

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO. 113 OF 2017

IN

TESTAMENTARY SUIT NO. 98 OF 2000

IN

TESTAMENTARY PETITION NO. 161 OF 1999

Dr. Carole Moraes] Petitioner

IN

Dr. Carole Moraes] Plaintiff

Vs.

Mrs. Mitchelle Crasto and Ors.] Respondents

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Ms. C.S. Savithri, for applicant/plaintiff.

Mr. Rajesh Talekar i/b Prime Legem, for defendants No.1 (a) to 1(c).

Mr. Austin Farnandes i/b Denzil D'Mello, for defendant No.2.

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CORAM : R.G. KETKAR, J.

DATE : 22nd AUGUST, 2017.

P.C.

Heard Ms. Savithri, learned Counsel for the applicant/plaintiff and Mr. Talekar, learned Counsel for defendants No.1 (a) to 1(c) and Mr. Farnandes, learned Counsel for defendant No.2 at length.

2. By this Motion, the petitioner/plaintiff has prayed for recalling the order dated 3rd April, 2017 passed by this Court [Coram: K.R. Shriram, J.]. By that order, as none appeared for the

plaintiff on 31st March, 2017 as also 3rd April, 2017, the suit was dismissed.

3. Ms. Savithri has taken me through affidavit in support of the present Motion as also affidavit in rejoinder filed by the plaintiff and in particular paragraphs 6 and 7 of affidavit in support of Notice of Motion No. 105 of 2014 and the order dated 19th November, 2014. She submitted that for the reasons set out in paragraph 3 of the affidavit in support of the present Motion, order dated 3rd April, 2017 deserves to be recalled, thereby restoring the suit to its original position.

4. On the other hand, Mr. Farnandes has strenuously opposed the Motion. He submitted that earlier the suit was listed for hearing on 28th March, 2011. It was adjourned to 25th April, 2011. The plaintiff was represented by her Advocate. As the plaintiff did not give instructions to her Advocate, suit was required to be dismissed but upon request made on behalf of the plaintiff, it was adjourned to 22nd June, 2011 for dismissal. On that date, neither the plaintiff nor plaintiff's Advocate remained present. In the order dated 22nd June, 2011, it was observed that Suit and Petition deserve to be dismissed. However, plaintiff was given a last opportunity. In short, he submitted that on 22nd June, 2011, the Court virtually dismissed the suit for absence of plaintiff and plaintiff's Advocate.

5. Mr. Farnandes further submitted that thereafter on 10th July, 2014, once again none appeared for the plaintiff. In view

thereof, suit was dismissed for want of prosecution. He submitted that even on the third occasion i.e on 31st March, 2017 and 3rd April, 2017, none appeared for the plaintiff and accordingly the suit was dismissed in default. He submitted that the plaintiff is thoroughly negligent in prosecuting the suit. He, therefore, submitted that no case is made out for granting any relief in the Motion.

6. Mr. Talekar has given no objection for granting reliefs in the Motion.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the order dated 22nd June, 2011 shows that opportunity was given to the plaintiff about next date of hearing. It appears that thereafter the suit was ordered to be listed for dismissal on 6th July, 2011. It is common ground between the parties that no order for dismissal was passed thereafter in July, 2011. The suit thereafter appeared on 10th July, 2014 when it was dismissed in default. A perusal of the affidavit in support of Notice of Motion No. 105 of 2014 and particularly paragraphs 7 and 8 thereof shows that sufficient cause was made out for recalling the order dated 10th July, 2014. Accordingly, by order dated 19th November, 2014, this Court made absolute Motion in terms of prayer clause (a) and the suit was restored.

8. On 31st March, 2017, suit was appeared on the board when none appeared on behalf of the plaintiff and it was adjourned

to 3rd April, 2017. Even on that date, none appeared on behalf of the plaintiff. After perusing the reason given in paragraph 3 in affidavit in support of the present Motion, I am satisfied by explanation given for absence on 31st March, 2017 and 3rd April, 2017.

9. In view thereof, Motion is made absolute in terms of prayer clause (a) with no order as to costs. Suit is restored to its original position.

[R.G. KETKAR, J.]