

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cavalry Vencata Narainapah v. the Collector of Masulipatam, from the High Court of Judicature of Madras; delivered the 20th day of December, 1867.*

Present:

MASTER OF THE ROLLS.

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD TORIN KINDERSLEY.

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SIR LAWRENCE PEEL.

THIS is the third Appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the Respondent, was entitled to the zemindary in question by escheat, subject to whatever interest the Appellant might have acquired therein by virtue of the transactions between his late father and Lakshmi-devammah, the widow of the last Zemindar. The Order made on the second, which bore date the 6th of January, 1862, amongst other things declared, that the Crown taking by escheat, had the same right to impeach the alienation of the widow which the next heirs of the husband (if such there had been) would have had; and that the Appellant, then the Respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances (if any) made by his father to the widow, as were made for purposes for which, according to the Hindoo law, she would have been entitled to alienate the estate against the next heirs of her husband,

in so far as she had no other estate of her husband to answer such purposes,—and by the same Order the cause was remitted to the Sudder Adawlut of Madras, with directions to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the razeenamah relied on by the Appellant, and if not, to inquire what advances, if any, were made by the Appellant's father to the widow, and whether all or any, and which of such advances, and to what amount, were made for the purposes for which, according to the Hindoo law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, and whether the widow had, when such advances were made, other estates of her husband sufficient to answer such purposes.

The Sudder Court sent down the Issues so directed for trial in the Zillah Court. The Judgment of the Civil Judge (Mr. Elliot), page 84 of the Record, states very carefully the facts which he found to have been proved before him, and came to the following conclusions:—1st, that the alienation by the widow was for legal purposes sanctioned by Hindoo law, and that the right of the Crown, as next heir of the husband, was therefore actually defeated by the razeenamah; 2ndly, that the sums due for such advances amounted, in April 1838, to 48,614 rupees 13 annas 6 pie, the balance of the account then adjusted and settled; and 3dly, that the Zemindar, the late husband of the widow, died possessed of no property available for any purpose, save and except the estate in dispute, which at his death was not unincumbered.

The Decree of the High Court, made on appeal from this Judgment, declared that the right of the Crown to take by escheat was not defeated by the razeenamah; that from the death of the Zemindar in 1810 up to 1813 advances were made to the widow by the Appellant's father for purposes for which, according to the Hindoo law, the widow would have been entitled to alienate the estate as against the next heirs of the husband, and that on the 18th of May, 1822, the balance due to the widow on these advances, with interest, was about 20,000 rupees; that in the year 1828 a further advance of 1,033 rupees 3 annas 3 pie was made

for similar purposes; and that when the before-mentioned advances were respectively made, the widow had not other estates of her husband sufficient to answer the purposes for which they were taken, and to which they were applied; but that the Defendant had not shown what, at the date of the advances last mentioned, was the debt on the former advances, or whether such former debt, or any part of it, still subsisted; that no advances were made from that date to the date of the mortgage deed in 1838; that it lay upon the Appellant to show, and that he had failed to show, that the widow was in debt to his father at the date of the execution of the mortgage deed for advances made for the purposes aforesaid; and that accordingly the Respondent, on the part of Government, was entitled to take the estate by escheat, unincumbered with charges created in favour of the Appellant or his father.

Against this Decree the present Appeal has been brought; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's Order of the 6th of January, 1862, and what conclusions ought to be deduced from them.

That the Zemindar, the husband of the widow, died in debt, and left little or nothing except the zemindary in question, is undisputed. There is, therefore, no contest as to the correctness of the conclusion to which both the Courts below have come upon the last issue. It seems to be also admitted that the gross annual revenue of the zemindary was, on the average, little, if at all, in excess of 10,000 rupees, that the Peishcush or Government revenue was upwards of 4,000 rupees, and that the balance was not much more than would cover the zemindary and other expenditure of the widow. The probability, therefore, of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again it is proved that the pecuniary transactions between the late Zemindar and the uncle and father of the Appellant, who were first cousins of his wife, began before 1804. This is shown by Exhibit XIII, which both the Courts below have treated as genuine, and from which they have, as their Lordships think, legitimately inferred that the statements in Exhibit XIV (also found to be genuine) may be accepted as

true. If this be so, we have it established that in 1810, when the widow came into possession, her late husband was indebted to the Appellant's uncle, Seethiah, in a sum exceeding 20,000 rupees, and that she had to borrow from him a further sum amounting to about 3,200 rupees, in order to defray the expenses of her husband's obsequies, and perhaps also for other purposes. That the debt so due to Seethiah was transferred to the Respondent's father on the 15th of April, 1811, is proved by No. XVI.

It is unnecessary to consider whether the debt thus assigned included any further sums paid for Peishcush, as the Appellant would infer from Exhibits XV and XVII, because the Courts below have, as their Lordships think, correctly held that effect must be given to the widow's admission, contained in her letter (No. XVIII) of the 18th of May, 1822; that at that date the debts on her own showing did not exceed the sum therein mentioned, a sum which this paper states to be about 20,000 rupees, but which according to the printed record is 22,000 rupees. The antecedent proof, in the absence of any evidence to the contrary, is, their Lordships think, sufficient to establish that the whole of that sum represented debts which the widow was entitled to charge upon the zemindary as against the heirs of her husband. The High Court has held that the only other advance established to their satisfaction is that of 1,033 rupees 3 annas 3 pie paid for Peishcush in 1828. And their Lordships will accept that finding as correct, though there is undoubtedly some evidence of other advances of the like nature.

This being so, the determination of this Appeal must turn on the question whether the High Court was right in holding that it lay on the Appellant to show, by positive proof, what part (if any) of these debts remained unpaid in 1838, at the date of the mortgage, and that, in the absence of such proof, it was to be inferred that no part of these debts subsisting in 1822 or in 1828 was subsisting in 1838.

The Appellant had, no doubt, to sustain an extraordinary burthen of proof. He had to establish not only that he had a charge on the estate by the act of the widow, but that the debt charged was of a particular character. He has shown that such a debt once existed. It does not, however, follow that because the Respondent had the right to

demand this peculiar proof, the ordinary rule, which requires the party who alleges payment to prove payment, is to be inverted in his favour, or that the debt is to be presumed to be satisfied unless the contrary is shown by the creditor. If, indeed, the facts had shown a strong probability of the satisfaction of the debt by the proper application of the surplus revenues of the estate by the widow, the High Court might have been justified in pressing against the Appellant the non-production of accounts, or of other satisfactory proof that the debt had not been so satisfied. They might legitimately have held that the facts establishing that probability afforded *prima facie* evidence of payment. But to their Lordships it appears that the facts proved are such as fairly lead to the opposite conclusion.

The widow is shown to have succeeded to the zemindary, encumbered with debt which she had no means of discharging, except the revenues, that are admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and provide for the expenses of her establishment and family. A landholder, whether male or female, when in such circumstances, rarely, very rarely in India, succeeds in getting out of debt. Again, in the present case, the Zillah Judge has shown that more than one of the years, in the course of which the process of payment is assumed to have taken place, were years of distress and famine, when the collections from the estate must have fallen short of the Government revenue. And there is also evidence of occasional litigation, in which the widow had to defend her title against adverse claimants. She seems to have been throughout her tenure of the estate a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822 and 1838, she was in a condition to make payments in excess of those which, from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

The transaction of 1838 is on the face of it a settlement of accounts between the widow and her creditor; a balance struck; and a mortgage taken to secure that balance. It is treated by the Respondent as a mere contrivance to give the estate to the Appellant's family in accordance with the desire

which the widow's correspondence with Government shows she had expressed in 1832. There might be good grounds for so treating it, if the other evidence in the cause was in favour of the conclusion that she had then discharged the whole of the debts of 22,000 rupees and 1,033 rupees. But their Lordships have already stated that they cannot draw that conclusion from the evidence.

They think that the burthen of proof that this settlement of account was not a *bond fide* transaction between the debtor and the creditor lies on the Respondent, and that he has failed to adduce any evidence to that effect. Assuming it then to have been a *bond fide* transaction, it follows that advances with which she was entitled to charge the estate as against her husband's heirs had previously been made to her to the amount of 21,000 or 23,000 rupees; and that there is no sufficient proof that she had then paid off these debts. What, then, is the effect of the transaction? Those advances, with the interest thereon, would considerably exceed the sum secured by the mortgage. Their Lordships think that it is a fair and just inference to take this sum of 48,614 rupees 13 annas 6 pie, which was secured by the mortgage, to be the balance due in respect of such advances after giving credit for all payments on account, and after deducting the 5000 rupees paid at the time of the settlement. If it be urged that the Appellant's case assumes other advances which the Courts below have not found to be of the character required, the answer is that in a case like this, wherein both debtor and creditor were interested in appropriating the payments so as to make this balance a charge upon the estate, the transaction itself which could only be valid in the event of appropriating the payments made towards discharge of advances which could not constitute a charge upon the estate, may reasonably be treated as evidence that such an appropriation was made. Their Lordships, therefore, are of opinion that the Appellant has succeeded in establishing that under the mortgage of 1838 his father acquired a charge on the estate for the sum therein named, which, on the widow's death, would have been valid against the next heirs of the husband if such there had been.

Further than this their Lordships are not prepared to go. They do not agree with the finding of the

Zillah Judge, that the title of the Crown was absolutely defeated by the Razeenamah of the 5th of April, 1841. They do not think that the Crown is bound by that document, or by the Judgment of the 20th of March, 1839, on which it was founded.

The result is, that their Lordships must humbly recommend Her Majesty to reverse the Decree of the High Court, and to declare that on the 20th of April, 1838, there was due from the widow to the father of the Appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, the sum of 48,611 rupees 13 annas 6 pie; that that sum was duly charged upon the estate by the mortgage of the 20th of April, 1838, and that accordingly the Appellant is now entitled to hold the zemindary against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the Respondent's claim to immediate possession of the zemindary; but it will leave an equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the order to be made on this Appeal. But if they do not so agree, the order which their Lordships must recommend to Her Majesty, as the consequence of the before-mentioned declaration, is that the Respondent's suit stand dismissed without prejudice to the right of the Crown to redeem.

The Appellant is entitled to have the costs of this Appeal and of the proceedings in the Courts below under Her Majesty's Order of January 1862, and the general costs of the suit below, except such portion of them as was occasioned by his contesting the title of the Crown to take by escheat. This latter portion ought to be borne by him, and unless already paid should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below in India.

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