

Government {1898} of Madras.
REVENUE.

CONFIDENTIAL.

MISCELLANEOUS.

Recd.

Regd.

} 1898.

Enclosures

Spare copies

G.O., Mis. No. 1404 (Confdl. No. 1024), 21st Mar. 1898.

MARCH.

Will of the late Maharaja of Vizianagram.

Communicating to the Collector of the Vizianagram Zamindari opinion of the Advocate-General, Madras, regarding the taking out of probate of the —.

CONFIDENTIAL.

GOVERNMENT OF MADRAS.
REVENUE DEPARTMENT.

READ—the following G.O., No. 1619, Judicial, dated 19th November 1897:—

Read—letter from the Government of India, Home Department, Nos. 3, Public/101, and 808, dated 23rd January and 17th May 1897, respectively.

Read—letter from the Inspector-General of Registration, G. No. 2463, dated 20th May 1897.

Read—letter from the Government of India, Home Department, No. 1506, dated 16th July 1897.

Read—letter from the Inspector-General of Registration, G. No. 4223, dated 29th July 1897.

Read—letter from the Government of India, Home Department, No. 2076, dated 7th October 1897.

Order—No. 1619, Judicial, dated 19th November 1897.

The following letter will be despatched to the Government of India.

2. The attention of all Collectors will be invited to the fact that in cases in which the Collector of a district, acting under Regulation VII of 1817, has reason to suppose that the whole or part of the property of a deceased person, whose will has been deposited with a Registrar, should escheat to Government, it is open to him to proceed if necessary under section 45 of the Indian Registration Act III of 1877 and to obtain a copy of the will in the case.

(True Extract.)

(Signed) A. T. ARUNDEL,
Chief Secretary.

To the Inspector-General of Registration,
all Collectors.

the Revenue Department (with Honourable Members
and His Excellency's notes in original for consideration of the
questions regarding the Vizianagram and Pithapuram wills).

Read—the following Official Memorandum No. 25, Revenue, dated 29th January 1898:—

Official Memorandum—No. 25, Revenue, dated 29th January 1898.

The Advocate-General is requested to favour the Government with his opinion as to whether the minor, who has been appointed executor of the will of the late Maharaja of Vizianagram, is bound by law to take out probate of the will and whether his guardian—the Collector of Vizianagram—may make an application for it on his behalf.

(Signed) G. S. FORBES,
Secretary to Government.

To the Government Solicitor.

READ—Endorsement of ERNEST BARCLAY, Esq., Government Solicitor, Madras, dated 15th February 1898, No. 88, forwarding the following opinion of the Officiating Advocate-General:—

Opinion.

The last Will and Testament of the late Maharaja of Vizianagram was, I am informed, made in Vizianagram, and not in Madras. I believe that a comparatively small portion of the property, to which the Will relates, is a house situate in Madras, and also some houses in Calcutta. The Hindu Wills Act No. XXI of 1870 is, therefore, inapplicable to this Will [vide section 2 (a)] except in so far as it relates to immoveable properties situate in Madras and in the territories subject to the Lieutenant-Governor of Bengal [vide section 2 (b)]. The minor, who is the executor and residuary legatee under the late Maharaja's Will, is not bound by law to take out probate of the Will, unless any occasion should arise when it will be necessary for him to establish in any Court of Justice his title to the houses in Madras and Calcutta as executor or legatee under the late Maharaja's Will. So far as other properties comprised in the Will are concerned, his title to such properties as executor or legatee can be established simply on proof of the Will when occasion should arise to establish such right in a Court of Justice. But in respect of outstanding debts due to the estate of the testator other than rent, revenue or profits payable in respect of land used for agricultural purposes, no decree could be obtained nor any decree passed in favour of the late Maharaja executed, without the production of a probate of the Will or letters of administration with the Will annexed, or a certificate granted under the Succession Certificate Act VII of 1889 (vide section 4 of Act VII of 1889).

2. Section 187 of the Indian Succession Act, which enacts that no right as executor or legatee can be established in any Court of Justice, unless a court of competent jurisdiction shall have granted probate of the Will, is incorporated in the Hindu Wills Act XXI of 1870, but not in the Probate and Administration Act V of 1881. The result, therefore, is that probate of a Will made by a Hindu outside Madras, Bombay and the territories subject to the Lieutenant-Governor of Bengal is not compulsory (vide I.L.R., 17 Calcutta, 272, and 18 Allahabad, 260). But if such Will relates to immoveable property situate within those towns or territories, the executor under the Will or a legatee of such immoveable property could not establish in a Court of Justice his right as such unless probate of the Will had been granted by a court of competent jurisdiction. Even in respect of Wills made by Hindus to which the Hindu Wills Act does not apply, probate could be obtained at the option of the executor under the Probate and Administration Act either in a High Court or a District Court, and in that case the probate shall under section 59 have effect and operation throughout British India or the province as the case may be.

3. Where a minor is the sole executor or residuary legatee, he can obtain no probate of the Will until he attains the age of majority. But during his minority, the legal guardian of such minor may obtain under section 31 of Act V of 1881 letters of administration with the Will annexed. In the present case the legal guardian of the minor being the Collector of Vizianagram for the time being appointed under section 4 (6) of the Guardians and Wards Act, the Collector as the legal guardian in his official capacity may obtain letters of administration with the Will annexed. As already observed, in respect of outstanding debts due to the late Maharaja, either probate or letters of administration with the Will annexed should be obtained, or a

certificate under Act VII of 1889 should be obtained. In the former case succession duty will have to be paid in respect of the whole estate, whereas in the latter case succession duty will have to be paid only in respect of the outstanding debts to be recovered. Under section 1 (4) of the Succession Certificate Act, a certificate may be granted under that Act, even in a case in which a deceased Hindu left a will if such will is not governed by the Hindu Wills Act (*vide* I.L.R., 18 Bombay, 608).

MADRAS,
14th February 1898.

V. BHASHYAM AIYANGAR,
Offg. Advocate-General.

ORDER—Mis. No. 1404 (Confdl. No. 1024), Revenue, dated 21st March 1898.

The Advocate-General's opinion received with the last of the papers read above will be communicated to the Collector of the Vizianagram Zamindari for information and guidance.

(True Extract.)

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Secretary to Government.

To the Collector of the Vizianagram Zamindari.

Exd. W. D'Moss.

12 Copies.

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NOTES CONNECTED WITH G.O., MIS. No. 1404 (CONFDL. No. 1024),
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[SUBJECT.—Taking out probate of the will of the late Maharaja of Vizianagram.]

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In connection with the question of the disposal of "wills deposited in Registration offices but not withdrawn," the Hon'ble Sir Henry Bliss enquired whether "due care was always taken in the matter of proving wills when Government servants had the power to interfere." The Honourable Member referred in particular to the Pithápuram and Vizianagram Zamindaris which are under Government management on behalf of the minor proprietors.

2. The Hon'ble Mr. Grose observed that in regard to Pithápuram, the will need not be proved on behalf of the minor, who inherited the property as the son, but that enquiry might be made of the Court of Wards whether other beneficiaries, if any, have proved it of their own accord though they could not be forced to do so. In the case of Vizianagram, however, he was of opinion that a probate of the will was necessary as the minor was executor, and that the guardian should apply for it on his behalf. He directed, however, that a reference should be made to the Advocate-General on the subject. In these views His Excellency concurred.

3. The question for consideration is whether a reference need be made to the Advocate-General.

The following Acts relate to the subject of wills:—

- (i) The Indian Succession Act X of 1865.
- (ii) The Hindu Wills Act XXI of 1870.
- (iii) Probate and Administration Act V of 1881.

Section 331 of Act X of 1865 states: "The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist." Act XXI of 1870 which provides rules for the "execution, attestation, revocation, revival, interpretation and probate of the wills of Hindus, Jainas, Sikhs and Buddhists" applies only to the towns of Madras and Bombay—*vide* the preamble. The Probate and Administration Act (V of 1881) however applies to the mofussil; as section 2 states "chapters II to XIII, both inclusive, of this Act shall apply in the case of every Hindu, Muhammadan or Buddhist. . . ." But it contains no provision similar to section 187 of the Indian Succession Act which directs: "No right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed"—*vide* also I.L.R., 14 Cal., 40). Hence the taking out of a probate is not compulsory in mofussil districts. It is necessary in the town of Madras under section 187 of Act X of 1865, which by section 2 of Act XXI of 1870 as amended by section 154 of Act V of 1881 has been made applicable to "all wills and codicils made by any Hindu." Even as regards the latter, an application for a probate will not be needed unless a civil suit is under contemplation.

4. For orders whether in these circumstances a reference to the Advocate-General need be made. If the minor need not take out a probate, his guardian cannot, it is submitted, put him to expense by doing so.

V.K.R.
26-1-98.

As this department cannot give any authoritative exposition of the law, please put up draft making the reference to Advocate-General as required by Honourable Member.

G. S. FORBES.
27-1-98.

To Secretary—

Please see draft below.

2. A copy of the will is not here, but it is presumed that the Advocate-General, who has been consulted on the subject more than once, knows all about it.

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Issued as Official Memorandum, No. 25, dated
29th January 1898.

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G.S.F.
28-1-98.

Endorsement of the Government Solicitor, No. 88, dated 15th February 1898.

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Please see the Advocate-General's opinion forwarded with the above which states that probate of the will may or may not be taken out, except when there is a civil suit affecting landed properties in Madras or Calcutta, or when any of the Maharaja's debts have to be collected through civil courts.

2. Seeing that the minor is not bound to take out probate of the will except in the two cases referred to, the question for consideration is whether his guardian will be acting within his authority when he takes out probate before it is actually required.

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We may communicate the Advocate-General's opinion to the guardian of the minor.

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Yes.

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Sir Henry Bliss to see.

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The Advocate-General (and every one else) seems to have left out of account the large Benares property (worth, I believe, about Rs. 1,20,000 a year) which is in Bengal and of which the Collector of Vizianagram has taken possession and is administering; can he do that without probate? Where is his *locus standi* with reference either to the Government of Bengal or to the tenants?

Does it make any difference that the Collector of Vizianagram has taken possession of the property in Madras and has actually sold some of it?
I should like these points to be considered.

H. W. B[LISS].
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2. With reference to the Hon'ble Sir Henry Bliss's remarks *supra*, attention is solicited to paragraph 2 of the Advocate-General's opinion. With regard to the Benares property and that in Madras, probate of the will will be required only in the event of a dispute requiring a reference to a Civil Court, *i.e.*, when the authority of the executor is questioned. For the Court will not recognize the executor of the will, unless he has been granted probate of the will.

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All we have done is to communicate the Advocate-General's opinion to the Collector for his guidance.

The opinion points out that the Hindu Wills Act is applicable so far as concerns, *inter alia*, immovable property in the territories of the Lieutenant-Governor of Bengal. But Benares is not in those territories; it is in the North-Western Provinces,* and the Advocate-General tells us that probate is not necessary; a succession certificate is sufficient; but if probate is taken out it avails throughout British India.

* So it is. I must have been misled by my recollection of the Benares Opium Agency being under Bengal.

H.W.B.
17-3-98.

G.S.F.
12-3-98.

H.W.B.
17-3-98.

Issue order.

G.S.F.
19-3-98.

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To the Hon'ble Sir Henry Bliss—

All we have done is to communicate the Advocate-General's opinion to the Collector for his guidance.

The opinion points out that the Hindu Wills Act is applicable so far as concerns, *inter alia*, immovable property in the territories of the Lieutenant-Governor of Bengal. But Benares is not in those territories; it is in the North-Western Provinces,* and the Advocate-General tells us that probate is not necessary; a succession certificate is sufficient; but if probate is taken out it avails throughout British India.

* So it is. I must have been misled by my recollection of the Benares Opium Agency being under Bengal.

H.W.B.
17-3-98.

Issue order.

G.S.F.
12-3-98.

H.W.B.
17-3-98.

G.S.F.
19-3-98.

[Issued as G.O., Mis. No. 1404 (Confdl. No. 1024), Revenue, dated 21st March 1898.]