**Affidavit to Recall ex- parte order and set aside the order passed in the absence of Defendant.**

**Format of Affidavit for Miscellaneous Application to recall ex parte order passed against the Defendant.**

Miscellaneous Application an be filed against ex parte order. Application under Order IX Rule 13 of Code of Civil Procedure dealing with Setting aside of decree ex parte against the defendant can be entertained only the following two grounds:

- Where summons were not duly served

- Where defendant was prevented from sufficient cause from appearing where the fact called for hearing.

Sample Format of Affidavit for Miscellaneous Application to recall ex parte order is given below:

**IN THE COURT OF THE \_\_\_\_\_\_\_\_\_\_\_\_\_ JUDGE AT \_\_\_\_\_\_\_\_\_**

**MISCELLANEOUS APPLICATION NO \_\_\_\_\_\_\_ OF 20\_\_**

**MR \_\_\_\_\_\_\_\_\_\_\_\_\_\_                                        APPLICANT / DEFENDANT**

**VS**

**MR \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_                                        RESPONDENT / PLAINTIFF**

**AFFIDAVIT**

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Son of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ aged \_\_\_\_\_\_\_\_\_ years, Resident of  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, do solemnly affirm and say as follows:

1. That I say, that I am the defendant in the above suit and the applicant in the application. I am well conversant with the facts and circumstances of the case and stand competent to swear to this affidavit.

2. That I say, that the aforementioned suit is for the recovery of an amount of Rs \_\_\_\_\_\_\_\_, allegedly due to the respondent-plaintiff from me, for selling Electronic Weighing Machine to the applicant.

3. That I say, that notice in the suit was not duly served on me.

4. The notice was in fact served to another person in my name in the same locality without verifying address. The said person did not care to inform me about any such service of notice and it was only on enquiry that I came to know that the address was wrongly given into the Process Memo of the summons by the respondent-plaintiff and therefore the notice was returned unserved earlier. Therefore, there was no due or proper service of notice on the applicant.

4. That I say, that it was only from one of my friends , who happened to have a case before this Hon'ble Court last week, that I came to know about the filing of the suit and the declaration of the applicant ex parte by this Hon'ble Court, not having appeared before this Hon'ble Court inspite of the alleged service of notice. This has caused great inconvenience and hardship to me. I further came to know that this Hon'ble Court had posted the case to for plaintiff's evidence. If evidence is taken ex parte and the suit decreed by this Hon'ble Court, it will cause irreparable loss, injury and hardship to me.

5. That I say, that I have got very serious contentions in the suit and have records to show that all amounts due to the respondent-plaintiff towards the aforementioned construction have been fully paid against proper receipts issued by him and there is no amount due from, and payable by me.

6. That I say, that the case has not reached the trial stage. Even the issues have not been framed. The respondent-plaintiff will not therefore in any way be prejudicially affected by setting aside the ex parte order.

7. It is therefore, just and necessary that this Hon'ble Court may be pleased to set aside the order dated passed by declaring the applicant ex parte and to allow me to contest the suit by filing the written statement. It is also necessary that this Hon'ble Court may be pleased not to go ahead with the trial of the suit on the namely the next date of hearing.

**DEPONENT**

**VERIFICATION**

I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_the above named deponent do hereby verify on oath that the contents of the affidavit above are true to my personal knowledge and nothing material has been concealed or falsely stated therein.

Signed and verified this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_ 20 \_\_\_\_\_\_\_ at \_\_\_\_\_\_\_

**DEPONENT**

Solemnly affirmed and signed before me by the deponent, who is personally known to me, on this the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_ ,20\_\_**.**

**COUNSEL FOR THE DEPONENT**

## Order VIII Rule 13 of Civil Procedure Code 1908.

**Rule 13 Order VIII "Setting aside decree ex parte against defendant"**
In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may he set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.