

MHRG140027882016



ORDER BELOW EXH-39

1. This is the application filed at Exhibit 39 by Defendant Nos. 1 and 2, seeking to set aside the order dated 22/11/2021, whereby the suit was ordered to proceed ex-parte against them, and praying for permission to file their Written Statement on record.

2. Briefly stated, the Plaintiffs have instituted the present suit against the Defendants for partition, declaration, and permanent injunction. Records reveal that the summons/notice of the suit was served upon Defendant Nos. 1 and 2 on or about 04/10/2018. Owing to their non-appearance before this Court, an order directing the suit to proceed ex-parte against them was passed on 22/11/2021.

3. The Applicants/Defendant Nos. 1 and 2 have submitted in Exhibit 39 that their non-appearance was neither intentional nor deliberate. They assert that upon receiving the suit summons, they engaged the services of Advocate B.S. Patil to conduct the proceedings on their behalf and handed over all the relevant case papers, documents, and information. Under the bonafide belief that their advocate had drafted and filed the necessary written statement (कैफियत), they remained under the impression that the matter was

being properly defended.

4. It is further contended by the Applicants that due to a prolonged lack of communication, they attempted to contact Advocate B.S. Patil at his office and residential premises. However, they found that his residential building had been vacated for redevelopment, and they were unable to establish contact. Upon making subsequent inquiries with other advocates in the local court premises, the Applicants discovered that their appointed advocate, Mr. B.S. Patil, had sadly passed away. Soon after learning of his demise, they made inquiries about the status of the present suit and discovered, around 15 to 20 days prior to filing the present application, that an ex-parte order had been passed against them on 22/11/2021. The Applicants have now appeared in person and with new counsel, and have tendered their written statement along with this application, praying that the ex-parte order be set aside in the interest of natural justice.

5. The Plaintiff has strongly resisted the application by filing his reply at Exhibit 41. The Plaintiff contends that the application is legally untenable and the reasons advanced by the Applicants are not genuine or justified. It is argued that despite service of summons in October 2018, the Defendants failed to appear, showing sheer negligence. The Plaintiff further objects that there is an inordinate delay in filing the present application, and no separate application for condonation of delay has been preferred. It is contended that the ground of the advocate's death is a manufactured excuse to delay

the proceedings, and therefore, the application should be rejected with exemplary costs.

6. It is an undisputed fact that the summons was served upon Defendant Nos. 1 and 2 in October 2018, and the ex-parte order was passed on 22/11/2021. The present application under Exhibit 39 was presented on 27/01/2026. The primary objection raised by the Plaintiff is the lack of a separate application for condonation of delay. In this regard, it is a settled position of civil procedure that under Order IX Rule 7 of the Code of Civil Procedure, 1908, if a defendant appears at or before an adjourned hearing and assigns good cause for their previous non-appearance, they may be heard in answer to the suit as if they had appeared on the day fixed. As long as the suit is pending and has not been finally disposed of by an ex-parte decree, a formal application under Section 5 of the Limitation Act is not strictly mandatory, provided the applicant successfully demonstrates 'good cause' for the delay and non-appearance within the application itself.

7. The core reason assigned by the Applicants is the demise of their previous advocate, Mr. B.S. Patil, and the subsequent loss of contact due to the redevelopment of his residential building. It is a fundamental principle of equity and justice that a litigant should not suffer for the inaction, omission, or unfortunate demise of their appointed counsel. The Applicants had entrusted their case to an officer of the court and were under a reasonable expectation that their interest was being protected. The demise of the advocate is a

circumstance beyond the control of the litigants. Although there has been a considerable lapse of time, the explanation offered by the Applicants appears plausible, bonafide, and constitutes 'good cause' for their non-appearance.

8. No litigant should be deprived of their right to defend a civil suit on merits, particularly when the suit involves valuable property rights concerning partition and declaration. Denying the Applicants an opportunity to file their written statement would result in a one-sided trial, violating the principle of 'audi alteram partem' (hear the other side) and causing irreparable loss to the Defendants. On the other hand, the inconvenience caused to the Plaintiff due to the delay can be adequately compensated in terms of monetary costs.

9. In order to balance the equities and ensure that the suit is decided on its actual merits rather than technical defaults, this Court is of the opinion that the application at Exhibit 39 deserves to be allowed, subject to the payment of reasonable costs to the Plaintiff. Hence, I proceeds to pass the following order:

ORDER

1. This Application at Exhibit 39 is hereby allowed.
2. The ex-parte order dated 22/11/2021 passed against Defendant Nos. 1 and 2 is hereby set aside, subject to the

payment of costs of Rs. 2,000/- (Rupees Two Thousand Only) by Defendant Nos. 1 and 2 to the Plaintiff on or before next date.

3. The Written Statement filed by Defendant Nos. 1 and 2 be taken on record, subject to the payment of the aforesaid costs.

Uran

Date – 04.08.2026

S. P. Wankhade
(Civil Judge J. D. Uran)