Revenue (1897) Department.

G.O., No. 1975

Confidential No. 932

DATED 13 April 1897

[Despatch Abstract.]

Referring to the Court of Wards for remarks the suggestion of the Hon'ble the Advocate General re the engagement of Counsel in Pittapore appeal suit.

BACK PAPERS.

G.O.	No	Department.	Date.	G.O.	No.	Department.	Date.
f/p.	1182	Rev	2-3-97				
f/p.	850	Rev	12-2-97				
f/p.	56	Rev	6-1-97				
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FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.
f/p.	2741	Rev	31-5-97				

Revenue (1897) Department.

CURRENT No. 2667

Confidential No. 32

From The Govt Solicitor

Order

No. 191.

Dated 25 March 1897

Received 〃 〃

Registered 〃 〃

Enclosures One.

Spare copies

SUBJECT.

Forwarding the opinion of the Hon'ble the acting Advocate Gener on the question of retention of Counsel in England in Ca of Ward cases.

BACK PAPERS.

G.O.	No	Department.	Date.
	1182 2-3-97		

FURTHER PAPERS.

G.O.	No.	Department.	Date.

Confidential

Opinion

(G.O. dated 2nd March 1897 No. 1182 Mis)

1. I find it difficult to express an opinion on the matter referred to me regarding it as a pure question of law.

2. The Madras Court of Wards Regulation No. V of 1804 is an antiquated piece of legislation which is found quite inadequate to present requirements or to furnish a satisfactory legal basis for all the practice which has grown under it. The validity of the contentions of the Court of Wards in paras 4 and 5 of the Proceedings of 11th February, 1897, No. ~~1182~~ 259 Mis, can only be determined with reference to general principles of law and practice applicable to the wardship of infants and the care of infants' estates by the Court of Chancery in England, to which the jurisdiction of the Crown as parens patriæ over infants may be regarded as having been delegated, whatever may be the obscurity as to the origin of such delegation.

3. In India this protective jurisdiction of the Crown was delegated through legislature so far as this Presidency is concerned under Regulation V of 1804 to a Court of Wards erected and established under that Regulation, such court to consist of the members of the Board of Revenue for the time being

and

and to have wardship of only one class of infants, and that the most important class, Viz:- proprietors of lands paying revenue direct to Government. By sections 20, 21 and 22 of the same Regulation as extended by section 3 of Madras Regulation X of 1831, such protective jurisdiction over other infants was delegated to the principal Civil Courts of Original jurisdiction in the Mofussil, and the said Civil Courts now exercise their jurisdiction over infants under the Guardian and Wards Act VIII (India Act) of 1890, which fully saves the jurisdiction of Court of Wards over infant proprietors paying revenue direct to Government. (Vide sections 3. 19. & subsection 1(b) and subsection 2(b) of section 41 of the Guardian and Wards Act VIII of 1890).

4. The reason for delegating this protective jurisdiction of the Crown over infants partly to a special Court which is to consist of the members of the Board of Revenue, the Chief Controlling Revenue Authority, and partly to the principal Civil Courts which so far as the Mofussil is concerned may be said to correspond to the Court of Chancery in England, seems to me to be this. The Crown being parens patriæ of infant proprietors, it would be incompatible with such position that it should bring to sale estates of infants for realizing arrears of revenue due to the Crown, and therefore the legislature had to exempt under clause 4, section 14 of Regulation V of 1804, their estates from liability to be sold for arrears of revenue, and by section 2 of Regulation X of 1831, to declare that such exemption is applicable also to minor proprietors of lands paying revenue to Government, though such estates may not have been taken charge of by the Court of Wards. It was therefore deemed necessary to place such estates under the care and superintendence of the Chief Controlling Revenue Authority, in view to secure the public revenue due thereon from its rents and profits.

5. So far as other infants are concerned there would be no occasion for the Crown having to sell their property for realizing arrears of revenue due to the Crown, for the simple reason that they are not proprietors of lands paying revenue direct to Government, and their wardship therefore was entrusted to the ordinary principal Civil tribunals of the land.

6. The Court of Wards established in India may be said to correspond to the Court of Wards for the Kings Wards erected and established in England under

under Statute 32 Henry VIII Ch. 46, which Court, after a period of more than 100 years, was abolished by Statute 12 Charles II Ch. 24. I wanted to refer to the Statute of Henry VIII in view to see what light it throws upon Madras Regulation X of 1804, but I regret that no copy of it is available in Madras. x not available

7. The protective jurisdiction over infants is quasi judicial and quasi executive or administrative. The exercise of such jurisdiction by Civil tribunals naturally developed on a judicial basis and partook more of a judicial than of an executive character, whereas the exercise of the same jurisdiction by the Chief Controlling Revenue Authority, in its capacity of Court of Wards, developed on an executive basis, and partook more of an executive than of a judicial character.

8. While, in principle, the protective jurisdiction and functions of the Civil Courts and of the Court of Wards over their respective wards are the same, the Civil Courts in India like the Court of Chancery in England do not interfere with the action of the guardian of the person and property of the minors beyond advising them, and requiring them to obtain their sanction

sanction in important matters, or take any direct or active part in the management of their estates, or in suits relating to the same, whereas the Court of Wards in relation to its wards exercises a complete control, both directly and through its local agent, the Collector, over the guardians of the person and property of their wards, and takes an active and sometimes direct part in the management of their estates and suits relating thereto so much so, that in the Pittapore case the Court of Wards was joined as an indispensable defendant, and it was seriously contended that it was in possession of the estate, and also liable for mesne profits &c. On behalf of the Court of Wards, it was argued that the Court of Wards was no more a necessary party, nor joined as an independent party to suits respecting its wards estates, than the Court of Chancery in England, or the High Court, or the District Courts in India, were necessary parties, or joined as parties to suits in respect of the estates of their wards. (Vide judgment of the District Judge in the Pittapore case, paras 130 to 135.)

pages 52 et seq of the D. Judge's Judgment flagged A

It was unnecessary for the High Court to consider or decide this point in the Pittapore Appeal, but if the adopted son should succeed in his appeal to the Privy Council

counsel as against the Court's ward. the question of the liability of the Court of Wards for mesne profits &c may have to be considered, and determined by the Judicial Committee.

9. Notwithstanding this marked difference in the extent to which the Court of Chancery and the Court of Wards in India exercise their respective supervision over their wards and their estates, yet it really does not make any difference in principle, for "in all cases when an infant is a ward of Chancery, no act can be done affecting the person or property or state of the minor, unless, under the express or implied direction of the Court itself, and in regard to the management and disposal of property of infants, the Court of Chancery "will exercise a vigilant care over guardians in the management of the property of infants." (Vide also sections 32 & 43 of Act VIII of 1890)

10 Turning now to Regulation V of 1804, I find that the interposition of Govt is provided ~~only~~ for only in 2 cases, one under clause 3 of section 2, and clause 1 of section 3, before an infant is made a ward of the Court, and the other, under clause 4 of section 8, when there is difference of opinion between the Court of Wards and the Collector. in the choice of a fit and proper person as manager of the property of the ward. Under the Regulation, the property of an infant ward is committed to the care of the Court of Wards (vide clause 1, section 8), and the entire charge of the estates of the minor is entrusted to the Manager (Vide clause 1, section 12)

10(a) As regards leases or other dispositions of the ward's estate, section 15 provides that the Manager shall not grant any lease beyond the period of one year, without the consent in writing of the Collector or to dispose of any part of the property without the sanction of the Court of Wards.

11. As regards investment of savings from the estates and payment of debts due from the estates, sections 16 & 17. provide that the Collector is to act in the matter with the previous sanction of the Court of Wards, and that payments of such debts shall be postponed to the payment of public revenue.

12. Sections 23 and 24 invest the Court of Wards with purely judicial functions, to pass judgments against Collectors, guardians, and managers, in cases therein provided for, which judgments are appealable to the Sadr Court, now the High Court, and are executable as decrees passed by Zillah Courts. It is unnecessary to advert to the provisions

provisions enacted by Act XXI of 1855. in regard to the education and marriage of minor wards.

12(a) The powers of the Court of Wards above referred to, it will be observed, are analogous to the powers and functions usually exercised by the Court of Chancery in relation to its wards.

13. The only allusion made to suits in which the ward is concerned, is in section 23. which provides that the ward shall not be liable to be sued otherwise than, as under the protection and in the joint name of the guardian of his person, notwithstanding that the charge of the ward's estate devolves on the Manager. of Reg: V of 1804

14. On reference to the form of the bond prescribed by section 10. which the manager is to execute, it will be observed that the manager engages to adhere to such Regulations, as have been or may hereafter be framed for the guidance of managers by the Court of Wards. This necessarily implies that the Court of Wards may frame rules which will place the manager, in regard to the management of the estate and affairs of the ward, under the complete control of the Court of Wards, and thus provides for the exercise by the Court of Wards to whom the property and care of infants is committed by the Regulation of powers and functions not specified in the Regulation

15. The jurisdiction of the Court of Chancery and of the Court of Wards over their respective wards, it will thus be seen is essentially the same, though the extent to which such jurisdiction is actually exercised by the two Courts considerably varies. If a ward of the Court of Chancery has occasion to sue, or be sued, in an Indian Court, the ward's guardian, who is appointed by the Court of Chancery will do the needful for the prosecution or defence of the suit, as the case may be, and, in the matter of employing Counsel &c, he will act after obtaining the directions and sanction of the Court of Chancery.

16 Having regard to these general principles, and the provisions of the Regulation, I am of opinion that the contentions advanced in paras 4 & 5 of the Proceedings of the Court of Wards are supported by sound reasoning and the Court of Wards "was strictly within its powers, when it used its ~~powers~~ previous knowledge and experience, in respect of a selection from the English Bar to

to suit the exigencies of the Pittapore case," and when it had reason to believe that the interests of its ward would be benefited by the retention of any specified counsel, its fiduciary position towards its ward is such, as to justify the expectation that its wishes will be complied with.

17. I am not however to be understood as implying that the Government is not entitled to exercise a general administrative control or supervision over the Court of Wards, in respect of the management of the estates of disqualified proprietors. Any rules or directions which it may issue for the exercise of such administrative supervision, will not have the force of law, in the proper acceptation of the term, but operate merely as departmental instructions for general guidance. When a purely judicial function has to be exercised by the Court, as for instance in the cases specified in sections 23 & 24, the exercise of such function can in no way be made subject to the supervision of Government in its executive capacity. But in so far as the management of the ward's estate partakes more of an executive than judicial character,

character, and the conduct or defence of suits concerning the ward's estates must generally be regarded as partaking of (such) character, it cannot be maintained that the Governor in Council, in whom the executive Government of the Presidency is vested, (vide 3 & 4 Will IV ch. 85 § 56), and which in that character is interested in securing the public revenue payable in respect of the estates of wards under the Court of Wards, cannot exercise its executive authority so far as it may be necessary, to ensure the proper management of by the Court of Wards and its officers of such estates, which are exempt from being sold for arrears of public revenue. In this respect civil Courts, in the exercise of their protective jurisdiction over infants, stand on a different footing, because the estates of their wards, who are not subject to the jurisdiction of the Court of Wards, do not pay revenue direct to Govt, and the Govt therefore in its executive capacity has no interest in their efficient and proper management.

18. In so far as the Pittapore appeal is concerned, the difficulty, if any, may be easily met by the 1st Defendant, the Court of Wards, entering appearance separately

separately from its ward, the 2nd
Defendant. This is a fit and proper
case for adopting this course in
England, for the Court of Wards as
a defendant in the suit independently
of its ward is interested only in one
question raised in the case, and in
that question its ward is in no way
interested. The two defendants may
therefore may appear by separate
solicitors and Counsel, the counsel
for the Court of Wards confining him-
-self to the 1st issue in the case, namely
whether the Plaintiff has a cause of
action against the Courts of Wards
as such. If the appeal of the adopted
son be dismissed, separate costs will,
in the ordinary course, be awarded
to the 1st and 2nd defendants
respectively.

What, if the appeal succeeds

W V Sashyam Iyengar
Acting Advocate General

Madras
25th March
1897

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3708.

Confidential

No 191

Madras 25th March 1897

From,

Ernest Barclay
Government Solicitor
M a d r a s

To,

The Secretary to Government
Revenue Department
M a d r a s

Sir,

With reference to the Order of Government dated 2nd instant No 1132 Mis, I return herewith the Proceedings of the Court of Wards which accompanied such Order, together with, in original, the opinion of the Acting Advocate General on the questions raised in such Proceedings.

I have the honor to be
Sir
Your Obedient Servant
Ernest Barclay
Government Solicitor

D 4 — 1,000—11-6-96.

REVENUE DEPARTMENT.

No. 2667 of 1897.

From the Govt Solicitor

The Hon. Mr Grose C.J.
The Hon. Mr Bliss C.J.

Dated 25 - 3 - 1897.

FOR ORDERS.

In C.O. No 1182
d 2-3-97, two questions
were referred to the
Advocate General
for opinion, viz.
(1) Is the court of
Wards, legally in-
dependent of the
executive? and
(2) Has it the right to
insist that the
Counsel specified
by it shall be retain-
ed in its litigation
before the Privy Council
The current contains
the Advocate Generals
reply to these questions.
2. The gist of the
opinion seems to
be this.
The court of Wards,

The gist of the opinion is contained in para 16 & 17.
1/6/97.

is legally independent of the executive except "in respect of the management of the estates of disqualified proprietors" Accordingly, when a purely judicial function has to be exercised by the court, as, for instance, in the cases specified in sections 23 and 24 of Regn. II of 1804, the exercise of such function can in no way be controlled by the Govt. But in respect of the management of estates, the court's function is more of an executive than of a judicial character. Accordingly, the court of Wards is subject to such departmental instructions as the Govt might issue under 3 and 4

FOR ORDERS.

The opinion turns & we must pay close on this point but I think it lays down that the management of a suit is an executive function of the Court & that it is in that matter under the Control of Govt

16/4/97.

D 4 1,000--11-6-96.

REVENUE DEPARTMENT.

No.

From

Dated 189 .

FOR ORDERS.

William the Fourth ch 85 & 56 by which the executive Govt of the Presy is vested in the Govr in council. The conduct or defence of suits connected with the Ward's estates must generally be regarded as of an executive character and it would seem therefore that the Govt can control the court in the selection of counsel to conduct its suits.

3. It is submitted that the opinion of the Advocate-General

Stat 2/14/97.

may lee communicated to the Govt of wards with the intimation that in the circumstances the Govt. does not consider it advisable to address the Secy of State again in the matter, as proposed by the Govt in para 6 of its No: dt 11.2.97.

2. The suggestion in para 18 of the Advocate General's opinion may be referred to the Govt of wards pr remarks in the first instance

CR. 5/4/97

6/4/97.

FOR ORDERS.

The opinion of Hon. the Coj w was justified in thinking [illegible] its writer should be attended to. Hon. Govt c.

in terms.

6/4/97.

× flagged B.

6/4/97. Yes JS 7/4/97

10/4/97

Dept. The papers must go to H.E. when the Court's opinion comes back.

13/4/97.

C.N. 2667 of 1897

Go. nos No 1975 & 13 April

Forwarded to the Govt of wards for remarks with reference to the suggestion in para 2 of the Hon. the Advocate General's opinion.

13/4/97.

From orders

To the Govt of wards with Govt to be ret'd Dept. 14/4/97

CR. 13/4/97

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