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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1235 OF 2017

B.M.K. Industries Private Limited ...Petitioner

vs

Suvarna Dying And Printing Works And Ors. ...Respondents

WITH

WRIT PETITION NO.1156 OF 2017

WITH

WRIT PETITION NO.1234 OF 2017

Mayur Jaykumar Vora And Ors. ...Petitioners

vs

Darshana Shamit Vasa ...Respondent

.....

Mr. Bharat Joshi, for the Petitioner.

Mr. Jacob Kodantot, for the Respondents.

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CORAM : S.C. GUPTE, J.

DATED: SEPTEMBER 16, 2019

P.C.:

. Heard learned Counsel for the parties.

2. Rule in Writ Petition No.1235 of 2017. Rule taken up for hearing forthwith by consent of Counsel.

3. This petition challenges an order passed on an application for amendment to a memo of appeal. The amendment sought to implead a legal representative of deceased Respondent No. 1C. The application was rejected by the appellate court on the ground that

Respondent No.1C had expired on 25 August 1992, that is to say, before the filing of the present suit.

4. The death of Respondent No.1C has been said to be an admitted fact. No such admission is, however, finds place in the records. In fact, the written statement filed by the Respondents as of 25 March 2009 shows that it was Respondent No.1C, who had signed the written statement. The Petitioner's case is that when the appeal memo was sought to be served on the Respondents, the fact that Respondent No.1C had died came to light through the bailiff. There is no reason to disbelieve this statement. The only fact against the Petitioner is that in the affidavit of evidence filed by the Respondents on 25 March 2010, there was a reference to the fact that Respondent No.1C had died. Learned Counsel for the Petitioner submits that this fact was missed by the Petitioner through oversight. It is believable that the narration of the death of Respondent No.1C was so missed by the Petitioner.

5. The principle of abatement invoked by the trial court is not in order. According to the appellate court, Respondent No.1C had died before the filing of the suit. The Court, however, did not consider the effect of filing of the suit against a dead person. The only question, in the premises, which really fell for consideration was whether to bring the correct opponent on record. This the Petitioner claims to have applied for immediately after he came to learn about the death of the deceased, that is to say, when the bailiff sought to serve the memo of appeal on Respondent No.1C. The question of abatement would have arisen, had the deceased died during the pendency of the suit. That was not the case here.

6. There is nothing on record to indicate that any prejudice was suffered by the Respondents as a result of the amendment application not having been made earlier. It would, accordingly, be in the interest of justice to allow the amendment proposed by the Petitioner. It is necessary to bring out the true controversy between the parties, that is to say, between the correct parties.

7. The impugned order of the appeal court dated 4 September 2013 is, accordingly, quashed and set aside and the application of the Petitioner (original appellant) before the Court of Small Causes in the appeal, being “Exhibit No.19”, is allowed. Amendment to be carried out within two weeks. The petition is disposed of accordingly.

8. The companion petitions, namely, Writ Petition Nos. 1156 of 2017 and 1234 of 2017, challenge two similar orders granting temporary reliefs to the Petitioner. These petitions may be taken up upon reopening of Courts after the ensuing Diwali vacation. Stand over to 18 November 2019.

(S.C. GUPTE, J.)