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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO. 39 OF 2017
IN
TESTAMENTARY PETITION NO. 119 OF 2014

- 1. ANGELINA PASCOAL MENDES,**
Age 76 years,
- 2. PHILOMENA PASCOAL**
MENDES,
Age 71 years,

Both are permanent resident of Flat
No. 301, Navnath Cooperative
Society Ltd., Opp Ahilya Devi Baug,
Charai, Thane (West), Thane 400
601

... **PETITIONERS**

versus

SAVIO D'SOUZA,
Age 44 years,
Residing at B-53, Gulmahal Sleater Road,
Mumbai 400 007

... **RESPONDENT**

APPEARANCES

FOR THE PETITIONERS	Mrs Leena Fernandes.
FOR THE RESPONDENT	Mr RN Bhagattjee.

CORAM : G.S.Patel, J.
DATED : 26th July 2018

ORAL JUDGMENT:

1. The Respondent (“**Savio**”) filed Testamentary Petition No. 119 of 2014 in which he propounded a Will dated 1st January 2013 of one Joseph John Remedios (“**Joseph**”). He said that Joseph died on 4th January 2013 leaving a Will dated 1st January 2013. Savio claims that he was looking after Joseph. The Will he propounded named Savio as the executor. Savio is the major legatee under the Will. Another legatee was one Dean D’Souza.

2. Savio is not related directly by blood to Joseph, the testator. Joseph was married to a lady named Maria. Savio’s mother, Mary and Maria were sisters. Thus, Savio is Joseph’s wife’s sister’s son. Maria died on 23rd November 2010. Joseph was thus a widower. Maria had other sisters. The two Petitioners in the revocation Petition, viz., Angelina Pascoal Mendes and Philomena Pascoal Mendes, are both Maria’s sisters and, therefore, also Mary’s sisters and are both, therefore, Savio’s maternal aunts.

3. The Testamentary Petition was amended on 24th June 2014. Savio did not cite anyone in his probate Petition. He only mentioned that Joseph had one sister, Anita Remedios, who died on 29th August 2000. Joseph’s father John Remedios died on 19th April 1944 and his mother, Martha died on 28th February 1974.

4. The submission from Mr Bhagattjee is that Joseph had no heirs at all; his only next of kin was his sister, Anita, who died before Joseph. The claimants/present Petitioners were not Joseph's heirs; they were his predeceased wife's heirs, being her sisters. They could not succeed to Joseph's estate even on intestacy, and hence Savio had no need to cite them in his petition for probate to Joseph's Will. Savio brought that probate Petition as a named executor. He was duty bound to apply for probate.

5. As a general principle, I think this is a correct interpretation of the relevant provisions Indian Succession Act 1925. Chapter II deals with the Rules that apply to intestates other than Parsis. Section 32 makes it clear that the property of the intestate devolves upon the wife or husband, or on the kindred of the deceased in the order and according to the rules hereinafter contained in Chapter II. Sections 33, 33A, 34 and 35 read:

"33. Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.— Where the intestate has left a widow —

(a) if he has also left any lineal descendants, one-thirds of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained;

(b) save as provided by section 33A, if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are kindred to him, in the order and according to the rules hereinafter contained;

(c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

33A. Special provision where intestate has left widow and no lineal descendants.— (1) Where the intestate has left a widow but no lineal descendants and the net value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

(2) Where the net value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at 4 per cent, per annum until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of section 33 as if it were the whole of such intestate's property.

(4) The net value of the property shall be ascertained by deducting from the gross value thereof all debts, and all funeral and administration expenses of the intestate, and all other lawful liabilities and charges to which the property shall be subject.

(5) This section shall not apply —

(a) to the property of —

(i) any Indian Christian,

(ii) any child or grandchild of
any male person who is or was

at the time of his death an
Indian Christian, or

(iii) any person professing
the Hindu, Buddhist, Sikh or
Jaina religion the succession to
whose property is, under
section 24 of the Special
Marriage Act, 1872 (3 of 1872)
regulated by the provisions of
this Act;

(b) unless the deceased dies intestate in
respect of all his property.

34. Where intestate has left no widow, and where he has left no kindred.— Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained; and, if he has left none who are of kindred to him, it shall go to the Government.

35. Right of widower.— A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate."

6. Then come a set of rules for distribution, with which we are not immediately concerned because those speak of a distribution where there are lineal descendants. In this case, it is clear that there were no lineal descendant. The second set of rules from Sections 41 to 49 deal with distribution where there are no lineal descendants. Section 41 reads:

"41. Rules of distribution where intestate has left no lineal descendants.— Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48."

7. We then have a set of sections that contemplate different scenarios: the deceased survived by his father; by his mother; by his siblings, or their children, and combinations of these situations. Then we have Section 46 and 47, which must be read together.

"46. Where intestate's father dead, but his mother living and no brother, sister, nephew, or niece.— If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

47. Where intestate has left neither lineal descendant, nor father, nor mother.— Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death."

8. Now the last of this is a case which perhaps lies at an extremity where intestate has left no lineal descendant, no sibling or no children of any sibling. In that case his property is to be divided *equally among those of his relatives who are in the nearest degree of kindred to him.*

9. The expression “kindred” is not formally defined in the Act. For an understanding of it, one must turn to Section 24 which says that “kindred” or “consanguinity” is the connection or relation of persons descended from the same stock or common ancestor.

10. As I understand it, Mr Bhagattjee’s case is the two revocation Petitioners do not satisfy the definition of being Joseph’s kindred. He was not their “common ancestor”. They are not of “the same stock”. Section 28 refers us to Schedule I to the Act where degrees of kindred are set out in a table of consanguinity. Now read from this perspective, the question that would arise is this: whether the sisters of Maria (given that she died before Joseph), can be said to be Joseph’s kindred, and sufficiently related to him to be considered his ‘next of kin’ so as to succeed to any part of his estate assuming intestacy. The only relation between Joseph and the revocation Petitioners is a relationship not of blood, that is to say not of consanguinity, but of marriage. The two revocation Petitioners cannot be said, therefore, to have either “descended from the same stock” as Joseph or to share with Joseph a “common ancestor”. In fact, the two Petitioners and Joseph had no ancestor in common at all. They did not share the same stock at all. Joseph’s only heirs might have been the children, if any, of his own sister, Anita Remedios, but no one else.

11. It is difficult to see from this how it can be sustained that the two Petitioners were in fact in law entitled to be cited as Joseph’s heirs in Savio’s probate Petition.

12. The revocation Petition will have to be dismissed.

13. However, it is equally well settled that a probate proceeding will not decide a question of title. If the Petitioners contend that they have valid title to any property, movable or otherwise, subject to any provisions of law that operate, those contentions are left open for appropriate proceedings in a civil court of competent jurisdiction. I am not addressing the question of whether any prior proceeding operates as *res judicata* or not. It cannot operate as *res judicata* in the context of a Petition for revocation of a probate. Whether or not it operates as *res judicata* in a substantive civil suit is for another court to decide.

14. The revocation Petition is dismissed with these observations.
No costs.

15. The Affidavit dated 26th July 2018 is taken on record.

16. The grant that was deposited in Court will be returned to the Respondent.

(G.S. PATEL, J.)