M.R.O. 14—10,000—21-4-22

MADRAS RECORD OFFICE.

Government of Madras.

Revenue DEPARTMENT.

G.O. No. 759 Press
Mis.

71-73

Dated 5 — 4 — 1861.

Not to be folded or roughly handled

Proceedings of the Madras Government, Revenue Department, 5th April 1861.

Read the following papers:—

No. 71. From CLEMENT DALE, Esq., Government Pleader, Sudder Adálat, to J. D. BOURDILLON, Esq., Secretary to Government, Revenue Department, dated Madras, 12th March 1861, No. 49.

SIR,

1. In continuation of the letter I had the honor to address to you under the date and number noted in the margin, I now do myself the honor of enclosing for the information of the Honorable the Governor in Council, three copies of the Decree passed by the Court of Sudder Adálat on the 22nd of October last, in Appeal Suits numbered 103 and 136 of 1857.

23rd October 1860, *No.* 158.

2. It will be observed that the Decree is dated the 22nd of October 1860. It is also stated to have been signed and sealed on the same day; thus limiting the time for appealing from that date. It is not the fact that the Decree was so signed and sealed, for the arguments were not concluded till a late hour that evening, and some time afterwards I was informed the Decree was in preparation by one of the Judges, and had to be circulated and finally settled before it could be promulgated. In a Decree of this nature, if the Judges consider it necessary to enter into their views and reasons, some time must necessarily elapse in the preparation, circulation, and final settlement, and such time ought not to be counted as forming part of the time allowed for appealing, because it is not the Decree of the Court till it is finally settled, engrossed, and sealed; and it does not follow but that during such preparation, the Judges may see reason to modify the views enunciated from the Bench, and therefore no steps can be taken by a suitor or his adviser until the Decree, as it is determined it shall stand, is promulgated. Moreover, the delay in publishing a Decree necessitates a professional man going through the case again, as it is impossible to retain all the points which require consideration before advising whether an appeal should or should not be preferred to Her Majesty in Council. In the case now under consideration, the record being heavy, such delay has caused considerable additional labor, and I regret that much delay has been thus caused in sending in my report.

3. Since the receipt of the Decree I have given the matter very careful consideration, the result of which is, that I deem it to be my duty to advise that an appeal to Her Majesty in Council should be preferred.

4. One reason for my advising an appeal is that the Lords of the Privy Council in their judgment say, it appears to them very doubtful whether the present record afforded the materials requisite for the SATISFACTORY decision of some of the various questions which were raised on the appeal to Her Majesty. Their Honors, the Judges of the Sudder Adálat, have not however felt any of the difficulties entertained by the Lords of the Privy Council, but have undertaken to decide this very important case, embracing questions of great public interest, on a record which the Lords of the Privy Council had pronounced imperfect on points of (as it appears to me) vital importance to a due consideration of the true merits of the case. My principal reason, however, for arriving at the conclusion that an appeal should be preferred is, that quite independent of any question as regards the justice or injustice of the amount claimed by the defendant to be due to him, questions of law are raised by the judgment of the Sudder Court, which are of great public importance, and if this judgment be permitted to stand unimpugned, one great fundamental principle of Hindu Law, as hitherto acknowledged by all Courts, and acted upon by Hindus as clear and unquestionable law, will be placed in doubt, and a door will be thereby opened to the exercise of great fraud being practised through the ignorance and weakness of Hindu widows, to the prejudice of the heirs of their deceased husbands.

5. As the matter is new to His Honor the Governor, it may be convenient to state a short precis of the case. The object of the suit was to recover from the defendant the Zamíndári of Vissanapetta in the Collectorate of Masulipatam. The facts are as follows: the Zamíndári formerly belonged to Varegonda Ramanapah. He died so far back as 1810 without leaving any son natural or adopted, or any collateral heirs. He had one wife named Lutchmedavamah who survived him, and for want of lineal heirs of her husband, became entitled, under Hindu Law, to the Zamíndári for her life. From the death of the husband therefore, the widow retained possession of the Zamíndári, the father of the defendant was a near relative of hers. As is customary with Hindu females of rank, she necessarily led a secluded life not appearing in public, and on her becoming a widow, the defendant's father as her near relative acted as her manager or agent until his death. So far as has been proved, or has transpired, nothing arose which brought the Zamíndári to the notice of Government or its Officers until 1830. The kist having been in the meantime paid to Government. It does not appear by the proceedings in this suit, what the clear net annual revenue of the Zamíndári is, after deducting the kist, but during the last hearing it was stated by the defendant's counsel to be considerable, I think between 7 or 8,000 Rupees. In 1830 application was made by the widow to the Collector of Masulipatam to register a Deed of transfer from herself to the grandson of her brother (the defendant's father, I believe). The Collector demurred to doing this, conceiving a transfer of her late husband's estate by a Hindu widow to be repugnant to Hindu Law, and especially in the case presented to him, as by the document which he was asked to register,

the widow proposed to transfer her late husband's property into her own family, to the prejudice of the next heirs of her husband who, under Hindu Law, would be entitled on her death to succeed to the estate. The question whether a widow could so transfer was referred to the Sudder Court. The Judges whereof had "no hesitation in deciding the question "in the negative." It is to be here particularly noticed as an important fact, that no mention was made in that Deed of any alleged debt being then owing from the widow or her late husband to the proposed grantee. This is a fact which ought to be prominently borne in mind when considering the real merits of the case, so far as Government or its Officers are informed. Nothing more was done till 1838, April 20th, when, the defendant alleges, accounts were adjusted between his father and this widow, and the latter acknowledged herself as indebted to the defendant's father, in the large sum of Rupees 48,614-13-6. For securing this with interest she was then, as is alleged, induced to execute to the defendant's father a bond, and to mortgage to him 12 out of the 14 villages constituting the Zamíndári. The alleged debt was to be paid by instalments, and in default of any one instalment the whole was to be recoverable. A transaction of this nature would be viewed by an English Court of Equity with very grave suspicion. But to proceed, the defendant's father continued to act as the widow's agent, and default was made in payment of the first instalment, whereupon and in the same year the defendant's father instituted a suit against the widow, which was number 18 of 1838. To this suit this widow (secluded as Hindu females are, and the client of the plaintiff) did not (as under such circumstances might be surmised) appear, the suit as a matter of course being tried in her absence *ex parte*, and on the 20th of March 1839 a Decree was pronounced against her. On an execution being issued in the suit, the Collector appears to have become acquainted, for the first time, with the course adopted by this agent towards the widow. He thereupon by a letter, dated the 29th of March 1841, which he addressed to the widow, urged her to endeavour to effect an arrangement to save her interest in the Zamíndári from being lost to her. I allude to this, because reference is made to the acts of the Collector in the order of the Lords of the Privy Council as one of the points on which their Lordships required further information, and a decision by the Court of Sudder Adálat. At that time it was doubtless the policy of Government to encourage Zamíndárs, and the Supreme and Sudder Courts having recognised the principle laid down by Sir Thomas Strange, that "a native woman is, under the special protection of the Court, "entitled to the benefit of that principle, which in equity subjects to be regarded with peculiar "jealousy, all transactions with persons whom the policy of the law considers to be, at the "time, incompetent to maintain their own right, and to exact for themselves justice. A native "woman can never be deemed sufficiently *sui juris* to be held bound by her personal acts, if there "exists the slightest reason to apprehend that advantage *may* have been taken of her. A Court "administering Hindu Law must, to do justice, often interpose between a native woman and her "acts, as Courts of Equity do at home, in all cases between persons standing together in certain "specified relations, giving to one, a presumed advantage over the other." I imagine the Collector would have done no more than his duty, if he had as Collector endeavoured to screen this widow from the (apparently) disastrous effects of her acts in favor of her agent, and performed under his influence; but a critical consideration of the Collector's letter shows, as it appears to me, that he did nothing more, and did not intend or attempt to do any thing more, than as Nazir to warn her of the proceedings which had been issued, and to urge upon her the advisability of her making an effort to save herself, or he must do his duty as an officer of the Court. It is, moreover, averred in the pleadings in this suit that the Collector's letter was "in the ordinary form in which such instruments are issued." On the 5th of April 1841 a Razinama was obtained by the defendant (his father had previously died) from the widow, the defendant then acting as her manager or agent in the room of his father. This Razinama was much to the same effect as the previous bond and mortgage, so far as providing that the 12 villages were to continue as security for the debt, which (increased by interest to the large sum of Rupees 67,444-12-0) was made payable by eight instalments, which were to commence on the 15th of December 1841 and to continue till the 15th of October 1848, in default of any one instalment the whole debt with subsequent interest at 12 per cent. per annum was to be recoverable, but not as in ordinary cases by a sale of the property, for it was provided that the Court might issue a precept to the Collector to make over at once the 12 villages, &c., to the defendant. It was moreover stipulated that the other two villages were to be retained by the widow during her life for her maintenance, but the Razinama went on to provide, that after her death those two villages might be assumed by the defendant, and that "the whole Zamíndári should be continued to him as long as his posterity "should remain, as an ancient Zamíndári estate." I suppose that in the annals of legal history a case more pregnant with the appearance of fraud has scarcely ever presented itself. And the curious provisions made in the Razinama which I have quoted, certainly do not tend to remove the suspicious appearances presented by the previous (alleged) dealings by the defendant's father and himself with the widow. This Razinama was filed in Court on the 12th of April 1841. The defendant continued to be the agent and manager for the widow, and default was made in payment of the first instalment. The defendant in his answer avers that the execution of the Decree in Original Suit No. 18 of 1838 was suspended by the Sudder, in consequence of litigation by other parties who preferred claims against the widow. I believe such was the fact, and if true it operates prejudicially to the *bonâ fides* of the defendant; for

the Sudder did not interfere with the possession of the Zamíndári by the widow, which it would have done, if the defendant had applied for the appointment of a receiver of the 12 villages on which his debt was secured, and which any really honest creditor having no other object than the payment of his debt would have pursued. Looking, however, at the terms of the Razinama, it is evident such a course would not be the one which would suit this defendant's purpose, at any rate, without considering his motives, there is the broad fact that he did not apply for a receiver, but preferred that the widow should ostensibly continue in the possession of the Zamíndári, under his own agency and management. The last instalment became due on the 15th of October 1848, the widow did not die till the 1st of September 1849; and this Zamíndári yielding a clear annual net rental of seven or eight thousand Rupees did not pay off one single pie of the debt, or of the accruing interest. On the 8th of September 1849, the Collector attached and sequestered the Zamíndári as an escheat, whereupon the defendant interposed; and after some proceedings on miscellaneous petitions, the Sudder by orders, dated the 13th of February and 21st of October 1854, directed the Civil Judge to make over the Zamíndári to the defendant, pursuant to the terms of the Razinama; the effect of which was to reverse the position of the litigants. The Government were in possession and ought to have been made defendants in any litigation, whereas by these orders the possession was taken from the Government who was thereby compelled to sue as plaintiffs.

6. Such are the facts of the case, which may be shortly recapitulated as follows: The last male Zamíndári died in 1810, his widow succeeded, a near relative acting as her manager and agent; 20 years after the death of her husband an attempt was made to get this Zamíndári transferred to that relative and agent, in which no mention is made of any debt owing by the widow or her late husband to the agent; that attempt failing, eight years afterwards and 28 years after the death of her husband, it is alleged that a settlement of accounts between this widow and her agent takes place, upon which, it is alleged, that notwithstanding the Zamíndári netted a clear annual income of 7 or 8,000 Rupees (and it is shown that the revenue of two of the 14 villages was considered sufficient for the maintenance of the widow), yet the widow is brought into debt Rupees 48,614-13-6 to her agent. The defendant continues as her agent, and in three years the alleged debt is increased to Rupees 67,444-12-0. He then in 1841 obtains the Razinama; and from 1841 to 1849 the defendant (who continued as her agent) alleges that the debt was not diminished one pie, nor even the accruing interest kept down, and as he was her agent he must have known the true state of the case, and yet he does not attempt to take the course open to him of getting a receiver appointed. The case put forward by the defendant is of such a character that the most ordinary country jury in England could not, I believe, be induced to credit it.

7. As regards the law of the case, that appears to me equally clear. By Hindoo Law, a widow is only entitled to enjoy an estate which belonged to her husband for *her* life. Such property is not stridhim. Except for special circumstances a widow CANNOT encumber the estate, nor can she alienate it. Those succeeding to the estate on the death of the widow are not liable for debts contracted by her, and on the death of the widow the Estate does not descend to her heirs, but reverts back to her husband's, in default of which it escheats to the Crown.

8. It appears to me that the Court of Sudder Adálat neither in their orders of 1854, or in the Decree now under consideration, have been able to realize what constitutes a life estate and its incidents; indeed, such clearly manifested itself by what fell from the Court during the reply of the defendant's counsel on the 22nd of October; from which it appeared that in their Honor's opinion, if a tenant for life encumbered the estate, the creditor might seize the whole fee simple and completely oust the remainder man. Now I opine, that if any one of their Honors were fortunate enough to have a relation possessed of an estate which he devised to his widow for life and after her death to his Honor, he would expect after the death of the widow to get the estate; and that he would think it passing strange were he on the widow's death to be told that her agent, a highly respectable man and near relative of hers, had so managed her affairs that instead of the estate yielding her a handsome and sufficient income, she had become greatly indebted to her agent, for securing whom she had conveyed away the entire estate, not merely her life interest, and that he had no remedy. I imagine if any one of their Honors were so circumstanced he would not concur in so monstrous a proposition, but would come to the natural conclusion that the widow might deal as she pleased with her life interest, but that on her death he was entitled to his estate free from any encumbrance she might have created, and which, in fact, would cease with her life, and in such reasoning his Honor would be correct. I entertain no doubt such would be the reasoning under such a state of circumstances, yet surprising as it may seem, their Honors in the case under consideration, which is a parallel case to that put by me, have by their Decree arrived at a diametrically opposite conclusion.

9. In their Decree now under consideration, the Judges of the Sudder allude to the plaint in this suit not averring that the alleged debt was fraudulent. the plaint was prepared by my predecessor, Mr. J. B. Norton, but since the promulgation of this Decree I have given the objection my consideration, and I consider the plaint as drawn by Mr. Norton was properly framed, so far as regards that part of the case; I think he might possibly have raised that issue, but it was not necessary for settling the question of law, whether a Hindu widow having only a life estate could or could not defeat an escheat by encumbering the Zamíndári; probably Mr. Norton might have safely added an averment that if the debt had really and in fact been contracted as

alleged, it was not contracted to meet any case of necessity, or under the special circumstances allowed by Hindu Law, but that is not the position taken up by the Sudder.

10. As regards the law of escheat, I am of opinion their Honors are in error. They rely on the cases cited on behalf of the defendant as establishing the position which they themselves take up. In my opinion those cases are totally inapplicable to the case under consideration, and the defendant's counsel failed in showing their applicability; the real question in this case, can a Hindu widow, who has only a life estate, defeat the rights of the Crown accruing on her death for failure of heirs to her husband, is not touched by those cases. Moreover, in those cases (I may state generally) the parties who did the acts had the estate in fee simple vested in them (not a mere estate for life) when they executed the Deeds creating the estates which defeated the Crown. Moreover, it is now clear law, that the Crown, although it takes subject to any mortgage, has the right to redeem, where the legal estate has escheated. All this I endeavoured to show to the Court on the argument, although, as now appears, ineffectually.

11. I am also of opinion that their Honors have erroneously enunciated the Hindu Law on the subject. The passage quoted does not, in my opinion, support their position. In my opinion the wealth of a husband never becomes the property of a Hindu widow, so as to vest in her absolutely, but that she has a mere interest for her life parcelled out of the inheritance, which on her death reverts, through the husband, to his heirs; and if I be correct in this opinion the whole hypothesis raised by this Decree on that point fails.

12. I have already in paragraph 5, slightly alluded to the acts of the Collector in 1841. I do not agree with the Sudder in their reasoning, nor do I think it is supported by the evidence; but however that may be, the defendant acted on his own responsibility and not under any influence of the Collector, and he doubtless thought he had made much better terms in the Razinama; nor was the Collector bound at the time to offer any objection thereto; he knew that the widow could only encumber or dispose of her life interest, and he had done as much as could be expected of him to protect the widow. Moreover, if the instalments had been paid, as might have been under proper management, the provisions of the Razinama would never have come into force; but whether they did or did not, that was not the proper time for the Collector to object, the widow had a right to deal with her life interest as she thought proper; while on the other hand, the defendant in dealing with the widow was bound to know the law, and to satisfy himself of the extent of interest in the Zamíndári which the widow possessed, and if he failed in this reasonable act, he must take the consequence in the same manner as any other purchaser or mortgagee.

13. In the opinion of Mr. Norton, the orders passed by the Sudder in 1854 were erroneous; there was however no appeal, but fortunately they are not likely to work much mischief, as the Lords of the Privy Council have declared that they "do not constitute any bar to the title of the "appellant in this suit."

14. As regards the suggestion contained in the last paragraph of the judgment of the Lords of the Privy Council, I understand Government directed that the Collector should report on the subject. This I mentioned to the Sudder, and submitted that the hearing should not be proceeded with until the defects pointed out by the Privy Council had been supplied, which would allow of time for the Collector to report on the subject, and communication to be made to the defendant. This however the counsel for the defendant would not listen to, they did not require any further evidence, nor would they listen to any proposition for investigating the justness of the claim.

15. The questions of law raised by this Decree are of such a quality, that even if I entertained doubts whether the judgment of the Sudder could be upheld, I should not have felt myself justified in advising the Government to acquiesce in this Decree, but I should have deemed it my duty to advise that the questions should be submitted for the judgment of the Lords of the Privy Council. Entertaining however the opinion I do, that the Decree of the Sudder is erroneous on points of law of so much importance to the Crown and Hindu population of India, no other course is open to me than to advise his Excellency in Council to appeal from that Decree to Her Majesty in Council.

16. Not knowing whether you may have a copy of the short-hand writer's notes taken of the hearing of the case before the Privy Council, I return the copy sent to me; I shall wish however to have it returned, if his Excellency determines on appealing to her Majesty in Council.

17. The time for appealing will expire on the 22nd April.

No. 72. MINUTE BY THE HONORABLE W. A. MOREHEAD.

There is much in Mr. Dale's letter, advising an appeal in this case, that is not to be discovered in the record of the case; but on which Mr. Dale has nevertheless founded arguments, against the soundness of the judgment passed by the Sudder Court.

Such, for instance, is the assertion put forward by Mr. Dale, that the defendant and his father were the agents of the widow. This circumstance is not borne out by the record, nor is it even hinted at in the pleadings. It is in fact, purely an invention of Mr. Dale.

Again, neither plaint nor reply contain a single suggestion of fraud in any part of the transaction, nor is it denied that the money was advanced for the reason found in the Decree of 1858, viz., that it was to pay the Government kist. The plaint preferred by the Government

goes entirely on the supposition that a widow could under no circumstances whatever encumber an estate for a longer period than her life.

This supposition the decree, I think correctly, of the Sudder Court, shows to be quite opposed to Hindu law. And had therefore the decision of the Sudder Court rested on this point only, I should have objected to the Government preferring in this case an appeal to the Privy Council.

But as the Sudder Court have in their judgment, laid it down as Hindu Law "that in "regard to the ruling power, the female is absolutely free, being at liberty to alienate with-"out seeking its consent and irrespective of its ulterior rights," it seems to me right that the Government should refer the final decision of this point to the Privy Council. The more so, as the present ruling of the Sudder Court is opposed to that course of procedure, which under the Hindu law as hitherto declared, has governed the law of escheat in India.

5th April 1861. (Signed) W. A. MOREHEAD.

No. 73. ORDER THEREON, 5th April 1861, No. 759.

1. The Government Pleader submits the Decree passed by the Court of Sudder Adálat on the 22nd October 1860 in Appeal Suits Nos. 103 and 136 of 1857 in the matter of the Vissanapetta Estate; and for reasons stated, advises that an appeal therefrom should be preferred to Her Majesty in Council.

2. The point of Hindu Law involved in the case is so important that an appeal to Her Majesty in Council, as suggested by the Government Pleader, seems to the Governor in Council to be necessary for its settlement; and he accordingly hereby empowers and directs Mr. Dale to take the necessary steps to that end.

3. The notes forwarded by Mr. Dale will be returned to him, as requested in paragraph 16 of his letter.

4. A copy of paragraph 2 of Mr. Dale's letter will be transmitted to the Court of Sudder Adálat through the Judicial Department with the intimation that, if the course there described is followed in respect to the decrees of the Court, the practice requires to be corrected.

(Signed) J. D. BOURDILLON,
Secretary to Government.

passed by the Sadr in 1854 were erroneous, there was however no appeal, but fortunately they are not likely to work much Mischief as the Lords of the Privy Council have declared that they "do not constitute any bar to the "Title of the Appellant in this Suit"

14. As regards the Suggestion contained in the last para of the Judgment of the Lords of the Privy Council, I understand Government directed that the Collector should report on the subject; This I mentioned to the Sadr, and submitted that the hearing should not be proceeded with until the defects pointed out by the Privy Council had been supplied, which would allow of time for the Collector to report on the subject, and Communication to be made to the Defendant: This however the Counsel for the Defendant would not listen to, they did not require any further Evidence, nor would they listen to any proposition for investigating the justness of the Claim.

15. The Questions of Law raised by this Decree are of such a quality, that even if I entertained doubts whether the Judgment of the Sadr could not be upheld, I should not have felt myself justified in advising the Government to acquiesce in this Decree, but I should have deemed it my duty to advise that the questions should be submitted for the Judgment of the Lords of the Privy Council, Entertaining however the opinion I do, that the Decree of the Sadr is erroneous on points of law of so much importance to the Hindu Population of India, no other Course is open to me than to advise His Excellency in Council to Appeal from that Decree to Her

Majesty in Council.

16. Not Knowing whether you may have a Copy of the Shorthand Writer's Notes taken on the Hearing of the Case before the Privy Council, I return the Copy sent to me; I shall wish however to have it returned, if His Excellency determines on appealing to Her Majesty in Council.

17. The time for appealing will expire on the 22d April.

I have the honor to be
Sir
Your most Obed Servant
Mad. L. Dale
Govt Pleader

Sadr Adalat

Appeal admitted
Petn. & Exhibits
Transmitted

Pd. 2 Dumbs 57 Rs 8 as 8 ps.
R- 26-3-11 Stamps 13-12-0
R- 26-3-11 Postage 0-7-0.
R- 26-2-11 Fees 0-4-0
2 8 Attns 0-2-0
8 Attns 1-0-0 142-143.
2 Attns 1-0-0 140-141.
2 Attns 1-0-0 37-38.
13 Attns 1-0-0 215-216

Pd. Rupees Eight & Annas Eight
Rs 8-8-0

Dated 7th March 18

No 49

Admitted & Entered
No 3759. 5th April
1841

Transmitted Copies of the Decree appealed from by the Court of Sudder Adawlut in A. No 103 of 1839 & 130 of 1839 and Order admitting that Appeal to Her Majesty in Council to be registered

1841.

Copy
Letter to Govt
7th May 1841 p 22

There is Made in Mr Dales Letter, a distinction as to Costs, in this case, that is not to be Decreed in the Record of the Case - but on which Mr Dale has Petitioned the Court - praying that the Costs of the Judgment passed by the Sudder Court - may be Decreed against the Defendant, that the Defendant in

His father having demised, the Defendant sued out execution. The process was committed to the Collector, who, on the 29th March 1841, recommended Lakshmidevamma to come to terms with her creditor, intimating to her that unless she satisfied him within five days, he would take steps to bring the zemindari to sale. Upon this the Defendant and the said Lakshmidevamma came to an agreement, under date the 5th April 1841, the conditions of which were that the debt, which with interest had then swollen to Rs. 67,444-12-0, should be paid off by eight annual instalments, the first of which was to fall due on the 15th December 1841; that failing any one of the instalments the portion of the zemindari originally mortgaged for the debt, being twelve out of the fourteen villages of which the zemindari consisted, should be placed in Defendant's possession in satisfaction of whatever might remain due of the debt; that after the demise of Lakshmidevamma the remaining two villages, which were reserved to her to provide her with maintenance, should in like manner be made over to the Defendant, and that the whole zemindari should thus be enjoyed by him as his permanent estate.

No part of the debt was ever discharged, but before the first instalment fell due, or the penalty consequent could be sought to be enforced, the Sudder Court, under date the 19th April 1841, issued proceedings prohibiting the execution of the decree held by the Defendant until the issue of a suit instituted by one Varigonda Ramanna, the object of which was to prove his title to the zemindari, and that the aforesaid decree had been obtained collusively. While execution was thus suspended, Lakshmidevamma, in September 1849, demised without

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Copy of a Letter to Govt
Dated 14th May 1851 No 22

Decree Copy & Govt

Dated 14th March 1849

No 759. 5 Annas

Certified Copy of the Decree passed by the Court of Sudder Adawlut in A.D. 1849 on Appeal from the Court of Principal Sudder Ameen of Bellary.

Exhibit 4 enclosure

1849

Dated 14th March 1849

No 759. 5 Annas

Certified Copy of the Decree passed by the Court of Sudder Adawlut in A.D. 1849 on Appeal from the Court of Principal Sudder Ameen of Bellary.

Exhibit 4 enclosure

Father was the Agent of the Widow - This circumstance is not borne out by the record nor it even hinted at in the Pleadings - It is in fact purely an invention of the D- Again neither Plaint nor Reply contain a single suggestion of fraud - in any part of the transaction - nor is it denied that the money was advanced for the reasons stated in the

decree of 1850 - viz that it was to pay the Govt Rent - The Plaint prepared by the Govt - Govt entitled on the temple = Lihon that a Widow could under no circumstances alienate Lease executed are Date for a longer period than her life - This dispute, the decree I think correctly, & the Lower Court should be quite pleased to Dismiss Case - And

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Letter to Govt
8/8/44 May 1851 p. 22
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Dated 14th March 1851
Rec'd 14th

No 449

With 4 Enclosures

No 759. 5th April

Transmits Copies of Proceedings of the Revenue Board, and of the Court of Sudder Adawlut in Appeal No 1038 of 1850 and 130 of 1851 between Lakshmidevamma and Varigonda Ramanna in Appeal to His Majesty in Council, praying for Special Leave to appeal

Lea Receipt the decision of the Sudder Court rejected the Petitioner's Petition only. I should have objected to the Govt. Petitioner in this case appeal to the Privy Council - But as the Sudder Court have in their Judgment laid it down as Sudder Law "that in regard to the Zemindary" "Power the Zemindar is absolutely" "free being at liberty to alienate

"without seeking his consent"
"and thus resuming it at"
"Zemindar pleasure" It seems to me right that the Govt should refer the Judicial decision of this point to the Privy Council for them to say if the Zemindar is in fact absolute proprietor, which the Sudder Court have laid down as Law

His father having demised, the Defendant sued out execution. The process was committed to the Collector, who, on the 29th March 1841, recommended Lakshmidevamma to come to terms with her creditor, intimating to her that unless she satisfied him within five days, he would take steps to bring the zemindari to sale. Upon this the Defendant and the said Lakshmidevamma came to an agreement, under date the 5th April 1841, the conditions of which were that the debt, which with interest had then swollen to Rs. 67,444-12-0, should be paid off by eight annual instalments, the first of which was to fall due on the 15th December 1841; that failing any one of the instalments the portion of the zemindari originally mortgaged for the debt, being twelve out of the fourteen villages of which the zemindari consisted, should be placed in Defendant's possession in satisfaction of whatever might remain due of the debt; that after the demise of Lakshmidevamma the remaining two villages, which were reserved to her to provide her with maintenance, should in like manner be made over to the Defendant, and that the whole zemindari should thus be enjoyed by him as his permanent estate.

No part of the debt was ever discharged, but before the first instalment fell due, or the penalty consequent could be sought to be enforced, the Sudder Court, under date the 19th April 1841, issued proceedings prohibiting the execution of the decree held by the Defendant until the issue of a suit instituted by one Varigonda Ramanna, the object of which was to prove his title to the zemindari, and that the aforesaid decree had been obtained collusively. While execution was thus suspended, Lakshmidevamma, in September 1849, demised without

declared, has ordered
the Sum of ... shall be Paid
to ... Esq.
Madras

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Majes
16.
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on the

Copy in a Letter to England
dt 18th May 1861 No 72

Recd 1861 Sept 16.
Pro: of Govt for April.
No 830

The Honorable
the Court of
Directors

dated 5th April
Recd 16th 1861.

No 759. 5th April.

Records his sentiments on the Decree passed by the Sudder Adalat in A. S. Nos 103 & 136 of 1857, in the matter of the Vissanca-petta Estate.—

No 72.

Copy in a Letter to England
dt 18th May 1861 No 72

Recd 1861 Sept 16.
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No 72.

DECREE OF THE SUDDER COURT AT MADRAS.

Before the Civil Court of Masulipatam, Original Suit No 103 *of* 1855.
Before the Sudder Court at Madras, Appeal Nos. 103 *and* 136 *of* 1857.

(Signed) E. Lo. Strange
" Hon. D. Phillips
" H. Frere.

SEAL OF THE SUDDER COURT AT MADRAS.

Appellant.	*versus*	*Respondent.*
KAVALI VENKATA NARAYANAPPA.		COLLECTOR of MASULIPATAM.

This suit is in respect of the zemindari of Vissannapeta.

The Defendant's father, on the 20th April 1838, obtained a bond from Varigonda Lakshmidevamma, the last undisputed owner of the said zemindari, for the sum of Rs. 48,611-13-6. The conditions of the bond were that it should be discharged within the term of a year by four instalments, and that failing payment of any one of the instalments, the whole bond should be enforced, the zemindari, with the exception of two villages named Vissannapeta and Tatakuntla, being mortgaged for the debt. The first instalment not having been paid, the Defendant's father instituted a suit, No. 18 of 1838, for recovery on the bond, and decree, ex parte, was passed in his favor, the mortgaged property being held liable in satisfaction.

His father having demised, the Defendant sued out execution. The process was committed to the Collector, who, on the 29th March 1841, recommended Lakshmidevamma to come to terms with her creditor, intimating to her that unless she satisfied him within five days, he would take steps to bring the zemindari to sale. Upon this the Defendant and the said Lakshmidevamma came to an agreement, under date the 5th April 1841, the conditions of which were that the debt, which with interest had then swollen to Rs. 67,444-12-0, should be paid off by eight annual instalments, the first of which was to fall due on the 15th December 1841; that failing any one of the instalments the portion of the zemindari originally mortgaged for the debt, being twelve out of the fourteen villages of which the zemindari consisted, should be placed in Defendant's possession in satisfaction of whatever might remain due of the debt; that after the demise of Lakshmidevamma the remaining two villages, which were reserved to her to provide her with maintenance, should in like manner be made over to the Defendant, and that the whole zemindari should thus be enjoyed by him as his permanent estate.

No part of the debt was ever discharged, but before the first instalment fell due, or the penalty consequent could be sought to be enforced, the Sudder Court, under date the 19th April 1841, issued proceedings prohibiting the execution of the decree held by the Defendant until the issue of a suit instituted by one Varigonda Ramanna, the object of which was to prove his title to the zemindari, and that the aforesaid decree had been obtained collusively. While execution was thus suspended, Lakshmidevamma, in September 1849, demised without

apparent heirs. In the following month, the Collector attached the zemindari pending the disposal before the court of the pretensions of certain persons who laid title to the zemindari. On the 16th July 1850, the Government issued a declaration that the zemindari had escheated to them from default of heirs. On the 13th February 1854, the Sudder Court, on the motion of the Defendant, ordered that possession should be given to him under the terms of the aforesaid razinama or agreement of the 5th April 1841. On the 3rd April of the same year, the Court further directed that the proceeds of the estate should be paid over to him from the time that he had been kept out of possession under their orders, before mentioned, of the 19th April 1841; and on the 11th October following, they rejected the petition of the Collector, demanding, in behalf of the Government, that their orders of the 13th February aforesaid should be withdrawn in deference to the right which the Government asserted to hold the zemindari as an escheat. Upon this, the Collector, representing the Government, has instituted the present suit, claiming the zemindari free of all incumbrance as an escheat

The case came before the civil judge who decided that the terms of the razinama of the 5th April 1841 should not be carried out. He decreed that the judgment held by the Defendant should be enforced by sale of the zemindari, and that any overplus of proceeds that might remain after satisfying the debt, should go to the Government as an escheat.

Both parties being dissatisfied with this decision, appealed to the Sudder Court, when the suit was dismissed on the ground that under Hindoo law, according to a declaration of Menu "that the property of a brahmin shall never be taken by the king," the Government had no right of escheat in respect of the zemindari in issue, which was the estate of a brahmin.

This decree having gone in appeal before the Lords of the Judicial Committee of the Privy Council, was reversed, their Lordships being of opinion that "in so dealing with the "question, the Sudder Court was applying the actual or supposed Hindoo law, in derogation "of the general right of the British sovereignty." The suit was remanded to the Sudder Court for consideration of the "effect of the acts of Lakshmidevamma in her lifetime," and especially "the effect of the Collector's acts in 1841," their Lordships observing that it appeared "very doubtful whether the present record affords the materials requisite for the satis-"factory decision of some of those questions. There is little (they add,) if any, legal evidence "of the nature of the advances made to the widow, or of the necessity for them." Their Lordships also pointed out that it might be "material to know what was the nature and "what the effect of the proceedings by which the execution of the razinama was suspended," (particulars given in the preliminary account of the circumstances under which the suit has arisen, now drawn up, where the proceedings of this Court of the 19th April 1841, and their subsequent proceedings of 1854, are cited). Finally, their Lordships suggested "for the con-"sideration of the parties, that some arrangement for the surrender of the zemindari to "Government, upon payment of what is due to the Respondent for the advances actually "made, would probably meet the real justice of the case, and save both parties from protracted "litigation."

It is under these circumstances that the suit has again come before the Sudder Court.

Mr. Dale, the Government Pleader, appeared for the Plaintiff, and Messrs. Mayne and Branson for the Defendant.

Judgment.

Before proceeding to hear the parties, the Court, in reference to the suggestion made by the Lords of the Judicial Committee of the Privy Council that they should come to an arrangement with each other, ascertained from them that they were not in a position to take this course but wished that the suit should proceed.

With every deference to their Lordships, the Court have not found it necessary towards their pronouncing upon the merits of the suit to call for the additional evidence which their Lordships have indicated as apparently requisite.

The arguments brought before the Court have led them to consider, primarily, what may be the rights of the Crown by the law of escheat, especially as connected with the powers of a female, under Hindoo law, to alienate property. In view of the circumstances under which the right of the Crown to an escheat, in reference to the particular estate in litigation, has been declared by their Lordships of the Privy Council, any clause of the Hindoo law, "actual or supposed" notwithstanding, the Court have felt it incumbent on them to judge of the law of escheat in the most general aspect, and towards forming an opinion on

the subject, they have admitted the arguments of counsel based upon the bearings of the law as recognized in the courts in England, besides taking into consideration the state of the law as existing in this part of India, which it is their more peculiar province to deal with.

It has been pressed upon the Court that by English law title by escheat does not confer the powers belonging to title by heirship. The Lord Paramount, it is declared, always takes to his own disadvantage. (Burgess and Wheate, 1 Blackstone's Reports, 123). Where a trustee held property, and those for whose benefit it had been entrusted to him had lapsed, the Crown was declared not entitled to deprive the trustee of the possession as having escheated to it. (Burgess and Wheate, 1 Blackstone 123 ; 2 Spence 266 ; Taylor and Haygarth, 14 Simon 16, 17). It has been also ruled in the case of property held under mortgage, the heirs of the mortgagor being extinct, that the Crown cannot exercise the equity of redemption. (Burgess and Wheate, 1 Blackstone 184 ; 1 Jeremy 182 ; 2 Spence 237; Taylor and Haygarth, 14 Simon 17, 18; Prescott and Tyler, 1 Jurist 470). Also that the Crown cannot enforce forfeiture upon breach of condition (Burgess and Wheate, 1 Blackstone 147).

The Hindoo law is here analagous. Had the last undisputed owner of the zemindary in issue been a male, without male progeny, he could have alienated the estate at any moment before his death, whether with or without consideration, and no collateral could have questioned the act. By consequence the Crown could not do so. The last owner having been a female, the power to alienate in her was placed by the law under certain special restrictions. That is, though destitute of direct lineage, she could not alienate to the prejudice of her remotest heirs, save under their consent, or under strict necessity. In the present suit the Crown claim to possess the restrictive power belonging to an heir of the female, and have laid this suit to defeat her act. The Court have consulted their Pundits on the occasion, and their declaration is to the effect that the limitations under which a female is placed are exclusively for protection of the interests of her heirs, meaning thereby her kindred, or those of her husband ; that failing all such heirs the provision does not extend to the protection of the interests of the ruling power as coming in by escheat; and that in regard to the ruling power the female is absolutely free, being at liberty to alienate without seeking its consent, and irrespective of its ulterior rights.

Among the authorities quoted by the Pundits in support of their view of the law, they have referred to Mitachshara Chapter I, Section 1, Clause 2, where the following definition appears. "The term heritage (Daya) signifies that wealth, which becomes the property of "another, solely by reason of relation to the owner." This being the treatise under which rights in property are governed among Hindoos in this part of India, the dictum must be received as of high authority, and it obviously governs all those parts of the treatise which relate to the limitation under which females are placed in respect of those who are to take the "heritage" after them, that is the "heirs," or, as the original is, the "Dayadies." The limitations are thus for protection of those to whom the property is to come in right of kindred, and here the Crown, as the ultimate possible successor, is not in question. Accordingly, it is the consent of the "Dayadies" that must be secured by the female before she can alienate, save under strict necessity, and the consent of the Crown is unessential.

Community of right in property among the Hindoos is ever dependent upon community in blood, and the possible ultimate appropriation by the Crown rests upon quite another basis. It is where there is *no* "heir" only that the Crown comes in, and obviously as universal landlord where no individual rights exist, and for the avoidance of the disputations and disturbance which would arise were unclaimed property left, without provision of law, to be seized upon by the strongest or the most active. This the Court consider to be the principle of the law of escheat. Under it the Crown could propably defeat the possession of any heirless property obtained by fraud upon the previous owner, and certainly any that had been secured by mere seizure without pretence of right; but where there is an assignment by the former owner, the Crown cannot take the place of an heir to challenge the power of the individual to effect the assignment, and undo the act. It is upon the presumption that the Crown has thus the power to challenge and defeat the act of the last incumbent that this suit has been brought, and on the ground that the Crown, by the law of escheat, has no such power, the suit should be dismissed.

Another bar to the suit, it appears to the Court, is created by the Collector's act in 1841 to which their Lordships of the Privy Council advert.

The Defendant was in process of putting in execution the decree held by him, and was about to have his claim satisfied by sale of the zemindari as provided for in the decree. The

execution was entrusted by the court to the Collector to enforce, when he gave that counsel to the debtor Lakshmidevamma which led to the execution of the razinama on which the Defendant founds his title. The terms of the razinama were immediately communicated to the Collector and the execution dropped. The Collector held office in more capacities than one. As respected the enforcement of the decree he was acting as the nazir or executive officer of the court. Otherwise, in his ordinary position, he was the agent or representative of the Government in his district. It appears clear to the Court that in advising Lakshmidevamma to "come to some terms, settling upon any conditions with the creditor" so as to save the estate from sale, the Collector was dealing with the matter in a manner beyond the functions devolving on him as executive officer of the court, and was acting in the capacity proper to him as agent of the Government. It is the policy of the Government to save from peremptory sale the possessions of landlords, and especially those important estates known as zemindaris, and there can be little doubt that it was owing to the interest thus felt in Lakshmidevamma as a zemindar that the advice in any way to save her property from being brought to auction was given, together with the respite necessary for the purpose. The terms into which Lakshmidevamma entered with her creditor in pursuance of the above advice were such as to allow of the estate eventually vesting in him. The Collector, after being made aware of these terms, offered no objection thereto. On the contrary, he gave effect to the arrangement, and so endorsed it, by dropping the execution. It would be altogether inadmissible that the Collector individually, after the condition of lapse to the creditor had become effectual, should appear and protest against the arrangement and seek to defeat it, on the plea that it was made without his consent and against his interests, and it is equally inadmissible that his principal, the Government, should do so. The Court are of opinion therefore that supposing the consent of the ruling power to the alienation by Lakshmidevamma were necessary, the suit should be dismissed on the ground that such consent was in effect obtained.

But even if it might be admitted that the Government could now challenge the alienation in question, it appears to the Court that the plaint takes up no ground on which the act can be called in question.

The Defendant held a decree in which it was found, upon evidence taken, that the debt was one actually incurred by Lakshmidevamma, and of a nature to be fairly and legally chargeable upon the estate. To defeat that decree the Plaintiff had to subvert the facts found by showing that the judgment was one obtained fraudulently and collusively; that the debt was not a *bonâ fide* one; or that the obligation was of a character such as to render it not chargeable on the estate. In the plaint no such grounds are taken. The plaint in fact is founded upon a wrong view of the law, being to this purport. "Let the obligation "be of what character it will, it is not chargeable upon the estate, as a female can under no "circumstances alienate her property, in which she holds but a life interest." Now it is well known, and certainly not disputed at the hearing of this appeal, that a female may alienate her property absolutely, if for relief of necessities. There can be no more admissible necessity than the obligation to meet the peshkash, or Government demand, failing discharge of which the estate would be peremptorily sold and lost both to the occupant and her heirs. Advances for peshkash are represented to have formed an essential part of the debt incurred by Lakshmidevamma. The fact was so found in the decree held by the Defendant, and the plaint discloses that the Plaintiff was aware, as in truth he was bound to be, that such was the alleged character of the debt. Yet there is no denial that the debt was thus incurred. On the contrary, the Civil Judge, who had the conduct of the actual examination of the case, states in his judgment that "the justice or otherwise of the claim in original suit No. 18 of "1838, is in no way called in question in the present case." True it is the Civil Judge adds that "the suit is alluded to as having been a collusive one;" but where he has met with such allusion the Court fail to discover. The claim itself being taken as a just one, how the suit can have been a collusive one is not apparent. Possibly the fact of the suit having been undefended is all that is pointed to. From all these grounds the Court come to the conclusion that the plaint has alleged nothing in consideration of which the assignment by Lakshmidevamma to the Defendant can be called in question.

It has been maintained on the part of the Plaintiff at the hearing of this appeal that the burden of sustaining the legality of the assignment rested upon the Defendant. The Court think otherwise. First, as before observed, he held a decree sustaining the basis of the assignment, and it was for the objector to shew something by which that decree could be overthrown. Nothing of the sort having been shown, the Defendant may rest upon his

decree. Secondly, even supposing there had been no decree, or that the decree obtained cannot be pleaded, the obligation in question was not incurred with the Defendant but with his father. It sprang from transactions originating, as the decree held by him shows, in 1813, and continued to 1838, and remaining unchallenged, so far as this Plaintiff is concerned, until the filing of this suit in 1855, even if this suit can be said to have called them in question. The father, in 1831, obtained assurance for the debt by the bond in favor of which the said decree was given, and the Defendant, in 1841, entered upon the fresh transaction, on the basis of the previous obligation, which it is the design of this suit to set aside. The Defendant would be placed at a great disadvantage were the maintenance of his position to be dependant upon his producing antiquated testimony of transactions long ago concluded, and not personally so by himself, evidence which may by this time have been extinguished, or otherwise placed beyond his reach. The Court think therefore, that where such a transaction as that now in question is challenged, the burden of showing cause against it rests with the challenger. In this opinion the Court find themselves supported by a judgment of the Privy Council. In deciding upon a case where the heir sought to free his estate of liability for a charge incurred by the previous incumbent as his guardian, their Lordships observed, "It is obvious, however, that it might be unreasonable to require such proof "from one not an original party (*i.e.* the creditor), after a lapse of time, and enjoyment "and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it "be created by substitution of a new security for an older one, where the consideration for "the older one was an old precedent debt of an ancestor not previously questioned, a "presumption of the kind contended for by the appellant (the creditor, namely that the "obligation formed a valid charge) would be reasonable" (6 Moore 420). The burden of proving therefore whatever might be necessary to free the estate in issue of its liability to the Defendant has rested upon the Plaintiff.

It is apparent that no sort of proof of the nature in question has been adduced by him. He has contented himself with filing four exhibits, *A*, *B*, *C*, and *D*, which are irrelevant to the transaction in issue, and produced no witnesses.

The judgment of the Privy Council above referred to enables the Court to meet another plea that has been taken in behalf of the Plaintiff; namely, that admitting the obligation incurred by Lakshmidevamma to have been of a character whereby the estate could be charged, the resources of the estate were so ample that it could only have been by dissipating them that she could have fallen under any necessity to incur debt, and that, consequently, the estate cannot be charged with such debt. The Court have already observed that the liability for peshkash, to meet which the obligation in question was in part, and presumedly in chief part, incurred, was one of a nature so urgent, that, when it arose, had it not been met, the estate would have been sold and lost to all interested in it. To pronounce the estate when thus redeemed from risk not liable for the money advanced for its redemption, would, under any circumstances, in the opinion of the Court, be unjust, and the prevalence of such a principle would, it may be remarked, jeopardize every estate incurring similar risk. But in the judgment of the Privy Council adverted to, it is laid down that a creditor is ordinarily not to be prejudiced by the previous waste which may have led to the necessity which he relieves "Where," their Lordships observe, "the charge is one that a prudent owner would make, in "order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanage-"ment of the estate. The actual pressure on the estate, the danger to be averted, or the "benefit to be conferred upon it, in the particular instance, is the thing to be regarded" (6 Moore 423).

Upon every ground above taken the Court resolve, in reversal of the decree below, to dismiss the suit with costs; first, because the law of escheat does not give the Plaintiff the power to question the assignment objected to; secondly, because the Plaintiff acquiesced in this assignment when made; thirdly, because the burden of showing cause against the assignment rested upon the Plaintiff, had he been in a position to challenge the same, and no such cause has been shown by him, or even alleged.

In Appeal No. 103 *of* 1857.

IN THE SUDDER COURT.

Appellant's costs.

Pleader's fee on Rs. 12,405-10-11	398 1 7	
To be paid to the appellant by the respondent	———	398 1 7

Respondent's costs.

Pleader's fee on Rs. 79,850-6-11	999	4	0
1 Roll for vakalatnama	2	0	0
To be paid by the appellant to the respondent	1,001	4	0

Given under our hands and the seal of the Court, this twenty-second day of October in the year of our Lord 1860.

By order of the Sudder Court.

Signed and sealed in Court,
this 22nd day of October 1860.

/signed/ C. F. Chanmier
Registrar.

It is hereby certified that the value of the matter in dispute amounts to the sum of Company's Rs. 12,405-10-11, and the period for appealing will expire on the 22nd April 1861.

/signed/ C. F. Chanmier
Registrar.

Sixth and last Sheet.

/signed/ C. F. C.
Registrar.

Copy via Letter to Govt
dated 8th May 1861 No 52.

Revenue Dept

No 759

Proceedings of the Madras Government

Under date the 5th April 1861.

Read the following

papers

From the Govt Pleader

Forwards copies of the Do

-ree passed by the Court of

Sudder Adalat in A.S. Nos

103 and 136 of 1857 and advises

that an appeal to Her Majesty

in Council should be preferred.

Minute by the Honble W. Morehead -

(Here enter 12th March 61
No 49)

(Here enter

The Govt Pleader

submits the Decree passed

by the Court of Sudder

Adalat on the 22d October

1860 in appeal Suits Nos

103 and 136 of 1857 in the

matter of the Vijayanagrum

estate; and for reasons

dated, advises that an Ap-
-peal thereupon should be
preferred to Her Majesty
in Council

2 The point of
Hindu Law involved
in the case is so important
that an appeal to Her
Majesty in Council, as
suggested by the Government
Pleader, seems to the
Governor in Council to be
necessary for its settlement;
and he accordingly hereby
empowers and directs
Mr. Dale to take the
necessary steps to that end.

3 The Notes for-
-warded by Mr. Dale
will be returned to him,
as requested in Para 16
of his letter.

A

4 A copy of Para
2 of Mr. Dale's letter
will be transmitted to
the Court of Sudder
Adalat thro' the Judicial
Department with the
intimation that, if the
opinion of Govt. the
course there described
is followed in respect
to the decree of the
Court, the practice
requires to be ex-
-ercised.

It is improper and unfair
to Suitors, and ought
not to be allowed in
any Court, and least
of all in the highest
local Court in the
Country.

4 Copies to Govt Pleader
with Notes - Cop. 6
13 — Sec. of Rev
5 — Jud. Dep. with P. 2 of the Rev

Appeal to Her Majesty in Council
No 72.

Reports to Lords 8/18th May/61

The matters of the Vizianagaram Estate.

Revenue 1861 Departt.
Pro: of Govt for April.

No 759.

Pro: of the Madras Govt.
Dd 5th April 1861.

Pro: of the Madras Govt dd 5th April 1861 & No 952 in Pro:
From Govt Pleader dd 19th April/61
No 956.

Regarding the Decree passed by the Sudder Adalat in A. S. No 103 & 136 of 1857 in the matter of the Vizianagaram Estate.

No 71 at p 3.