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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 137 OF 2010.
IN
APPEAL NO.351 OF 2009
IN
APPEAL NO.61 OF 2009
IN
MISC. NOTICE NO.4705 OF 2004
IN
R.A.E. & R.SUIT NO. 1486/4851/1983

Central Bank of India.
A Banking Company constituted under the Provisions of Banking Companies Act, (Acquisition & Transfer of Undertakings Act, 1970) having their Principal Office at Central Bank Building, M.G.Road, Fort, Mumbai. .. Applicant

Versus

1. Anil Puranmal Bansal
Age 39 years, Occ. Business, residing at Flat No.2, Sea Green 7/15, A.G.Khan Road, Worli Sea Face, Mumbai 400 018

2. Vimal Puranmal Bansal
Age 37 years, Occ. Business, residing at D-13, Paschimi Marg, Vasant Vihar, New Delhi 110 057. .. Respondents

Mr.Sharan Jagtiani a/w Mr.Aditya Thakkar, Mr.Deepak Deshmukh, Mr.Durgesh Khanapurkar, and Mr.Rohan Agrawal i/b Juris Corp., for Applicant.

Mr.Chetan Kapadia a/w Mr.Sheelang Shah, Mr.Vipul Jain i/b

I.A.Bagaria, for Respondents.

CORAM: N.M.Jamdar, J.
Friday 20 March, 2015

ORAL JUDGMENT:

By this Revision Application the Applicant challenges the Judgment and order passed by the Small Causes Court Mumbai dated 20 September 2008 and the Judgment and Order dated 19 December 2009 passed by the appellate bench of Small Causes Court Mumbai, by which the Miscellaneous Notice No.4705 of 2004 filed by the Respondents is allowed and the Applicant is directed to pay mesne profits at the rate of Rs.141/- per sq.ft. from 30 September 1991 to 30 September 2000 with interest at the rate of 6% for the area admeasuring 7000 sq.ft.

2. The Respondents are owners and landlord of premises No.7A and 7B on the 7^{th} floor of the building 'Chander Mukhi' admeasuring 7000 sq.ft. built-up area situated at Nariman Point, Mumbai. An agreement was entered into by the Applicant with the predecessor-in-title of the Respondents on 15 May 1972. Thereafter the Applicant became licensee of the Respondents and was paying license fee / compensation. A suit was filed by the Respondents under Section 13(1)(g) of the Bombay Rent Control Act, 1947. The suit was decreed on 12 July 1991. Thereafter an appeal was filed by the Applicant. On 29 April 1992, the appeal bench of the Small Causes Court allowed the appeal filed by the Applicant and dismissed the suit. Thereafter the Respondents filed

a Writ petition bearing No.4053 of 1992 against the Judgment and Order of the appellate bench. While the petition was pending, on 30 March 2000, the Maharashtra Rent Control Act,1999 came into force. As per the provisions of the new Act, the protection of rent legislation was no longer available to the Applicant and therefore, the Respondent issued another notice of termination on 30 August 2000. In October 2000, the Respondents filed Suit No. 229/274/2000 under Maharashtra Rent Control Act 1991, for possession and mesne profits. In a parallel proceedings in respect of the earlier suit, the writ petition filed by the Respondents was allowed by this Court on 3 September 2000. Thereafter Applicant filed Special Leave Petition against the order. The Special Leave Petition was dismissed on 13 November 2002 and time upto 31 March 2003 was granted to the Applicant to vacate the suit premises. On 31 March 2003, the Applicant handed over possession of the premises to the Respondents.

3. On 6 September 2004, a Miscellaneous Notice bearing No.4705 of 2004 was filed by the Respondents. The Respondents filed the said notice (referred to as application) by stating that it is filed under Order XX rule 12 of the Code of Civil Procedure. The Respondents called upon the Small Causes Court to determine the amount of mesne profits from filing of the suit i.e. from October 1983 till 30 September 2000, with interest. The Respondents claimed that they was entitled to mesne profits because of continued wrongful use and occupation by the Applicant. The Respondents stated that Respondents are entitled to claim mesne

profits till delivery of possession i.e. 31 March 2003, however, the Respondents were claiming mesne profits only upto 30 September 2000, as for subsequent period, they have already filed a Suit bearing No.229/274 of 2000. The Respondents gave particulars of the location of the building and the use for which it was put and accordingly claimed compensation based on the market conditions. The Respondents also relied upon report of a valuer.

4. A reply was filed by the Applicant in which the contentions raised by the Respondents were denied. The Applicant denied that it was in unlawful possession of the premises. The reply basically proceeded on general denial of the claims asserted by the Respondents. In the reply there was also the contention that the application is not in accordance with Order XX Rule 12 of the CPC.

5. Before the Small Causes Court Mumbai, both the parties led their evidence, documentary as well as oral. The parties cross-examined the respective witnesses. Detailed arguments were advanced and the learned Small Causes Court Judge framed issues to be decided. The learned Small Causes Court Judge, after considering the evidence on record in detail, including the valuer's report, came to the conclusion that the Respondents were entitled to get mesne profits at the rate of Rs.141/- per sq.ft. on the built-up area from 30 September 1991 till realization of the entire amount. The Applicant thereafter filed an Appeal bearing No.351 of 2009 in the Small Causes Court Mumbai. In the appeal, the Applicant challenged the findings of the learned Small Causes Court as regard

fixing the rate of Rs.141/- per sq.ft. towards mesne profits. The Applicant submitted that the appreciation of evidence as regards arriving at the market value was not correct. It was also submitted that the valuation report, on the basis of which, the rate was arrived, could not be relied upon and the valuation report of the Applicant ought to have been considered. In the appeal, the Applicant took an additional ground that, in the earlier suit filed by Respondents no prayer was made for mesne profits nor in the plaint there was any reference to the mesne profits and therefore, after the conclusion of proceedings and after handing over the possession, the Respondents could not have filed an application under Order XX rule 12 so as to reopen the proceedings. It was contended that the Court had no jurisdiction to determine the mesne profits.

6. The appellate bench of Small Causes Court came to the conclusion that the objection raised by the Applicant that the application under Order XX rule 12 was not maintainable was correct. The appellate bench however held that a separate suit for the prayers made in the application could be filed and though the application referred to provisions of Order XX Rule 12 the way it was presented and decided was akin to a plaint and trial of suit, and therefore no prejudice was caused to the Applicant. The appellate bench reassessed the evidence on record and came to the conclusion that the rate of Rs.141/- per sq.ft. was just and proper. Accordingly, the appellate bench by order dated 19 December 2009

dismissed the appeal and confirmed the order passed by the learned Small Causes Court Judge. These orders have been impugned by the Applicant in the present revision application.

7. I have heard Mr.Sharan Jagtiani, learned Advocate for the Applicant and Mr.Chetan Kapadia, learned Advocate for the Respondents.

8. The first point that arises is whether the application under Order XX Rule 12 of Code of Civil Procedure was maintainable. It is an admitted position that in the plaint of the original suit, the Respondents have not prayed for mesne profits. The application was filed after the proceedings were concluded and possession was handed over. Order XX Rule 12 reads thus -

> ***"O 20, R 12.*** *Decree for possession and mesne profits .- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-*
> *(a) for the possession of the property;*
> *(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;*
> *(ba) for the mesne profits or directing an inquiry as to such mesne profits;*
> *(c) directing an inquiry as to rent or mesne profits from the institution of the suit until-*
> *(i) the delivery of possession to the decree-holder,*
> *(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or*
> *(iii) the expiration of three years from the date of the decree, whichever event first occurs.*

> *(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."*

9. A bare perusal of the order shows that the suit has to be for possession and mesne profits and the proceedings and the application for mesne profit to be filed before conclusion of the proceedings. The appeal Court has relied upon various decisions to come to this conclusion. It is not necessary to discuss this aspect all over again as the Respondents have not challenged these findings which are in favour of the Applicant. As regards the parties are concerned, the findings that the application if was to be treated as filed under Order XX Rule 12 could not be maintainable, has become final.

10. However, the finding which has gone against the Applicant and which is being seriously contested is that no prejudice was caused to the Applicant since the application filed by the Respondents was tried as a suit.

11. It was not disputed by the Applicant before the appeal Court neither it was disputed in this Court that for the claim made in the application filed by the Respondents, a separate suit would be maintainable. Thus, the only question arises therefore is, whether finding of the appellate Court that the application filed by the Respondents could be treated as a suit was correct and also the

further finding as regards prejudice to the Applicant.

12. Under Section 4 of the Presidency Small Causes Court Act 1882, Small Causes Courts were established at Calcutta, Madras and Bombay. The Small Causes Court has been given exclusive jurisdiction to decide all disputes between the landlord and tenant, including of possession, mesne profits, deposits etc. Therefore, a substantive suit for mesne profits/damages, and also an application under Order XX Rule 12 would lie in the same Court i.e. Small Causes Court.

13. The Code of Civil Procedure lays down provisions under Order VII Rule 1 in respect of the plaint. If the application in question is perused, it conforms with general requirements of a plaint. The Applicant after receipt of the notice has filed it's reply. Thereafter parties have led oral and documentary evidence, witnesses have been examined. These witnesses have been cross-examined. The Small Causes Court framed issues. Arguments were advanced on the basis of issues framed and the learned Judge pronounced a Judgment and order. Full opportunity was given to both the parties to put forward their case. Court fee of Rs.3,00,000/- was paid by the Respondents, therefore, ex-chequer has also not suffered in that regard.

14. It was however submitted on behalf of the Applicant that assuming that it was tried as a suit, since the application

specifically referred to Order XX Rule 12, the Court had no jurisdiction and since the Court had no jurisdiction, this point could be taken up even in appeal. It was submitted that having once come to the conclusion Court had no jurisdiction there was no further question of holding whether it resulted in prejudice to the Applicant or not.

15. Mr.Jagtiani relied upon the decisions reported in the case of **Moly and another Vs. State of Kerala** -*AIR 2004 SC 1890*; **Chittoori Subbanna v. Kudappa Subbanna and others** - *AIR 1965 SC 1325*; **Official Trustee, West Bengal and others v. Sachindra Nath Chatterjee and another** - *AIR 1969 SC 823*; **Mohd. Amin and others v. Vakil Ahmed and others** - *AIR 1952 SC 358*; **Ganapati Madhav Sawant (Dead) Through his Lrs. v. Dattur Madhav Sawant** -*(2008) 3 Supreme Court Cases 183*; **Shiv Kumar Sharma v. Santosh Kumari** - *(2007) 8 SCC 600*; **Shankar Manikrao Waghmare & anr. v. Bhaurao Bapurao Waghmare** - 2012 (2) Bom.C.R 747; **Veeramachaneni Gangadhararao v. Kanuri Venkateswara Rao and others** - *AIR 1974 Andhra Pradesh 289* and in the case of **State of Uttar Pradesh v. Brahm Datt Sharma and another** -*(1987) 2 Supreme Court Cases 179*.

16. None of these decisions cited will advance the case of Mr.Jatiani, because there is no dispute about the proposition that if a Court lacks inherent jurisdiction, then no party by agreement or waiver can confer jurisdiction, and so also if the decision is a

nullity, that ground can be always taken even in execution proceedings. All the decisions cited by Mr.Jagtiani lays down the above two propositions, which as stated earlier are not disputed. Even if the Court had no inherent jurisdiction to decide the application, the question still remains is whether it was open for the Court to consider the application as a suit, which was maintainable. If the application is to be treated as a suit then the lack of inherent jurisdiction does not arise because the suit was maintainable in the Small Causes Court. Therefore, much will turn whether the application filed by the Respondents could be treated as a suit. If the argument of Mr.Jagtiani is to be accepted, then it would mean that even though Court had jurisdiction to decide a suit it was divested of it because the proceedings brought before it mentioned some other provisions for which the Court did not have jurisdiction.

17. The application admittedly refers to Order XX Rule 12 of Code of Civil Procedure. The application however fulfills all ingredients of a plaint. The issue is whether the proceedings filed under one provisions could be treated as proceedings under another provision. Mr.Chetan Kapadia for the respondents relied upon the decision of **Maganbhai Madhabai and others Vs Ambalal Bhikhabhai Patel and others –** *AIR 1982 Gujarat 129.* Before the learned Single Judge of Gujarat High Court, an argument was raised that the Court at Nadiad had no jurisdiction to entertain the suit. In this case an injunction was granted by

District Court Nadiad and appeal was filed challenging the order of injunction. In the said appeal, it was urged that the Court had no jurisdiction to entertain the suit of the nature in which it was brought. The learned Single Judge in following paragraphs enumerated facts and contentions as follows:-

> *"5. The first point argued by Mr.Desai requires to be dealt with first The alleged plaint was made available to me at the time of hearing and even that the plain as if a formal plaint was being drafted. Even the prayer clause showed that a declaration was sought with a consequential relief. Mr. Desai's burden of submission before me was that such a suit did not lie in the District Court because there was no provision in law to bring such a suit anywhere, much less in the District Court. Mr. Desai's submissions to this extent appears to be very well--founded. If it is a regular civil suit under the provisions of the Civil P.C. and under the provisions of the Bombay Civil Courts -Act,, it would have been required to be filed in the court Civil, Judge, Senior Division, at Nadiad' and not in the District Court. No provision of law could be pointed - out on 'behalf. of the contesting respondents as to how these proceedings, if treated as a suit, could be filed in the District Court. A half-hearted attempt was made before me to show that the present Scheme was not the substitution of the earlier Scheme but it was only an amendment of the earlier Scheme and that the earlier Scheme provided for approaching the District Court, Nadiad, for suitable directions. But this attempt obviously for good reasons was not pressingly put forward before me.*
>
> *Had I treated this as a regular suit filed under the provisions of the Civil P. C., particularly under S. 9 thereof, I would have unhesitatingly held that the suit was misconceived and it was out of gross misconception. presented to the District Court at Nadiad. However, an argument was advanced before me that though labelled as*

a suit and that too as a regular civil suit and though couched in the language normally employed in terms of Orders 6 and 7 of the Civil P.C., the ostensible appearance of the proceedings should. not. be the decisive factor one way or the other' and it the proceedings could be said to have been under other provisions of some law, they should be treated as such. Mr. H. B. Shah who argued the matter for the appellants before me at the stage of reply to the, arguments of contesting respondents was fair enough to concede that the nomenclature or the label, attached to a particular document presented to the Court should not and could not be made much of and if the proceedings could be said to have been in pith and substance the proceedings under some other specific provision of law, there should be no bar to examine the merits of the matter, under that new label or head. What the contesting respondents that is the original plaintiffs and the remaining of the Trustees other than the defendants Nos. 5 and 6 Who, now supported the case of the original plaintiffs and through the mouth of their advocate Mr. P. M. Raval now stated. That the -present proceedings should be and could be deemed to have been pursued ,under S. 56A of the Bombay Public Trusts Act, 1950 (hereinafter Referred to as the "Act", for brevity's sake) and all the contention of the contesting respondents was focussed on the said section which I reproduce below in, material parts.

"56A (1) Save as hereinbefore provided in this Act, any trustee of a public trust may apply to the Court within the local limits of whose jurisdiction the whole or part of the subject matter of trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or, administration of the trust property or income thereof, and the Court shall give its opinion, advice, or direction, as the case may be, thereon:

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it

> *considers to be a question not proper for summary disposal.*
>
> *(2) The Court, on an application under sub-section (1), may give its opinion, advice or direction thereon after giving notice to the Charity Commissioner. The Court before giving any opinion, advice or direction shall afford a reasonable opportunity of being heard to all persons appearing in connection with the application,*
>
> *(3) A trustee stating in good faith the facts of any matter relating to the trust in an application under sub-section (1), and acting upon the, opinion, advice, or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the application was made.*
>
> *(4) No appeal shall lie against any opinion, advice or direction given under this section."*

The learned Single Judge thereafter went on to hold as under:-

> *6. 1 have therefore to decide whether the document presented to the learned District Judge under the caption of a civil suit and registered by the office of the District Court as the Regular Suit No. 3 of 1980 can conceivably be an application or proceeding initiated by the Trustees for the opinion, advice or direction of the Court on any question affecting the management or administration been defined in Clause 4 of S. 2 of the Act a of the trust property or income thereof. The term "Court" occurring in the Act has "the District Court." So for the purposes of S. 56A of the Act, the District Court will be competent to deal with an application, if it is made by any trustee of a public trust and if it is made for the opinion, advice or direction of the District Court on any question affecting the management or administration of the trust property.*

7. To me it appears that the proceedings registered as the Regular Suit No.. 3 of 1980 in the District Court at Nadiad can be said to be the proceedings under S. 56A of the Act because they met with both the above mentioned requirements of S. 56A. They car be termed to be an application to the District Court within the local limits of whose jurisdiction the whole or party of the subject matter of the trust is situate. Secondly, it can be said that, it was made to the District Court by', the original plaintiffs who were trustees and who claimed to be continuing as trustees despite the impugned resolutions. Thirdly, it could be said that the prayer clause put forth in this document presented to the Court initially was for seeking the direction of the Court on the question pertaining to the management or management of the trust properties. The fact that the District Court was requested to declare that the plaintiffs continued as trustees and the defendants Nos. 7 and 8 could not act as trustees would in substance mean that the Court's direction was sought that the plaintiffs were entitled to and the defendants Nos. 7 and 8 were not entitled to, manage and administer the trust properties.

So in the technical sense of the term requirements of sub-see. (1) of S. 56A of the Act can be said to have been met. It is to be noted that it was not the say of Messrs. Desai and Shah that ordinarily the prayer put forth cannot fall within four corners of S. 56A(1) of the Act but the non-application of the said sub-section was pressed into service on the ground that the original plaintiffs had ceased to be trustees by operation of law and secondly it was alleged that the Civil Court's jurisdiction was expressly taken away by S. 80 of the Bombay Public Trusts Act read with S. 22 of the said Act. I shall examine this defence instantly."

18 Mr.Kapadia then relied upon the decision of Full Bench of this Court in ***Jagdish Balwantrao Abhyankar & ors. v/s State of***

Maharashtra & ors. reported in ***A.I.R. 1994 Bom. 141.*** An issue was referred to the Full Bench in the context of provisions of Article 226 and 227 and maintainability of Letters Patent Appeal. The Full Bench observed as under :

> *"**21.** Sometimes it does happen that an. application is filed under a particular provision of a statute and it is found to be not; maintainable thereunder or the Court or Tribunal has no power to grant the relief asked for thereunder but the said application is maintainable under some other provision of the statute before the same Court or Tribunal and it has power to grant the relief asked for, it is in such cases that it has always been held that the "label" or the "nomenclature" of the application or petition should not matter and after seeing the substance or contents of the application, if it is possible to grant the relief under some other provision of the statute, such a relief should not be denied to a party. It is, however, material to note that such a recourse is taken only when it is found that the relief asked for cannot be granted under the provisions under which the jurisdiction of the Court or Tribunal is invoked, much less when the result would be to deprive the party of a right of appeal provided against the order passed under such a provision."*

19. The Full bench reiterated the position that mere label and nomenclature in an application would not matter and if it is possible to grant a relief under some other provisions of the statute relief should not be denied. This position was considered in detail by Single Judge of Calcutta High Court (Bachawat J.) reported in **Associated Bank of Tripura Ltd. Vs Bishnu Pada Chakravarty** *-55 C.W.N 402*. Bachawat, J. relied upon various earlier decisions

and decisions of the English Courts and held that though it is settled law that by waiver, jurisdiction cannot be conferred, but the jurisdiction is not ousted by mere error as to the form of the proceedings. The learned Judge held that if incorrect form of procedure is adopted, there is no lack of inherent jurisdiction to grant relief.

20. Thus, if the tenor of the document presented to the Court would show that the reliefs claimed therein could be granted by the Court under the provision which it had power to do so, merely because referred to another provision in which there was no such power, relief could not be refused. What needs to be considered is the substance of the proceedings and the relief. If the Court was competent to grant the relief, then mere nomenclature of the document nullifies the exercise of jurisdiction. Of course, the court has to take care that, while doing so the other party is not put to serious prejudice.

21. Therefore what has happened in the present case is that though the application invokes provision of Order XX rule 12 for grant of relief, under which the Court had no jurisdiction, if it could be treated as a plaint, then the Court indeed had jurisdiction to grant the reliefs. Once the Court had jurisdiction to grant relief by way of a suit, then there is no question to any inherent lack of jurisdiction.

22. Having come to the conclusion that for grant of relief treating

the application as a suit, the Court had jurisdiction then question will arise whether the Applicant was put to any prejudice by adopting this methodology. As I have pointed out earlier, the entire gamut of a suit was followed. The procedure adopted was similar or rather the same as a suit. There is no dispute that full opportunity was been given to the Applicant. Court fee also has been paid. Therefore, the finding of the appellate Court that no prejudice was caused to the Applicant cannot be faulted with.

23. As regards the finding of fixing the compensation of Rs.141/- per sq.ft. is concerned, both the Courts have considered the evidence on record. Both the parties led evidence, produced the valuation report and the Court has determined the compensation. This finding is a pure finding of fact. Though Mr.Jagtiani made a faint attempt to contend that valuation report is not just and proper, this is an argument which goes in the factual aspect of the matter. Apart from this position, the premises are situated at Nariman Point Mumbai. They are an entire floor in a prime commercial locality in Mumbai. It was used for commercial purpose. Both the Courts have taken note that all conveniences that are available around the locality. If the amount of Rs.141/- per sq.ft. for 7000 sq.ft. is calculated, monthly compensation comes to the tune of around Rs.9,87,000/-. Keeping the ground and commercial realities, this compensation for the premises in question, cannot be termed as so perverse to warrant interference under revisional jurisdiction. Therefore, I am not inclined to

interfere with this finding of fact and discretion used to determine the quantum of compensation.

24. Mr.Kapadia submitted that the grant of 6% interest by the Small Causes Court Judge was not proper as per the guidelines issued by RBI, as the interest prevalent was to the tune of 18%. There is no substantive proceedings filed by the Respondents challenging the grant of interest at 6% in this Court and therefore, in the Revision filed by the Applicant this prayer cannot be considered.

25. Next ground urged by Mr.Jagtiani however must be taken note of is that the application was not within limitation.

26. Mr.Jagtiani submitted that if the application has to be treated as a suit then bar of limitation of three years will apply. Mr.Jagtiani relied upon Article 51 of the Limitation Act, 1963 which corresponds to Article 109 of the Limitation Act, 1908. The Article 51 reads as follows-

Art.51. *For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.*	*Three years*	*When the profits received.*

Mr.Jagtiani also relied upon a decision in the case of ***Dullabhbhai Hansji Vs Gulabbhai Morarjee Desai*** - ***AIR 1938 Bombay 158***., under the Limitation Act, 1908. The application which now has to be treated as a plaint, refers to the cause of action as under -

> *"10) I say that the Judgment of the Trial Court Order dated 12.7.1991 merged in the Order of the SLP dated 13.11.2002 by which the defendants were ordered and decreed to hand over the possession of the suit premises by 31.3.2003. The plaintiffs are thus entitled to mesne profits for the continued wrongful use and occupation of the suit premises by the defendants abovenamed till the delivery of the possession by the defendants to the plaintiff on 31.3.2003, but the plaintiffs are claiming mesne profits in this application only upto 30.9.2000, as thereafter the mesne profits are claimed in an application made in T.E. & R Suit No.229/274/2000."*

27. Thus a categorical statement has been made in the application/plaint that the Respondents are claiming the mesne profits only up-to 30 September 2000. The application/plaint is filed on 6 September 2004. Mr.Kapadia, however, sought to advance various contentions to demonstrate that the notice / plaint was within period of limitation. He submitted that the Respondents could have claimed the relief upto 31 March 2003 but for the period after 30 September 2000 another suit has been filed and therefore, it was not claimed in the present application/suit. This may be the reason why the Respondents restricted it's claim, but legal effect of such restriction is still a matter of debate. Mr. Kapadia also submitted that initially the suit was decreed thereafter the appeal was allowed and at that time no cause of action arose and it arose to the Respondents only after Writ petition was

allowed in his favour and considering those dates the claim is within time.

28. Firstly, the appellate bench, when it considered the application as a suit was under obligation to consider whether the suit would be within limitation. The limitation Act places an embargo on the Court from entertaining time barred claims. It is duty of the Court to examine whether the claim is barred by limitation. Thus, once having come to the conclusion that the proceedings were a suit and it was entertaining an appeal from decision in a suit, the appellate Court was under obligation to examine whether the suit was within limitation.

29. Mr.Kapadia contended that the issue of limitation was not urged by the Applicant before the appellate Court, and it was raised for the first time in the present Civil Revision Application. However, the Applicant cannot suffer double prejudice in this matter. It was their case before the appellate bench that the application was not maintainable which was accepted and thereafter the Court has non-suited the Applicant on the ground that the application was to be treated as a suit. It is only after this finding has been rendered against it by the appellate bench that the applicant could have taken the ground of limitation. Apart from this position, as stated above, whether the Applicant took a ground regarding limitation or not, it was incumbent on the appellate bench to consider it.

30. The question of limitation in this matter is not a pure question of law. If the application/plaint is perused, it itself shows that the end point of claim is 30 September 2000 and the application/suit is filed on 6 September 2004. Mr.Kapadia, across the bar, advanced submissions to demonstrate that the application/plaint is within limitation. This exercise will have to be, however, undertaken by the appellate Court, as various factual issues will arise in determining this issue.

31. In the circumstances, I am of the opinion that the findings of the learned appellate bench that the application had to be treated as a plaint and the proceedings as a suit and that the Applicant has not suffered any prejudice in this course of action, is correct and requires no interference. I am also of the opinion that the finding regarding fixing the compensation at the rate of Rs.141/- is also just and proper. However, the issue as to whether the claim made in the application/plaint was within limitation or not, has to be determined by the appellate bench and for this limited purpose the proceedings need to be remanded back to the appellate bench of the Small Causes Court. It will be open to the Respondents to file such additional affidavit and it will be open to the Applicant to file a reply. All contentions as regards the issue of limitation are kept open.

32. The impugned order dated 19 December 2009, is quashed

and set aside, and the proceeding is remanded back to the appellate bench of the Small Causes Court, Mumbai, on the limited issue to consider whether the Misc. notice No. 4705 of 2004 was within a period of limitation as provided under the Limitation Act, treating it as a plaint in a suit.

33. The learned appellate bench of the Small Causes Court will decide the issue of limitation within a period of four months from the date of appearance of parties before it. The parties shall appear before the learned appellate Bench of the Small Causes Court on 8 April 2015.

34. At this stage, Mr.Jagtiani states that the amount deposited in this Court be refunded to the Applicant. Since I have upheld the order of the appellate bench on merits and the proceedings are remanded to the appellate bench on a limited issue, to be decided in time-bound period, considering the facts and circumstances of the case, I am of the opinion that at this stage, it will not be possible to accede to the request of Mr.Jagtiani as regards withdrawal of the amount. After the decision of the appellate bench, it will be open to the Applicant to make appropriate request to this Court as regards the withdrawal of the amount.

35. Revision application is disposed of in above terms. No costs.

(N.M.Jamdar, J.)