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**(2010) 02 AP CK 0077**  
**In the Andhra Pradesh High Court**  
**Case No : C.R.P. No. 5079 of 2009**

Vemana Venkataratnam

APPELLANT

Vs

Koppanna Chakradharudu and Others

RESPONDENT

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**Date of Decision :** 11-02-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 9 Rule 8, Order 9 Rule 9  
Constitution of India, 1950 — Article 227

**Citation :** (2010) 4 ALT 263

**Hon'ble Judges :** A. Gopal Reddy, J

**Bench :** Single Bench

**Advocate :** Kancharla Palli Siva Rama Prasad, for the Appellant; V.V. Ramana, for the Respondent

**Final Decision :** Allowed

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## Judgement

A. Gopal Reddy, J.—This revision under Article 227 of the Constitution of India, is directed against the orders of the Senior Civil Judge, Peddapuram dated 10-07-2009 made in C.M.A. No. 10 of 2005, whereby the appeal filed by the petitioner was dismissed confirming the dismissal of I.A. No. 126 of 2005 in O.S. No. 72 of 1997, filed under Order IX Rule 9 of the CPC (for brevity, "CPC"), for restoration of the suit, which was dismissed for default on 28-02-2005.

2. Petitioner/plaintiff instituted the above suit for permanent injunction restraining the defendants, their henchmen, followers from interfering with his peaceful possession and enjoyment of the plaint schedule property, contending that himself and the defendants are the children of late Koppana Chinna Apparao. Plaint schedule properties and other properties have been in possession and enjoyment of late Koppana Chinna Apparao till his death. During his life time, he executed a Will deed dated 05-12-1995 bequeathing the plaint schedule properties in favour of the plaintiff in a sound and disposing state of mind and ever since he is in possession of the same. The defendants are proclaiming that they will trespass into the plaint schedule properties and dispossess the plaintiff

therefrom. The said suit was posted for trial on 28-02-2005, but the petitioner/plaintiff, who appeared through his counsel has not entered into the witness box to lead evidence. Therefore, the said suit was dismissed for default. On dismissal of the suit, I.A. No. 126 of 2005 was filed contending that on 28-02-2005 when the suit was posted for trial, petitioner/plaintiff was suffering with high fever and represented before the trial court that he is unable to give evidence. In spite of the same, . the suit was dismissed for default and hence, the same has to be restored. The respondents/defendants filed a counter opposing the petition stating that the decree and judgment in the suit was passed on 28-02-2005 on merits, against which only an appeal lies and hence, the application under Order IX Rule 9 of the CPC is not maintainable.

3. The trial court by order dated 27-09-2005 dismissed the LA; holding that the plaintiff appeared through his Advocate, but, however, the Advocate was not ready to proceed with the matter. On dismissal of the LA., he filed C.M.A. No. 10 of 2005 before the Senior Civil Judge's Court, Peddapuram, who dismissed the appeal holding that when the plaintiff was very much present in the Court and did not proceed with the trial of the suit, the provisions of Order IX Rule 9 of CPC are not applicable. A plain construction of scheme of Order IX Rule 8 and Rule 9 of CPC discloses that the said provisions apply only where the defendants appear and the plaintiff does not appear. Therefore, the application filed under Order IX Rule 9 of the CPC is not maintainable.

4. Learned Counsel for the petitioner, in spite of granting four adjournments has not rendered any assistance in disposing of the matter.

5. Order XVII Rule 2 of CPC prescribes the procedure, if parties fail to appear on any day fixed, which reads as under:

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation: Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present.

6. By A.P. Amendment Act, Explanation to Rule 2 was added on 27-04-1961, which reads as under:

Explanation: The mere presence in Court of a party or his Counsel not duly instructed shall not be considered to be an appearance of the party within the meaning of this rule.

7. In view of the above insertion of the Explanation to Rule 2 of Order XVII of CPC by the A.P. Amendment Act, as referred above, the court can only proceed to dispose of the suit in one of the modes directed in that behalf by Order IX of

CPC. In such a case, the suit can be dismissed under Order IX Rule 8 of CPC and on such dismissal an application under Order IX Rule 9 of CPC is very much maintainable. Therefore, the reliance placed by the appellate court in State Bank of India Vs. Kumar Apparel Industries and Others, does not apply to the facts of the present case, in view of the Explanation added to Order XVII Rule 2 of CPC by the A.P. Amendment Act.

8. In view of the same, the impugned order passed by the trial court is set aside and the I.A. filed for restoration of the suit is allowed as prayed for, on condition of petitioner depositing a sum of Rs. 1,000/- to the Legal Services Authority, Kakinada within three weeks from the date of receipt of a copy of this order.

9. Accordingly, the Civil Revision petition is allowed. No order as to costs.