

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

WRIT PETITION NO. 9359 OF 2014

Anilkumar Jinabhai Patel,
since deceased through his L.Rs.

- 1) Smt. Geetaben Anilkumar Patel (widow),
age 65 years, occ. Household,
- 2) Shri Darshan Anilkumar Patel (son),
age 43 years, occ. Business,
- 3) Shri Chetan Anilkumar Patel (son),
age 41 years, occ. Business,
- 4) Shri Vikram Anilkumar Patel (son),
age 39 years, occ. Business,

All r/o 180/1, 'Smruti',
Gujarati Galli, Jilha Peth, Jalgaon

...Petitioners
Orig.Plaintiffs

VERSUS

- 1) Shri Mahadeo Tukaram Shinde,
age major, occ. Agril. & labour,
R/o House No. 30, Shivaji Nagar,
Jalgaon,
- 2) Samrat Development Corporation,
A partnership firm, through
Samrat Reymand Cloth Store,
Khandesh Mill Shopping Complex,
Jalgaon
(notice be served on the partner of
partnership firm i.e. Resp. No.3),
- 3) Dilip s/o Samratmal Gandhi,
age major, occ. Business,
R/o Navi Peth, in front of Old Bus Stand,

through Paras Motors, Jalgaon

...Respondents
Orig. Defendants)

...

Mr. S.B.Yawalkar, Advocate for Petitioner

Mr. S.S.Manale, Advocate for Resp. No.1

Mr. A.M.Gholap, Advocate for Resp. Nos. 2 and 3

...

CORAM : N.W.SAMBRE, J.

DATED : 15th November, 2017

PER COURT : -

This petition is filed by the petitioners-legal representatives of original plaintiff questioning the order dated August 11, 2014, passed by the learned 2nd Joint Civil Judge, Senior Division, Jalgaon, below Exhs. 68 and 72, in Special Civil Suit No. 8 of 2011 for specific performance of contract.

2. The case of the present plaintiffs/petitioners is that the respondents/defendants proceeded ex parte on June 8, 2011 after they were served through paper publication on 25.1.2011. By inviting attention of this Court to the observations of the learned Trial Court in the order impugned that the suit has reached the stage of pronouncement of judgment, learned counsel for petitioners submits that the application of the respondents for setting aside ex parte order passed against them, should not have been allowed. According to him, liberty granted to the respondents/defendants to place

on record written statement is not sustainable, having regard to the stage of the suit.

3. Application Exhs.68 and 72 are moved by the original defendant nos. 2, 3 and 1, respectively for the same relief.

4. In addition, learned counsel for present petitioners submits that once the respondents were served by paper publication, the same is within the meaning of Order XX Rule 5 of the Code of Civil Procedure, and as such, the Trial Court ought not to have allowed the application for setting aside ex parte order, based on the submission that the respondents were not properly served. He sought dismissal of both the applications by setting aside the order impugned.

5. Per contra, Shri Gholap and Shri Manale, learned counsel for respondent nos. 1 to 3, respectively would urge that the claim put forth by learned counsel for the petitioners is contrary to the record, as the suit was never fixed for judgment. According to them, it is during pendency of Special Civil Suit No. 196 of 1997 and 197 of 1997, the present respondents came to know about pendency of some suit and upon inquiry they came to know about Special Civil Suit No. 8 of 2011 instituted against them. They submit that no prejudice would be caused to the petitioners as they were already compensated by the court below. They would then invite attention of this Court to the roznama in Special Civil Suit No. 8 of 2011 to substantiate their contentions.

6. I have considered rival submissions. It could be borne out from the roznama that the suit was part heard as on 3.12.2013. Thereafter the suit never proceeded for final hearing and was never posted or closed for judgment.

7. In the wake of above, the application moved by the respondents/defendants for setting aside ex parte order and production of written statement was very much maintainable, as there is no embargo on the right of the respondents under the Code of Civil Procedure.

8. So far as next contention of the petitioners that the service on the respondents was complete, it is to be noted that the respondents/defendants were served by paper publication, in spite of the fact that two other suits, referred supra, are pending between the parties.

9. The learned Trial Court has saddled costs on the respondents while allowing their applications.

10. In view of the discretion exercised by the learned Trial Court, particularly for setting aside ex parte order and acceptance of written statement of the respondents, I hardly see any scope for interference.

11. The petition fails and stands dismissed.

[N.W.SAMBRE, J.]

dbm