

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

**NOTICE OF MOTION NO.166 OF 2016
IN
TESTAMENTARY PETITION NO.1291 OF 1999**

Gopinath Arjun Kondgekar

....Applicant/Petitioner

Vs.

Shivram A. Kondgekar and Ors.

....Respondents/Caveators

Mr. Mihir Desai, senior advocate i/b. Ms. Nirmala Bhosale for applicant/petitioner.

Mr. Jitendra M. Mulik for respondents/caveators.

CORAM : K.R.SHRIRAM, J.

DATE : 19th APRIL, 2017

P.C.:

1 This notice of motion has been taken out in very peculiar circumstances. The petition was lodged on or about October, 1999. The Caveators had filed Caveat in 2003. Before the Caveat was filed, the petition came to be dismissed on 16th July, 2003.

2 Though there is no original notice of motion or affidavit in support or order on record, the petitioner's counsel has filed a photocopy of notice of motion no.54 of 2007 with affidavit in support dated 9th July, 2007 wherein the petitioner has prayed for restoration of the petition. There is a print out from the website of the High Court Bombay which gives the case status of the notice of motion and it states that the notice of motion bearing no.54 of 2007 was made absolute by an order dated

31st August, 2007. The registry has filed a report stating that the minutes book of 31st August, 2007 are not traceable. The advocate for petitioner – Ms. Nirmala Bhosale has filed a personal affidavit dated 1st February, 2017 in which she has confirmed that she was personally present on 31st August, 2007 when the petition was restored and notice of motion was made absolute.

3 The present notice of motion has been taken out because the order of 31st August, 2007 is not on record. The Caveators have filed affidavit in reply opposing the grant of relief as sought in this notice of motion. The counsel for respondents submitted that between 2007 and 2016, when this notice of motion has been taken out, the petitioner has not taken any steps to proceed with the matter. The counsel for respondents further states that the petitioner had made attempts to get the properties of the deceased mutated in his name and when the Caveators raised objection before the concerned authority, the petitioner has taken out this notice of motion. The counsel for respondents states that this notice of motion is malafide and should be dismissed.

4 Having heard the counsel and considered the affidavit in support and the record and proceedings, the court case status does indicate that notice of motion no.54 of 2007 was heard and disposed by this court. The photocopy of the affidavit in support of the said notice of motion also

indicates that the petitioner had appeared before the sworn Interpreter of the court on 9th July, 2007 for having the affidavit interpreted in Marathi. The advocate on record for petitioner has also filed an affidavit dated 1st February, 2017 stating that she was personally present when the order dated 31st August, 2007 was passed. In view of these facts and circumstances, I am inclined to hold that the petition has been restored by an order dated 31st August, 2007.

5 Notice of motion accordingly stands disposed.

6 The original Caveators have expired and their legal heirs have to be brought on record. The counsel for petitioner states that they have been provided with the details of the legal heirs and seeks leave to amend the petition to bring the legal heirs on record. Leave granted.

Amendment to be carried out and copy of the amended petition to be served within three weeks from today.

7 The petitioner to pay a sum of Rs.10,000/- as cost to the advocate on record for the legal heirs of the original Caveators and this amount to be paid within four weeks from today.

8 Registry to convert the petition into suit and place it for issues on 14th June, 2017.

(K.R. SHRIRAM, J.)