

**IN THE COURT OF THE III ADDL. CIVIL JUDGE &
JMFC, AT: BELAGAVI.**

**PRESENT: SMT. SUJATHA A.B.,
B.A.L, LL.B.,
III Addl. Civil Judge & JMFC.,
Belagavi.**

DATED: THIS 04th DAY OF JULY, 2018

MISC. APPLICATION NO.01/2018

BETWEEN:

1. Shri Mahadev S/o Laxman Kademani,
Age: 66 years, Occ: Retired,
R/o: CTS.No.4623/1A1, Bhadakal Galli,
Belagavi also residing at Santaji Galli, Kangrali (BK)
Tal & Dist: Belagavi through his Power of attorney
Holder Shri Shankar S/o Nagapa Sottennavar
Age: 51 years, Occ: Govt Servant,
R/o: Class-III, 20-A,
Vishveshwarayya Nagar, Belgavi.

... Petitioner

(By Sri R.N. Totiger , Advocate)

AND:

1. Shri Shashikant S/o Laxman Kademani,
Age: 53 years, Occ: Service,
R/o: CTS.No.4623/1A/3,
Bhadakal galli, Belagavi.

.... Respondent

(By Shri S. Anand, Advocate)

: O R D E R :

This petition is filed by petitioner under Order 9 Rule 9 R/w Section 151 of C.P.C. to restore the original suit No.170/2017, which was dismissed for non-prosecution on 04.01.2018 by the III Addl. Civil Judge (Jr.Dn.), Belagavi to its original file, by permitting them to prosecute the said suit on merits.

2. The substance of pleadings are:-

The petitioners submitted that, the original suit No.170/2017 was posted on 04.01.2018 for recording of evidence by the plaintiff. It is stated that, the present applicant was served in the judicial department and now he is retired. It is stated that, due to his old age, he was unable to attend the court and hence, he has executed power of attorney in favour of his son-in-law to proceed with the case. Since on 04.01.2018, the PA holder was unable to secure leave and even the plaintiff i.e., Mahadev Kademani was unable to walk from one place to other place. Therefore he contended, in the absence of both the parties, this court has

dismissed the suit for non-prosecution. It is further stated that, there is no willful negligence on the part of the applicant. Hence, prayed to restore of the suit to its original file.

3. The notice was served upon the Respondent, he has appeared through his counsel by filing the objections to the main petition.

In the objections, the respondent has denied the averments of the application. It is stated that, if this court peruses the order sheet, it is clear that, the plaintiff has failed to present before the court on earlier dates of evidence. It is further stated that, taking into consideration of the guidelines of the Supreme Court of India in 2011 AIR 5789, if plaintiff remained absent of three consecutive dates of hearing then there is no option for court to except to dismiss the suit for non-prosecution. Hence, prayed to dismiss the petition.

4. The power of attorney holder of the petitioner has examined himself as PW.1 and got marked Ex.P.1 to P.4. The

learned counsel for the respondent has cross examined the PW.1. After the cross examination of the PW.1, the learned counsel for the petitioner has submitted that, he has no further petitioner evidence. Hence, the case was posted for respondent evidence. But, the learned counsel for the respondent also submitted that there is no respondent evidence. The learned counsel for the respondent has relied upon the decision which is reported in **Civil Appeal No.7532 of 2011 (M/s Shiv Cotex V/s Tirguan Auto Plast P.Pvt Ltd., and others)**

5. The following Points arise for my consideration.

:POINTS:

1. Whether the petitioner has shown sufficient cause for his non-appearance on 04.01.2018 in O.S.No.170/2017?
 2. Whether the petitioner is entitled to the relief sought for?
 3. What order?
6. Heard on both sides.

7. My answers to the above said Points are as follows:-

Point No.1:- In the Negative,

Point No.2:- In the Negative,

Point No.3:- As per the final order, for the following;

:REASONS:

8. **Points No.1 & 2:-** As these points are interlinked with each other. Therefore these points are taken together for common discussion in order to avoid repetition.

9. The petitioner to prove his case has got examined as PW.1. The PW.1 has specifically deposed that, the petitioner had filed O.S.No.170/2017 against the present Respondent for the relief of Permanent and mandatory injunction. Due to his absence, the suit was dismissed for non prosecution on 04.01.2018. The petitioner further contended that, he was diligent in prosecuting the said suit and there was no willful negligence or latches on his part.

10. The petitioner has relied upon Ex.P.1 to P.4. Ex.P.1 is the certified copy of the pliant in OS.No.170/2017.

Ex.P.2 is the certified copy of the written statement produced in OS.No.170/2017. Ex.P.3 is the certified copy of the ordersheet produced in OS.No.170/2017. Ex.P.4 is the power of attorney.

11. The plaintiff/petitioner had filed the suit for permanent injunction and as well as mandatory Injunction. In order to prove the contention taken by the petitioner, he has not furnished any documents for his non appearance on 04.01.2018 and for contesting the O.S.No.170/2017. But it is noted that petitioner contended that due to the beginning of the year he was not able to secure the leave and he has not been able to attend the court on 04-01-2018. In the above background it is observed that petitioner failed to explain the proper reason for his absence. Moreover, he has not produced any document to show that he has applied for leave. The petitioner is only taken a mere contention that he was not able to secure the leave, but the same contention is not established by him. Similarly at the same time on perusal of Ex.P3 is the order sheet in O.S.No.170/2017 on reading of

the above it is clear that plaintiff was continuously absent from 21.09.2017, 21.10.2017 and 18.11.2017 i.e. from last 3 hearing dates before it being finally got dismissed on 04.01.2018. At this juncture, it is relevant to look into the cross- examination of the PW,1, ಸಾಕ್ಷಿಗೆ ನಿಷ್ಪನ್ನ ತೋರಿಸಿ ಸದರಿ ದಾಖಲೆಯಲ್ಲಿ ವಾದಿಗಳು ದಾವೆ ಹೂಡಿದಾಗಿನಿಂದಲೂ ನಿಖಾಲಿಯಾಗುವವರೆಗೂ ಹಾಜರಾಗಿಲ್ಲ ಅಂದರೆ ಸರಿ. ದಿನಾಂಕ 21-08-2017 ರಿಂದ ದಾವೆ ನಿಖಾಲಿಯಾಗುವವರೆಗೂ ನಾನು ನ್ಯಾಯಾಲಯದಲ್ಲಿ ಹಾಜರಿರಲಿಲ್ಲ ಅಂದರೆ ಸರಿ. He has further deposed that "ಈ ದಾವೆಗೆ ಸಾಕಷ್ಟು ಅವಕಾಶ ನೀಡಲಾಗಿತ್ತು ಅಂದರೆ ಸರಿ".

12. In light of the above admission and the document placed before the court, the petitioner continuously absent from last 03 hearing dates moreover he also failed to convince the court regarding his absence on the said date. Considering the nature of the suit and stages, petitioner herein has not made out any valid grounds. Considering the very purpose of the suit and its dismissal for default and non-prosecution definitely it will not cause any hurdle to the petitioner to file the fresh suit against the Respondents. The counsel for the

respondent has rightly pointed out in decision of the Hon'ble Apex Court. I have gone through the said decision with due respect. Wherein in their lordship held that ***the court should not be a silent spectator and leave control of the case to a party to the case who has decided not to take case forward.*** It is further held that ***“no litigant has a right to abuse the procedure provided in the Civil Procedure Code”***. Keeping in the mind of the above ration laid down by the Hon'ble Apex court and considering the facts and circumstance of the petitioner, I have no hesitation to hold that the petitioner has failed to prove that he is entitled for the relief as sought for. The dismissal order as well as the findings of this petition will not come in the way of petitioner to file the fresh suit on the same cause of action against the respondents as per law if so advise.

13. Therefore, considering all these above Points the said application deserves to be rejected. **Therefore, I answer Points No.1 & 2 in the Negative.**

14. **Point No.3**:- For the foregoing reasons and in view of my findings on Points No.1 & 2, **I proceed to pass the following;**

ORDER

The petition filed by the petitioner under
Order XI Rule 9 R/w Section 151 of C.P.C is
hereby dismissed.

No order as to costs.

(Dictated to the Stenographer, transcribed and typed
by her, revised & corrected by me and then pronounced in
the open Court on this the 04th day of July, 2018)

Sd/-

**(SMT. SUJATHA A.B.)
III Addl. Civil Judge & JMFC,
Belagavi.**

ANNEXURE

1. WITNESS EXAMINED BY THE PETITIONER:-

PW.1 : Shri. Shankar .N. Sottennavar

2. DOCUMENTS MARKED BY THE PETITIONER: -

Ex.P.1: C/c of the pliant in OS.No.170/2017.

Ex.P.2:C/c of the written statement produced in
OS.No.170/2017.

Ex.P.3: C/c of the ordersheet produced in
OS.No.170/2017.

Ex.P.4 is the power of attorney.

3. WITENSS EXAMINED BY THE RESPONDENT:-

Nil

4. DOCUMENTS MARKED BY THE RESPONDENT:-

Nil

Sd/-

**(SMT. SUJATHA A.B.)
III Addl. Civil Judge & JMFC,
Belagavi.**