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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 109 OF 2013
IN
TESTAMENTARY SUIT NO. 102 OF 2013
IN
TESTAMENTARY PETITION NO. 64 OF 2013
WITH
NOTICE OF MOTION NO. 58 OF 2014**

Farida Firdaus Variava	...Plaintiff
<i>Versus</i>	
Kersi Maneck Choksey & Ors.	...Defendants

**Mr. Cyrus Bharucha, i/b M/s. Daftary Ferreira & Divan, for the
Plaintiff.**
Mr. Amit H. Yadav, for the Defendants.

**CORAM: G.S. PATEL, J
DATED: 10th June 2015**

PC:-

1. Heard. The Plaintiff and Defendants both propound contesting Wills of the same deceased, one Eruch Kaikhashroo Choksey. The Will propounded by the Plaintiff is dated 1st

September 2011; that propounded by the Defendants is of 16th September 2012.

2. The principal contest is in relation to Flat No. 12 in the Dhun Villa Cooperative Housing Society Limited. On 7th January 2014, Mr. Justice Dhanuka granted ad-interim injunction in terms of prayer clause (c)(iii) of Notice of Motion No. 109 of 2013 restraining the Defendants from alienating, encumbering or parting with possession or creating any third party rights in respect of this flat. That order of injunction has continued till date. It has not been carried in appeal.

3. Mr. Bharucha, learned Advocate on behalf of the Plaintiff, presses for the appointment of an Administrator. He states that the initial entry of the Defendants into the flat, and there is no doubt that it is the Defendants who are now occupying this flat, was not in such a manner as was intended to convey title to them. It is too early in the day to arrive at any conclusion whether the Defendants' entry in the flat was illegal, and in any case questions of title are not matters that may be investigated in probate proceedings. The Defendants' claim as legatees of the flat under the Will that they propound just as the Plaintiff claims to be a legatee under the Will that she propounds. Mr. Justice Dhanuka's order more than sufficiently preserves the *status quo*.

4. On the basis of the decision of this Court in *Pandurang Shamrao Laud & Ors. V Dworkadas Kalliandas & Ors.*,¹ Mr. Bharucha submits that in such a situation where there is a dispute

¹ AIR 1933 Bombay 342

as to the title of the property, an Administrator *pendente lite* must be appointed, and the Defendants must be directed to pay royalty for their continued use of this flat. The decision of the learned Single Judge in *Pandurang Shamrao Laud* was, I think, in substantially distinguishable circumstances. The question of one of the parties being in actual possession of an immovable property did not there arrive. As I have noted, Mr. Justice Dhanuka's order, yet undisturbed, more than adequately preserves the *status quo*. There is little to commend the alteration of that *status quo* at this stage. Mr. Bharucha may be entitled to claim monetary compensation for being kept out of occupation of the flat but that order cannot possibly be obtained in a probate action. For that he would need to file a separate civil proceeding and he would need to establish that even without probate, he was entitled to immediate possession of the flat. This, therefore, is insufficient and unconvincing reason to appoint an Administrator at this stage. The continuance of the ad-interim order is more than sufficient as a final order on the Notice of Motion.

5. In Notice of Motion No. 58 of 2014, the Plaintiff has, apart from seeking an Administrator, also asked for certain further details with regard to a bank account with the Punjab National Bank. Essentially, the Plaintiff seeks access to certain documents. Presumably this is sought by the Plaintiff in order to establish the signature of the Testator and for other evidentiary purposes. As regards these matters, the Plaintiff will undoubtedly be entitled to have an appropriate summons issued to the Punjab National Bank to produce necessary specimen signature cards etc. and also to lead evidence of an handwriting expert if the Plaintiff so desires. This

will need to be done at an appropriate stage during the trial. Given that it is the Defendants' Testamentary Suit that is being tried first, that stage is some time distant from now.

6. An application is also sought to restrain the Punjab National Bank to prevent any transaction in certain savings bank accounts except under orders of the Court and also to hand over to the Plaintiff copies of the bank statements in respect of these accounts. These submissions proceed on the basis that the Defendants have failed in their probate petition and that the Plaintiff is entitled as a matter of law, at this stage, to these accounts and to the information about these accounts. It is clarified that if the Defendants' suit is ultimately dismissed, the Defendants will undoubtedly be liable, including under the Indian Succession Act, for all actions that they may have taken in regard to every part of the deceased's estate, including the two bank accounts in question and will be liable to make good any losses that may have been caused to the estate on that account. It is, however, not possible to grant the final reliefs that are being sought today given the rival contests and the fact that there are two separate Wills being propounded.

7. Notice of Motion No. 109 of 2013 is made absolute in terms of prayer clause (c)(iii). There will be no order on Notice of Motion No. 58 of 2014 which is disposed of in the aforesaid terms.

(G. S. PATEL, J.)