

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

WRIT PETITION NO. 607 OF 2016

Balaji s/o. Antram Depe,
Age : 49 years, Occ. Agri.,
r/o. Kopra, Tq. Ahmedpur,
Dist. Latur ..Petitioner

Vs.

Sambhaji s/o. Antram Depe,
Age : 54 years, Occ. Agri.
and others ..Respondents

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Mr.V.D.Gunale, Advocate for petitioner
Mr.S.D.Karkare, Advocate i/b. Mr.P.K.Joshi,
Advocate for respondent nos.1 to 5
Mr.Milind Patil, Advocate for respondent nos.6 to 9
Mr.S.B.Yawalkar, AGP for respondent nos.10 and 11

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CORAM : S.V. GANGAPURWALA, J.

DATE : APRIL 24, 2017

PER COURT :

The application filed by the present petitioner under Order XXIII of the Code of Civil Procedure ("C.P.C.", for short) Seeking withdrawal of the suit with liberty to file a fresh suit, has been rejected by the trial Court.

2. Mr.Gunale, learned Counsel for the petitioner/plaintiff submits that because of a formal defect, the suit would fail and therefore, the application was filed seeking withdrawal of the suit with liberty to file a fresh suit, so as to avoid multiplicity of litigation. The plaintiff is not in actual possession of the suit property, however, the same is not pleaded in the plaint. The defendants have not filed counter claim and they could not get sufficient opportunity to reply the defence. The learned Counsel further submits that time to time, the plaintiff has changed the Advocate and because of which, there is no consistency in the plaintiff's evidence. A huge mess is created. The learned Counsel submits that the plaintiff should not be non-suited on the ground of formal defect and as such, the said application was filed.

3. I have also heard the learned Counsel for the respondents/defendants.

4. The suit can be allowed to be withdrawn with liberty to file a fresh suit only if there are contingencies as detailed in Order XXIII Rule 1(3) of the C.P.C. There should be sufficient ground to allow the plaintiff to withdraw the suit with liberty to file a fresh suit.

5. The application filed by the plaintiff and the order passed by the trial Court does not specifically spell out any formal defect. The merits of the suit and the evidence are not required to be considered while dealing with an application under Order XXIII of C.P.C. The only aspect to be considered is presence of formal defect by virtue of which, the claim would fail. It appears that the evidence has already been recorded and the suit is at the stage of final argument when the said application was filed. The trial Court has arrived at a plausible conclusion.

6. Considering the above, no case is made for interference. The Writ Petition is dismissed. No costs.

[S.V. GANGAPURWALA, J.]

kbp