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MADRAS RECORD OFFICE.

Government of Madras.

Revenue. DEPARTMENT.

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GOVERNMENT OF MADRAS.

REVENUE DEPARTMENT.

Read—the following Proceedings of the Court of Wards, dated 16th October 1893, No. 3408:—

Read—again Proceedings of the Court of Wards, dated 3rd August 1893, No. 2532.

ABSTRACT.—Forwarding to Mr. S. Subramania Iyer for remarks Godáviri Collector's letter regarding alienations in the Pittapur estate, and requesting the former to revise, in the light of recent decisions, Mr. Mayne's opinion regarding alienations in zemindaris.

Read—also letter from M.R.Ry. Dewan Bahadur S. SUBRAMANIA IYER Avergal, B.L., C.I.E., High Court Vakil, dated 21st September 1893, No. 65.

ABSTRACT.—Revising, in the light of recent decisions, Mr. Mayne's opinion regarding alienations by holders of impartible zemindaris and giving his opinion regarding alienations in the Pittapur zemindari.

Resolution—dated 16th October 1893, No. 3408.

Mr. Mayne's opinion, given in 1871, regarding alienations in zemindaris, will, as now revised by Dewan Bahadur S. Subramania Iyer, C.I.E., with reference to later decisions, be printed and circulated to all Collectors for information.

(A true Extract.)

(Signed) W. S. MEYER,
Acting Secretary.

To all Collectors, except Madras.

Copy to the Secretary to Government, Revenue Department.

APPENDIX.

REVISED opinion in *re* alienations by holders of impartible zemindaris.

I. Alienations may be absolute or transfers in the nature of leases; each gives rise to different considerations. I shall state what, in my opinion, is the law in reference to each class of cases. Before doing so, it is however necessary to observe that the language of two recent decisions of the Privy Council on the subject renders the task of stating the law on some of the points connected with the subject, one of considerable difficulty. In the case reported at page 272, Indian Law Report X Allahabad, their Lordships of the Privy Council hold that the doctrine of right by birth is inapplicable to the case of impartible zemindaris. The applicability of the above fundamental principle, on which the whole Mitakshara system of coparcenary rests, having been denied, it is difficult to see how any distinction as to the legal principle, governing devolution and succession, is to be made between the case of male issue and that of unseparated collateral kinsmen, who would take in the absence of such male issue. The only logical course, under the circumstances, is to hold that collateral as well as lineal successors take the property as if it were the separate property of the deceased. But the Privy Council have ruled otherwise, as will appear from section IV of this opinion. The consequence is, that the authorities have got into such a state of confusion as, in my opinion, to make it practically impossible to deduce from them any

consistent rules, based on principles known to the Hindu Law and admitted by the Privy Council to be applicable to impartible estates. The uncertainty and doubt thus introduced into the subject are, I am afraid, not likely to be removed until the Privy Council gives a decision, much more clearly expressed, than those just referred to. The proper construction, however, to be put on the authorities as they stand is, I think, what I state in section IV. below. It is one which would disturb the law (as it has been hitherto understood to be), no more than is strictly necessary to give full effect to what was actually decided by the Privy Council in the recent cases alluded to above.

II. As regards absolute alienations, the questions for discussion appear to be three:—First, what power of alienations is possessed by a zemindar; secondly, how far is that power affected by the provisions of Regulation XXV of 1802, section 8; thirdly, when does the statute of Limitations bar the right of his successor to set aside such alienations so far as they are invalid.

III. The right of the zemindar to alien the whole or any part of his zemindari, provided he complies with the formalities laid down by the legislature, is neither given nor restricted by Regulation XXV of 1802. Such alienations are by section 8 to be recognized so far as they are "not repugnant to the Muhammadan or Hindu Law, or to the Regulations of the British Government." There are no regulations which restrict the right of a zemindar to alien, and therefore in such case it becomes a question—what does the Hindu Law permit him to do?

IV. (i) An impartible zemindari can, of course, be held by only one member of a family at a time, and though neither the corpus nor the annually accruing income is divisible among the members of the family, yet neither circumstance prevents such property being treated as joint property. This has been more than once laid down by the Privy Council (4 Moore's I.A. Page 593, 13 Moore's I.A. 349, and L.R. 17 I.A. 128). One consequence of joint ownership is that the holder for the time being is restrained from alienating the property except for purposes warranted by law (at page 287 I.L.R. 10 Allahabad). The position of a zemindar, who has joint owners, is, as respects the latter, analogous to that of a qualified female owner, such as a widow in relation to her reversionary heirs. The estate is no doubt his or hers for life and can be freely transferred to the extent of such interest; but no act of his or hers, unless under circumstances of legal necessity, can affect the interests of his or her successors.

(ii) But as to who are joint owners in respect of such zemindaris, the law as laid down by the Privy Council in the Allahabad case is at variance with what the law was understood to be prior to that decision.

(iii) Previously, not only unseparated brothers and other male collaterals of the zemindar, but also his own male issue, were held to be jointly interested in the zemindari and all were equally entitled to question alienations by the zemindar made without legal necessity. But in the case referred to above, the Privy Council ruled that sons are not joint owners with their fathers with respect to an impartible zemindari, and in consequence they cannot question their fathers' disposition of such property. This view has since been held by the Madras High Court to be applicable to the zemindaris in this Presidency as well (I.L.R. 13 Madras p. 197), and it must now be taken as settled that sons succeeding to impartible zemindaris are in the same position as sons succeeding to the separate property of their father and that in consequence they are bound by all alienations made by him.

(iv) Furthermore, it would seem that such zemindaris, in the hands of the sons, are liable for all the fathers' debts, and that the rule which exempts the interests of the son in ordinary divisible joint property from liability to seizure on account of illegal or immoral debts of the father would be held inapplicable to the case in question.

(v) As to unseparated brothers or other collaterals, the law, I think, is otherwise. They are joint owners with the zemindar and their position as such seems to be unaffected by the Allahabad case. At page 287 I.L.R. 10 Allahabad, their Lordships of the Privy Council observe "By the custom or usage, the eldest son succeeds to the estate on the death of the father as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family and to hold that there is a joint ownership which is a restraint upon alienation. It is not so difficult were the holder of the estate has no son and it is necessary to decide who is to succeed." This passage seems to me to furnish a clue to the real view of the Privy Council. And the argument of the judicial committee seems to be this. When a zemindar dies, without male issue, but leaving an unseparated brother or other collateral kinsman, the latter does not take the zemindari as an heir succeeding to the separate property of the deceased. For, if the property were treated as separate, the deceased's widow, daughter and the daughter's son would exclude the brother or other collateral. But, in the case of ancestral zemindaris, it is the settled law of the country that the unseparated brother or other collateral excludes the widow, daughter or daughter's son instead of being excluded by them. Such a succession of the said collateral relations can only be reconciled with succession to joint property by survivorship. This being so, it would, in my opinion, follow that restraint on alienation, which is one of the incidents of joint property, still exists in favour of the such collateral successors (notwithstanding that it has been denied to the sons) and alienations made by a zemindar without legal necessity cannot in any way affect the interest of such collateral successors in the property.

V. Next, as to the effect of Regulation XXV of 1802, section 8, nothing is to be found in that section which can be said to extend the rights of a Hindu zemindar. Consequently, even if he were to register his alienation, and to procure an apportionment of the kist, the only result would be that, in the event of a sale for arrears of revenue, the portion on which the arrears arose could alone be made liable. Supposing, however, that the formalities of section 8 have not been complied with, the question is whether such non-compliance in any way affects the validity of the alienation. In 3 H.C. 5 it was held that non-registration rendered the transaction invalid, but this view has since been overruled. In the Vizianagram case, reported in L.R. XIII Indian Appeals, page 32, the Privy Council stated that the true construction of the regulation was that it imposed restrictions on alienations only to secure the interests of the public revenue and the zemindar would have no power to disturb grants, otherwise valid, made by his predecessor or titles to inams acquired by prescription.

VI. Now as to the question of limitation (whether the alienation is duly registered or not) it would certainly be valid as against the grantor. If his successor be a son or other heir, he would be bound by the grant and no question of limitation can arise. But if the successor is a person succeeding by survivorship, then the cause of action to him would first arise at the time the succession opens to him and the statute would run from that date.

VII. If the statute has once run against a successor, it is clear that no fresh right of action could accrue to such successor's successor. The point has been expressly ruled by the High Court (3 H.C. 153) and their decision has been affirmed by the Privy Council (V Madras Jurist 389); on principle it seems plain that such last named successor would have no right in respect of which he could sue. He could only claim what descended to him from the grantor and his successor. But the grantor had lost the right by his grant and the successor by the statute. Any doubt there might ever have been upon this point seems to be removed by Act XV of 1877, section 28, which declares in opposition to the ruling in 1 High Court 85 that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

VIII. The second class of alienations are those in the nature of leases. The term is here used, not in a technical sense, but as denoting any arrangement whereby the property and the reversionary right thereto is recognised as remaining in the zemindar, but the possession, either permanently or temporarily, is vested in another for some recurring consideration. These cases resolve themselves into (a) service tenures; (b) leases at full assessment; (c) leases at a favorable assessment; (d) possession, at a favorable assessment or without assessment, on mere sufferance, but without any express contract.

IX. (a) The law as to the service inams, or lands held as what is known in this Presidency as *amarum* tenure, is laid down in four Privy Council cases (7 Moore's I.A. 128, 8 Moore's I.A. 327, 10 Moore's I.A. 16, and 5 Bengal L.R. 429). The result of these decisions seems to be "that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant" (5 Bengal L.R. 544). Lands held on pure *amarum* tenure, that is, for the performance of services to the zemindar himself, are resumable at pleasure, as soon as he chooses to dispense with the services (7 Moore's I.A. 128). But it is otherwise where the services are such as the zemindar is bound to continue and provide for, the public or the Government having an interest in them (10 Moore's I.A. 16). And where an estate is granted, burdened with a certain office, the grant will not be resumable on the ceasing of the duties, unless the continued performance of the service was the whole motive to and consideration for the grant, or unless the instrument by express words declared that, the service ceasing, the tenure should determine (5 Bengal L.R. 544, 8 Moore's I.A. 327). Of course where the zemindar himself can resume, his heir can also resume. But there may perhaps be cases where the grantor could not resume, but where his successor could. These will be spoken of under head (c).

(b) Leases at full assessment for whatever duration are equally binding on the zemindar and his successor.

(c) Leases at favorable rent, that is, one below full assessment, are binding on the grantor and his heirs including sons, but not upon his successors taking by survivorship, unless the lease has been granted for some of the purposes named in Madras Act VIII of 1865, section 11, clause 4.

(d) Where the case is merely that the tenant has been allowed to hold possession for any period, however long, on payment of no rent or of a favorable rent, there is nothing to prevent the zemindar or his heir from assessing to the full amount whenever they choose.

X. Regulation XXV of 1802, section 8, has no application to leases, whether temporary or permanent (8 Moore's I.A. 327, IV H.C. 396, overruling 1 H.C. 141).

XI. Lastly, as to the effect of the statute of limitation upon cases of leases created by the grantor and resumable by his successors. This will always depend upon whether the resumption is in accordance with the terms of the lease or holding, or is in violation of those terms. In the first case, the possession of the tenant, however long it may continue, is never hostile to the claim to resume. In the latter case, it is hostile, and therefore the statute will run from the

time when the right to resume or to exact the full assessment accrues (Act XV of 1877, Schedule II, Article 130). Therefore in case (a) the statute would not begin till the services were discontinued, or perhaps not till the grantor or his successor notified his resumption of the *amarum* grant. In case (c) the grant would be good for the life of the grantor and of those who succeed him, not as coparceners, but as heirs. But as against a successor taking by survivorship, the statute would begin to run from the time the succession opens to him. For the reasons given, *ante* section 7, if the statute once ran against a successor, entitled to question an alienation, no new right of action would arise in favour of the successor of that successor. In case (d) the statute of limitation would never begin to run until a demand for full rent and a refusal, for, till then the possession of the tenant was as tenant-at-will, and there was no hostile right set up (2 H. C. 22, 3 H. C. 1).

XII. Inams which have been created since the permanent settlement so as to diminish the assets of the zemindari are not binding on the Government, and the Collector, when he enters as attaching creditor, may claim full assessment so long as he is in possession (Madras Act II of 1864, section 32). But such leases are only void as against him, as soon as he goes out of possession, they will resume their validity as against the zemindar to exactly the same extent as they were valid before attachment. Supposing the zemindar to have lost the right to resume, the only way to raise the assessment to its full amount would be to sell the portion of the zemindari so under-assessed for arrears of revenue. The purchaser would then be able at once to resume the inam and impose full assessment (Madras Act II of 1864, section 41).

XIII. In conclusion, it may be remarked that no act of the zemindar in alienating his assets by lease or otherwise can in any degree diminish the security for the public revenue. Until there is a valid apportionment of kist, the whole and every part of the zemindari is pledged as a security for the public demand. That demand takes precedence of all other encumbrances, and in the event of either attachment or sale, the Collector, in the former case, and the purchaser, in the latter case, are in no way bound by an alienation or diminution of the assets of the zemindari.

(Signed) S. SUBRAMANIA IYER.

ORDER—dated 11th November 1893, No. 975, Revenue.

Miscellaneous.

Recorded.

(True Extract.)

(Signed) E. GIBSON,
Ag. Secretary to Government.

To the Commissioners of Land Revenue.

Ezd. C. M. Brisson.

40 Copies.

Original
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Govt. of {1893} Madras.
REVENUE.

Issued

Recd.

Encl.

G.O., 11th November 1893, No. 975.

NOVEMBER.

Alienations in Zemindaris.

Proceedings of the Court of Wards communicating to all Collectors Mr. Mayne's opinion regarding —, as revised by M.R.Ry. Dewan Bahadur S. Subramania Iyer Avergal, in the light of more recent decisions on the subject, recorded.

COURT OF WARDS, 16TH OCTOBER 1893, No. 3408.

PROCEEDINGS OF THE COURT OF WARDS.

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XI. Lastly, as to the effect of the statute of limitation upon cases of leases created by the grantor and resumable by his successors. This will always depend upon whether the resumption is in accordance with the terms of the lease or holding, or is in violation of those terms. In the first case, the possession of the tenant, however long it may continue, is never hostile to the claim to resume. In the latter case, it is hostile, and therefore the statute will run from the

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XII. Inams which have been created since the permanent settlement so as to diminish the assets of the zemindari are not binding on the Government, and the Collector, when he enters as attaching creditor, may claim full assessment so long as he is in possession (Madras Act II of 1864, section 32). But such leases are only void as against him, as soon as he goes out of possession, they will resume their validity as against the zemindar to exactly the same extent as they were valid before attachment. Supposing the zemindar to have lost the right to resume, the only way to raise the assessment to its full amount would be to sell the portion of the zemindari so under-assessed for arrears of revenue. The purchaser would then be able at once to resume the inam and impose full assessment (Madras Act II of 1864, section 41).

XIII. In conclusion, it may be remarked that no act of the zemindar in alienating his assets by lease or otherwise can in any degree diminish the security for the public revenue. Until there is a valid apportionment of kist, the whole and every part of the zemindari is pledged as a security for the public demand. That demand takes precedence of all other encumbrances, and in the event of either attachment or sale, the Collector, in the former case, and the purchaser, in the latter case, are in no way bound by an alienation or diminution of the assets of the zemindari.

(Signed) S. SUBRAMANIA IYER.

REVENUE DEPARTMENT.

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Communicating to all Collectors, Mr. Mayne's
opinion regarding alienations in zemindaris, as
revised by M.R.Ry. Dewan Bahadur S. Subra-
mania Iyer Avergal, in the light of more recent
decisions on the subject.

To the court of R.

CR
6/11

C 7/11
C 11/11

Line. V. H. M. with Mayne's
opinion in 1871 upon the value
of Panchipundar cases -

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