

**Narayan Vs. Ningappa and anr.**

**Narayan Vs. Ningappa and anr.**

**SooperKanoon Citation :** [sooperkanoon.com/374134](http://sooperkanoon.com/374134)

**Court :** Karnataka

**Decided On :** Apr-13-1981

**Reported in :** AIR1982Kant159; ILR1982KAR439

**Judge :** K.A. Swami, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 9 - Order 17, Rules 2 and 3

**Appeal No. :** Civil Revn. Petn. No. 3353 of 1979

**Appellant :** Narayan

**Respondent :** Ningappa and anr.

**Advocate for Def. :** Annadanayya Puranik, Adv.

**Advocate for Pet/Ap. :** B.S. Raikote, Adv.

**Judgement :**

ORDER

1. In view of the further arguments addressed by both the sides before signing the order dated 2-4-1981 is recalled and the following order is passed.

The petitioner is the plaintiff and the respondents are the defendants. The suit was posted for evidence on 25-11-1975 and on that day, the Court was otherwise engaged; therefore, the suit came to be adjourned by the Court to 27th January

1976 but not at the instance of any of the parties. On 27-1-1976, the plaintiff and the defendants and their counsel were present but the plaintiff did not adduce evidence nor did he enter the witness box. The Court dismissed the suit for non-prosecution with costs. Thereafter, the petitioner filed an application under O. IX, R. 9 of the Civil P. C. for restoration of the suit. The trial court has held that the order in question dismissing the suit for non-prosecution falls within the scope of R. 3 of O. 17 of the Code, therefore, it is appealable and accordingly it has rejected the application as not maintainable. In the appeal, the learned Additional District Judge, has concurred with the view expressed by the trial Court and has dismissed the appeal.

2. It was contended on behalf of the petitioner that the Courts below were not correct in holding that the order dismissing the suit for non-prosecution was the one passed under R. 3 of O. 17 of the Civil P. C. inasmuch as on 25-11-1975 the suit came to be adjourned not at the instance of the plaintiff but it was only at the instance of the Court as the Court was otherwise engaged. Thus, it was submitted that the posting of the suit on 27th Jan. 1976 was not at the instance of the plaintiff for adducing evidence; therefore, the provisions contained in R. 3 of O. 17 of the Code were not applicable. It was further submitted that in the instant case R. 2 of O. 17 also was not applicable, hence the order passed was without jurisdiction.

3. On the contrary, Sri Annadanayya Puranik, learned counsel for the respondents, submitted that as the plaintiff was required to adduce evidence and the suit was posted for evidence on 27-1-1976 and admittedly he failed to adduce the evidence on that day, the provisions of O. 17, R. 3 of the Civil P. C. were attracted even though the suit was dismissed for non-prosecution, but under the circumstances of the case such an order operated as a decree, hence the proper remedy was to file an appeal and not the application under O. IX R. 9 of the Civil P. C. It was also submitted that R. 2 of O. 17 was not applicable to the facts of the present case.

4. In view of the undisputed fact that the suit was adjourned from 25-11-1975 to 27-1-1976 not at the instance of the plaintiff but on the ground that the court was otherwise engaged and as such there was no sufficient time to take up the suit on

25-11-1975; the provisions of R. 3 of O. 17 of the Civil P. C. were (not?) attracted. For the application of R. 3 of O. 17 of the Code, it is necessary that the party to the suit must have been granted time and he must fail to produce evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time has been granted to him. In the instant case, as borne out by the order-sheet, it was not disputed by the learned counsel appearing for the respondents that the suit was not adjourned to 27-1-1976 at the instance of the parties for adducing evidence and it was adjourned by the Court as it was otherwise engaged. Therefore, the provisions of R. 3 of O. 17 of the Civil P. C. were not attracted to the facts of the present. case. Therefore, the contention that the order dismissing the suit for non-prosecution should be read as the one falling under IR. 3 of O. 17 of the Civil P. C. cannot be accepted. The learned counsel for the respondents has placed reliance upon a decision of the High Court of Madras in C. Chennaiya Naidu v., Panchayat Board, reported in : AIR1979 Mad135 . That was a case in which the time was specifically given to the plaintiff for adducing the evidence and on that date, the plaintiff failed to adduce evidence, hence the provisions of R. 3 of O. 17 were attracted; therefore, it was held that even though the suit was dismissed for non-prosecution such an order should be read as the one passed under R. 3 of O. 17 of the Civil P., C. As already pointed out, such a situation does not arise in the present case; therefore the aforesaid, decision of the High Court of Madras cannot be made applicable to the facts of the present case.

5. Thus, from what is stated above, it is clear that the order in question passed on 27-1-1976 does not attract the provisions of R. 3 of O. 17 of the Civil P. C. therefore it is not appealable. Hence, the petitioner has no remedy by way of an appeal. No doubt, the said order cannot also be read as the one passed under R. 2 of O. 17 of the Civil P. C. inasmuch as the parties have appeared in the suit on 27-1-1976. But the order being the one dismissing the suit for default, it is open for the plaintiff to prefer an application for setting aside the said order, That being so, the application filed by the plaintiff for setting aside the order in question, is required to be decided on merits.

6. Accordingly, the order passed by both the Courts below are set aside. The trial Court is directed to consider the case on merits afresh, in accordance with law.

7. Petition allowed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**