

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 1822 OF 2015
IN
SUIT NO. 4142 OF 2000**

Smt. Freny P. Chowna .. Applicant

In the matter between :

Smt. Freny P. Chowna .. Plaintiff.

Vs.

Subhas Andrew Dias .. Defendant

Mr.Rajendra N. Bhagatjee for plaintiff.

Mr.O.S. Kutty i/b V.S. Legal Associates for defendant.

CORAM : K.R.SHRIRAM, J.

DATE : 21ST APRIL, 2016

P.C.

1 This notice of motion is taken out for following reliefs :

(a) The order passed ex-parte on 29.10.2014 dismissing the suit be withdrawn and the suit be restored.

(b) No probate be issued to the defendant Subhas A. Dias in Testamentary Suit No.10 of 2001 in Testamentary Petition No. 925 of 2000.

(c) The delay of approx. 1 year in filing this Notice of Motion be condoned in the interest of justice.

2 At the outset, prayer clause (b) cannot be granted in this notice of motion as this notice of motion is primarily for restoring the suit. Such a

relief can be considered only if the suit is restored.

As regards prayer clauses (a) and (c), the order of 29th October 2014, dismissing the suit reads as under :

In view of the order passed in Testamentary Suit No. 10 of 2001, this suit for administration does not survive. In any even, the plaintiff and their advocates are absent. Suit dismissed for default.

3 If it was an order simply based on default of the plaintiff in remaining present in Court when the matter was called out, in my view, there would not have been problem in granting the reliefs sought. Based on the explanation given, the Court could have exercised its power as far as prayer (a) and (c) is concerned. But in the order quoted above, it is mentioned that *suit for administration does not even survive in view of the order passed in Testamentary suit No.10 of 2001*. In my view, if the applicant is aggrieved by this order, in view of this one sentence, the applicant will have to file an Appeal to set aside the order.

4 The counsel for the applicant relied on two judgements one of the Apex Court in ***S.P. Chengalvaraya Naidu (Dead) by L.Rs. Vs. Jagannath (Dead) by L.Rs. & Ors.***¹ and of the Bombay High Court in ***Kundalrai Mohekar Vs. National Textile Corporation Ltd. (M.N.) through its***

1 (1994) 1 SCC 1

Company Secretary & Ors. Ashok Kundalrai Mohekar Vs. National Textile Corporation Ltd. (M.N.) through its Company Secretary & Ors.² In my view, both the judgements are not applicable to the present application.

6 Shri Bhagatji, counsel for the plaintiff states that status-quo be maintained since their client would be filing appropriate Appeal. Shri Kutty counsel for defendant points out that till date even in the suit, which was dismissed, no interim orders have been passed. Therefore, request for stay is rejected.

6 The notice of motion is dismissed.

(K.R. SHRIRAM, J.)

² 2015(4) Bom.C.R.494