

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO.960 OF 2014**

|                                            |   |                                   |
|--------------------------------------------|---|-----------------------------------|
| M/s. Sitaram Enterprises,                  | ] |                                   |
| Through its Partner Girish Chandmal Lodha. | ] | ... Applicant/<br>Orig. Plaintiff |

Versus

|                                      |   |                                      |
|--------------------------------------|---|--------------------------------------|
| Smt. Sadhanadevi D. Gupta (Deceased) | ] |                                      |
| 1. Deepak Dwarkaprasad Gupta,        | ] |                                      |
| 2. Pankaj Dwarkaprasad Gupta.        | ] | ... Respondents/<br>Orig. Defendants |

Mr. Shreepadmurthy i/b Mr. Vinod N. Tayade for Applicant.  
Mr. B. R. Singh for Respondent No.1.

**CORAM :- M. S. SONAK, J.**

**DATE :- JULY 20, 2015**

**P. C. :-**

1. Leave to convert this Civil Revision Application into a Writ Petition. Amendment to be carried out forthwith.

2. Rule.

3. With the consent of and at the request of learned Counsel for parties, Rule is made returnable forthwith.

4. The Plaintiff in R.A.E. Suit No.615 of 1995 has been declined the opportunity of leading evidence on the issue of limitation.

5. In this case, the plaint was instituted by the Plaintiff on 15/07/1995. The evidence on behalf of the Plaintiff concluded on 11/02/2010. When, the cross-examination of the Respondents (Defendants) was in progress, the Plaintiff applied for leave to amend the plaint and raise the issue of denial of title by the Respondents. Such amendment was allowed by the trial Court by its order dated 13/07/2011.

6. In Writ Petition No.7328 of 2011, instituted by the Respondents challenging the grant of leave to amend, this Court made the following order on 17/10/2011.

*“12. Hence I pass following order :*

*(i) Rule is partly made absolute in terms of this order.*

*(ii) The impugned Judgment and Order dated 13/7/2011 passed in R.A.E. Suit No. 615 of 1995 by the learned Judge of the Court of Small Causes presiding in C.R. No. 37, Bandra Branch below Exh. 62 in the said Suit is not interfered with. It is however directed that the question whether the proposed amendment seeks to incorporate the time barred claim and the question whether the Trial Court would be competent to consider*

*the ground of denial of title or whether such a ground cannot be considered on account of a clear bar of limitation, having been raised more than 12 years after the filing of the Written Statement on 18/7/1996 is expressly kept open for being considered at the time of decision of the Suit. For that limited purpose, the Trial Court will have to frame an additional issue which will be a pure question of law and hence no additional evidence can be permitted to be led for that issue. Needless to state that the Petitioners would be at liberty to file additional Written Statement within a period of 2 months from the service of amended plaint on the defendants who are Petitioners herein. It will be open for the learned Judge of the Trial Court to decide whether the Plaintiff should be permitted to step into the witness box again or should be permitted to file affidavit of examination in chief. Defendants would however, be entitled to file additional affidavit of examination in chief as a matter of right.*

*(iii) The Plaintiff shall pay costs quantified at Rs. 7500/- to the Defendants being the costs for delayed application for amendment. Costs shall be paid within a period of 6 weeks from today. Payment of cost is a condition precedent for the Application Exh. 62 being allowed. If cost as aforesaid is not paid or deposited in the Trial Court, the impugned Judgment and Order will*

*stand set aside and the Petition would stand allowed.  
Rule made partly absolute in the aforesaid terms.”*

7. The Plaintiff, by application at Exh.77, applied for leave to lead evidence on the issue of limitation. By the impugned order dated 12/06/2014, the same has been dismissed.

8. Mr. Shreepadmurthy, learned Counsel for Plaintiff, submitted that the amendment application having been allowed on basis of certain observations in the order dated 17/10/2011, it cannot be said that the Plaintiff was barred, for all times to come, to lead any evidence on the issue of limitation. In fact, this Court, in its order dated 17/10/2011, has specifically reserved opportunity to the Plaintiff to apply for leading of fresh evidence after, the Defendants filed their additional Written Statement in response to the amended plaint. Thereafter, it was left open to the trial Court to decide whether the Plaintiff should be permitted to step into the witness box again or to be permitted to file additional affidavit in lieu of examination-in-chief.

9. Mr. B. R. Singh, learned Counsel for Respondent No.1, submitted that the entire attempt on the part of the Plaintiff to attempt to plug the lacunae which have arisen in the Plaintiff's case, consequent upon Respondent's deposition, which by now, has reached at an advanced stage. Mr. Singh therefore submitted that if any opportunity of leading evidence on the issue of limitation is accorded

to the Plaintiff at this stage, the same will occasion the Plaintiff very severe prejudice not compensable by way of costs.

10. Having heard the learned Counsel for parties and perused the record, this is a case where, as prayed for, opportunity can be given to the Plaintiff, subject however to payment of exemplary costs. The record indicates that application for amendment of the plaint was itself made after the conclusion of the Plaintiff's evidence and at a stage when the cross-examination of the Respondent was in progress. The amendment was allowed by the trial Court and not interfered with by this Court. The issue of limitation was, no doubt, kept open and it was also observed that since this would be a pure question of law, no additional evidence can be permitted to be led over the said issue. However, that was at the stage when the Respondents were yet to file any additional Written Statement in response to the amended plaint. Realizing perhaps, that there may be necessity of leading evidence, once Written Statement is filed to the amended plaint, opportunity was granted to the trial Court to decide whether the Plaintiff should be permitted to step into the witness box again or be permitted to file Affidavit of examination-in-chief. This, in my judgment, would be the proper manner to read the observations in para 12 of this Court's order dated 17/10/2011.

11. That apart, normally, no party should be deprived of opportunity to place on record the evidence in respect of any issue which may arise and which may be framed in the suit. This is, of

course, subject to the rule of prejudice. As contended by Mr. Singh, some prejudice is bound to occasion to the Respondents, particularly since their evidence has already commenced and has reached at a substantially advanced stage. However, it is not correct, in the facts and circumstances of the present case, to say that such prejudice is not compensable in terms of costs. The very amendment application was allowed after the commencement of cross-examination of the Respondent. The same was allowed subject to payment of costs of Rs.7,500/-. In such circumstances, the application at Exh.77 can be granted, subject to payment of substantial costs by the Plaintiff. The Plaintiff in the present case, has offered to pay costs of Rs.50,000/- (Rupees Fifty Thousand Only). This amount, in the facts and circumstances of the present case, appears to be reasonable.

12. Therefore, upon consideration of the aforesaid facts and circumstances, the impugned order dated 12/06/2014 is set aside. The Plaintiff's application at Exh.77 is allowed. This is, of course, subject to payment of costs of Rs.50,000/- (Rupees Fifty Thousand Only) by the Plaintiff. Such costs to be deposited before the trial Court within a period of two weeks from today. Once deposited, the Defendants will be at liberty to withdraw the same unconditionally.

13. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

14. All concerned to act on basis of authenticated copy of this order.

15. At this stage, Mr. B. R. Singh, learned Counsel for Respondent No.1, seeks a stay of six weeks upon the order now made, as the Respondents may intend to seek a recourse against this order before the Hon'ble Apex Court. The request, is reasonable and is therefore granted. Accordingly, the period for deposit of costs is also proportionately extended.

**(M. S. SONAK, J.)**