

IN THE COURT OF SMALL CAUSES AT MUMBAI

**ORDER BELOW EXH.24
IN
R.A.D. SUIT NO.221 OF 2018**

Tejkumar Mathuraprasad Dikshit ...**Plaintiff**
Versus
Arvind Kothari ...**Defendant**
And
M/s. Kantilal Narbheram & Co. ...**Proposed Defendant No. 1**

**Coram : D. S. Dabhade,
Judge, C.R. No.17
Date : 09.12.2021**

ORDER :

This is an application for amendment filed by the plaintiff to add proposed defendant No. 1 and for some additions in the plaint. The Court has passed the order to issue notice to proposed defendant and call the say of the contesting defendant. Accordingly, notice was issued to proposed defendant and same has been served on him by postal acknowledgement Exh. 27. But said proposed defendant has not appeared before the Court and not filed reply. The contesting defendant has filed reply at Exh. 28.

2. The defendant has strongly opposed the application on the ground that the plaintiff wants to fill up lacuna and the same has been filed at belated stage with gross latches. He contended that proposed defendant was a tenant of shop No.1. In front of said shop No.1 there was one Ovla and said Kantilal requested to predecessor-in-title of the defendant to permit him to use said Ovla. Then, said Kantilal constructed

illegal pedi on it. The plaintiff has alleged said illegal pedi as a shop No.1. Said Kantilal has handed over vacant possession of shop No.1 and same has been let out to Ghanshyam Kauthiya. The said defendant has denied all the contentions raised in application and prayed for rejection of the same.

3. By this application, the plaintiff wants to make certain amendment in Plaint under Order VI Rule 17 of Code of Civil Procedure. Now, it is necessary to see the provisions of Order VI Rule 17. **Amendment of Pleadings;** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

4. The above said provision is inserted by Act 22 of 2002 is coached in mandatory form. The Court has to allow amendment, but the jurisdiction to allow such amendment application is taken away, unless the conditions precedent are satisfied. Such as, the Court must come to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In the case in hand, the issues are framed on 15.06.2019 but yet the plaintiff has not adduced his evidence. So, it is clear that the trial has not been commenced.

5. By way of present application, the plaintiff wants to add M/s. Kantilal Narbheram and Company being a defendant No.1, in

consonance of said addition, he wants to make some correction in place of the word defendant and to add some pleadings. He also wants to add a word “shop No.1” in title of the plaint and in prayer clause also. Though, the present defendant has replied the said application and raised objection and contended that proposed defendant Kantilal has vacated shop No.1 and delivered its possession. It is further contended that the plaintiff has constructed illegal pedi which is situated in front of shop No.1 being a shop No.1. In that event, whatever contentions have been raised by the plaintiff in the application, the burden of proof lies on him to prove the same and the said contentions are also liable to be decided on merit. At the same time, the defendants have an opportunity to submit their additional written statement on it. In the application, the plaintiff has thrown all his responsibility on his previous Advocate for not making present pleading which he wants to raise by way of amendment at the time of institution of the suit. Ld. Advocate for the plaintiff relied on the case of **Kailas s/o Shivling Jagtap V/s. Avinash s/o Vasantrao Zarkar (2012 (3) ALL MR 65)**. Considering the fact and ratio of authority, it is just and proper to allow the application and to grant an opportunity to the plaintiff to prove his allegation. Hence, I pass the following order.

ORDER

1. Application Exh.24 is allowed as prayed.
2. The plaintiff is directed to carry out amendment within 14 days.
3. The plaintiff shall have to submit amended plaint on record and copy of the same be served to other side also.

4. Costs in cause.

5. Parties to take note.

(Dictated and pronounced in open Court)

Mumbai.
Dt. 09.12.2021

(D.S. Dabhade)
Judge, C. R. No.17