# APPELLATE CIVIL.

*Before the Honourable Mr. Justice Farran, Chief Justice, and Mr. Justice Parsons.*

BHA'URA'O DA'DA'JIRA'O (ORIGINAL PETITIONER), APPELLANT, *v.* LAKSHMIBA'I, WIDOW OF RA'NOJIRA'O AND ANOTHER (ORIGINAL CAVEATORS), RESPONDENTS.*

1895. *July* 17.

*Probate and Administration Act (V of 1881), Secs. 56 and 57—Testator subject of the Baroda State—Will executed at Baroda—Disposition of immoveable property in British India—Courts in British India—Jurisdiction—Probate.*

Under section 56 of the Probate and Administration Act (V of 1881) a District Judge has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject, if the testator had at the time of his death moveable or immoveable property within the jurisdiction of the Judge.

The discretion vested in a Judge by section 57 of that Act does not extend to a case where there is no Court of concurrent jurisdiction in India to which application for probate can be made.

The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India.

APPEAL from the decree of C. G. W. Macpherson, District Judge of Belgaum.

Application for probate. Bháurão Dádájiráo applied to the District Judge of Belgaum for probate of the will of one Ráṅojiráo Ghorpáde, deceased.

The deceased was a subject of the Baroda State and the will was executed at Baroda, but the petition for probate stated that the testator had left immoveable property situate in the district of Belgaum.

The application for probate was made under section 56 of the Probate Act (V of 1881).

The Judge rejected the application on the following ground :—

"The testator is the subject of the Baroda State, and it does not appear to me that I can determine whether the document, probate of which is sought, is a will, *i. e.*, whether it is the legal declaration of the intentions of the testator (section 3 of Act V of 1881), as the testamentary law of Baroda may be altogether different to that of British India.

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"It appears to me that the proper place to prove a will made in Baroda by a Baroda subject is Baroda itself, after which action can be taken under section 5.

"It is said that the testator is not only a Baroda subject but also a British subject, but I cannot see that for the purposes now in question he can be the latter when he is admittedly the former.

"I must reject the application both for want of jurisdiction and on the analogy of section 57 of Act V of 1881."

The applicant appealed.

*Ganesh K. Deshmukh*, for the appellant (applicant):—The will was made at Baroda. It disposed of immoveable property situate in the Belgaum District. The property is situate in British territory, and under section 56 of the Probate and Administration Act the Judge had jurisdiction to entertain our application.

*Bálájí A. Bhágvat*, for the respondents (opponents):—The testator had his domicil at Baroda and the will must be proved to be a valid will, having regard to the law of the testator's domicil.

[FARRAN, C. J.:—But there is immoveable property in the Belgaum district: therefore the law of British India is applicable to the will.]

In the case of *In the goods of Elliott*[1], the question of domicil was considered in determining the legality of a will.

[FARRAN, C. J.:—The law of domicil applies to moveable and not to immoveable property.]

The Probate Act makes no distinction between moveable and immoveable property. Section 56 of the Act refers only to wills made in British India, inasmuch as the Act applies to British India. Section 3 of the Act, which defines a will, speaks of "property" only and not of moveable and immoveable property. We contend that the will being made at Baroda is not governed by the Probate Act.

FARRAN, C. J.:—In this case one Bháuráo Dádájiráo applied to the Judge of the District Court of Belgaum, under section 56 of Act V of 1881, for probate of the will of Ránojiráo Ghorpáde, stating in his petition that the testator had left immoveable property within the district of Belgaum. The testator is stated to

(1) I. L. R., 4 Cal., 106.

have been a subject of the Baroda State. There is no finding as to where his domicil was. The will was executed at Baroda.

Section 56 of the Probate and Administration Act, 1881, gives jurisdiction to the District Judge to grant probate of a will, if it appears from the petition of the applicant that * * * * the testator had, at the time of his death, any property, moveable or immoveable, within the jurisdiction of the Judge. That provision is general and is quite irrespective of the place where the will was executed or of the nationality of the testator or of the place of his domicil.

It has always been the practice of the Courts of Probate in England to grant probate of foreign wills, whether executed abroad or not, if the testator has left personal property in England. The cases of *In the goods of De Pradel*(1), *In the goods of Donna Maria De Vera Maraver*(2), *In the goods of De La Saussaye*(3) are instances of the exercise of this jurisdiction. In *Bloxam* v. *Favre*(4) the plea was filed to a petition for probate of a will that the will, which was that of a woman domiciled in Germany, had not been made according to German law. The Court in such cases, if requisite, takes evidence as to the law relating to the execution of wills in force in the country where the testator was domiciled. The late Supreme Court and this High Court have always followed the same practice in the exercise of their testamentary jurisdiction. There is, therefore, no warrant for limiting the express words of section 56 of the Probate and Administration Act, 1881, in the manner in which the learned Judge has limited them, or for his holding that he has no jurisdiction in the case.

The District Judge was also in error in applying the provisions of section 57 of the Act by analogy to this application. When between Courts of different districts in British India there is a question as to which of such Courts can most justly or conveniently grant probate, the Judge has a discretion to refer the applicant to the more convenient Court; but when there is no Court of concurrent jurisdiction in British India to which the

(1) L. R., 1 P. and D., 454.
(2) 1 Hagg., 498.
(3) L. R., 3 P. and D., 42.
(4) 8 Pro. Div., 101.

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applicant can apply for probate, the Judge is vested with no such discretion. An executor whose testator has left property in British India is entitled to probate of the will in the Court in British India which has jurisdiction in the case or where there is more than one such Court in the most convenient of them. Baroda is not a district within the meaning of the Act, and the Judge has no discretion to refer the applicant to the Baroda Court. Analogy has no place in the case of a positive enactment such as this. If a foreign will has already been proved and deposited in a competent Court abroad, section 5 of the Act, following the English law, enables a Court in British India to grant letters of administration to the applicant with a properly authenticated copy of such will annexed, and thus to dispense with the necessity of proof of the original will; but where a foreign will has not been so proved, the Judge will have himself to take evidence as to the due execution of the will, according to the law of the country in which the testator was domiciled, in cases where the property in respect of which probate is sought is moveable or personal property, and must, if necessary, satisfy himself by evidence as to the law relating to the execution of wills in force in such country. In the present case no such inquiry is necessary, as the property left by the testator in British India is immoveable. The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India. This has been established by a series of decisions too numerous to refer to. They will be found collected in Jarman on Wills, Vol. I, p. 76.

We reverse the order of the District Judge and remand the case in order that the application may be dealt with on its merits. Costs to abide the result.

*Order reversed and case remanded.*