

**ORDER BELOW EXH.31**

**(Passed on 06.09.2017)**

- 1.** This is an application filed by the plaintiff under Order 6 Rule 17 of the Civil Procedure Code for the amendment in the plaint.
- 2.** By way of proposed amendment, the plaintiff wants to add in title clause, to add para 3-A after para 3 and in the prayer clause 9-B-1 after 9-B of the plaint.
- 3.** The plaintiff submitted that after rejection of his temporary injunction application on 07.01.2015 the defendant has illegally constructed over the road owned and possessed by the plaintiff. As the construction over the road going towards the suit property and the construction for the animals i.e. Gotha is completed by the defendant. The plaintiff further submitted that as the said illegal act of the defendant is during the pendency of the suit. It is necessary to permit him to amend his plaint as proposed by him.
- 4.** Per contra, the defendant strongly opposed the application. He submitted that the original suit of the plaintiff is for permanent injunction along with the application for Temporary Injunction. But after the order on the T.I. application the plaintiff moved this application and created the new cause of action. The plaintiff wants to change the title of the suit and claim mandatory injunction. It is further submitted that if this application is allowed then nature of suit will change. But it is not maintainable under the provisions of Order 6 Rule 17 of the Civil Procedure Code. It is further submitted that the plaintiff can file the separate suit for mandatory injunction with the permission of the court. Hence, this application is not tenable.
- 5.** I have given thoughtful consideration to submissions of both the side. It is contention of the plaintiff that during pendency of the suit and after passing of order of temporary injunction application, the defendant has taken illegal possession of the suit land and hence, he required to pray for decree of possession by amending the plaint. It is seen that initially the

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suit of the plaintiff was for simplicitor injunction. It was contention of the plaintiff that he was in possession of the suit land at the time of the filing of the suit.

6. Looking towards the said contention as well as contention in the present amendment application, it can be said that the proposed amendment does not fundamentally change the nature of the suit. It is further seen that the proposed amendment appears to be outcome of the subsequent event happened during the pendency of the suit. Thus, if such amendment will be allowed to be taken on record then, it would certainly curtail multiplicity of litigation. The amendment sought appears to be necessary for proper adjudication of controversy between the parties. It is settled principle of law that the merit of proposed amendment cannot be gone into while deciding the amendment application. The same can be decided only during the trial.

7. The **Hon'ble Division Bench of Bombay High Court in Mahadeo S/o. Maroti Bhanje Vs. Balaji S/o. Shivaji Pathade reported in 2012 (7) All.M.R. 564** held that the trial in a civil suit commences from the date of filing of affidavit in lieu of the examination in chief of the witness and the proviso to Order 6 Rule 17 of the Civil Procedure Code will come into play after stage of filing of affidavit in lieu of examination in chief of witnesses. Perusal of the record shows that in the present suit only issues are framed and no evidence in the form of affidavit or otherwise is tendered on record. Thus, the evidence of the plaintiff is yet to be started.

8. The learned advocate for defendant shri. P.N. Chaudhry opposed the application on the ground that the proposed amendment will change the nature of the suit. It is important to note that it will not change the nature of the suit as the proposed amendment sought is in the nature of subsequent event happened during pendency of the suit.

9. Further it is argued by the advocate for the defendant that the plaintiff can file fresh suit for mandatory injunction. But as per my view if fresh suit can be entertained for the said relief then it certainly cause multiplicity of proceedings.

**10.** Perusal of the record shows that there is delay caused in filing the present application. But only on the said ground, the application of plaintiff cannot be rejected which is otherwise liable to be allowed. In my view other side can be compensated in terms of costs for the said reason. Hence, in view of the above discussion, I am of the opinion that the present amendment application needs to be allowed. Hence, I pass the following order.

**OPERATIVE ORDER**

- 1.** The application Exh.31 is hereby allowed with cost of Rs.400/- payable to the defendant.
- 2.** The plaintiff is permitted and directed to carry out proposed amendment in his plaint within 14 days and place on record amended copy of the plaint.
- 3.** The defendants are at liberty to carry out consequential amendment in their written statements.

Date:- 06/09/2017

**(R.M. Shaikh)**  
2<sup>nd</sup> Jt.Civil Judge Junior Division,  
Manora.