

## Mohd. Khaja Vs C. Nand Kumar and others

**Court:** Andhra Pradesh High Court

**Date of Decision:** Sept. 3, 1999

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 9 Rule 9

**Citation:** (1999) 6 ALD 709 : (1999) 3 APLJ 301

**Hon'ble Judges:** T.CH. Surya Rao, J

**Bench:** Single Bench

**Advocate:** Mr. V.L.N.G.K. Murthy, for the Appellant; Mr. A. Seshachalam Mudaliar, for the Respondent

### Judgement

@JUDGMENTTAG-ORDER

1. This CRP is directed against the order dated 2-2-1999 passed by the I Additional Chief Judge, City Civil Court, Secunderabad, in CA 23 of

1997. The petitioner is the plaintiff and he filed the suit for mandatory injunction directing the respondents-herein to restore the water and power

supply. That suit having been dismissed for default, he filed the application under Order 9, Rule 9 CPC for restoration of the suit. Even that

application met with the same fate and eventually he filed the appeal-CMA 23 of 1997 and under the impugned order the appeal too has been

dismissed. On the date on which the suit stood posted, that was on 19-11-1996, for payment of costs of Rs.100/- and for trial of the suit, neither

the petitioner nor his Counsel was present and as the amount of Rs.100/-as ordered by the Court towards costs was not paid, the suit was

dismissed as aforesaid for default.

2. The learned Counsel appearing for the petitioner contends that the Counsel for the petitioner-plaintiff appeared after the call-work and in fact

paid the costs of Rs.100/- to the Counsel appearing for the respondents. The amount of Rs. 100/-seems to have been received by the Counsel for

the respondents. The petition seeking to set aside the default order in IA No.1673 of 1996 itself was filed on the same day supported by the

affidavit given by the Counsel himself. The trial Court proceeded on the premise that the affidavit has got to be given by the petitioner himself and

as the petitioner failed to give the affidavit, it was an indication that he had no interest in the matter. The appellate Court after having gone through

the docket orders in the suit has ultimately come to the conclusion that the petitioner was never ready for the trial in the suit and despite the fact that

the suit had to be adjourned on terms of payment of costs of more than one occasion and that was an indication that the order passed by the trial

Court dismissing the suit for default was well founded. The trial Court as well as the appellate Court were obvious of the fact that the amount of

Rs.100/- imposed towards costs was paid and an application to set aside the default order was filed on the very same day. Affidavit in support of

the application need not necessarily be given by the party. Anybody, who is conversant with the facts which are necessary to be stated in support

of the petition can give the affidavit. Here is a case where the delay in coming to the Court after the call-work by which time the petition has

already come to be dismissed has been testified by the Counsel himself. There can be no other person who can better testify that fact than the

Counsel himself. The affidavit filed by the Counsel cannot be ignored on that ground. Ordinarily, no counsel would come-forward to give his

personal affidavit. That affidavit deserves weight to be given than any other affidavit given by the parties. Both the Courts below proceeded on the

wrong assumption and committed error in having ignored the affidavit given by the Counsel testifying the fact of delay in attending the Court after

the call work. It is always expedient to decide the matters on merits rather than default inasmuch as substantial rights of the parties are involved.

The impugned order therefore suffers from the said illegality and is liable to be set aside.

3. In the result, revision petition is allowed and the order dated 2-2-1999 passed in CMA No.23 of 1999 is hereby set aside and IA 1673 of

1996 in OS No.461 of 1993 is allowed. The learned Counsel for the petitioner submits that if a date is fixed for the trial of the suit, he would

proceed with the trial without any further delay in the matter. The trial Court should fix the date for trial and shall proceed to dispose of the suit day

to day till the trial comes to an end within three months from the date of receipt of this order. No costs.