M.R.O. 14-5,480-28-10-25.

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Judicial **DEPARTMENT.**

G.O. No. 586 Press Mis.

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Dated 12 — 8 — 1897.

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No. 11. Read the following letter from T. J. KNOX, Esq., Acting Collector of Masulipatam; to T. PYCROFT, Esq., Chief Secretary to Government, dated 18th April 1857, No. 12.

SIR,

In obedience to the orders of Government, under date 21st February 1857, relative to the No. 220. Suit regarding the Vissunnapettah Mootah, I have the honor to report that the Civil Court has given Judgment, copy of which I enclose for the information of Government and I feel sure the matter will soon be brought before the Court of Sudr Adawlut in Appeal.

(Signed) T. J. KNOX,
Acting Collector.

Decree of the Civil Court of Masulipatam. Original Suit No. 103 of 1855. Civil Court's File.

Plaintiff.	*Defendant.*
Collector of Masulipatam.	Cavally Venkatanaraina Pahpah, Zemindar of Vissunnapett.

1. This Suit was instituted to establish the right of Government to the Mootah of Vissunnapetta, valued at an annual rental of Rupees 12,405-10-11, which lapsed as an escheat on the death of the late Zemindarree V. Lutchmedavummah, and to set aside a Rauzeenamah entered into by the Defendant with the said Lutchmedavummah, by which the property in question, was hypothecated to him on account of an award passed in a (Collusive) Suit No. 18 of 1838, against that Defendant V. Lutchmedavummah, in favor of the father of the present Defendant; such alienation of real property by a childless widow being in opposition to Hindu Law, and to be put in possession of the property sued for free of all incumbrances and debt.

The Defendant in answer states, that the ancestors of the said V. Lutchmedavummah and his own, had long held pecuniary transactions, and the former had become heavily indebted to the latter. Such advances having been made for the discharge of Government Peishcush, and other personal liabilities. That subsequent to the said V. Lutchmedavummah coming into legal possession of the property, his, Defendant's, father advanced other loans of money for similar purposes. That these dealings were brought to a close in 1837, and the balance due on a settlement of accounts not being paid off, Defendant's father brought the suit alluded to No. 18 of 1838, in the late Provincial Court, and obtained a Decree in his favor. That Defendant's father having shortly after that period died, he, Defendant, applied for the execution of that Decree, (in 1840) when a Precept was issued through the late Auxiliary Court to the then Collector who sent an *Eneyetnamah*, dated 29th March 1841, directing the said Lutchmedavummah to settle the demand against her in 5 days; whereupon, a Rauzeenamah (now sought to be set aside) was entered into between Defendant and Lutchmedavummah, dated 5th April 1841, but which owing to the vexatious claims brought against the same property by other parties, and the dilatory Law Proceedings, consequent thereupon, was only put into execution (by Defendant being placed in possession of the property together with past produce) through the proceedings of the Sudr Udalut, dated 13th February and 3rd April 1854. Defendant further urges that from the very commencement of the above proceedings, the Government through their Agent, the Collector, was a cognisant and consenting party, but that on the death of the said Zemindarree Lutchmedavummah, the then Collector attached the Estate *not* as an escheat to Government, but, pending the decision of the rights thereto of certain contending claimants, as appears by the order of the Civil Court, dated June 24th 1853.

That this Zemindaree having been held under a permanent Cowle with full power to dispose of or alienate it, it can in no way become an escheat to Government, except on failure of payment of peishcush, which has not happened.

That by Hindu Law any widow in possession as heir, has full right to sell, mortgage or alienate in perpetuity, the property or any portion thereof for necessary purposes, such as for the liquidation of debt contracted for the discharge of Government khist and liabilities, or for her

own maintenance, &c., and finally that by this law, which Plaintiff adduces, also the estate is of such a nature that under no circumstances, could it escheat to Government. Defendant therefore prays for the dismissal of this suit with all costs.

The reply and rejoinder support the plaint and answer respectively.

Points were recorded on 21st April 1856.

The Plantiff filed 4 Documents.

The Defendant filed 12 Documents.

Defendant presented a Motion No. 484 of 1856, requesting that questions might be submitted to the Hindu Law Officers of the Court of Sudr Udalut, with reference to the 2nd and 6th points recorded by the Court.

Judgment.—The Civil Judge has given the present Case his most careful consideration.

Neither parties before the Court called any witnesses, and were contented to rely on the weight due to their respective documentary evidence.

The present suit was preferred to eject the Defendant in possession from the estate in question, conferred on him by an interlocutory proceeding of the Court of Sudr Udalut, and also to set aside a Rauzeenamah Postpone Petition dated 5th April 1841, filed as No. 5 in so far as it indirectly bore on the claim of Government to the property therein alluded to, which, it is maintained, escheated through a failure of heirs. The justice or otherwise of the claim in O. S. No. 18 of 1838, is in no way called in question in the present case, but the suit is alluded to as having been a "collusive" one. The Document (5) based on the Decree in the above case, deferred the execution of the latter under certain stipulations, and the Defendant urges that owing to the failure of his opposite party to act up to the said stipulations, the terms referred to therein became absolute from and after such failure. This Document (5) recapitulates the terms of the Bond on which the original suit No. 18 of 1838 dated 30th April 1838 was founded, viz., a mortgage deed dated 30th April 1838 by which the greater portion of the Estate in question (or 12 out of 14 Villages) was impledged to that Plaintiff; from the proceeds of which, the then claim was liable to liquidation. (The mortgage Bond was given on an alleged settlement of accounts between the parties which extended from 14th May 1810 up to date, or over a period of 28 years.) The Decree passed in the above suit declared such Mortgage Deed equivalent to a conditional Bill of sale and awarded to the Plaintiff the recovery of the amount sued for from the Defendant by the sale of the mortgaged property, in the first place, and in the event of the proceeds therefrom being insufficient to meet the claim, that such deficiency should be recovered from any other property belonging to the Defendant, the Rauzeenamah Postpone Petition (V) dated 5th April 1841, quoted at length in the plaint acknowledged the above decision and by its stipulations transferred (in consequence of the failure of the Defendant in the case to pay the very first instalment) on the 15th December 1841 (alluded to therein) by that act and deed the whole of the above 12 Villages to her adversary the present Defendant. This transfer was effected during the life time of the said V. Lutchmedavummah who appears not have died till about the 1st September 1849. Defendant urges that his claim to possession of the property became absolute accordingly from such previous date, viz., 15th December 1841, when the 1st instalment under the Rauzeenamah Postpone Petition became due, in fact that the decree passed in suit No. 18 of 1838 and dated 10th March 1839 determined this point, by declaring the said property there and then liable in extenso for his father's demand.

With regard to the 1st point for the Plaintiff, he produced the "opinion" of the Sudr Udalut (exhibit marked A) and the consequent inability of the Zemindarree V. Lutchmedavummah, who only held a life interest in the property to alienate the same to others to the prejudice of her husband's heirs.

The question in further detail was submitted again for the opinion of the Law Officers, Pundits of the Sudr Udalut and also with reference to points Nos. 2 and 6 given to the Defendant, at his request. This opinion of the Sudr Court Pundits apparently at first sight disposed of the question, distinctly in favor of the Defendant.

It would appear therefrom that punctuality of payment of the Circar Peishcush (as well as other items noted) is of such paramount importance, that the Hindu Law holds a widow possessed

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of only real estate, competent to alienate her right and title thereto to meet such demands. In fact, that to avoid the risk of a lapse to Government on account of balances of Peishcush, she is empowered to dispose of the property by sale or mortgage to others, and such transfer becomes valid and binding upon her and her relatives, and property so transferred cannot come under the title of *Beywaress* or heirless property after her transferer's death.

But it must be observed that the conditions under which such alienation takes place, must be clear and explicit, viz., *that there was no other alternative that the Estate itself did not yield, under any circumstances whatever, produces sufficient to meet the above charges,* as well as her own personal expenses.

None of these conditions is attempted to be proved in the present or previous suits, nor does it appear that a single Rupee has ever been paid in liquidation of the original debt or mortgage bond up to the date of the widow's decease, the whole subject has been waived for some reason unexplained and left to inference.

By the 3rd para: of the answer of the Pundits of the Sudr Udalut, it is laid down that the Circar cannot take as *heirless property* that which has been legally transferred by the proprietor thereof during his life time, and adds "*that in the present instance,* the Estate transferred as above, cannot be escheated as Beywaress." As no particular "instance" was cited for the information of the Pundits, it seems somewhat singular that they should allude to the "present" one before the Civil Court, as *the Brahmin widow referred to.*

With reference to the Decree passed in O. S. No. 18 of 1838, the Plaintiff on the one hand maintains that as neither he nor his predecessors in office were parties to that suit, in which the interests of the Government were concerned, he is in no way bound by that decision. The Defendant on the other, argues that the Plaintiff (that is to say his predecessors in office) were ex-officio cognizant of every step in the above proceedings, and substantiates this by the production of documents Nos. VI, VII, VIII, and urges that Plaintiff is consequently bound by the acts of his predecessors, who possessed the same full authority from the Government now exercised by Plaintiff.

In disproof of the 3rd point given to Plaintiff and which he sought to substantiate by his Document D and (Extract from the Minutes of Consultation of Government, dated 16th July 1850) which in consideration of certain "circumstances" laid before them by the Commissioner for the Northern Circars, declared the Estate now in dispute to have escheated, on apparent failure of heirs, he, Defendant, filed the Document marked IX, a copy of a communication from the Collector to the Civil Judge, dated 20th October 1849, which simply reported having assumed charge of the deceased Zemindaree's property pending the disposal of certain claims adduced by parties before the Court. This view of the case was also adopted by the Civil Court in the Extract from the Proceeding, dated 24th June 1853.

Certain points of law however still remain for consideration before determining the issue of the present case.

With reference to the Suit No. 18 of 1838, the circumstances connected with it are as follows:

The widow Zemindarree V. Lutchmedavummah applied to the Collector in 1830 to register the transfer of her estate in the name of the grandson of her uncle, and nephew of the Plaintiff in that case. Being informed by the Collector on the 9th November 1831 that such transfer would not be legal, the matter appears to have dropped until 1838. On the 20th April of that year, the Mortgage Bond the ground of the original suit No. 18 of 1838, was executed by which the estate was pledged to that Plaintiff for Rupees 48614-13-6 due on account. The first instalment became due on the 20th May following, and on failure of payment, a demand appears to have been made and acknowledged on the 24th Idem. The date of the Plaint in No. 18 of 1838 is 15th June or 3 weeks subsequently, on the 3rd July another letter was passed between the parties calling on Plaintiff to compromise the suit. The suit itself was however allowed to go *exparte,* and a Decree was passed 10th March 1839, whereby the property became liable (by sale) for the amount of award. Instead however of this Decree being literally carried out *by sale* whereby possibly a portion only of the property might have changed hands in liquidation of the award, a Postpone Petition or Kararnamah (V) was subsequently entered into between the Defendant and the

heir of that Plaintiff (present Defendant) whereby the property itself was to be transferred to that Plaintiff creditor (without any reference to the value of the estate) and devising also the 2 remaining Villages left in her (V. Lutchmedavummah's) possession on her death, to the same party, thus constituting the document a testamentary one as well. The question hereupon arise whether or no this Kararnamah Postpone Petition is a legal and valid deed, even under the circumstances recorded.

The Hindu Law quoted allows of *the sale* of real property by a Hindu widow to an extent, sufficient to meet certain necessary expenses and demands alluded to, but it remains to be proved whether the sale or transfer of the whole of the widow's real property *was* necessary to cover those expenses, and it is nowhere shown that such was the case. On the contrary judging from the value of such property generally, the quantity appears to have been greatly in excess of the exigencies of the case which alone could justify such transfer upon an open *sale* which however never took place.

As stated in an earlier para: of this Decree, the Plaintiff has not brought the present suit to question the validity or legality of the claim in original suit No. 18 of 1838, the Decree in which awarded to that Plaintiff the amount sued for from the property mortgaged. In pursuance of that Decree when execution was sued out by that Plaintiff's heir in Miscellaneous Petition No. 321 of 1840, a Precept was issued dated 14th January 1841, (marked VIII) by the Provincial Court, directing the enforcement of that Decree by *the sale* of the property.

With reference to the stipulations of the Kararnamah or Postpone Petition (V) dated 5th April 1841, the Civil Judge observes as follows:

It acknowledges the former Mortgage Bond 20th April 1838, and the justice of the Plaintiff's claim in No. 18 of 1838, that the Decree passed thereon *exparte* after a "thorough enquiry" made into the matter having been sought to be enforced by Plaintiff, the Provincial Court directed the sale of the mortgaged property, she the Defendant however to *secure* her Zemindaree from *sale* by *auction*, entered into the present Rauzeenamah, to pay up the amount due to date (viz., Rupees 67,444-12-0 which included the sum of Rupees 11,829-9-8 due on account of *interest* from the date of the previous Decree, not one anna of which had been liquidated from the Estate proceeds during the whole time) together with interest at one per cent per mensem pending such payments. That the 12 out of the 14 villages alluded to, together with the Government Cowle for the whole should be impledged to Plaintiff as security. That on failure of paying up any one *instalment*, Plaintiff might move the Court for the recovery of the entire balance *entered in the Petition* principal and interest, without waiting for the ensuing instalments; and the Court was thereby authorized to issue Precept to the Collector to *make over at once and absolutely to Plaintiff*, his heirs and assigns, the 12 villages without further consent of Defendant, and that after her, Defendant's, death, the remaining 2 villages should also be taken possession by that Plaintiff and the whole incorporated in his Estate; to be enjoyed as an ancient Zemindaree on the same terms as by herself; and thus the litigant parties agree amicably to postpone the execution of the Warrant "for the present." To all which terms, that Plaintiff cordially agreed. Defendant V. Lutchmedavummah again, as matter of course, failed to act up to the stipulations of the deed, which thereby became absolute by her Defendant on the 1st instalment.

It is the opinion of this Court that the object of this Deed was to make that permanent and absolute, which the Mortgage Bond (alluded to in original suit No. 18 of 1838) had made simply conditional, or dependent, on the amount that should be realized by the enforcement of the terms; to wit by the sale of the property alluded to, and although such Deed may have been executed, the Civil Judge is of opinion that for the reasons recorded, such transfer without good and sufficient cause shown was illegal and contrary to the provisions of Hindu Law.

From a full consideration of the whole of the circumstances of the case, the Civil Judge is of opinion that the Kararnamah or Postpone Petition alluded to (No. V.) must be quashed and that the provisions of the Decree in original suit No. 18 of 1838 should be enforced in its integrity by the sale of the property therein alluded to, or so much thereof as may be sufficient to meet the balance of the award then made, and to *no later period*, the whole to be exposed at an

Fort St. George, Judicial Consultation, 12th May 1857.

upset price equal to that demand, and on failure to realize the sum decreed, the property itself should be made over to Defendant.

On the other hand, should the value of the property be more than sufficient to satisfy the ward to Defendant in the former Decree, in consequence of there being no direct heirs to the deceased V. Lutchmedavummah, late Zemindarree of Vissunnapettah, the title of the Government to claim such property as an escheat is confirmed (on payment of the lien thereupon viz., the balance due to Defendant as pointed out.)

The Civil Judge on perusal of the Pleadings observed that 8 sheets of the Plaint and 2½ of Defence are occupied in quoting at length Documents that should properly have been adduced in their proper place as evidence; and consequently since such documentary evidence was receivable on stampt paper of the value of 8 Annas instead of 4 Rupees each paper (as must have been well known to the Pleaders of the respective litigants) the Court resolves that the difference of the value of such papers shall be recovered from the respective Pleaders under Section IX, Regulation XIV, of 1816.

In conclusion, and on a consideration of the nature of the present suit, the Civil Judges determines that the costs of the present suit shall be recovered and paid by Plaintiff if the property lapses as above to Government, otherwise, that they shall be borne by the parties themselves respectively.

Given under my hand and the Seal of the Court at Masulipatam, the 8th day of April 1857.

(Signed) J. J. COTTON,
Civil Judge.

(True Copy.)

(Signed) W. KNOX,
Acting Collector.

No. 12. ORDER THEREON, No. 526; dated 6th May 1857.

Resolved that a copy of the foregoing communication be forwarded to the Honorable the Court of Directors with reference to their Despatch of 17th December, No. 19 of 1856, paras: 35 to 40.

(Signed) T. PYCROFT,
Chief Secretary.

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№526

Resolved that a copy of the foregoing communication be forwarded to the Honble the Court of Directors with reference to their Despatch of 17th Decr. № 19 of 1856 paras 35 & 40.

W.G.

Fort St. George
6th May 1857

Copy to the Ag Coll of Masulipatam Desp. 11th

Lieut. C. Maltby
Sec. to Govt.

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24-2-57