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M.R.O. 14—10,000—21-4-22

MADRAS RECORD OFFICE.

Government of Madras.

Revenue **DEPARTMENT.**

G.O. No. 760 — Press / ~~Mis.~~

74-75

Dated 5 — 4 — 1861.

Not to be folded or roughly handled

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

No. 74. Read the following letter from CLEMENT DALE, Esq., Government Pleader Sudder Adálat, to J. D. SIM, Esq., Secretary to the Board of Revenue, dated Madras, 13th March 1861, No. 51.

Letter from Government Pleader, to Secretary to the Board of Revenue, 23rd October 1860, *No.* 159.
Proceedings of the Board of Revenue, 5th November 1860, *No.* 5,099.
Official Memorandum from Secretary Board of Revenne, 9th November 1860, *No.*
Letter from Government Pleader, to the Secretary to the Board of Revenue, 13th November 1860, *No.* 168.
Official Memorandum from Acting Secretary to the Board of Revenue, 5th January 1861, *No.*
Letter from Government Pleader to Acting Secretary to Board of Revenue, 7th January 1861, *No.* 3.
Letter from Sub-Secretary to the Board of Revenue to Government Pleader 6th February 1861, *No.* 672

SIR,

1. In continuation of my letter of the 23rd October 1860, and the subsequent correspondence, &c., noted in the margin, I have the honor to enclose for the information of the Board of Revenue a copy of a letter I have addressed to Government, advising an appeal to Her Majesty in Council from the Decree of the Court of Sudder Adálat passed in appeal Suits Nos. 103 and 136 of 1857.

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1. The Board concur as to the advisability of an appeal being instituted.

2. The merits of the case are so fully stated in Mr. Dale's letter and in Mr. J. B. Norton's letter to the Chief Secretary, dated 14th March 1855, No. 11, that the Board need not remark on them.

E. M. C. 21st April 1855, *J. D. No.* 299.

3. The report called for in paragraph 1 of Government Order 8th October 1860, Revenue Department, No. 1,821, is rendered unnecessary by the opening sentence of the Decree of the Sudder Adálat, against which, it is now proposed to appeal. A copy of the Collector's letter will however be forwarded to Mr. Dale for his information.

(A true Extract and Copy.)

(Signed) J. D. SIM, *Secretary.*

No. 75. ORDER THEREON, 5th April 1861, No. 760.

Ordered to be recorded; an order for the institution of an appeal having been passed this day (No. 759) in Mr. Dale's letter.

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

No. 1,625.

PROCEEDINGS OF THE BOARD OF REVENUE, dated 27th March 1861.

Read the following letter from C. DALE, Esq., Government Pleader Sudder Adalat, to J. D. SIM, Esq., Secretary to the Board of Revenue, Fort Saint George, dated Madras, 13th March 1861, No. 51 :—

Letter from Government Pleader, to Secretary to the Board of Revenue, 23rd October 1860, No. 159.
Proceedings of the Board of Revenue, 5th November 1860, No. 5,099.
Official Memorandum from Secretary to the Board of Revenue, 9th November 1860.
Letter from Government Pleader, to Secretary to the Board of Revenue, 13th November 1860, No. 168.
Official Memorandum from Acting Secretary to the Board of Revenue, 5th January 1861.
Letter from Government Pleader, to Acting Secretary to the Board of Revenue, 7th January 1861, No. 3
Letter from Sub-Secretary to the Board of Revenue, to Government Pleader, 6th February 1861, No. 672.

In continuation of my letter of the 23rd October 1860, and the subsequent correspondence, &c., noted in the margin, I have the honor to enclose for the information of the Board of Revenue, a copy of a letter I have addressed to Government, advising an appeal to Her Majesty in Council, from the Decree of the Court of Sudder Adalat, passed in Appeal Suits Nos. 103 and 136 of 1857.

ENCLOSURE No. 1.

From C. DALE, Esq., Government Pleader Sudder Adalat, to J. D. BOURDILLON, Esq., Secretary to Government, dated Madras, 12th March 1861, No. 49.

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 Adalat on the 22nd of October last in Appeal Suits Nos. 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 sometime 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 reascns, 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 labour, 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 Adalat 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 Hindoos 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 Zemindari of Vissunnapetta in the Collectorate of Masulipatam. The facts are as follows:—The Zemindari 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 Zemindari for her life. From the death of the husband, therefore, the widow retained possession of the Zemindari. 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 Zemindari 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 Zemindari 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 800 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 Zemindari. 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 No. 18 of 1838. To this suit this widow (secluded as Hindoo 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 endeavor to effect an arrangement to save her interest in the Zemindari 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 Adalat at that time it was doubtless the policy of Government to encourage Zemindars, and the Supreme and Sudder Courts having recognized 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 Hindoo 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 anything 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 Zemindary should be continued to him as long as his posterity should remain "as an ancient Zemindary 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 Zemindari 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 purposes. 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 Zemindari 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 Zemindari yielding a clear annual net rental of 7 or 8,000 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 Zemindari 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 Zemindari 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 Zemindar 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 Zemindari 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, 8 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 Zemindari netted a clear annual income of 7 or 8,000 Rupees (and it is shown that the revenue of 2 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 Hindu 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* incumber 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 Adalat neither in their orders of 1854, nor 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 Honors' opinion, if a tenant for life incumbered 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 incumbrance 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 incumbering the Zemindari; 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 incumber 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 Zemindari 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 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 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 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 22nd April.

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1. The Board concur as to the advisability of an Appeal being instituted.

2. The merits of the case are so fully stated in Mr. Dale's letter, and in Mr. J. B. Norton's letter to the Chief Secretary, dated 14th March 1855, No. 11, that the Board need not remark on them.

Ex. Mins. Cons. 21st April 1855, Jud. Dept., No. 299.

3. The report called for in paragraph 1 of G. O., 8th October 1860, R. D., No. 1,821, is rendered unnecessary by the opening sentence of the Decree of the Sudder Adalat against which it is now proposed to appeal. A copy of the Collector's letter will, however, be forwarded to Mr. Dale for his information.

30th October, in Cons. 5th November 1860, No. 5,687.

(True Copies and Extract.)

(Signed) J. D. SIM,
Secretary.

To J. D. Bourdillon, Esq., Secretary to Government, R. D.
„ C. Dale, Esq., Government Pleader.
„ J. W. Reid, Esq., Acting Sub-Collector in charge of the Kistna District.

Exd. J. Wright.

Recd 1861 Sept 4th

No 780.

Proceedings of the
Board of Revenue

Dated 27th March 1861.
Desp.d 27d "
Rec.d 28th "

No 1625.
5th April/61 No 760.

Concurring in the advisability of appealing to Her Majesty in Council from the Decree of the Court of Sudder Adalut in A. Suit Nos 103 and 136 of 1857, as recommended by the Govt Pleader.

Ad'd enp already [illegible]

Copy sent a Letter to Engd
10th May 61 No 72.

Received 1861 Despatch
Prov: of Govt for April "
No 780.

Proceedings of the
Board of Revl
Mr Dale's letter 7th August 1861.

Dated 27
Despd 27 } March 1861
Recd 28th "

No 1625

Forwarding copy of a
letter from the Govt Secry
S. A and concurring with
him as to the advisability
of an appeal being instituted
to Her Majesty in Council in
A. S. Nos 103 & 136 of 1857.

No 760 - 5th April.

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Withdrawn order

No 74 & 75.

No 760 760

Ordered to be re-
corded, an order for the w
sidution of an appeal
having been passed by
day on Mr Dale's lett

J. D. L.

Fort St George
5th April 1861

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