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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 160 OF 2016
IN
TESTAMENTARY SUIT NO. 135 OF 2015
IN
TESTAMENTARY PETITION NO. 493 OF 2015**

Christine Rustom Pastakia & 2 Others ...Plaintiffs
Versus
Marzaban Dadi Naegamvala ...Defendant

**WITH
NOTICE OF MOTION NO. 143 OF 2015
IN
TESTAMENTARY SUIT NO. 135 OF 2015
IN
TESTAMENTARY PETITION NO. 493 OF 2015**

Christine Rustom Pastakia & 2 Others ...Plaintiffs
Versus
Marzaban Dadi Naegamvala ...Defendant

**Mr. Zubin Behramkamdin, i/b Wadia Ghandy & Co., for the
Plaintiffs.
Mr. Q.M. Ashfaq, for the Applicant/Defendant.**

CORAM: G.S. PATEL, J
DATED: 25th July 2016

PC:-

1. This is an application by the original Caveator, Marzban Dadi Naegamvala, to recall an order dated 10th June 2016, Exhibit "A" at page 9 to the Affidavit in Support of this Notice of Motion. By that order, one made on Notice of Motion No. 143 of 2015 filed by the Plaintiffs, I discharged Marzban Naegamvala's Caveat in Testamentary Suit No. 135 of 2015.
2. The matter requires some explanation. The estate in question is that of one Soona Burjor Pastakia. Testamentary Petition No. 493 of 2015 seeks probate to that Will. Marzban Naegamvala filed a Caveat and it was renumbered as Testamentary Suit No. 135 of 2015.
3. Even before this, Marzban Naegamvala himself filed Testamentary Petition No. 771 of 2013 for Letters of Administration to the property and credits of the same deceased, Soona Burjor Pastakia. He in fact obtained a grant on 26th August 2014. The present Plaintiffs filed Miscellaneous Petition No. 61 of 2015 for revocation of that grant. On 16th October 2015, Mr. Naegamvala made a statement that he did not wish to contest the Plaintiffs' Miscellaneous Petition for revocation. That Miscellaneous Petition succeeded, and the grant of Letters of Administration stood revoked. Marzban Naegamvala then also withdrew his own Testamentary Petition No. 771 of 2013. In short, what happened was this: since Mr. Naegamvala did not oppose the Miscellaneous

Petition, it stood made absolute. This revived Mr. Naegamvala's Testamentary Petition No. 771 of 2013 for Letters of Administration. Mr. Naegamvala then said that he did not wish to pursue that Testamentary Petition and withdrew it.

4. However, while doing so, he clarified that he did wish to pursue his Caveats filed in other proceedings and it was clarified that the order on his Testamentary Petition and his withdrawal of it would not be understood to compromise his opposition set up in these Caveats. All contentions were kept open.

5. In consequence, all that remained was the Plaintiffs' Testamentary Suit No. 135 of 2015 in which Mr. Naegamwala had filed his Caveat.

6. The Plaintiffs then filed Notice of Motion No. 143 of 2015 seeking that Marzban Naegamvala's Caveat be discharged. The ground was that Marzban Naegamvala was by no means a heir of the deceased and had no caveatable interest.

7. On 10th June 2016, when I allowed the Plaintiffs' Notice of Motion, Mr. Naegamvala was not present. It is for this reason that he now seeks a recall. In the present application, he says that his Advocate took a discharge and that he had no notice of the Plaintiffs' Notice of Motion to dismiss his Caveat.

8. I heard Mr. Ashfaq for Marzban Naegamvala in the morning when the matter was on the ad-interim board. I indicated that I

would allow his Notice of Motion for restoration of the Plaintiffs' Notice of Motion No. 143 of 2015 and for recall of order dated 10th June 2016 provided that the Plaintiffs' Notice of Motion was taken up at once. Mr. Ashfaq agreed, but sought time till 3.00 p.m. This was readily granted.

9. I propose, therefore, by this order to recall the order dated 10th June 2016. The Notice of Motion No. 160 of 2016 is made absolute in terms of prayer clause (a).

10. I will now, by consent, proceed to consider the Plaintiffs' Notice of Motion No. 143 of 2015 on merits.

11. I have heard Mr. Ashfaq for the Defendant/Caveator and Mr. Behramkamdin for the Plaintiffs.

12. Mr. Behramkamdin points out that the family tree annexed by amendment to the Petition and also annexed in other Affidavits clearly shows that the Defendant is related, if at all, to the deceased by at least three and perhaps four or more degrees of separation. The kinship is through the grandparents of the deceased and the Defendant. However, the deceased had heirs who are in closer proximity and fall within Class I of Schedule II to the Indian Succession Act, 1925. The names of those next of kin are shown in the family tree and they are also shown in the amended Schedule. There are at least four heirs who are in closer proximity and kinship than the Defendant. Their position in Class I will necessarily operate to exclude the Defendant. Two of these heirs have in fact

passed away. There is no manner of doubt that the Defendant himself cannot claim to have a caveatable interest or to be an heir of the deceased.

13. As to Mr. Ashfaq's argument that the order dated 16th October 2015 is one that operates to render his caveat immune from challenge, this is a submission that only needs to be stated to be rejected. That order specifically kept open all contentions. This cannot mean that the Plaintiffs' contentions that there is no caveatable interest were given up or abandoned or were in any way decided at the time of that order. There is no substance to the objection.

14. The Notice of Motion No. 143 of 2015 is made absolute in terms of prayer clause (a). Marzban Naegamvala's Caveat is discharged. The Petition will proceed uncontested and probate is to be issued expeditiously and on a priority basis.

15. Both Notices of Motion are disposed of in these terms with no order as to costs.

(G. S. PATEL, J.)