

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

**NOTICE OF MOTION NO.115 OF 2016
IN
TESTAMENTARY SUIT NO.45 OF 1989
IN
TESTAMENTARY PETITION NO.99 OF 1989**

Sister M. Herlinde ... Applicant

In the matter between

Sister M. Herlinde (since deceased)

Sister Christal Tuscano ... Petitioner

Versus

Mr. Michael Lopez ... Defendant/Respondent

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Mr. Joel D'Souza i/b Vishwajeet V. Mohite for the Applicant/Petitioner.

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CORAM : S.C.GUPTE, J.

DATE : 6 NOVEMBER 2017

P.C. :

. Heard learned Counsel for the Applicant. This Notice of Motion is taken out by the secretary of a religious order known as 'The Immaculate Society', which is a public charitable trust, registered under the Bombay Public Trusts Act, 1950. The present testamentary suit is filed on behalf of the Immaculate Society by its erstwhile Secretary (since deceased). The Petitioner trust claims that the deceased Delphine Veronica Miranda had bequeathed her property under her last will and testament to the petitioner trust.

2 It appears that by an order dated 3 December 2007, the testamentary suit was dismissed for default. The dismissal of the suit was, however, not noticed by any of the parties and the matter proceeded before the Court. On 21 March 2009, evidence of the Plaintiff's witnesses, i.e. P.W. 1 and P.W.2, was duly recorded and the matter was stood over for arguments. When the testamentary suit came up for arguments, it was noticed by the Court that the suit was already dismissed by an order passed on 3 December 2007. The Court, in the premises, by its order dated 25 March 2009, noted that the suit could not proceed in the circumstances, noting the proposal of the Plaintiff's Advocate to take out an appropriate proceeding for restoration of the suit. The present Notice of Motion is taken out accordingly for recall of the dismissal order and restoration of the suit to file.

3 There has been a long delay in taking out the Notice of Motion. When the matter was heard by my learned predecessor Judge, it was contended on behalf of the Applicant/Plaintiff that earlier Notice of Motion taken out for restoration of the suit was dismissed, but that information was not passed on by her Advocate. It was submitted that the present Applicant learnt about the status of the suit and the earlier Notice of Motion taken out therein, when she engaged a new set of Advocates. The Court thereupon gave liberty to the Plaintiff/Applicant to submit an affidavit of the earlier Advocate, who was appearing for the Plaintiff in Notice of Motion No.83 of 2009. The Advocate has filed an affidavit dated 2 May 2016 explaining the circumstances, in which the present Notice of Motion for restoration of testamentary suit was taken out by the Plaintiff.

4 After going through the contents of the affidavit and in the light of the avrments made by the Applicant/Plaintiff in her affidavit in support of the Notice of Motion, this Court is of the view that a case is made out for setting aside the order of dismissal passed on 3 December 2007. Accordingly, the Notice of Motion is made absolute in terms of prayer clauses-(a) and (b). The suit is restored to file. The suit to come up on board for directions on 20 November 2017.

(S.C. GUPTE, J.)