

(1921) 09 MAD CK 0003
In the Madras High Court

In Re: V. Subramania Chetty and Company

Date of Decision : 14-09-1921

Acts Referred:

Citation : 70 Ind. Cas. 764 : (1922) 16 LW 46

Hon'ble Judges : Coutts-Trotter, J

Bench : Single Bench

Judgement

Coutts-Trotter, J.—This is in substance an appeal against the refusal of the Official Assignee of Madras to allow the preferential claim of

Government for the sum of Rs. 4,488-1-0 in priority to the claims of all other creditors in the insolvency of a firm trading as V. Subramania Chetty

and Co. as a Crown debt within the meaning of Section 49(1)(a) of the Presidency Towns Insolvency Act. I have had the benefit of a learned and

instructive argument as to the nature and history of debts to the Crown both in England and in this country, and it is not out of disrespect to that

argument but rather because of the assistance I derived from it that I give my judgment in a comparatively small compass. I do not intend to

enquire into the history of writs of extent whether in chief or in aid. The curious will find much learning on the subject in Ex parts Postmaster-

General, In re Boham (1879) 10 Ch. D. 595 and in the very erudite judgment of Palles, C.B., in In re Galvin (1897) 1 Ir. R. 520. Where Statute

Law intervenes, one ruling principle is that the Crown is not bound by a Statute in which it is not specially mentioned. Another is that where the

Crown comes into competition with other creditors in the case of debts of the same degree, the right of the Crown must prevail: see In re Henley

& Co. (1878) 9 Ch. D. 469 . These rules would be sufficient to determine that if this is a debt legally incurred to the Crown, It would have an

undoubted priority at Common Law. I agree with Garth, C. J., in *Judah v. Secretary of State for India* in Council 6 Ind. Dec.302 that it is

unnecessary to go into the history of the Common Law on the subject where we have the plain words of an Indian Statute. But a much wider

question is argued by Counsel on behalf of the Official Assignee. His contention is that this is not a Crown debt, because the Crown has no power

to enter into the transactions which resulted in the debt. He says that the transactions which resulted in the debt, to use an expression familiar to

lawyers though perhaps it is anlagous rather than directly appropriate--were ultra vires of the Crown.

2. The facts are these. In 1919 Government took over the Soap Factory at Calicut known as the Kerala Soap Institute, It was taken over and has

been conducted by the Department of Industries, the object being to demonstrate that this industry can be carried on at a profit and to encourage

the starting of similar factories by private enterprise. The net result has been that Government carried it on as an ordinary trading concern. Mr.

Mockett's argument was that Government is not entitled to trade except in so far as it is authorised to do so by Statute. The Government of India

by 21 and 22 Vic, C. 106, inherited all the rights and privileges of the East India Company. It is quite plain that the power to trade other than for

revenue purposes had been lost before that to the Company by 3 & 4 William IV, C. 85, Section 4. That is a prohibition imposed on the

Company itself quite distinct from the earlier prohibition imposed by 53 Geo. 3, C. 155, on the individual servants of the Company from engaging

in trade on their own account. It is, therefore, I think, quite plain that Government could not carry on this Factory by virtue of any power inherited

from the East India Company.

3. But the Advocate-General bases his claim on a much wider ground, and contends that the Crown, that is, the Government of India, is entitled to

trade in this country by virtue of the Royal prerogative. At this point the analogy of England begins to fail for a variety of reasons. In the first place,

the Crown, as the term is used by English lawyers, has a double meaning. It may mean the Sovereign in person, and no one questions the right of

His Majesty to engage as an individual in whatever trade he pleases, and no doubt, subject to technical rules of English Law, as to varying degrees

of debts such as specialty and simple contract debts. His Majesty, as a trader, would have preferential rights over other creditors, unless such rights were taken away by Statutes in which the Crown was named. On the other hand, the Crown in Constitutional Law much more frequently means King, Lords and Commons, and the essence of the distinction is that, if the Crown in that sense were to trade, it would trade with public monies and not merely with the private resources of the King. The Advocate-General admits that the Crown in that sense could not trade in England without statutory authority. He contends that that is not because the prerogative would not cover the case but because the necessary funds from the public revenue could only be obtained by a vote of the House of Commons, the result being that while the rights of the King, Lords and Commons to trade is within the prerogative, it cannot be exercised de facto unless the necessary capital were voted by an Act of Parliament. The next step in his argument is to point out that in India, where the Crown is directly vested with the revenues of the country, it can, without the need of the Parliamentary vote, apply the revenues of the country for purposes of trade by virtue of the prerogative. The prerogative may sufficiently be described, for my present purpose, as the discretionary power vested in the executive for which it does not need a Parliamentary vote or statutory authority. On this view Acts like the Telegraph and Telephone Acts would not be sources of Government's authority to conduct these businesses--for businesses they are--but merely a warrant to employ public moneys in their conduct. The immense mass of trading which the Government undertook during the War does not carry the matter any further, because it may all be said to have been legalised by Parliament under the Defence of the Realm Act, 4 and 5 Geo. V, C. 29.

4. I do not think I can rely on the fact--it is an undoubted--fact that one of the reported cases in India viz. *Secretary of State for India v. Bombay Landing and Shipping Co.* 5 B.H.C.R. 23 was a case of Government trading in the wider sense because the point argued before me was not there taken, and clearly was not present to the mind of the Court. Nor do I think that *Judah v. Secretary of State for India in Council* 12 C. 445 is a case in point, for though the Government were clearly trading in the ordinarily accepted sense of the term the trade was in opium, a recognised

source of revenue and, therefore, directly within the scope of 3 & 4 William IV, C. 85. The same observation applies to the Government trading in the Salt and Abkari Departments.

5. On the whole, I do not think I am called upon to decide the wide problem of constitutional law involved in these rival contentions. I cannot say

that this is trading for purposes of revenue, because, although the profits of this undertaking (and it resulted in fact in a profit last year) are paid into

the general exchequer and swell the Government revenue, the Advocate-General has frankly stated that the Government's purpose in this and.

similar undertakings which, I understand, are conducted on a considerable scale in many fields of industry is not to bring accretions to the revenue,

but to serve by way of industrial instruction to the people of this country. I think that the claim of the Government can be justified on the ground

that, apart from any question of prerogative, the conduct of this industrial undertaking is justified by statutory authority. As I have already pointed

out, the allocation of the revenue of India to particular purposes does not require anything in the nature of an express vote of a representative body.

Nevertheless, it is regulated by one dominating statutory provision, viz., Section 20(1) of the Government of India Acts 1915 to 1919, 5 & 6 Geo.

V, C. 61, 6 & 7 Geo. V, C. 37, and 9 & 10 Geo. V, C. 100. The words of the section are these: ""The revenues of India shall be received for and

in the name of His Majesty and shall, subject to the provisions of this Act, be applied for the purposes of the Government of India alone.

6. Exactly to draw the line as to what falls within the strict purview of the phrase the ""Government"" of the country and what is outside it, would be

an impossible task. To take an example ready to hand, many, if not most, of the Indian Railways are conducted or subsidised by Government

without specific statutory authority; it would be startling to have to come to the conclusion that such an activity of Government was without

warrant. Mr. Mockett shrank from pressing such a result and argued that, although no doubt Railways brought in much profit from the carriage of

private passengers and the goods of private owners, yet their maintenance was essential to the Government by their facilities for rapid transport of

Government Officials and the Police and Military Forces necessary to secure law and order throughout the country and that, therefore, they may

be regarded as essential to the purposes of the Government of India in the strictest sense, but he maintained that an experiment like the present, however benevolent and though wholly desirable for the benefit of the people, cannot be regarded as reasonably appertaining to the "Government of the country but rather to its improvement and education. I think there is much force in his argument, but with some hesitation I think that in India at all events it ought not to prevail. In a country with a fully developed industrial life like England, I might feel en-strained to give effect to it. But in a country like India where many industries; suitable to its natural resources and its people have either not been started at all or are nascent and struggling, I think it would be a misfortune if a Judge were driven to say that the starting and encouraging of such industries by way of education and demonstration was not within the province of the "Government" of India. The Government of India after all has long been and must long be a paternal Government, and in deciding what is within its; legitimate scope, one can hardly lose sight of that outstanding consideration.

7. I, therefore, come to the conclusion that it is not outside the statutory powers of the Government of India to conduct a Soap Factory such as this, and it follows from what was said in the earlier part of this judgment that this claim was a Crown debt recoverable in full in preference to the claims of any other creditor.

8. That disposes of the point of law which I am called upon to decide. Perhaps, I may be permitted respectfully to suggest that it would be well if such claims were not pressed in future by Government. The old theory of the priority of the Crown debts was doubtless based on the personal preeminence of the Sovereign. The King was the King and obviously took precedence over the subject. Modern lawyers justify the rule on a different ground. The rights of the Crown mean in modern times the rights of the mass of the King's subjects, and on this ground it is said to be right and just that the claims of the community as a whole should prevail over those of individuals. But I venture to think that this reasoning is not applicable to the present case. In the first place, the commercial community, which might otherwise welcome the attempts of Government to open up new avenues of trade and manufacture, is very likely to be alarmed and alienated by the claim of Government to stand on a different footing to

other traders. In the next place, and this is much more important--it appears to me that the enforcing of claims such as this--must in the end defeat

the very purpose that Government has in view. The object of the conduct of this concern, as explained to me by the Advocate-General, was to

demonstrate that the natural resources of Malabar could be profitably used by private manufacturers and traders to start and carry on similar

businesses, the Government, as it were, saying to the people ""we have shown that this business can be carried on at a profit. Let this encourage

you to put your capital into similar undertakings and hope for similar profits to those we have shown that we have made.

9. The whole demonstration obviously breaks down if the traders can reply ""you have only made a profit because you stood in a privileged

position in which we cannot stand, by claiming priority of payment of your debts over those of all your business competitors.

10. The Government Solicitor to be entitled to be paid his taxed costs on the Original Side scale by the Government.