

JSN

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

NOTICE OF MOTION NO.69 OF 2015

IN

TESTAMENTARY SUIT NO.2 OF 1997

IN

TESTAMENTARY PETITION NO.350 OF 1994

Ashalata H. Mhatre alias Kandivalikar ...Plaintiff

Versus

Chitra G. Vaidya & Ors. ...Defendants

Ms. S. Abhyankar, for the Plaintiff

Ms. Geeta Shashtri, for the Defendants Nos. 2(i) & (ii).

**Mr. Abhishek Prabhu, i/b. M/s. Thakore Jarimala & Associates for
for Defendant No.3.**

CORAM: G.S. PATEL, J.
DATED: 23rd March 2016

P.C.

1. The Notice of Motion seeks that the delay in filing the Motion be condoned and that the order dated 26th June 2014 (Hon'ble Mr. Justice S.J.Kathawalla) be recalled and set aside. A copy of that order is at page 59. The Suit was dismissed for default.

2. At the time of dismissal, this was the stage of the Suit: Caveats had been filed. The Petition for probate had been

renumbered as Suit. Issues had been framed. Some documents had been marked in evidence and the cross-examination of the Plaintiff and on behalf of defendants other than Defendant No.3 was complete. Defendant No.3 had filed his Evidence Affidavit. The documents of the 3rd Defendant had however not been marked and his cross-examination yet remained to be completed.

3. The reason for dismissal was the non-appearance of the Plaintiff and her Advocate. This is explained now in the Affidavit of Support of the present Notice of Motion and, in particular, from paragraph 10 onwards. In this paragraph, the Plaintiff states that her Advocates had, for various personal reasons, expressed their inability to continue representing the Plaintiff. They asked her to take back papers and make alternate arrangements. The Plaintiff says that she is senior citizen, today over 75 years old, and that she has several physical ailments for which she had knee surgeries twice in 2014 and was bedridden for a considerable part of 2013-2014. She has a number of other ailments that restrict her mobility and make it difficult for her to pursue such matters. Given all these causes, she was in 2014 unable to appoint a new Advocate in a timely fashion. One of her earlier Advocates resumed work in January 2015. The Plaintiff learnt of this in March 2015. She asked her earlier Advocate to take up her matter. Her earlier Advocate agreed. Then, on checking the status, it was found that the Suit has been dismissed for default.

4. It is in these circumstances that I am asked to restore the Suit to file. Ms. Shastri appearing for some of the Defendants and Mr. Prabhu appearing for the other Defendants oppose the grant of

relief. I realise that there is delay. However, having regard to the considerable progress made in the Suit which was nearing completion of the trial, I think this is appropriate case to grant the Plaintiff relief, especially having regard to the statements made in the Affidavit in Support of this Notice of Motion. At the same time and in fairness to the present Advocates and their clients, care must be taken to ensure that no additional latitude is needlessly granted now to the Plaintiff. Learned Advocate for the Plaintiff immediately agrees not to seek any adjournments and not to allow the matter to go by default even once hereafter.

5. In view thereof the Notice of Motion is made absolute in terms of prayer clauses (a) and (b). The Suit shall be listed on 4th April 2016 for directions for referring the matter to a Commissioner for completing cross-examination of the 3rd Defendant. Having regard to the circumstances of the case, the costs of the commission for the purposes of completing the 3rd Defendant's examination will have to be borne by the Plaintiff. Learned Advocate for the Plaintiff specifically agrees to this. This does not mean that the cross-examination can be needlessly prolonged or continue at a leisurely pace either. If I find that is happening, this order of the costs being borne by the Plaintiff will be revisited. In addition, that cross examination on commission will be in a time bound manner so that the matter is not unduly delayed. Defendants are directed to agree upon the name of the Commissioner and to ascertain his or her availability in advance, the intention being to complete cross examination before the end of the present term.

(G. S. PATEL, J.)