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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELATE JURISDICTION

CIVIL REVISION APPLICATION NO.602 OF 2011

WITH

CIVIL APPLICATION NO.748 OF 2016

Smt. Naim Boman Hamadani

..Applicant.

V/s.

Smt. Shamshi Malek Malekpur

..Respondent.

Mr.P.V.Nichani i/b. P.V.Nichani & Co. & D.Merchant for the Applicant.

Mr.Nachiket Khaladkar for the Respondent.

Coram : N.M.Jamdar, J.

Date : 23 March 2017

ORAL ORDER

In view of the order dated 17 March 2017 passed in Civil Application 748 of 2016, taken out for vacating the stay granted in the Civil Revision Application, by consent of the parties, the Revision Application is taken up for final disposal.

2. The Respondent-landlord filed a R.A.E. Suit No.903/

1157 of 2008 in the Small Causes Court, Mumbai against one Smt. H.S.Khosrovi and Smt.N.B.Hamdani. The suit was filed on the ground that Defendant No.1 was a monthly tenant and she is not using the premises herself and has sublet the premises. The suit was also filed on the ground of *bonafide* requirement. The suit was instituted on 30 July 2008. Written Statement was filed on behalf of Defendant No.2 stating that Defendant No.1, mother of Defendant No.2 had expired prior to the institution of the suit. The Respondent thereafter sought an amendment in view of this information provided by Defendant No.1 and amendment was granted on 19 March 2009. Thereafter, the Applicant-Defendant filed an application under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the plaint on the ground that the suit was instituted against a dead person. This application was rejected by the impugned order dated 3 February 2011. Thereafter, Revision Application was admitted on 28 September 2012 and the proceedings in the suit were stayed.

3. Heard the learned counsel for the parties. The learned counsel for the Applicant submitted that the suit was filed against a dead person and not maintainable. It was submitted that the application for rejection of the Plaint will have to be decided and it cannot be deferred. The learned counsel submitted that the suit being void, the plaint ought to have been rejected. The learned counsel for the Respondent submitted that the Respondent was not

aware of the death of Defendant No.1 and after coming to know of the same through the written statement of Defendant No.2, an amendment was sought for.

4. While passing the impugned order, the learned Small Cause Court Judge has not foreclosed the argument of the Applicant. The learned Small Cause Court Judge has held that the issue regarding the knowledge of the Respondent will have to be considered after the evidence is led. The learned Judge observed that an amendment was carried out and the order granting amendment was not challenged. Therefore, keeping all the contentions of the Applicant open at the time of hearing, the learned Small Cause Court Judge had disposed of the application.

5. The Applicant as on today is occupying the suit premises. She claims to be a tenant through deceased Defendant No.1. The issue as to whether the Respondent was aware that the Defendant No.1 had expired and whether the suit was filed with a malafide intention against a dead person, as held by the learned Judge would entail an inquiry. The learned Judge was well within his jurisdiction to take such a view. Merely because another view is possible, it is not a ground for interference in Revision Application. Therefore, by keeping the contention of the Applicant open, which has already been done by the learned Judge, the Revision Application is disposed of. It is clarified that the aspect as to whether

the suit filed was void at the inception is also kept open to be considered on its own merit.

6. The Revision Application is accordingly disposed of. In view of the disposal of the Revision Application, the Civil Application also stands disposed of.

(N.M.Jamdar, J.)