

ORDER BELOW EXH- 115.

Defendant no.1/C has filed this application for setting a side no W. S. order passed against him. It is contention of defendant that, plaintiffs have file this suit for fixation of boundaries. After service of suit summons, he has been appeared in proceeding in through his council. However, due to non availability of material documents he could not able to contact his council and in result no W. S. order was passed again him. Defendant not intentionally filed his W. S. within time. He having no knowledge of legal processing. Further, for filing W. S. he required some documents from concern city survey department. Present plaintiffs have already lodged complaint against city survey records. The proceeding an appeal there on pending at Kolhapur. Therefore, this defendant could not able to collect all documents within time.

2. He further contended that, he is under impression that, he no need to filed separate W. S. in present proceeding as he had already filed in pending proceeding before revenue court. If his W. S. not accepted on record, he would suffer irreparable loss. Per Contra if his W. S. accepted no prejudice would be cause to plaintiff. His W. S. is just and proper for the final disposal of suit. Therefore, he prayed to allowed his application.

3. Plaintiffs have filed their say at Exh. 116 and strongly opposed the application. It is contention of plaintiffs that, present application barred under provision of Order 8 Rule 1 of C. P. Code.

Previously, this defendant has filed an application for same reason which was not pressed by him. Therefore, present application is not tenable. This suit is for fixation of boundaries. Defendant had appeared in proceeding on 2015. Further, he had been party to previous suit R. C. S. No. 7/2007. This defendant having every knowledge of proceeding since beginning. However, intentionally he could not file W. S. since last 8 to 9 years. Even he has not sought sufficient reason for delay. The reason sought by defendant due to non availability of document, he could not file his W. S. is false and baseless. Plaintiffs have already filed relevant documents along with the suit on record. The delay cause to file W. S. is not condonable. After demise of the sole plaintiff his legal heirs were brought on record and thereafter suit has been proceeded and two witnesses were examined. Considering rulings of Hon'ble Apex Court present application deserved to be rejected. Thus, prayed to reject the application.

4. I have heard counsels for both sides at considerable length. Counsel for plaintiff contended that, after appearance this defendant is not able to collect documents in respect of pending litigation before Revenue Court within time. The claimed documents are old and therefore could not be easily available. The delay caused by this defendant to file his W. S. is not intentional. Considering his valuable right in suit property prayed to allow the application.

5. Per contra counsel for plaintiffs vehemently submitted that, the reasons sought by the defendant are not justifiable. He invited attention of this court towards the application filed by the defendant. Defendant along with this application has not filed

single document on record on which he relied and he could not able to collect since last 8 to 9 years. He further place his reliance on the judgment of Hon'ble Apex Court in Atcom Ltd Vs. Y. A. Chunawala and Company (2019 (2) Mh.L.J 26).

6. Perused record. It is not disputed that, suit summons was duly served to this defendant and he had appeared in proceedings. However, on 09.09.2015 no W. S. order was passed against him. Defendant filed this application in December 2014. Further, previously for the same ground this defendant has filed an application below Exh. 113. Later on he not pressed present application with reserving right to file present application.

7. Further, record shows that, during the pendency of suit some of the defendants were died and therefore time has been lapsed for bringing their heirs on record. Finally on 19.03.2024, plaintiffs adduced their evidence. Considering the above factual position of suit now only question left before this court to accept the W. S. of this defendant or not. It is settled law that, the provision of Order 8 Rule 1 is directory in nature. It depend upon court to exercise it's discretion to accept the W. S. at a belated stage after considering the compiling and exceptional circumstances.

8. Defendant sought reason of non availability of documents. He contends that, due to non availability of documents related to proceedings pending before city survey proceedings he was not able to file his W. S. within time. However, it is pertinent to note that the defendant has not filed a single document along with this application on record on which he relied. Therefore, I do not find any force in the submission of the defendant that, due to non

availability of documents he could not file his W. S.

9. Present suit is for fixation of boundaries and perpetual injunction. Valuable immovable property rights of both parties involved in present suit. Further, as per record except this defendant no one contests the suit. Suit is a proceeded ex-parte against the rest of the defendants. Therefore for deciding suit on merits, the W. S. of this defendant must be on record. Admittedly, the defendant is not diligent to avail his right. As per record, counsel for the defendant has cross examined plaintiff's witness no.2. It shows that, defendant is silently observing the proceeding.

10. Present suit is a non commercial suit. Therefore, the time limit for filing a W. S. does not need to be considered as mandatory. The judgment cited by plaintiff Supra Atcom Ltd. Specifically deal with the commercial dispute. Therefore, not applicable to the case in hand. Further, Hon'ble Apex Court in Does Deshraj Vs. Balkrishnan (CIVIL APPEAL NO. 433 OF 2020) interpreting Order 8 Rule 1 of the Code of C .P. Code had settled the position that, the requirement to file a W. S. within 30 days (extendable to 90 days) of receipt of summons is directory and not a mandatory requirement.

11. Therefore, considering the stage of a suit and the exceptional circumstances that, except this defendant no one contains the suit one more opportunity needs to be granted to him. The W. S. of the defendant is just for the final decision of suit and to put-forth his defence. If his application rejected, it will amount to denial of fair trial. However, at the same time the delay caused by the defendant to file a W. S. needs to be compensated by

him. Therefore, considering the above facts and in the interest of justice I pass following order,

ORDER

1. Application allowed subject to the cost of Rs. 6,000/- paid to the plaintiff.
2. After payment of the cost amount, the W. S. filed by defendant be read and recorded.
3. Defendant to take note and comply order accordingly.
4. Parties to take note and expedite the trial.

(R. P. Thore)

J. O. Code – MH 02897
Civil Judge, Junior Division,
Ajara.

Place- Ajara.

Date- 01.04.2025.

