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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 1865 OF 1980**

Bro Philip Pinto & Ors ...Plaintiffs
Versus
Nilkanth Shrikhande & Ors ...Defendants

**WITH
NOTICE OF MOTION NO. 931 OF 2014
IN
SUIT NO. 1865 OF 1980
WITH
NOTICE OF MOTION NO. 134 OF 2017
IN
SUIT NO. 1865 OF 1980
WITH
NOTICE OF MOTION NO. 1448 OF 2018
IN
SUIT NO. 1865 OF 1980
WITH
NOTICE OF MOTION NO. 1435 OF 2018
IN
SUIT NO. 1865 OF 1980
WITH
TESTAMENTARY AND INTESTATE JURISDICTION**

TESTAMENTARY SUIT NO. 5 OF 2004
IN
TESTAMENTARY PETITION NO. 46 OF 2002

Irene Pontes ...Plaintiff
Versus
Rita C Pinto & Ors ...Defendants

WITH
CAVEAT NO. 164 OF 2018
IN
TESTAMENTARY SUIT NO. 5 OF 2004
WITH
CAVEAT NO. 165 OF 2018
IN
TESTAMENTARY SUIT NO. 5 OF 2004
WITH
CAVEAT NO. 166 OF 2018
IN
TESTAMENTARY SUIT NO. 5 OF 2004
WITH
CAVEAT NO. 167 OF 2018
IN
TESTAMENTARY SUIT NO. 5 OF 2004
WITH
NOTICE OF MOTION NO. 931 OF 2014
IN
SUIT NO. 1865 OF 1980

WITH
NOTICE OF MOTION NO. 134 OF 2017
IN
SUIT NO. 1865 OF 1980

Mr Malcolm Siganporia, *with Mrs Nandini Joshi, i/b Harish Joshi & Company, for the Plaintiff in Testamentary Suit No. 5 of 2004 and Defendants Nos. 1A & 2 in Suit No. 1865 of 1980.*

Mr Zal Andhyarujina, *with Mr Kunal Dwarkadas & Vidya Chaudhari, i/b Chambers of Javed Gaya, for the Plaintiffs in Suit No. 1865 of 1980 and for Defendants Nos. 1 to 4 in Testamentary Suit No. 5 of 2004.*

Mr Nimay Dave, *with Ms Dipti Das, Ms Dimple Majithia & Mr Anagh Pradhan, i/b Divya Shah Associates, for Defendants Nos. 5A to 5D & 6, in Suit No. 1865 of 1980 and Defendants Nos. 5, 9, 10, 11 and 12 in Testamentary Suit No. 5 of 2004.*

CORAM: G.S. PATEL, J
DATED: 1st November 2018

PC:-

**TESTAMENTARY SUIT NO. 5 OF 2004 IN
TESTAMENTARY PETITION NO. 46 OF 2002**

1. This is a contested testamentary proceeding in respect of a Will dated 12th February 1963 said to have been made by one Cosmos Damain T Pinto. It was once decreed on 15th September 2008. That order was set aside by a Division Bench on 21st September 2011, by consent of parties. Clause 1 of the Appellate

Order remitted the Suit to the learned Single Judge for “de novo trial and decision in accordance with law”. Thereafter, it was said that the Trial Court could permit the parties to lead additional evidence if necessary.

2. In the time that has passed, the two attesting witnesses to the Will have both died. Even at that time, neither of attesting witnesses had led evidence. In any case, neither is available now. Even the Executors of the Will have passed away and this is therefore a Petition for Letters of Administration with, and I cannot now described this as a Will, some testamentary writing annexed. I will turn to that shortly.

3. On instructions of the Plaintiff, Mr Siganporia states that the Plaintiff will lead her own evidence to prove the document in question i.e. an alleged Will dated 12th February 1963 as being the last Will of the deceased.

4. The reason that it is difficult to describe what is produced with the Petition as a Will is because it is nether the original nor a photocopy of that alleged Will. It is a carbon copy of the handwritten transcript of what was said to be the Will of Cosmos Damain T Pinto. Whether this meets the requirements of a valid testamentary disposition is a decision for another day.

5. At this stage I am required to frame issues but before I turn to those, there is an apprehension expressed by Mr Dave, the Advocate for some of the Defendants. His clients are in a particularly unusual

position, in the sense that they were not cited or served with citations in the earlier round at all. There were several others who were similarly treated (or mistreated). They have all now been served and all of them have filed Caveats and Affidavits in Support. There is now no heir who can claim to have not been served with a citation or to have waived service of that citation. The anxiety that Mr Dave expresses is this. Since his clients were kept out of the earlier round of litigation, the evidence then recorded in his clients' absence should not be read necessarily against him or held against him. I am not prepared to accept the submission that Clause 1 of the Appellate Order requires that the entire evidence previously recorded should be, so to speak, expunged or wiped from the record. I do not think that is possible in law. It is certainly necessary, however, to protect the interest of not only Mr Dave's clients but all those who were not served with citations in the earlier rounds. This may be done by clarifying that the weightage to be attached to the evidence previously recorded is a matter to be decided at the final hearing of the Suit and that all contentions in that regard will be kept open. Further, the mere fact that some evidence was recorded and that some cross-examination took place on behalf of some other Defendants (who had been served), is not under any circumstances to be construed as necessarily binding on those Defendants who have only now been cited and for the first time given an opportunity to oppose the Petition. This will extend to both documentary and oral evidence. All contentions are expressly kept open.

6. Parties are agreed that the issues originally framed on 7th October 2004 will need to be recast. These are framed and appended to this order.

7. The Evidence Affidavit of the Plaintiff along with a supplemental Affidavit of Documents and Compilation of Documents, if any, are to be filed and served on or before 17th December 2018. I will list the Suit for marking the Plaintiff's documents and for further directions as to trial on 11th January 2019.

8. There is an accompanying Administration Suit No. 1865 of 1980. One of the Defendants in the Testamentary Suit is the Plaintiff in that Suit. It is clear that if the Testamentary Suit succeeds the Administration Suit will automatically fail in regard at least to those properties that are covered by the Will and the Testamentary Suit. The request at this stage is to direct that the trial in the Administration Suit be deferred after the decision in the Testamentary Suit. I leave that question open for the Trial Court to decide at the time when trial begins in the Testamentary Suit.

(G. S. PATEL, J)

ISSUES FRAMED ON 1ST NOVEMBER 2018

TESTAMENTARY SUIT NO. 5 OF 2004

IN

TESTAMENTARY PETITION NO. 46 OF 2002

1. Whether the Plaintiff proves that on 12th February 1963 there was a document that was validly and lawfully executed and attested in accordance with law as the last Will and Testament of the deceased Cosmos Damain T Pinto?
2. Whether the Plaintiff proves that at the time of the said writing the deceased was of sound and disposing state of mind, memory and understanding?
3. Whether the Plaintiff proves that a handwritten transcript or copy of the alleged Will was made by one Roger Correa, the son-in-law of the deceased?
4. Whether the Plaintiff proves that the document lodged in the Registry and the copy of which is at Exhibit "A" to the Petition is a carbon copy of this handwritten transcript or handwritten copy of the alleged last Will and Testament of the deceased?
5. Whether the Plaintiff proves that the original alleged Will is unavailable being lost or not traceable?
6. Whether 6th Defendant proves that the alleged writing of 12th February 1963 is false and fabricated?

7. What reliefs and what orders?

(G. S. PATEL, J.)