

KAUK610004482025



**IN THE COURT OF SENIOR CIVIL JUDGE AND JUDICIAL
MAGISTRATE OF THE FIRST CLASS AT HONNAVAR**

DATED ON THIS 13TH DAY OF MARCH, 2026

**PRESENT : SRI B.C. CHANDRASHEKAR B.A., LL.B.
SENIOR CIVIL JUDGE AND JMFC
HONNAVAR**

MISCELLANEOUS APPEAL NO.08 OF 2025

- APPELLANT/S :**
01. Smt. Radha W/o Krishna Shet,
Aged about 63 years,
R/o Durgakeri, Honavar town,
Taluk: Honavar.
 02. Sri. Ajay Krishna Shet,
Aged about 33 years,
R/o Durgakeri, Honavar town,
Taluk: Honavar.

(By Sri. CG, Advocate)

VERSUS

- RESPONDENT/S:**
01. Mahammad Ismail Shaikh,
Aged about 75 years,
Ryot/Private Business,
R/o Honavar Kasaba Gundibail,
Taluk: Honavar.

02. Hamaza Ismail Shaikh,
Aged about 69 years,
Private Business,
R/o Honavar Kasaba Gundibail,
Taluk: Honavar.
03. Hussain Ismail Shaikh,
Aged about 54 years,
Ryot,
R/o Honavar Kasaba Gundibail,
Taluk: Honavar.
04. Ummar Ismail Shaikh,
Aged about 50 years,
Ryot/Launch Driver,
R/o Honavar Kasaba Gundibail,
Taluk: Honavar.
05. Smt. Salma @ Salimabi,
W/o Mohiddin Shaikh,
Aged about 60 years,
Ryot/Household work,
R/o Sirsi Kotekere, Ramanbail,
Near Primary School,
Sirsi Taluk.

(R-1 by Sri. MNS, Advocate; R-2 to 4 by Sri. MLN, Advocate and R-5 notice dispensed)

Date and nature of the order or decree appealed against	:	Against the order passed by the Additional Civil Judge and JMFC., Honnavar in OS No.64/2016, dated 16-10-2025
Date of Institution of the Appeal	:	03-11-2025

Date of Order	:	13-03-2026		
Duration of appeal	:	Year/s	Month/s	Day/s
		00	04	10

ORDER

The appellants/plaintiff No.1 and 2 have filed this appeal under the provision of Order XLIII, Rule 1(c) read with section 141 of CPC challenging the legality and correctness of the findings of the trial court vide Order dated 16-10-2025 passed in OS No.64/2016 on the file of Additional Civil Judge JMFC., Honnavar.

02. The rank of the parties assigned by the trial court are also assigned in this appeal, for the sake of convenience.

03. The brief facts of the case, as set out in the appeal memo are that the plaintiffs have filed the suit in OS No.64/2016 for specific performance of agreement executed on 18-01-1987. The suit has been filed on 01-06-2016. When the case set down for plaintiffs evidence on 29-07-2024 the plaintiffs remained absent and finally it has posted on 21-03-

2025. But on that day the trial court has dismissed the suit for non prosecution.

04. It has further averred that the subject matter of the suit is with respect to agreement dated 18-01-1987 executed by mother of respondents in favour of husband of the appellant No.1 and father of appellant No.2. The appellant No.1 is aged about 65 years and suffering from age old related illness as well as left lower limb veins defect, thyroid and blood pressures. She has been suffering from disease since 04-03-2004 and taking treatment at various hospitals and the plaintiff No.2 is only the son taking care of the plaintiff No.1 and as advised by the doctor she was in bed rest. In view of the said reason the plaintiffs could not appear before the court when the court fixed for appearance of the plaintiffs. Hence the suit came to be dismissed for non-prosecution. The plaintiff No.2 has approached the advocate and took the NOC Vakalath and filed an application before the trial court under Order IX, Rule 4 read with section 151 of CPC for restoration of the said suit on 17-04-2025. The respondent No.1 has filed the objection on the application and without considering the relevant facts and documents the trial court has dismissed the application by observing that remedy available to them is to file separate miscellaneous application, which is totally incorrect and contrary to law.

05. The appellants have contended in the appeal memo that order of trial court in dismissing the application for restoration of the suit is only erroneous and contrary to law and opposed to the settled principle and liability to be set-aside. The trial court has not taken into consideration the relevant facts and circumstances of the case and dismissed the application on hyper technical ground.

06. It has further averred that while passing the order the trial court has not appreciated the provision of law that application under Order IX, Rule 9 is a proceedings in a court within section 141 of CPC and it is an independent application and it is to be registered as an independent miscellaneous and need not file separate miscellaneous petition. The reason assigned by the trial court is contrary to law. The trial court failed to consider that the suit for plaintiffs is dismissed for non-appearance and it attracted the provision of Order IX, Rule 8 of CPC. The provision of Order IX, Rule 4 of CPC is also applies when the suit is dismissed on the grounds mentioned in Rule 1 and 2 of Order IX of CPC. Hence the appeal under Order XLIII, Rule 1(c) is maintainable. Accordingly the appellants have prayed to set-aside the order of the trial court dated 16-10-2025 in OS No.64/2016 on the file of Additional Civil Judge, Honnavar and restore the suit in the same stage by modifying the order of trial court.

07. On receipt of notice issued by this court, the respondent No.1 to 4 have put their appearance through their counsel. Issuance of notice to respondent No.5 has been dispensed with since she was placed ex-parte before trial court.

08. Heard the argument of both side. Perused.

09. On the basis of the above the following points are arises for my consideration:

POINTS

01. Whether the trial court is justified in dismissing the application of the plaintiffs?

02. What order?

10. For the reasons assigned infra, I answered the above points are as follows:

Point No.1 : In the negative,
Point No.2 : As per the final order
for the following:

REASONS

11. **Point No.1:** The counsel for the appellants have argued that when the suit came to be dismissed for default the aggrieved party can file application under Order IX, Rule 9 of CPC as well as Order IX, Rule 4 of CPC. But without

applying the provision of law, the trial court has dismissed the application filed by the plaintiffs to restore the suit. Hence they requested to allow the appeal.

12. On the other hand the counsel for the respondents have argued that at the outset, the present appeal is not maintainable for the simple reason that the order on IX, Rule 4 of CPC is not covered under Order XLIII of CPC and the appellants cannot file this miscellaneous appeal before this court and they requested to draw the attention of this court on provision of Order XLIII of CPC. By considering the arguments of counsel for the respondents on perusal of the provision of Order XLIII of CPC, it appears that as rightly submitted by counsel for the respondent, orders on IA under Order IX, Rule 4 of CPC has not at all covered under Order XLIII, Rule 1 of CPC to file miscellaneous appeal.

13. At this juncture the counsel for the respondents has argued that though provision of Order IX, Rule 4 of CPC has not covered under Order XLIII, Rule 1 of CPC, the aggrieved party can file miscellaneous appeal under the said provision and in support of their arguments they have relied upon the unreported decision of ***Hon'ble High Court of Karnataka in Civil Revision Petition No.100031/2020 in between Srikant V/s Dhanappa and others.*** Wherein

Hon'ble High Court in para 17 and 18 of the decision it is held as here under:

17. *In the present case, the suit of the plaintiff was not dismissed on any of the ground as mentioned in Rules 2 and 3 of Order 9 of CPC. The impugned order of the trial court reflects that the suit of the plaintiff has been dismissed for non-appearance of the plaintiff when the suit was called for hearing and the same falls under Rule 8 of Order 9 and the application filed under Rule 4 of Order 9 to be treated as an application under Rule 9 of Order 9 of CPC. The Appellate Court construing that the application is under Rule 4 of Order 9 of CPC has dismissed the appeal under Order 43 Rule 1 as not maintainable.*

18. *Though the applications filed by the petitioner seeking for restoration of the suit in OS No.337/2010 is under Rule 4 of Order 9, the perusal of the impugned order and the application for restoration has to be construed as an application under Rule 9 of Order 9 CPC since the suit of the plaintiff was dismissed due to his absence and where the defendant has appeared and not under Rules 2 and 3 of Order 9 where the remedy lies under Rule 4 of Order 9 CPC and under such circumstances, the appeal preferred by the plaintiff is maintainable under Order 43 Rule 1 of CPC.*

14. As per the dictum of Hon'ble High Court when the suit of the plaintiff has been dismissed for non-appearance of plaintiff, it falls under the Rule 8 of Order IX of CPC and if an

application is filed under Order IX, Rule 4 of CPC, it has to be treated as an application under Order IX, Rule 9 of CPC. The lordship further held that since the suit of the plaintiff dismissed due to non-appearance the remedy lies under Rule 4 of Order IX of CPC and the appeal preferred by the plaintiff under Order XLIII, Rule 1 of CPC is maintainable. In view of the ratio of Hon'ble High Court, though the order of the trial court is under Order IX, Rule 4 of CPC and it is not covered under Order XLIII, Rule 1 of CPC, miscellaneous appeal under Order XLIII, Rule 1 of CPC is maintainable. Accordingly this court of the considered view that this appeal is maintainable.

15. The counsel for the appellants have argued that when the plaintiffs have filed an IA under Order IX, Rule 4 of CPC, the trial court has dismissed by holding that when the suit for dismissal for non-prosecution, remedy available to the plaintiff to file separate Civil Miscellaneous Application and after enquiry if the court deems fit then only the suit may be restored. With the said findings the trial court has dismissed the IA filed under Order IX, Rule 4 of CPC at least without figuring out whether is there any sufficient cause for the plaintiffs to not to appear before the court as per the provision of Order IX, Rule 4 of CPC. By considering the arguments of counsel for the appellants, it can be extracted

the reason of the trial court in the impugned order while rejecting the IA, it reads as here under:

6. On 21-03-2025, this court dismissed the suit for non-prosecution. Thereafter, the learned counsel for the plaintiff, on 17-04-2025, filed an application under Order IX Rule 4 read with section 151 of CPC, whereas the defendant filed an application contending that this application is not maintainable since the plaintiff has to file a separate miscellaneous application. Only after inquiry, if the court deems fit, then only the court may restore the file. The learned counsel for the plaintiff has filed a list of citations. This court has not through this list of citations. After going through all of this, this court is of the opinion that now the remedy available to the plaintiff is to file a separate civil miscellaneous. Only after the inquiry, if the court deems fit, then only the court may restore the file. Hence, this court answers Point No.1 in the Negative.

16. As above the trial court has just dismissed the application by holding that when the suit has dismissed for non prosecution the remedy available to the plaintiff is to file separate civil miscellaneous and after enquiry if the court deems fit it can be restored and with these observations, the trial court has dismissed the IA for restoration. But as already discussed above, the Hon'ble High Court in the cited decision in 'Srikant' Case, it is very clearly held that whenever suit is dismissed for default for non-appearance of the plaintiff and if an application is filed under Order IX,

Rule 4 of CPC, it shall be construed as an application under Order IX, Rule 9 of CPC. Under such circumstances, when an application under Order IX, Rule 9 of CPC has been filed by the plaintiff, the court is required to figure out whether the plaintiff has satisfied the court that there was a sufficient cause for his non-appearance when the suit was called for hearing and then court can pass an order by setting aside the dismissal order. But the trial court has failed to understand the provision of law and straight away hold that when the suit is dismissed for default, filing an application under Order IX, Rule 4 of CPC is not maintainable and further hold that the only remedy is to file separate Civil Miscellaneous is totally illegal.

17. The counsel for the appellants has submits that they have relied upon the decision of Hon'ble High Court before the trial court, but it has not considered. In view of the submission on perusal of the order, it appears that the counsel for the plaintiff has filed a list of citation and the trial court has gone through the same. But the trial court has not mentioned the decisions relied by the counsel for the appellants. However in view of the discussion made above the trial court has failed to understand the provision of law as well as decision of Hon'ble High Court relied by the counsel for the plaintiff. Hence it is inevitable to this court to call for into the findings of the trial court.

18. It is significant to note here that as per the decision of Hon'ble High Court, wherever an application filed under Order IX, Rule 4 of CPC, it shall be considered as Order IX Rule 9 of CPC. If the plaintiffs have shown the reasons for their non-appearance before the trial court, the order can be set-aside. But on perusal of the findings of the trial court, it appears that at least the trial court has not made any efforts to figure out that was there any reasons for the plaintiffs in non-appearance before the court whenever the case reserved for hearing and not assigned any reasons. Hence without figuring out the sufficient cause for non-appearance of the plaintiffs straight away dismissed the application. Hence this court felt it is just and necessary to set-aside the order of the trial court and remand the matter to the trial court with a direction to figure out is there any satisfiable sufficient cause for the non-appearance of the plaintiff when the suit called for hearing and then proceed to pass the order on IA under Order IX, Rule 4 of CPC by considering it as application under Order IX, Rule 9 of CPC in view of the dictum of Hon'ble High Court in '*Srikant*' Case. With these observations, I answered the **Point in the negative**.

19. **Point No.2:** In the result, I proceed to pass the following:

ORDER

The miscellaneous appeal filed by the appellants/plaintiffs under Order XLIII, Rule 1(c) read with section 141 of CPC is hereby allowed.

The order on application under Order IX, Rule 4 of CPC in OS No.64/2016 dated 16-10-2025 on the file of Additional Civil Judge and JMFC., Honnavar is hereby set-aside.

The matter is remanded to trial court and the trial court is directed to consider the application under Order IX, Rule 4 of CPC as an application under Order IX, Rule 9 of CPC in view of the dictum of Hon'ble High Court in 'Srikant' Case as observed in the judgment and dispose of the application in accordance with law by figuring out the sufficient cause for non-appearance of the plaintiffs when case called for as enumerated under the provision of Order IX, Rule 9 of CPC and dispose of the application.

No order as to costs.

Send the copy of the order to the trial court for information.

(Dictated to the stenographer directly on the computer, typed by her, corrected, then signed and pronounced in the open court on this 13th day of March, 2026)