

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Collector of Masulipatam v. Cavalry Vencata Narainapah, from the Sudder Dewanny Adawlut of Madras; delivered the 21st December, 1861.

Present :

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILLE.

THIS cause has come before their Lordships on appeal for the second time. They regret to find that they are still without the means of satisfactorily determining the long litigation between the parties.

The Zemindary which is the subject of the suit was claimed by the Appellant on behalf of the Government of Madras, as an escheat to which the Crown became entitled on the death of the widow of the last male Zemindar, of whom there were no heirs in remainder to the widow; and he claimed to have it free and discharged from all incumbrances with which it had been charged by the widow during her enjoyment of it.

The Respondent disputed the right of the Crown to take the particular property by escheat in any circumstances; and insisted that, even if that right existed, he had a title to the Zemindary paramount to that of the Crown by virtue of a Razeenamah executed in his favour by the widow in her lifetime. His case as to this was, that his father had made advances to the widow for some of the purposes which, under the Hindoo law, justify the alienation

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by a widow of immovable property inherited from her husband, and had obtained a Decree for the amount of the debt; that after his father's death he had taken out execution on that Decree, and that to stay his execution the Razeenamah had been executed. He further contended that this had been done with the sanction and under the advice of the then Collector of the District, and that the Government was estopped from disputing the transaction, if it could otherwise have done so, by the conduct of its officer.

The Razeenamah was in the nature of an agreement for the payment of the judgment debt by instalments, with stipulations that if default were made in the payment of any instalment, the whole sum should become due, and that the judgment creditor should be put into possession of twelve out of the fourteen villages comprising the Zemindary (which were to be impledged to him), and should, on her death, take possession of the two other villages, and hold the whole zemindary as his absolute estate. No instalment was paid by the widow, nor yet was possession taken under the Razeenamah in her lifetime. The Respondent, however, alleged that it was by reason of an order of the Sudder Court, suspending the execution of the Razeenamah, in consequence of proceedings in another suit, that he failed to get possession.

It follows from this statement that the questions to be determined in the cause were, whether the Crown had any title by escheat to the lands; and, if so, whether that title had been defeated, either absolutely or to the extent of any subsisting charge, by the acts of the widow in her lifetime. The latter question involved the consideration of the powers of a Hindoo female taking her husband's estate by inheritance, and whether the transaction relied upon by the Respondent was an act done *bonâ fide* in the exercise of her powers, or a mere colourable contrivance for transferring the property to the Respondent in spite of her disabilities.

In the Judgment of the Sudder Adawlut, which was the subject of the first Appeal, the Court had dealt with the first of these questions only. It held that the property having belonged to a Brahminical family the Crown had no right to take it by escheat, though on the clearest failure of heirs; and there-

fore dismissed the suit on that ground, without adjudicating upon the other questions raised in it.

Upon the Appeal however, the whole case was more or less fully argued. Their Lordships came to the conclusion that the Judgment of the Sudder Adawlut was erroneous; that the Crown was entitled to take the property of a Brahmin, as of any other Hindoo subject, dying without heirs; and that the question whether such property would be subject, in the hands of the Crown, to any trust in favour of Brahmins, that would be capable of enforcement, was one which could not be determined in that suit. After stating their reasons for this conclusion, their Lordships' Judgment proceeded thus:—

“Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the Appellant to the zemindary in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her lifetime. In the latter case the Government will, of course, be entitled to the property subject to the charge. It follows that the Decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised touching the acts of Lutchmedavamah in her lifetime. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the effect of the Collectors Act in 1841, it is peculiarly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature, and what the effect of the proceedings by which the execution of the Razeenamah was suspended. In these circumstances, their Lordships do not feel that they can safely do more than remit the Appeal to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government

by escheat (subject or not subject to a trust) has been established.”

Their Lordships also suggested to the parties the expediency of compromising the suit upon some such terms as the surrender of the zemindary to Government upon payment of what might be due to the Respondent for the advances really made.

Upon the recommendation of their Lordships an Order was made by Her Majesty in Council, in July 1860, pursuant to their Judgment, and remitting the cause to the Sudder Adawlut.

The case went back to Madras, and was re-heard by the Sudder Adawlut there. In the Judgment pronounced on the 22nd of October, 1860, the Judges stated that they had ascertained that both parties having failed to come to an agreement, wished the suit to proceed. They further stated that they had not found it necessary towards their pronouncing upon the merits of the suit, to call for the additional evidence which their Lordships had indicated as apparently requisite. They accordingly proceeded to deal with the merits of the suit in the following way:—

Admitting the right of the Crown to take by escheat property of which the last owner died without heirs, they held that where there had been an assignment by that owner, though a female, the Crown could not take the place of an heir to challenge her power to make that assignment. They therefore decided that the suit, having been brought upon the erroneous assumption that the Crown had the power to challenge and defeat the act of the last incumbent, should be dismissed.

They next decided that, even if the Crown had the right contended for, it was estopped from asserting it by the acts of the Collector, and the sanction given by him to the Razeenamah of 1841.

They, lastly, decided that, even if the Crown could now challenge the alienation in question, the plaint had not been properly framed for that purpose.

It is with the Appeal against this Judgment that their Lordships have now to deal.

It has been argued for the Appellants that in ruling the first and third of these points the Court below has exceeded its powers, inasmuch as it has come to conclusions inconsistent with those expressed

in or implied by Her Majesty's Order of July 1860. In their Lordships' opinion, this objection is well founded. The Order of 1860, which, after argument here, recommended, if it did not enjoin, the Court below to take additional evidence on the question whether the acts of the widow in her lifetime were valid against the Crown, must be taken to assume that the question was one fairly open to the parties upon the pleadings.

Again, the declaration that the general right of the Crown to take the property by escheat ought to prevail, unless it had been defeated by the acts of the widow in her lifetime, when followed by the direction to adjudicate upon those acts, seems to imply a decision that the Crown had established its right to maintain a suit of this nature.

The first conclusion of the *Sudder Adawlut*, however, involves a question of substance—an important question of law; and if their Lordships were satisfied that it was well-founded they would be disposed to prevent its being met by the objection, in some degree formal, of its inconsistency with the Order of Her Majesty, by taking measures to procure the variation of that Order. They, therefore, proceed to consider first whether the conclusion, in fact, correct.

The principal argument in support of it, which has been very ably put by the learned Counsel for the Respondents, is that on the death of a Hindoo owner of an undivided estate without preferable heirs, the whole inheritance descends to and vests in his widow; and that, although it be true that her power of disposition over it is qualified, and only valid against the heirs next in succession when exercised for certain purposes, or with their consent, yet if there be no such heirs it becomes absolute; or, at all events, its exercise at her free will can be questioned by nobody. Her power of disposition was likened to that of the male owner of an undivided estate in that part of India in which the general Hindoo law obtains without qualification: he can dispose of that as he will if he has no adult sons, but if there be such sons their consent is necessary to render his disposition valid. The only difference between the two cases was said to be that in the one the right of objection was confined to sons or other direct descendants, in the other it was possessed by

all collaterals capable of inheriting to the deceased husband of the widow.

It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life estate, that great confusion arises from applying analogies derived from the English law of real property to the Hindoo law of inheritance; and that when so applied the terms by which we describe estates in land under the English law are more likely to mislead than to direct the judgment aright. It may, however, be doubted whether the argument on behalf of the Respondents does not really require some such process of reasoning to support it. The Hindoo widow, it was urged, has an estate of inheritance, not a life estate; the original estate, it is said, devolves on her in a course of succession derived from the husband, who had in him an estate of inheritance which she takes as heir. Yet what is this, in effect, but to apply the English law regulating the descent of lands in fee simple from ancestor to heir?

It is clear that under the Hindoo law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindoo law that the extent and nature of the qualification can be determined.

It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of

alienation with consent may be due to a presumption of law that where that consent is given, the purpose for which the alienation is made must be proper.

Nor does it appear to their Lordships that the construction of Hindoo law which is now contended for, can be put upon the principle of "cessante ratione cessat et ipsa lex." It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Menu downwards, may be cited to show that, according to the principles of Hindoo law, the proper state of every woman is one of tutelage; that they always require protection and are never fit for independence. Sir Thomas Strange (*see* "Strange on Hindoo Law," vol. i, page 242), cites the authority of Menu for the proposition that, if a woman have no other controller or protector, the King should control or protect her. Again, all the authorities concur in showing that, according to the principles of Hindoo law, the life of a widow is to be one of ascetic privation (2 "Colebrooke's Digest," 459.) Hence, probably, it gave her a power of disposition for religious, which it denied to her for other purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated; perfectly uncontrolled in the disposal of her property; and free to squander her inherited wealth for the purposes of selfish enjoyment.

Their Lordships cannot but think that, if the consequences of the failure of heirs of the husband were such as they are now argued to be, there would be some decisions on a case so likely to have happened before; or, at all events, that there would be some trace of so startling an exception to the general rule of Hindoo law touching females taking by succession the property of males, in the ancient text-writers and commentators. The proposition, however, rests upon the argument founded on the nature of the Hindoo female's estate, as an estate of inheritance; upon a passage from a modern treatise by Mr. Strange, for which no authority is cited; and upon the opinion of the Pundits. The first, for the reasons already given, their Lordships consider unsatisfactory. The second cannot be treated as more than an opinion, though an opinion

deserving of respect and attention. Upon the last, their Lordships can but repeat an observation made by them in a late case, to the following effect: "Where an opinion apparently discordant from works of current and established authority is delivered by Pundits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned further as to authorities, usage, and generally received opinions. Such an inquiry might produce a conviction that the Pundits on a new case delivered rather their own notions of expedient law, as law, than delivered it on the force of the opinions of any writers or authoritative expounders of the Hindoo law."

Their Lordships are of opinion that the restrictions on a Hindoo widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

Their Lordships, therefore, dissent from the first ground on which, by the Judgment under appeal, the *Sudder Adawlut* has dismissed the Appellant's suit.

The next consideration is, whether the *Sudder Adawlut* was right in holding that the Crown is estopped by the act of the former Collector, Mr. Grant, from disputing the title asserted by the Respondent under the *Razeenamah*. In their Lordships' opinion the principles of estoppel do not support this contention. On every reasonable presumption the facts relating to the creation of the original debt were known to the Respondent, or to the original Plaintiff in the suit whose judgment he was enforcing. The Collector would have no necessary knowledge on the subject; nor is he proved to have had actual knowledge. His advice to the widow to the effect that unless she made an arrangement with the creditor, the estate (which, the sale being an execution sale, must be taken to mean her right, title, and interest in the estate) would be sold, is not a statement at variance with the true state of things. The *Razeenameh* into which she

entered, might, for aught that appeared, be satisfied by payment of the instalments in her lifetime. Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government in fact, or in law, directly, or by implication, ratifies the excess. The Collector in this case had certainly no authority to waive the rights to which Government might become entitled by the escheat; nor were his acts, when fairly viewed, calculated to give rise to the supposition that he had such an authority.

Their Lordships have already indicated their opinion that it is too late to assert, if it could ever have been successfully asserted, that it is not open to the Appellant on these pleadings to question the validity of the widow's alienation against the Crown. The reasoning of the Sudder Adawlut on this point seems to their Lordships to involve some misconception of the effect of the Decree under which the Respondent claims. As regards the Appellant that decree is *res inter alios acta*. He is, therefore, in a very different position from one who, coming into Court to get rid of a Decree binding upon him, has to allege and prove that it was fraudulently or collusively obtained, or is open to some other definite objection.

Again, though particular circumstances may shift the burthen of proof, the general rule certainly is, that it lies upon those who claim under an alienation from a Hindoo female to show that the transaction was within her limited powers.

Their Lordships continue to think that the evidence before them is not such as to admit of a satisfactory decision of the question whether the Razeenamah does to any and what extent constitute a charge on the Zemindary as against the Crown, and that there ought to be a further trial of that issue. Under the former Order of Her Majesty, the Sudder Adawlut should have given to each party, if so disposed, an opportunity of adducing further evidence. It does not appear to have done this, but to have acted on its own impression that no further evidence was necessary. Such at least is their Lordships' understanding of the preliminary statements in the Judgment under appeal.

In these circumstances their Lordships propose humbly to recommend to Her Majesty that the present Appeal be allowed; that it be declared that the Crown, taking by escheat, has the same right to impeach the alienation by the widow which the next heirs of the husband (if such there had been) would have had, and is not estopped from asserting that right by the acts of the Collector in 1841; that the Crown is not bound by the Decree; and that the widow was not entitled to alienate without the consent of the Crown, except in so far as she could have alienated without the consent of the next heirs of the husband, if such there had been, but that the Respondent is, at all events, 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 the Respondent's 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, as against the next heirs of her husband, if such there had been, in so far as she had not other estate of her husband to answer such purposes, and that the cause be remitted to the Sudder Adawlut to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the Razeenamab, and if not to inquire what advances, if any, were made by the Respondent's father to the widow, and whether all or any, and which, of such advances, and to what amount, were made 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 her husband, if such there had been, and whether the widow had, when such advances were respectively made, other estates of her husband sufficient to answer such purposes; and the parties respectively are to be at liberty to adduce further evidence touching the matters aforesaid, or any of them, as they may be advised, and the Sudder Court is to proceed in the cause according to the result of the said inquiries.
