

(1906) 03 BOM CK 0014
In the Bombay High Court
Case No : Motion in Suit No. 498

N.C. Macleod

APPELLANT

Vs

H.B. M'S Consul General, Zanzibar

RESPONDENT

Date of Decision : 26-03-1906

Acts Referred:

Succession Act, 1925 — Section 242

Citation : (1906) 8 BOMLR 725

Hon'ble Judges : Lawrence Jenkins, J;Batty, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Lawrence Jenkins, K.C.I.E., C.J.—This is a motion on behalf of His Britannic Majesty's Consul General at Zanzibar for an order that Mr. Macleod, the Receiver appointed in Suits No. 255 of 1893, and No. 187 of 1898, be directed to pay probate-duty on all the property and credits which Moosabhai Tharia deceased died possessed of or entitled to at the time of his death which have, or were likely to come into the hands of the Receiver.

2. The first of these two suits has been brought for the administration of the estate of Sir Tharia Topan : the second for the administration of the estate of Moosabhai.

3. The property and credits on which probate-duty is sought consist of the interests derived by Moosabhai under the will of Sir Tharia Topan in a house at Zanzibar and in the residue left by that testator.

4. Moosabhai survived Sir Tharia Topan and died on the 21st of January 1892. At that time probate was not necessary. But by the Zanzibar Order in Council dated the 7th of July 1897, the Indian Succession Act, except Section 331, was made applicable to Zanzibar.

5. On the 8th of February 1898 notice was served on the executors named in the

will of Moosabhai calling on them to appear before the Zanzibar Court and show cause why they should not be dealt with under Article 33 of the Zanzibar Order in Council of 1897, for dealing with estate of the late Moosabhai Tharia without obtaining probate of the will.

6. The executors appeared to show cause by Mr. Mead, who said his clients had not dealt with the property, and undertook to apply for the probate.

7. On this the rule was discharged.

8. On the 2nd of March 1897, the executors applied, and on the 22nd October probate was ordered to issue.

9. On the 25th of November 1898 the Court at Zanzibar passed an order in these terms :-

Ordered that executors take out probate at once, duties on value of estate can be paid when it can be ascertained.

10. No duty has as yet been paid.

11. On the 21st of July 1903 it was ordered by the Court at Zanzibar "that the house belonging to Moosabhai deceased at Shangani in the occupation of the Zanzibar Government as the Post Office be sold and that duty at the rate of 3 per cent on Rs. 4,00,000 be recovered from the proceeds thereof unless the Receiver do within six weeks from the date hereof pay duty at the above rate on Rs. 200,000 admitted by him to be the estate of the said deceased now in his hands and on Rs. 20,000 the estimated value of the said house of the deceased and give an undertaking to file a full and complete inventory and account of the whole of the estate of which the said Moosa Tharia died possessed within the jurisdiction of this Court and give security to the satisfaction of this Court for the due payment of any further duty up to the amount originally claimed that may eventually be found payable on the filing of such inventory and account. And it is further ordered that the costs of His Britannic Majesty's Government when taxed be paid out of the estate."

12. From this order an appeal has been preferred.

13. When the case came before this Court it was felt by those who represented the respondent that there were serious difficulties in the way of upholding the order made by the Zanzibar Court, and it was accordingly arranged that the appeal should be stayed and a motion made in the two suits No. 255 of 1893, and No. 187 of 1898, for payment of what might be due in respect of probate-duty and that the motion should come on with the appeal.

14. It is under these circumstances that the motion is now before us.

15. The motion has been resisted on many grounds.

16. First it is objected that we have no power to direct the payment of probate-duty as there is no provision of law vesting in us the requisite jurisdiction.

17. But this argument overlooks the circumstances in which the motion is made.

18. The estate of Moosabhai is being administered under a decree of this Court, and is thus under its control. The Consul General claims to be entitled to a payment out of that estate for probate-duty, and if he" makes good his claim then it is obviously within our power to direct the payment to be made in due course of administration. The objection therefore of lack of jurisdiction fails.

19. Then it is said that as the executors were needlessly and wrongly forced by the Zanzibar Court to take out probate, we ought not to direct payment of duty on that grant of probate. But that is an argument which should be addressed to the Revenue authorities at Zanzibar, not to this Court. We have to deal with the fact that probate has issued : how it came to be issued does not concern this Court, for it can in no way affect the legal liability to duty, and that such liability exists is (in my opinion) clear.

20. This brings me to the question on what duty is to be paid. It is not seriously disputed that duty must be paid on the house at Zanzibar, but that, it is argued, is the only item of property in respect of which liability attaches.

21. What is the rest of the estate? For the purposes of the argument before us it has been treated as consisting of funds in the hands of Mr. Macleod in Bombay as Receiver in the suit for the administration of Sir Tharia Topan's estate.

22. For the respondents it is argued that this part of Moosa's estate must for the purpose of duty be regarded as situate in Bombay, and so not liable to probate duty.

23. The question must be determined by reference to the Zanzibar Orders in Council and the rules issued thereunder.

24. By Clause 11 of the Zanzibar Order in Council dated the 7th July 1897 the Indian Succession Act except Section 331 was made applicable to Zanzibar.

25. By Clause 29 of the same Order in Council the Indian Succession Act is to have effect as if Zanzibar were a district in the Presidency of Bombay.

26. By Section 242 of the Indian Succession Act it is provided that:

Probate or letters of administration shall have effect over all the property and estate, moveable or immovable, of the deceased, throughout the Province in which the same is or are granted

and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him,

and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted.

27. By a rule dated May 3rd, 1893 under the Zanzibar Order in Council 1884 a

table of fees was declared as leviable and made to come into force, according to which the like sum was payable on probate as would for the time being be payable in England for stamp duty in like cases not exceeding a total fee of ? 100.

28. On October 11th 1898 a scale of fees in respect of any proceedings in Her Britannic Majesty's Court for Zanzibar was established under which on probate the like sum was leviable as was payable in England under the Act 44 Vic. c. 12 in like cases.

29. First we must determine whether it is the scale of fees under the rule of May 3rd 1893, or that prescribed on October 11th 1898 that governs this case.

30. The first scale was in force when the application for probate was made, the second when it was granted.

31. In my opinion it is the second scale that regulates the duty payable. This view accords with the express words of the rule, and I do not think it can be said the executors had such a vested right to probate at the old rate of duty as would justify us in saying that the rule should be construed so as to. entitle the executors to the benefit of the scale in force when the application was made.

32. Therefore the duty is that payable in England under 44 Vic. c. 12. Section 27 whereby it is provided that there shall be charged and paid on the affidavit to be required and received from the person applying for the probate where the estate and effects for or in respect of which the probate is to be granted, exclusive of what the deceased shall have been possessed of or entitled to as trustee and not beneficially shall be above the value of 1,000 ? at the rate of three pounds of every full sum of 100 ?.

33. But as Zanzibar is for the purposes of probate a district in the Presidency of Bombay, probate granted by the Zanzibar Court has effect over the property and estate of the deceased in Bombay; and it follows that property and estate situate in Bombay are " estate and effects for or in respect of which the probate is to be granted. "

34. Therefore the share of Moosa in the hands of Mr. Macleod as receiver of Sir Tharia Topan's estate is (in my opinion) liable to duty at the rate prescribed in 44 Vic. c. 12 Section 27 and we must direct that the duty when ascertained be paid to His Britannic Majesty's Agent and Consul General at Zanzibar by the Receiver out of the funds in his hands representing Moosa's interest under the will of Sir Tharia Topan. The Government of Bombay were given an opportunity of appearing on this motion, but they have deemed it unnecessary to take any part in the proceedings a" they make no claim in respect of Moosabhai's estate.

35. The appeal will be dismissed. No order as to costs. Liberty to Kulsumbai and Nanbai to apply for their costs in suit No. 187 of 1898.