

MHKO110012432016



Reg.Civil Suit No.206/2016
(CNR No.MHK0110012432016)

Order below Exh.82

01. The present application is made by plaintiffs with the prayer to grant permission to withdraw the suit conditionally.

02. It is contention of the plaintiffs i.e. applicants that, prior to instituting the present suit, defendant No.1 to the present suit instituted the suit bearing No.163/2015 against present plaintiffs and defendant No.2 to 4 with the prayer to partition and injunction. The suit property of the present suit i.e. land bearing Gat No.516 and 517 were also the subject matter of the said suit bearing No.163/2015. The plaintiffs and defendant No.1, 4, 5 to the suit bearing No.163/2015 submitted in the suit that, the subject matter of that suit is joint family property. However the present plaintiffs, who are defendant in the suit bearing No.163/2015 filed their written statement submitted that, land situated in Gat No.516 and 517 is self acquired property. In this background, it is the contention of the plaintiffs that, the dispute involved in the present suit will be resolved in the suit bearing No.163/2015. So to avoid multiplicity of proceeding, they are seeking lieu of this Court to withdraw the present suit conditionally to institute the fresh suit on the same cause of action, if it required in future.

03. Defendant No.2 to 4 filed their say vide Exh.85. It is the contention of the defendants that, plaintiffs sold the sugar cane being

cultivated in the suit property and they obtained the amount of Rs.91,300/- from the concerned sugar cane factory. Defendants made application vide Exh.56 with the prayer to direct the plaintiffs to deposit the amount of Rs.91,300/- into the Court and only to escape from depositing the said amount into the Court, they made the present application. They finally submitted to reject the present application with costs.

04. Perused the application and say thereon. Heard to both parties.

05. Before proceeding to the application, it is necessary to consider here when permission may be granted to the plaintiff to withdraw the suit conditionally. For this purpose let us take recourse of Order 23 of The Code of Civil Procedure.

06. In Code of Civil Procedure ‘formal defects’ is nowhere defined. But in the various judgments of Hon’ble Supreme Court and Hon’ble High Court ‘formal defects’ means – Some defect of form or procedure not affecting merits of the case; such as want of statutory notice under Section 80 of the Code, misjoinder or non joinder of the necessary parties or of cause of action or non payment of proper court fee or stamp fee or mistake in not seeking proper relief, improper or erroneous valuation of the subject matter of the suit etc.

07. In the present case in my hand, it is submission of plaintiffs that, the defendant No.1 to the present suit instituted a suit bearing No.163/2015 against the present plaintiffs and defendant No.2 to 4. It is also submission of the plaintiffs that, the suit bearing No.163/2015 was

instituted prior to instituting the present suit and the subject matter of the present suit and the suit i.e. bearing No.163/2015 was the same. So the relief being claimed by the plaintiffs in the present suit shall be given to them in the suit i.e. R.C.S.No.163/2015. So they want to withdraw the present suit with the condition to allow them to institute the fresh suit in future, if it will be required.

08. On perusing the entire order of Order 23 of C.P.C. it is nowhere mentioned that, if the subject matter of the present suit and any other suit was the same, that would be the formal defect which will entitle the plaintiff to withdraw the suit conditionally. It is pertinent to note here that, if the subject matter of the present suit and the suit i.e. R.C.S.No.163/2015 is one and same and relief being claimed in both suits are on the same footing, in such situation plaintiff has to take recourse of any other proper remedy provided under C.P.C. But the present plaintiffs in stead of availing the proper remedy provided under C.P.C. they made the present application which is not coming within the scope of Order 23 of C.P.C. As on perusing the application I do not come across any formal defect in the suit, it will not be in the interest of justice to allow the present plaintiffs to withdraw the suit. Hence I proceed to pass the following order.

ORDER

- 1) Application is hereby rejected with costs.
- 2) Application at Exh.82 is disposed off accordingly.

Date : 21/07/2022

(L. M. Pathan)
Civil Judge Junior Division,
Peth-Vadgaon