

MADRAS RECORD OFFICE.

Government of Madras.

Political DEPARTMENT.

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Not to be folded or roughly handled

J. J.

1

Fort Saint George, Political Consultation, 9th November 1858.

No. 9. From THOMAS SYDNEY SMYTH, Esq., Advocate General ; to the Chief Secretary to Government, Fort Saint George, dated 27th October 1858.

SIR,

As the claims of Mr. Arathoon, and of Messrs. George and James Richardson, against the Nabob's Estate under Act XXX of 1858, are the two first of the kind, the Right Honorable the Governor in Council may perhaps wish for a report from me upon the subject, such as I have now the honor to forward; but, unless the Government wish me so to do, I shall not consider it necessary to report upon future claims, unless I see something extraordinary or special, independent of the result of the claim, (such as an offer made to the claimant, its acceptance or rejection or the allowance or rejection of the claim by the Court upon summary investigation,) and the amount offered to and accepted by or decreed in favor of the claimant.

2. Mr. Arathoon claimed Rupees 1,00,000 for Principal, and Rupees 45,000 for interest at 12 per cent from 1st January 1848 to 30th September 1851. He then admitted the receipt of Rupees 20,000 on the 1st April 1854, and Rupees 25,000 on the 17th February 1855, and claimed to treat these sums as paid on account of interest, and, deducting them from Rupees 1,45,000, to treat the balance of Rupees 1,00,000 as Principal unpaid, and to calculate interest on that Rupees 1,00,000, from 30th September 1851 to 16th October 1858, making Rupees 42,266-10-8, Total Rupees 1,42,266-10-8.

3. Mr. Arathoon however was well aware that this claim was not fairly or truly stated. He knew that those two sums of Rupees 20,000 and Rupees 25,000 were paid to him *not* for interest, *but* on account of *Principal*, and were so endorsed in express terms on the Istafa Cutcherry Bond which he held. He was at first very unwilling to receive them in part payment of Principal, and this reluctance on his part, it was, that delayed the payment to him from February 1854, when the money to pay him was lodged in the Madras Bank until the 1st April, when he at last made up his mind to accept it.

4. It is clear therefore that so far from the Nabob or his Istafa Cutcherry having made these payments "in specific discharge of interest"—in which case alone the Act, Section XV, says such payments "shall not be re-opened or questioned," the fact was expressly the other way. Mr. Arathoon's claim therefore, by the payment of 1st April 1854, was reduced to Rupees 80,000; and by the payment of 17th February 1855, to Rupees 55,000, and it was on these two sums, and these two dates, respectively, that Mr. Arathoon was entitled to interest, at the rate of 6 per cent per annum, which made his claim Rupees 1,08,820-13-4, thus striking off Rupees 33,445-13-4.

5. On the 9th Instant, the Government Solicitor Mr. Boyson, and the Government Agent at Chepauk Dr. Balfour, with several of the late Nabob's Officers, met me at my house, and after investigating the matter, and finding the facts to be as above stated, I advised that a Notice, under Section XXI, should be sent to Mr. Arathoon, and his Solicitor, that Government was willing to pay him Rupees 1,08,820-13-4, "in full discharge of what was justly and fairly due to him."

6. This offer he by his Solicitor, on the 12th October, accepted "in full of the debt due to him from the Estate of the late Nabob;" the intention being, obviously, to claim *costs* besides.

7. On the 15th Instant, the claim came on for the Court to make its order for payment, when Mr. Arathoon's Counsel, Messrs. Norton, and Branson, claimed costs, which I resisted. The Chief Justice seemed disposed to give the costs as asked for, but reserved the point for consideration with Mr. Justice Bittleston.

8. On the 22nd Instant, both Judges sat and delivered Judgment, both concurring in refusing any costs, upon grounds that seem perfectly clear and satisfactory. I annex a copy of my Note of their Judgment. The point thus established is valuable as a precedent in the working of this Act; as I have reason to know that considerable costs had been incurred on the other side, such as, in my opinion, would not have been gone to, but for the expectation that the Government would be obliged to pay them.

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9. The Messrs. Rishardsons' claim was the next. There were no Account books, Accounts, or receipts to shew, in support of this large claim; merely instruments of various sorts (Assignments, Bonds and Promissory Notes) executed by the Nabob or by His Household, and the possession of the Title Deeds of the Nabob's Houses. It is however notorious that similar Bonds and Promissory Notes got into circulation to a very great extent in the Nabob's life time, for some of which he received nothing at all, and for others less than half the amount named in the instruments, so that these alone afforded no satisfactory evidence to my mind of the amount actually received by the Nabob.

10. This claim certainly differed materially from others where the parties held only Promissory Notes or Bonds, for the possession of the title deeds of the *whole* of the Nabob's landed property, was a strong fact in Messrs. Richardsons' favor; and I was moreover satisfied by their Solicitor that from Messrs. Arathoon, Lecot, Laybourn, and other respectable sources, they had actually raised, and had made themselves responsible for, at least Rupees 2,13,000, at the times at which they alleged this amount to have been paid to the Nabob. Their claim however was more than twice this amount, and the Government Solicitor's moreover, Mr. Boyson's, information impressed him strongly with the belief that the payments, or most part of them, were made not to the Nabob but Gholam Moortooza Khan; and, if so, there certainly was great reason to doubt whether any thing beyond a very small proportion of any such payments ever reached the Nabob's hands.

11. Under these circumstance I could discover no data upon which I should have felt justified in authorizing any offer to be made to the Messrs. Richardsons, such as there was any the remotest chance of their accepting.

12. That it was necessary to put the Messrs. Richardsons to strict proof of their claim from beginning to end, is perhaps best shewn by the remarks of the Court which allowed it. The Chief Justice said "the case was clearly one that made it incumbent on the Government to search it most strictly:"—that the "*whole* of the inquiry was *absolutely necessary*, and that the Government could not possibly have said it was satisfied at any period of the case before a quarter to 2 o'clock this day (Tuesday) when the Plaintiff's case closed." The Court further marked their sense of the nature of the case, by refusing to give Messrs. Richardson their costs of proving it; on the ground that they themselves, by their own course of dealing, had rendered the investigation absolutely necessary.

13. I am glad however to be able to add, in justice to the Messrs. Richardson, that the Chief Justice said "I am satisfied that the claim is a well founded one," that the discrepancies in the evidence did not effect the real merits of the case, and that he was "content with the explanation given as to how the several sums were obtained." "I am satisfied the sums are proved and that the Claimants are entitled to a decree for them." Mr. Justice Bittleston also said, "I am satisfied with the evidence of the claim, and that there has been general bonâ fides in the transaction," and elsewhere "I consider the claim an honest one and satisfactorily proved."

14. There can be no doubt that the transaction has been a most unfortunate one for Messrs. Richardson, and that they lost at least Rupees 91,000 as they admit (but much more, as I apprehend,) owing to the high rate of interest at which they borrowed money for the Nabob 18 per cent in some cases, 24 it was sworn in one, and never under 12 per cent, and owing to their having to pay interest at these rates from the date of the Nabob's death, 7th October 1855, to 5th November 1858, while they recover but six per cent, a loss moreover much increased by Mr. George Richardson's ill-advised bidding for and purchase of those large and to him useless houses of the Nabob, known as Pater's and Moorat's Gardens, which he purchased for Rupees 1,30,000, continuing his bids for them probably with reference to the valuation said to have been then recently put upon these Buildings by the Government Engineer, and under the belief that the Government Solicitor would continue his biddings to an amount closely approximating to that valuation, a very exaggerated one I believe.

15. The costs must have been very considerable in this case, from the Consultations of Counsel, the translations of Documents, the numerous exhibits and witnesses adduced in evidence,

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the Commission issued to examine a sick witness, and the length of time the trial lasted, viz., four days (including that occupied by the Commission) during which the Court sat till 6 o'clock P. M.

16. The Court was crowded with Soucars, and people of the class from which the bulk of the claims against the late Nabob's Estate is likely to proceed, and I am of opinion that the proof afforded by this trial of the rigid scrutiny to which all dubious claims will be subjected, and that the costs of proving all such in Court will fall upon the claimants, will have a very salutary effect upon the minds of such claimants in disposing them to accept any reasonable offer that may be made to them on behalf of the Government.

17. It will be obvious that I could not be expected to conduct such a case alone. I accordingly had Mr. Mayne, as my Junior, who rendered me most efficient assistance.

18. It was suggested to me to take an objection to the Messrs. Richardson's claim *in limine*, on the ground that the whole of their money dealings with the Nabob were illegal, and a misdemeanour, and all their Securities void, under the 37, Geo. 3rd, Cap. 142, Section 28, but I declined so to do, and Mr. Mayne quite concurred with me.

19. My reasons were as follows. In my opinion it is very doubtful whether that Section applies to Native Princes in the position of the Nabob, who have not a single acre of territory, and whose whole Revenue consists of a Pension (however secured) from the Honorable Company. It is matter of history that the mischiefs and oppressions mentioned in Parliament which led to the passing of this Section arose from assignments of *territory* to the creditors of the Nabob in satisfaction of their claims. This objection I remember was taken by Mr. Burgass, who was of Counsel with me for Mr. Maclean, when that Gentleman was tried in July 1818, under this Statute, and though the Court gave no decision upon the point (Mr. Maclean being acquitted upon another,) it intimated that it would reserve it, if necessary, and it was a very important one.

20. I am further of opinion that East Indians (which the Messrs. Richardsons are) though British Subjects in the same sense that Armenians born and domiciled in British India have been held in Calcutta to be British Subjects, are not British Subjects within the meaning of this Statute; and that, even if they were, it would never do for Government to recognize and pay, as it did last week, a debt due from the Nabob to an Armenian British Subject, Mr. Arathoon, but to repudiate as illegal, and a misdemeanour, a similar debt due to East Indian British Subjects like the Richardsons.

21. I am further of opinion that looking to the open manner in which the Messrs. Richardson brought forward their claims by Suit in the Supreme Court soon after the Nabob's death, to the letter written to them by the Government Solicitor, by the order of Government, on the 19th March 1857, upon which they stayed their proceedings, thereby being put to heavy expense in the shape of interest, to the Extract Minutes of Consultation in the September following wherein the Honorable the Governor in Council resolved that the Messrs. Richardson should be informed that as unexpected delays had arisen in the passing of the Nabob's Act they *were now at liberty to take such proceedings as they might be advised*, under all these circumstances, I was and am of opinion that it would be dishonorable on the part of Government to take such an objection to the Messrs. Richardsons' claim in October 1858, when made upon Government, when Government, though with full knowledge of the fact, had not only not thought fit to take the objection in March 1857 when the same claim was put in Suit against the Nabob's property and mortgagees, but had first induced Messrs. Richardson then to suspend and delay their proceedings, at great loss to themselves: and afterwards gave them leave to proceed with them.

22. I think to have taken such an objection to Messrs. Richardsons' claim under such circumstances, would have placed the Government in a false and most undesirable position, and would have produced a very bad effect upon the public mind, especially in England.

23. I annex a copy of my Notes of the Judgments of both the Judges in this case.

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Judgment in Messrs. Richardsons' Claim, October 26th 1858.

Rawlinson, C. J. This is the first contested claim under this Act.

We are both satisfied that it was Government's duty to have this case most strictly proved, the transactions were of an extraordinary nature. The position of Nabob made the case out of the ordinary course of dealing. Are we satisfied as to the conduct of Claimants since Nabob's death. I am satisfied that it is a well founded claim. Mr. J. Richardson's evidence has been strongly remarked upon, and it is open to remark. Had it stood alone, the result of the case would have been very doubtful, but fully confirmed as it has been by Messrs. Arathoon, Kenrick, Lecot, and by their Books, &c., it shows he spoke truth. What object indeed could they have? The sums entered in their claims all go not to themselves:—they borrowed all the sums from others. As to Fakeer Saib and his statement that he lent the Rupees 80,000 at 24 per cent, while Mr. J. Richardson says it was at 12 per cent, there is a mis-statement certainly somewhere, but I do not think it very important:—It may have been well worth their while to borrow even at 24, and lend at 12 to oblige so rich a Client from whom they might have had such large expectations. Discrepancies in the answer have been pointed out, but I prefer the evidence of a witness in the Box to the statements in sworn answers. It is too much the custom for Clients to give general instructions to their Solicitors, on which the answer is drawn and then sworn to without further examination. The discrepancies do not effect the merits of the case. As to the Rupees 70,000, 80,000, 35,000, I am content with the explanation given as to how these sums were obtained. Taking then these three sums as proved, and the Notes, and payments on them, and the Rupees 8,500 to Kenrick, I am satisfied that all these sums were proved, and that the Claimants are entitled to a decree for them.

Then as to Costs. This is a matter which the Act leaves to the discretion of the Court (reads from it) the case for the Government is really nothing at all, the evidence of their two first witnesses is that they knew nothing, moreover the second said, though he afterwards denied it, that he knew that Gholam Moortooza Khan conducted J. Richardson's business with the Nabob. The case was clearly one that made it incumbent on Government to search it most strictly, dealings to the amount of 4 lacks of Rupees, Notes renewable monthly, large interest. The Claimants moreover do not produce a single document, Books, or Account, to show that these were bonâ fide claims in the usual course of business. The Notes themselves do not show the truth of the case: they were all name-lending transactions. If therefore these parties have been put to expense in proving their claims, it is their own fault. If this were a case of Executors, of a claim made upon them by a Merchant, almost a Banker, having no Books, accounts, receipts, any Court would hold them justified in resisting the claim so circumstanced, and would certainly not give costs against them for so doing. But suppose the Claimants came into Court as Insolvents, what would be the first charge against them? Why that large sums had been made away with, and no Books or accounts to show how. A Court of Bankruptcy would feel bound to refuse them a first class Certificate. Looking then at the position of Government, the doubts in the Court's mind as to many of the items during the progress of the case, considering that the *whole* of this enquiry was absolutely necessary, and that the Government could not possibly have said it was satisfied at any period of the case *before* $\frac{1}{2}$ to 2 to-day when the Claimants' case closed, though I think it might have said so then, I feel that this is not a case in which the Government ought to be ordered to pay the Claimants their costs of proving their claim.

Bittleston, J.—I am of the same opinion, I am satisfied with the evidence of the claim, and that there has been general bonâ fides in the transactions: that indeed hardly seems disputed: they are admitted to be entitled *some* amount, but *what* amount, it is *said*, is not proved satisfactorily. The account to me seems to be proved. The Plaintiff's evidence is of the same value here as in other cases, unless wilful perjury is imputed, and looking at the evidence of Mr. J. Richardson in this way I think he makes out his case.

He says "I paid over the actual money borrowed," is he borne out by independent evidence? in all the cases where he was raising money, we find he did actually raise just exactly what he says he paid over, it is not likely he would raise much more than he wanted to pay over, Arathoon's

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Accounts, Lecot's, Laybourn's, Kenrick's, all square with his evidence. Then the Notes he says he cashed himself, Rupees 21,000 and Rupees 30,000, the Rupees 30,000 he received from his brother John, the 10,000 Rupees from the same quarter upon a mortgage of his house, and Rupees 11,000 he don't recollect where, but here the Rupees 18,000 he is proved to have received from Khader Beg comes into play, if so, this corroborates his story as to the Rupees 80,000, though there certainly are discrepancies; but, as there are no books, we might expect such. Besides, Fakeer Saib was sick and altogether less likely to be accurate than Mr. J. Richardson. All these considerations corroborated Mr. J. Richardson's evidence that the money was actually paid. He did not borrow the money himself until he had tried other ways, and failed, Arathoon was first asked to lend the money directly, but *refused*.

I consider the claim an honest one and satisfactorily proved.

As to Costs, it is a hardship to some extent to any one to be put to expense in proving a just claim, but, looking to the Act, we must make out for ourselves a course such as not to do injustice. When Government is clearly called on to require a searching investigation, and nothing less could justify Government in paying, and that is rendered necessary by the party's own mode of dealing, in not keeping accounts, that is not a case for ordering Government to pay costs. Here there was no attempt, Mr. Norton says that even if there had been accounts, that would not have satisfied the Government, but if there had been regular accounts it is by no means clear that the Government would not have consented to an order in favor of the Claimants. At all events, if not, the Claimants would have stood in a far different position if they had had regular accounts, all clear to produce. But as it is they come on the wrong side of the line.

Judgment in Mr. Arathoon's Claim, as to Costs, October 22nd, 1858.

Rawlinson, C. J.—I am glad I reserved the question of Costs for consideration with Mr. Justice Bittleston. I am now of opinion that it is not a case for Costs. There are three cases in which a Claimant might ask for Costs, two of these are provided for by the Act, Section XXII: 1stly, where the Government makes no offer, gives no notice under Section XXI, but puts the claimant to strict proof: in that case the Act provides that the Court may, if it shall think fit to award Costs at all, order "the Costs of proving the debt" to be paid to the Claimant: the 2nd case is where Government makes an offer, which is not accepted, and the Claimant proceeds to prove his claim, and fails to prove an amount exceeding that previously offered him by Government. In this case the Act expressly prohibits the Court from awarding Costs to the Claimant. A third case is where, as in the present case an offer is made by Government, and accepted by the Claimant; a case as to which the Act is silent as regards Costs. It was urged on the Court that this was analogous to a case where a Defendant paid money into Court which the Plaintiff accepted, in which case the Plaintiff is always entitled to his Costs, but I do not think the analogy really exists. In the case of money paid into Court the Defendant up to that time has been a wrong doer, has wrongly withheld that money; this cannot be said of the Government under this Act; Government here is a volunteer in paying the Nabob's debts. Therefore I do not think the analogy holds. And then referring to the Act, I find that the only Costs which the Court is expressly permitted to award, are the "Costs of proving the debt," but where no such proof is given or gone into, when the sum offered by Government is accepted, there can be no "Costs of proving the debt," and I think the intention of the Act is and was that no other Costs should be given.

Bittleston, J.—I am of the same opinion. I do not think this can be likened to a case of money paid into Court by a Defendant in an ordinary Suit; and, judging by analogy from the cases which the Act does specifically provide for, I think that in a case like the present, as to which the Act is silent, it was not meant to give the Claimant any Costs.

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No. 10. ORDER THEREON, No. 727; dated 9th November 1858.

The Government approve the proceedings of their Law Officers in the cases reported on in the above letter, and quite concur in the views expressed by the Advocate General in paras: 18 to 22 of his letter.

As supposed by Mr. Smyth, it will not be necessary that these cases should be made the subject of special report in future, unless there be in them any thing of an extraordinary or peculiar character.

(Signed) W. H. BAYLEY,
Acting Secretary to Government.

Exd. J. A. Wilson.

4

In the Supreme Court of Judicature at Madras.

Under Act.

XXX 1558

In the matter of the Estate of the late
Nabob of the Carnatic

The Particulars of the claim of John Matheson Esquire
¹⁸⁴⁷
January 25. To Cash paid in Bank Notes to Government

Moorsooga Khan Bahadur at the request of
His Highness the late Nabob of the Carnatic
on the receipt of his Promissory Note in
my name bearing date the 28th January 1847
for 100,000 Rupees payable on the 31st December 1847. ————— 100,000. . .

¹⁸⁵⁷
September 30th To interest on the above sum at 12 per cent per
Annum as per agreement from the 1st January
1848 to this date. ————— 45,000. . .
145,000. . .

Deduct Cash received on the 1st April 1858 ————— 20,000. . .
Deduct Cash received on the 17th February 1855 ————— 25,000. . . 145,000. . .
100,000. . .

Add interest on the above balance of 100,000 Rupees
from the 30 September 1857 to the 15th day of
October 1858 ————— 42266.10.8

Rupees 142,266.10.8

Signed J. M. Ritchie
Claimant Solr

(True copy)

John Matheson

Attor Co^r Solr.

The Particulars of the
Plan of Down & Waterbury

Printed Matter of the State
of the late Charles of the Court

Supreme Court
Madras
Under Act
xxx of 1858

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Advocate General
H. C. Solicitor
George
9 November 1858

No. 727

The Govt approve the proceedings of
the Law Officers in the cases reported
on in the above letter - and ^{quite} ~~entirely~~
concur in the views expressed by
the Advocate General in paras 18 to
22 of his letter -

As supposed by Mr. Somers
it will not be necessary that these
cases should be made the subject
of special report in future unless
there be in them any thing of an
extraordinary or peculiar character.