

IN THE COURT OF THE XIII ADDL.CITY CIVIL & SESSIONS JUDGE
Mayohall unit: Bengaluru **(CCH:22)**

Dated this the 1st day of February, 2018

PRESENT: - **Smt. Suvarna K. Mirji** B.Com., LL.B.(Spl)
XIII Addl. City Civil and Sessions Judge,
Bengaluru.

Misc. No. 25009 / 2018

Petitioner :- Mohammed Eshsanulla
S/o. Mohammed Kalimulla,
aged about 45 years,
R/at No.8, 2nd cross,
Church Road, Basavanagudi,
Bangalore 560 004.

(By Sri Laxmikantha K.B., Advocate)

V/s.

Respondent :- Ahmed Khan
S/o. Hafiz Khan alias Wajid Khan
major, R/at No.G-48,
Mominpur, Mysore Road Cross,
Old Guddadalli,
Bangalore 560 026.

:ORDER ON MAIN PETITION:

The petitioner has filed this petition under Order IX Rule
4 R/w. Sec. 151 of C.P.C., praying for restoring O.S. No.
25124/2015 to contest the case.

2. The brief facts of the petitioner herein is as under:-

The petitioner submits that he was a tenant under the defendant in respect of shop No.1, 2 and 3 property bearing No.161/1, Nawab Hyderali Khan Road, Corporation Division No.48, Bangalore 560 002. The respondent has demanded and collected huge security deposits towards the tenancy and the same was continued till October 2013. The respondent entered into oral sale agreement on 04/03/2014 in respect of shop No.1, 2 and 3 property bearing No. 161/1, Nawab Hyderali Khan Road, Corporation Division No.48, Bangalore 560 002 and collected Rs.4,60,000/- towards the sale consideration amount out of Rs.7,50,000/-. The respondent extended time to register the sale on or before March 2015 in respect of shop No.1, 2 and 3 and he has not come forward to execute agreement of sale nor sale deed in favour of the petitioner. The petitioner submits that he is in possession of the suit schedule property and ready and willing to perform his part of contract but the defendant is not ready. The defendant trying to alienate the suit schedule property. Hence he has filed the suit in O.S.No.25124/2015 seeking judgment and decree restraining the defendant from

alienating, encumbering, mortgaging and interfering into the peaceful possession and enjoyment of the suit schedule property.

3. The plaintiff further submits that the court issued summons to the respondent through court by R.P.A.D. and steps are duly taken, but the same was returned as insufficient address. His junior counsel appeared on 3.2.2017 before court, but he has not entered the next date of hearing in the dairy and misplaced the file. He was traveling out of state due to his business commitments and his mother was admitted to the hospital due to health issue in the Month of October and November. His mobile phone was reformatted and all the contacts were deleted along with his advocate's mobile number. In the month of December i.e., on 18.12.2017 he visited the advocate on record to get the status of the original suit and on verifying the status in e-courts website, shocked to know that the original suit was dismissed for default on 22.6.2017. The petitioner submits that they have been vigilantly prosecuting the matter. Due to inadvertence and oversight, the date of hearing was not mentioned in the dairy and the file was misplaced. The mistake is bonafide and

unintentional due to the fault of junior advocate. Hence, he is constrained to file present petition for restoration of the case. He has got valid defence on his side. The petitioner prays to allow the petition and restore original suit O.S. No. 25124/2015 and permit him to contest the matter.

4. In spite of service of notice the respondent not appeared and he was placed *ex parte*.

5. The petitioner is examined as PW1 and marked documents as per Ex.P1 and closed his side of evidence. Perused the records

6. The Points that arise for consideration are:-

(1) Whether the petitioner has made out *prima-facie* grounds to allow the petition?

(2) What order?

7. My findings on the above Points are as follows:

Point No.1: In the affirmative,

Point No.2: See final order for the following:-

REASONS**8. Point No.1:**

The petitioner Mohammed Ehsanulla, son of Mohammed Kalimulla, filed his affidavit in lieu of examination in chief as PW1 and deposed that he is a tenant under the defendant in respect of shop No.1, 2 and 3, property bearing No.161/1, Nawab Hyderali Khan Road, Corporation Division No.48, Bangalore 560002 and the defendant has demanded and collected huge security deposits towards the tenancy and the same was continued till October, 2013. Further the defendant entered into oral sale agreement with him on 04/03/2014 in respect of shop No.1, 2 and 3 bearing No.161/1, Nawab Hyderali Khan Road, Corporation Division No.48, Bangalore 560002 and has collected Rs.4,60,000/- towards the sale consideration amount out of Rs.7,50,000/-. The respondent extended time to register the sale and promised to register the sale deed on or before March 2015, in respect of shop No.1, 2 and 3 but he has not come forward to execute the agreement of sale nor sale deed in his favour. He is in possession of the suit schedule property

and he is ready and willing to perform his part of contract, but the respondent is prolonging in order to perform his part of contract. Recently he came to know that the defendant is trying to alienate the schedule property to proposed purchaser. Then, he approached the respondent and requested him not to alienate the suit schedule property. But the respondent has not responded properly. Hence, he filed suit in O.S. No. 25124/2015 seeking judgment and decree restraining the defendant from alienating, encumbering or mortgaging the suit schedule property and also interfering with his peaceful possession and enjoyment of the suit schedule property. That the court issued summons to the respondent through court by R.P.A.D. and the same was returned as insufficient address. The Junior counsel who appeared before the court on 03/02/2017 and he has not entered the next date of hearing in the dairy and misplaced the file. Hence, the counsel failed to appear on next date of hearing. He was traveling out of State due to his business commitments and his mother was admitted to the hospital due to health issue in the Month of October and November. His mobile phone was reformatted and all the contacts were deleted along with his

advocate's mobile number. In the month of December i.e., on 18/12/2017 he met the advocate on record to get the status of the original suit and on verifying the status in e-courts website, shocked to know that the original suit was dismissed for default on 22.6.2017. Hence he is constrained to file the present petition for restoration of the suit. He has got a valid and tenable defence on his side. If the petition is not allowed, he would be put to great hardship and irreparable loss and on the other hand no hardship or injury would be caused to the respondent if the petition is allowed by restoring the O.S.No. 25124/2015 and permitting him to contest the matter. In support of his evidence PW.1 marked document Ex.P1 Certified copy of the order sheet in O.S. No. 25124/2015.

9. The notice issued to the respondent through R.P.A.D. But, the same was unclaimed by the respondent. On 12.9.2018 my predecessor passed orders that the notice issued to the respondent is held sufficient and placed the respondent as *exparte*.

10. The ExP1 is certified copy of order sheet in O.S. No. 25124/2015 which discloses that on 22/06/2017 there is no representation on plaintiff's side and the court passed order dismissing the suit of the plaintiff for not taking steps to the defendant. Now in the present petition the petitioner contends that the junior advocate of his counsel has not entered the date in the diary and they could not be able to appear before the court. Yet, the suit was at the stage of taking steps to the defendant which was dismissed for non prosecution. Now, at this stage, if the petition is allowed restoring to its original stage by giving opportunity to the petitioner to contest the matter, no harm or injury would be caused to the respondent. Moreover the respondent has not appeared in the petition, even though filing of the petition is within his knowledge. Hence in the interest of justice, it is just and proper to allow the petition restoring O.S. No. 25124/2015 in its original stage and permit the petitioner to proceed with the case. Looking to all these facts, I answer point No.1 in the affirmative.

11. Point No.2:-

In view of above discussion, I proceed to pass following:

ORDER

The petition filed under Order IX Rule 4 R/w. Sec. 151 of the C.P.C. by the petitioner is hereby allowed and the suit in O.S. No. 25124/2015 on the file of this court is restored to its original number.

The office is directed to put up the original suit on board on 22/02/2019.

(Dictated to the Judgment Writer, transcript thereof is corrected and then pronounced by me in the open Court on this the 1st day of February, 2018).

(Suvarna K. Mirji)
XIII Addl. City Civil and Sessions Judge,
Mayohall Unit: Bangalore.

:ANNEXURE:**LIST OF WITNESSES EXAMINED FOR THE PETITIONER :**

PW1 :Mohammed Eshsanulla

LIST OF EXHIBITS MARKED FOR THE PETITIONER:

Ex.P1 :Certified copy of ordersheet in of O.S.No.25124/2015

LIST OF WITNESSES EXAMINED FOR THE RESPONDENT:

NIL

LIST OF DOCUMENTS MARKED FOR THE RESPONDENT:

NIL

(Suvarna K. Mirji)
XIII Addl.City Civil and Sessions Judge
Mayohall unit; Bangalore.

1.2.2019

P – LKB

R - Exparte

Order pronounced in open court:
vide separate detailed order.

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The office is directed to put up the original suit on board on 22/02/2019.

XIII Addl.City Civil and Sessions
Judge, Mayohall Unit, Bengaluru