

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

WRIT PETITION NO.8594 OF 2016

1. Avtarsing Sundarsing Chhabra,
Age 73 years, Occu. Retired
R/o Sector D, 35, Brij Nayani
Colony, Behind Queens College,
Khandwa Road, Indore (MP)
 2. Amarjitsing Avtarsing Chhabra,
Age 37 years, Occu. Service,
R/o Sector D, 35, Brij Nayani
Colony, Behind Queens College,
Khandwa Road, Indore (MP)
- ..Petitioners

Versus

1. Pradip Hiranand Katariya,
Age 47 years, Occu. Business,
R/o Block No.101, Room No.1,
Kumar Nagar, Sakri road,
Dhule
 2. Rajkumar Hiranand Katariya,
Age 50 years, Occu. Business,
R/o Block No.101, Room No.1,
Kumar Nagar, Sakri road,
Dhule
- ..Respondents

Mr S.P. Shah, Advocate for petitioners
Mr B.R. Warma, Advocate h/f Mr S.A. Nagargoje, Advocate for
petitioners

CORAM : T.V. NALAWADE, J.
DATE : 24th August 2016

ORAL JUDGMENT

Rule. Rule made returnable forthwith. With the consent of parties, heard finally at admission stage.

1. The petition is filed by defendants of Special Civil Suit No.107 of 2013, which is pending in the Court of Civil Judge, Senior Division Dhule to challenge the order dated 26.7.2016 made on Exh.28, by which they have prayed for setting aside the ex parte order made against them.

2. The suit is filed by present respondents for specific performance of contract of sale of immovable property. It appears that the suit summons was sent on two occasions for service on the address given in the plaint, but the summons could not be served and the serving Officer reported that there was no complete address available and so, summons could not be served. This order was sought from the Court to serve the summons by sending it through Registered Post Acknowledgment Due. The process was then sent through registered post and report was received that intimation was given to the present petitioners, but they did not collect the registered post notice. In view of this endorsement, ex parte order came to be made on 28.10.2014. The application for setting aside the order was made on 23.7.2015.

3. There are circumstances against the present petitioners/original defendants that legal notice sent by the plaintiffs before filing the suit was served on the same address on the petitioners and the notice was also replied by the petitioners. One more circumstance was argued by learned Counsel for the respondents/plaintiffs that along with the application, no written statement was filed by the present petitioners and so, the said application could not have been entertained. Learned Counsel for petitioners submitted that the written statement was tendered subsequently, but before passing of the order on aforesaid application by the trial Court.

4. This Court has gone through the contents of the legal notice given by plaintiffs and also the reply given by present petitioners to the notice. This Court is avoiding to mention the contents of the reply,

but it can be said that in view of those contents, it can not be said that the petitioners wanted to protract the things and they avoided to turn up intentionally. Learned Counsel submitted that the petitioner No.1 is retired Lecturer and he was out of station for some time at the relevant time. It can be said that not much could have been achieved by the petitioners by staying away from the Court when the reply of present nature was given by them is considered. In view of these circumstances, this Court holds that the trial Court ought to have considered the matter favourably. It also needs to be noted that granting relief of specific performance is within the discretion of Court and the Court needs to consider the material circumstances for giving relief to the plaintiff or for refusing the same.

5. In view of aforesaid circumstances, this Court holds that the order needs to be set aside. As such, Writ Petition is allowed. The order dated 28.10.2014 made by learned Judge of the trial Court of rejection of application filed on 23.7.2015, is hereby set aside. The said application Exh.28 is allowed subject to condition of depositing of Rs.10,000/- (Rs. Ten thousand) by the petitioners in the trial Court within a period of three weeks from today. This order is subject to condition that written statement is already tendered in the Court and that was tendered before giving decision by the trial Court on aforesaid application. The amount of costs to be paid to the original plaintiffs. If the cost is deposited within time, it is to be presumed that the order is set aside and the written statement is to be entertained.

6. Rule is made absolute in aforesaid terms.

(T.V. NALAWADE, J.)

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