts could not be completed unless two other of the Nabob's employes, *viz.*, Gholam Moortaza, Khan (Moomtaz-ool-Moolk) and Misbat Oollah Khan (Moottazim Jung) would furnish their accounts. Moreover these accounts profess to have received the *full* amount of every Promissory Note negotiated in the Bazaar at a time when it was notorious that the Nabob, had long before mortgaged his last Title Deed, and many of his personal ornaments, had no remaining means of raising any loan but these Promissory Notes, and had no security to offer for any of them.

4. Upon these grounds amongst others, including the notorious character of Gholam Mahomed it is my deliberate and decided opinion that these accounts are not to be relied on, and that they were all written after the Nabob's death, and not at the time of the dates they bear—though I am aware that in some respects, *ex. gr.* so far as they relate to payments and arrears of servants wages, they are in fact correct, and correspond with the accounts of the various Cutcheries.

5. Yet I must admit that not only have the Judges good grounds for their opinion looking only to the evidence before them in each case, but that the weight of that evidence is so strongly in favor of that view and that I have so little evidence to oppose to it, that I could not advise an appeal as the evidence now stands, with any hope of success.

6. Gholam Mahomed's character is not known to the Judges as it was to the Commissioners for the Nabob's affairs, and is to the Government Agent and the Law Officers of Government. He swore that he wrote these accounts from month to month, and produced the writers, now in the pay of Government, who swore they wrote them. He swore he lodged them in the Treasury month by month, and produced the Head of the Treasury, his brother Kismuth Khan, who confirmed him. Both swore that Seenavassa Row was only a head writer at the Treasury, and could not tell what accounts were put in or taken out: that Kisinuth Khan acted in these matters irrespective of the Dewan's orders: that it was true the accounts were not in the Treasury at the time of the Nabob's death, because before receipt of the Nabob's letter of 4th September 1855, Gholam Mahomed had got these accounts out of the Treasury to prepare what the Nabob had called for, and had not returned them when the Dewan called for them—an explanation very ingenious and plausible certainly, but I am satisfied quite untrue. The Nabob's letter too, and its demand for accounts, was explained away in an equally ingenious and plausible manner, which I am equally satisfied was quite untrue, but which certainly tallied with the words both of the Nabob's letter, and of Gholam Mahomed's answer. The accounts, he said, which the Nabob's letter called for were not the monthly accounts at all, but some other accounts, as to which he explained at great length. So far, Government will perceive, there was a complete conflict of testimony—but, in the second trial, my three witnesses, the Dewan, Seenavassa Row, and Nursingbhan failed me altogether. The Dewan directly contradicted his evidence on the first trial, and said that the accounts in question were in the Treasury during the Nabob's life and had been returned to Gholam Mahomed in September 1855, and that Kismuth Khan was the only man in charge of the Treasury and that he could do as he liked. Seenavassa Row, the Treasury Mooshriff, adhered to his statement that he had never seen any of the 19 months accounts till November or December 1855, and that then they were sent to him by the Dewan, but he said that Kismuth Khan was his superior, and could do as he pleased, and might have put in or taken out these accounts without his, Seenavassa Row's knowledge—which of course rendered Seenavassa Row's former evidence entirely worthless. Nursingbhan too, though maintaining stoutly that he wrote these 8 months accounts after the Nabob's death, got confused, and admitted want of recollection respecting the transactions of 1854-55 to such an extent as greatly weakened the effect of his evidence. Then the claimants, and those employed in borrowing the money, and the entries in the claimants books of accounts, all, of course, corroborated Gholam Mahomed—not that this weighed one iota in my mind, seeing as I have so often done, how easily such evidence is fabricated, but although the Chief Justice (as reported by the Bombay Newspapers) has felt himself obliged to express publicly his disgust at the prevalence of perjury amongst Native witnesses, yet both the Judges are at present rather new to India, and to the habitual readiness with which the Natives, even those in respectable circumstances, resort to perjury and forgery whenever money is to be gained.

7. Such being the evidence in favor of these accounts, I cannot say that I am surprised at the Judges being disposed to credit them; and as it will be seen that I have literally hardly any evidence to oppose to them, I feel satisfied that if these or similar cases were to be appealed home, the Privy Council would uphold the ruling of this Court. The Privy Council is prompt enough in overruling the decisions of Indian and Colonial Judges on points of *law*, but it requires an extremely strong case to induce them to overrule, on points of *evidence*, the decision of Judges who have had the witnesses examined *videlicet* before them.

8. As regards these accounts therefore, I must take it at present, and subject to the discovery of any fresh evidence, that the Court have found the fact against me.

9. As regards the intimations (they were only intimations, not decisions) given by the Judges of their views respecting costs I hope in some respects to be able to induce them upon further argument and reference to authorities, to modify their opinions still further in favor of Government, but I think that upon the whole their intimations were very satisfactory and enforced as they were by the refusal of the Judges to allow costs in the case then before them, added to the very searching cross examination to which I have subjected every claimant and all his witnesses, I have reason to believe that a salutary effect has been already produced.

10. In two cases where the offers which I directed to be made had been previously refused I have every reason to believe they will be accepted; and as I shall continue to pursue the same searching investigation into all the affairs and transactions and accounts of every claimant who declines such offers as I may consider it advisable to make, I hope they will ere long begin to see the prudence of accepting those offers especially when the costs of a trial are likely to fall, upon themselves.

11. In conclusion I must request permission to observe that I was very far from being prepared when the Nabob's Debts Act was passed, for the amount or severity of the labour that I find in practice it has imposed, and will long continue to impose, upon myself and the Government Solicitor. Every day, and all day, and often till unusually late hours occupied in Court by these cases, we are engaged many additional hours every day before Court and after it in Consultations, searching for evidence, and digesting it, from the voluminous Masses of Papers at Chepauk, and the informations of witnesses—work which not only severely tries my health, but entirely excludes the possibility of attending to any other professional business—though, as Government is well aware, private practice was always considered the chief part of the income of their Law Officers—the salaries being never calculated as an equivalent for the whole or even the chief part of their time or professional labors.

12. Aware however as I am of the present state of the Treasury, I have cheerfully [and without even calling for the assistance of a Junior Counsel in any case where I can possibly avoid it] undertaken this extra and unforeseen labor, in the hope that a strenuous opposition in the outset to every thing like exorbitant claims, may diminish the drain on the Public Finances, and lead to the acceptance of fair and reasonable terms; but however successful I may be in this respect, and so saving Government from costs (a very serious item indeed, amounting even in the case of comparatively small claims, to nearly Rupees 1,000 a case—much more of course in the larger cases) these cases must necessarily continue for many months to come to impose heavy labour upon, and to occupy the exclusive time and attention of the Law Officers.

13. I observe that the "Athenæum" Newspaper professes to report the proceedings of these trials, but the report is so incorrect and imperfect that it can hardly be relied upon for any thing beyond shewing the number of days occupied by them.

4th April 1859, Monday.

DAVISON C. J.

As you seemed, Mr. Advocate General, to wish for some intimation of the views of the Court upon the subject of costs, I will tell you what is my present impression. There is not a trace in the Act of any intention of the Legislature that costs shall only be given when there are demerits on the part of the Government, or their legal advisers. The Legislature probably did not think it decent to presume that any such case would occur. If they had meant that this Court was never to give costs against Government when Government was entirely in the dark, and had access to no information that would warrant it in making an offer, the Legislature would have said so: but they have said nothing of the sort. They have given this Court the fullest discretion. I think that whenever a claimant makes out his case, and has done nothing wrong previously to the claim coming into Court, and where there is nothing in his evidence or the manner of giving it that is objectionable, and where no false witnesses are brought to support the claim there is in short nothing on the claimant's part to disentitle him to costs, then in that case, on the claimants

own merits, and not on the ground of any demerits on the part of Government, I think the claimant should have the costs of proving his claim. In such case we think the claimant ought to have his costs, although the Government did not know, and could not have known, that the claim which he has proved before us was a good one.

The Court cannot go further at present than this. The case of the Richardsons was no doubt opposed to the rule I have now enunciated, but there the ruling of the Court went upon the particular merits of that case, which was peculiar and exceptional. A similar case may again arise, and the Court will then have to decide on the particular circumstances of the case, therefore we cannot be tied down to any positive rule to be applied in every case. I must also add that in giving costs to a successful claimant it was never intended to cast any slur whatever upon the Government, or the conduct of their legal advisers.

BITTLESTON J.

I recollect distinctly in the case of the Richardsons, the reason why the costs were not allowed was because the whole proceedings were exceptional, and out of the usual course of their business, and they had kept no books or entries of them. The Government may in any case require proof. If they make an offer, and it is accepted, the Legislature has not provided for allowing costs in such a case. The costs for which it has provided are the "costs of proving the debt," which cannot be incurred where no proof is given or required. But though the Court may give costs in other cases when the claimant proves his claim, no inference can be drawn, where no offer is made of any condemnation of the conduct of Government or their advisers, costs may be given in Cases in which it is proper to require the claim to be proved.

(BITTLESTON J.—on another occasion.)

As I read the act, it intends the claimant to have the full sum which the Court considers was "justly and fairly due to him from the Estate of the Nabob at the time of his death," and six per cent interest, without any deduction, but if we were to refuse him the costs of proving his claim, where we think he has fairly proved it, this would be in many cases a very large deduction. Where there is no fault on either side the usual rule is that the costs follow the event:

DAVISON C. J. [Respecting the accounts put forward by Gholam Mahomed and Salarool Moolk as the Nabob's Dufters.]

As you asked as Mr. Advocate General for some intimation of our opinion on the general evidence before us, as a guide for yourself in similar cases, we see no objection to saying that at present we see no reason to believe the Dufters produced to be other than correct accounts of the transactions to which they relate, nor, also, (though we do not consider this of so much importance as you appeared to do) that they were not regularly kept, and deposited in the Treasury in the Nabob's life time.

Costs DAVISON C. J.

The only question now is as to costs. This claim consists of 2 Items, one a Bond for Rupees 5,800. According to the conclusion we have come to, the Government offered as much as was due. As to this item therefore there will be no costs. As to the 2nd Item, of Rupees 5,000 on a note, the claim as sent in was for the whole amount, without any deduction, but the claimant's own evidence was, that he had received 2 sums of Rupees 100 each for interest. These two sums then should have appeared in his claim by way of deduction. We don't think the claimant has done or said any thing with intent to deceive the Court, but he has claimed more than he was entitled to, having the means of proving that he was not entitled to these Rupees 200 and so far he has deceived the Government. Claimants in these cases to entitle themselves to costs, must be very careful, so far as they have the means of knowing, to be accurate. If there be any exaggeration, the claimant cannot entitle himself to costs. In giving their evidence before the Court, they must not deviate from the strict truth. We don't say he meant to deceive, but still his claim was too large by Rupees 200, and he ought to have made it out accurately according to his own accounts.

BITTLESTON J.

I quite concur. We ought to see claims made out with strict accuracy. Where the claimant has the means of making out his account, he ought to be accurate. Where there are those means, and they are not followed, with intent to deceive, that of course is a clear case for not giving costs; but even in a case of mere inaccuracy (and here there are several) where the claimant has the means of accuracy, I think that is a case for no costs.

No. 2. ORDER THEREON, No. 234; dated 18th April 1859.

The Government concur in the views expressed by the Advocate General in the above letter, and they remark with much satisfaction the exertions which are being made by their Law Officers for the protection of their interests in claims brought under Act XXX of 1858.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. A. P. W. Begbie.

The Government concurs in the
 views expressed by the Advocate General
 in the above letter, and they remark
 with much satisfaction the exertions
 which are being made by their Law
 Officers for the protection of their inte-
 -rests in claims brought under
 Act ~~1858~~ 1858.

1/11/59
 1/11/59
 1/11/59

Fort George,
 13 April 1859.

JP

21/6/59

To the Advocate General }
 " Government Advocate } Sept 16th