

KAUK220000492022



**IN THE COURT OF THE SENIOR CIVIL JUDGE AND
JMFC,. ANKOLA, AT: ANKOLA.**

Dated this the 04th day of January, 2025.

PRESENT:

Sri. Manohara M. LL.M.
Senior Civil Judge, Ankola.

ORIGINAL SUIT No.04/2022

Plaintiffs: Smt.Vidya Manohar Achari
and others.

-Vs-

Defendants: Smt.Parvati Jagannath Achari
and others.

I.A.No.IX

APPLICANT: Vasant Avu Achari
Defendant No.3 Age 81 years, Retired,
R/o: Harwada, Ankola,
Now residing at A-001, Royal CHS Ltd.,
Behind New English School, Kalwa (W),
District Thane, Maharashtra 400605.

V/s

RESPONDENTS: Smt.Parvati Achari and others.

I.A.No.X

APPLICANT: Smt.Parvati Jagannath Achari and others.

V/s

RESPONDENTS: Smt.Vidya Manohar Achari
and others.

ORDER ON IA No.IX and X

The counsel for defendant No.3 filed I.A.No.IX under Order IX Rule 7 R/w Sec.151 of CPC to set aside the Order of Exparte of defendant No.3 and permit him to appear through his Advocate.

2. In the memo of facts, in support of this application, the counsel for defendant No.3 stated that the suit is filed for partition and separate possession. As the defendant No.3 was unaware of the facts, and recently he came to know the case, and he contacted him to appear on his behalf. The absence of the defendant No.3 is not intentional one. It is necessary to be present and defense for the present suit by filing written statement. If the application is allowed, no injustice, inconvenience, loss or damage will be caused to the respondents. On the other hand, if the application is not allowed, injustice, inconvenience, loss and damage will be caused to the him. Hence, it is prayed to allow the application.

3. The learned counsel for the plaintiffs filed objections stating that the summons on defendant No.3 was served on 17.8.2022 and two years are completed. But, the defendant No.3 has not appeared. Even in the memo of facts also, the reason for non appearing for the last two years has not been satisfactorily explained. The cross-examination of plaintiff has completed and the case was set down for defendants' evidence. In this way, the defendants unnecessarily dragged this case without any reason. The defendant No.3 has not filed affidavit for his delay. Hence, it is prayed to dismiss the application.

4. The learned counsel for the defendant No.3 filed I.A.No.X under Order III Rule 2(a) R/w Sec.151 of CPC to permit GPA holder of defendant No.3 to lead evidence.

5. In the memo of facts, in support of this application, the counsel for defendant No.3 stated that the defendant No.3 is old aged, and due to old age illness, he is not in a position to attend the court for leading evidence. The defendant No.3 had given a general power of attorney in favour of his son Milind Vasant Achari. If the application is allowed, no injustice, inconvenience, loss or damage will be caused to the respondents. On the other hand, if the application is not allowed, injustice, inconvenience, loss and damage will be caused to him. Hence, it is prayed to allow the application.

6. The learned counsel for the plaintiffs filed objections stating that the son of defendant No.3 has prayed to permit him to appear on behalf of defendant No.3 by filing memo of facts which is not correct. The summons was served on 17.8.2022 to the defendant No.3. Though two years are completed, the defendant No.3 has not appeared and no reason is forthcoming in the memo of facts for appearing after two years. The son of defendant No.3 has got no opportunity under law to appear on behalf of defendant No.3 at this stage. The evidence of plaintiff is already closed, and the case was set down for defendants' evidence. At this stage, by filing this application, the defendants are unnecessarily dragging the matter. Hence, it is prayed to dismiss the said application.

7. Having heard both side and having perused the plaint, written statement, IA No.IX and X, objections and other materials following points arise for consideration:

1. Whether the defendant No.3 made out ground to permit him to appear through his general power of attorney holder by setting aside the order of placing him Exparte as prayed for?

2. What order?

8. My answer to the above points are as under:-

Point No.1 : In the **affirmative**.

Point No.2 : As per the final order for
the following:

REASONS

9. **Point No.1:** Admittedly, this suit is for partition and separate possession. The summons to defendant No.3 was served on 17.8.2022. But, the defendant No.3 has not appeared. Now the defendant No.3 appeared through his son by executing general power of attorney in favour of his son. According to the memo of facts, the defendant no.3 was unaware of the facts and recently he came to know the pendency of this suit and he contacted his present advocate. The present Advocate already appeared for defendant No.1 and 2. Whether he was aware or not is a fact. The said fact cannot be proved at this stage. Now the question is whether he is to be permitted to appear by setting aside the Order of him placing Exparte. The giving of opportunity to contest the case is a natural justice principle. If the defendant No.3 appeared and contested this case, and the plaintiffs have got merit in this case, the appearance of defendant No.3 and contesting of this case by him do not put them injustice as the plaintiffs have got every opportunity to traverse any defence of the defendant No.3 by filing rejoinder. No doubt, delay will be caused, but the delay

could be compensated in terms of money. If the application is rejected and the defendant No.3 is not allowed to contest this case, certainly he will be put to more hardship than the plaintiffs. As stated above, the giving of an opportunity is a natural justice principle, the Order of placing him Exparte is to be set aside. The appearance personally or through his attorney is his choice. As he has chosen to appear through his son i.e., attorney, he is to be permitted to appear through his attorney. Consequently, I answer **point No.1 in the affirmative.**

10. **Point No.2:** In view of my reason on Point No.1, I proceed to pass the following:

ORDER

I.A No.IX filed under Order IX Rule 7 R/w Sec.151 of CPC and I.A.No.X under Order III Rule 2(a) R/w Sec.151 of CPC by the defendant No.3 are hereby allowed on cost of Rs.1,000/-.

(Typed to my dictation by the Stenographer, revised and corrected by me and then pronounced in the open court on **4th January, 2025**)

**(MANOHARA M.)
Senior Civil Judge, Ankola.**