

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 7877 OF 2025**

Rafique A Rauf Kauchali ...Petitioner

**Versus**

Nathu Ramji Malusare And Ors ...Respondents

Mr. C. G. Gavnekar, a/w Ashutosh Gavnekar and Rohit Parab,  
for the Petitioner.

Mr. P. Ranjan a/w Santosh Salekar, i/b Halai & Co., for  
Respondent No.2.

Mr. Vishal Golambade, a/w Harshadn Inamdar, for Respondent  
Nos.3 to 5.

Ms. Mamta Srivastava, AGP for the State – Respondent Nos.6 to  
9.

SANTOSH  
SUBHASH  
KULKARNI

Digitally signed by  
SANTOSH SUBHASH  
KULKARNI  
Date: 2026.08.20  
18:46:54 +0530

**CORAM: N. J. JAMADAR, J.**  
**DATED: 18<sup>th</sup> AUGUST, 2026**

**JUDGMENT:-**

1. Heard the learned Counsel for the parties.
2. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.
3. The challenge in this petition is to an order dated 28<sup>th</sup> January, 2025 passed by the learned Civil Judge, whereby an application for amendment in the plaint seeking to incorporate the relief of removal of encroachment and possession of the premises over which Defendant No.2 has allegedly erected unauthorized structure, came to be rejected, primarily on the

ground that there was delay in seeking the amendment and the Plaintiff had not satisfied the test of due diligence.

4. Initially, the Plaintiff instituted the suit seeking a declaration that the Plaintiff has right of access over the land described in paragraph 1 of the plaint to approach Mumbai-Goa road and the consequential relief of injunction to restrain the Defendants No.3 to 5 from causing obstruction to the said access and also for a mandatory injunction to remove the obstructions that might have been erected over the said access road.

5. During the pendency of the suit, by an order dated 5<sup>th</sup> November, 2019, a Court Commissioner came to be appointed. The Deputy Superintendent of Land Records, Mahad, carried out survey and submitted a report alongwith the map which, *inter alia*, indicated the alleged encroachment by the Defendant No.2 over the property bearing Survey No.15-2B. Thereupon the Plaintiff filed an application seeking amendment in the plaint so as to incorporate the relief of removal of encroachment over the land bearing Survey No.15-2B.

6. The learned Civil Judge was of the view that the interdict contained in Order VI Rule 17 came into play and the Plaintiff failed to satisfy the test of due diligence. The fact that in the

earlier reports of Court Commission, purportedly carried out in the year 2013, the same encroachment was indicated, weighed with the learned Civil Judge, in observing that since there was delay of 11 and ½ years in seeking the relief of removal of encroachment, the relief sought to be claimed by way of amendment appeared to be barred by law of limitation.

7. Ordinarily, when the relief sought to be claimed by way of amendment is *ex facie* bar by the law of limitation, the Courts, as a rule, decline to grant permission to amend the plaint to incorporate such relief. However, it is not an absolute proposition of law that whenever the bar of limitation is raised, the Court is not empowered to allow the amendment. That is a factor to be taken into account in determining the prayer for amendment. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of *L. J. Leach and Company Limited and Another vs. Jardine Skinner and Company*<sup>1</sup> wherein the following observations were made:

“17. It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice. In *Charan Das v. Amir Khan* (1920 SCC OnLine PC 51) the Privy Council observed:

---

**1** AIR 1957 SC 357.

“.... That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases .... where such considerations are outweighed by the special circumstances of the case.”

Vide also *Kisandas Rupchand v. Rachappa Vithoba Shilwant* (1909 SCC OnLine Bom. 84).”

8. The said position was highlighted by the Supreme Court in the case of *Life Insurance Corporation of India vs. Sanjeev Builders Pvt. Ltd. and another*,<sup>2</sup>.

9. In the case at hand, the prayer sought to be incorporated by way of amendment is essentially for the recovery of possession of the alleged encroached portion of Survey No.15-2B, on the basis of title. In view of the provisions contained in Article 65 of the Limitation Act, the period of limitation for recovery of possession of immovable property on the basis of title begins to run from the date the possession of the Defendant becomes adverse.

10. At any rate, the question of limitation can be kept open for adjudication at the trial. A profitable reference can be made to the judgment of the Supreme Court in the case of *Raghu Thilak D. John V/s. S. Rayappan and Ors.*<sup>3</sup>

---

<sup>2</sup> 2020 SCC OnLine SC 1128.

<sup>3</sup> (2001) 2 SCC 472.

11. In the case at hand, the learned Civil Judge has misdirected himself in observing that, since the encroachment was allegedly carried out prior to 11 and ½ years, the prayer sought to be added by way of amendment was *ex facie* barred by law of limitation. That question ought to have been left for adjudication at the stage of final decision of the suit.

12. Since the amendment was sought pursuant to the report of the Cadestal Surveyor which indicated alleged encroachment by Defendant No.2, the interdict contained in the proviso to Order VI Rule 17 of the Code may not be strictly attracted. In any event, in order to determine all the questions in controversy between the parties once and for all, the proposed amendment appears necessary. There is no element of irretrievable prejudice to the Defendant No.2 as the Defendant No.2 would have an opportunity to contest the suit.

13. For the foregoing reasons, this Court is inclined to allow the petition.

14. Hence, the following order:

**: O R D E R:**

- (i) The petition stands allowed.
- (ii) The impugned order stands quashed and set aside.

- (iii) The application for amendment stands allowed.
- (iv) Necessary amendment be carried out within a period of four weeks and amended copy of the plaint be served on the Defendants.
- (v) The Defendants are at liberty to file additional written statement to the amended plaint within a period of one month of the service of the amended copy of the plaint.
- (vi) It is clarified that the observations are confined to test the legality and propriety of the order rejecting the application for amendment and the trial Court shall not be influenced by any of the observations, including on the aspect of limitation, at the stage of final adjudication of the suit.
- (vii) Rule made absolute in aforesaid terms.

No costs.

[N. J. JAMADAR, J.]