
(1932) 02 MAD CK 0004
In the Madras High Court

Achambat Abdurahiman, minor, by his mother Thithachumma and Another APPELLANT

Vs

Kelavarman Puthentheruvil Kizhakkayil Imbichunny (dead) and Gopalan added as L.R. of 1st Respondent RESPONDENT

Date of Decision : 25-02-1932

Acts Referred:

Citation : AIR 1932 Mad 669 : (1932) ILR (Mad) 871 : (1932) 36 LW 242 : (1932) 63 MLJ 357

Hon'ble Judges : Pakenham Walsh, J

Bench : Division Bench

Judgement

Pakenham Walsh, J.—This appeal arises in the following way. In execution of the decree in O.S. No. 782 of 1916 on the file of the District

Munsif's Court of Parpanangadi the suit properties were attached. A petition against such attachment was put in - E.A. No. 166 of 1928 - and the

Court found that the petitioners had no right to the property and passed an order dismissing the petition on 1.0th December, 1.928. Against that

order an appeal was filed in the District Court which was transferred to the Subordinate Judge's Court of Ottapalam. After the passing of the

order against which the appeal was filed, the appellants filed E. A. No. 1670 of 1928 in the District Munsif's Court of Parpanangadi for a review

of the order; and on that review application notice was issued to the respondent to appear by pleader and file objections, and the Court passed its

order on 18th January, 1929, rejecting the petition. When the appeal against the order in E.A. No. 166 of 1928 came on for hearing, a preliminary

objection was raised that the appeal was not competent and the Subordinate Judge, holding that it was not competent, dismissed it. Against this

order the present appeal has been filed.

2. The matter is one of considerable difficulty. The learned Subordinate Judge held that, though the effect of the order, dated 18th January, 1929,

on the review application was to repeat the former decree, nevertheless on the authority of *Vadilal v. Fulchand* ILR (1905) Bom. 56 the whole

matter having been re-opened, there was a fresh decree and therefore the appeal against the order of 10th December, 1928, was not competent.

The decision in *Vadilal v. Fulchand* ILR (1905) Bom. 56 and *Gour v. Nilmadhab* (1922) 36 C.L.J. 484 lay down clearly the procedure which

should be followed in regard to an application for review. As stated in the latter case, a review proceeding commences ordinarily with an *ex parte*

application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review

should not be granted. In the second stage the rule may either be admitted or discharged, and the hearing of this rule may involve to some extent an

investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is

reached; the case is re-heard on the merits and may result in a repetition of a former decree or in some variation of it. Though, in one aspect, the

result is the same whether the rule is discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the

latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old

decree. The real difficulty in the present case is to determine whether the order was passed in the second or third stage. It seems to me clear that

the Court which passed it did not realise that there were three stages and we have, therefore, to gather from what has happened at what stage the

final order was passed. It is stated at page 487 in *Gour v. Nilmadhab* (1922) 36 C.L.J. 484

The failure to recognise the distinction between the second and third stages has, as appears from the cases in the books, led to the embarrassment

of litigants in many instances.

3. In that case also it was stated that the various stages through which an application for review may pass were not clearly appreciated by the

lower appellate Court. In that case, however, the decree was reviewed, so that

the present difficulty did not really arise. The appellants rely very strongly on this sentence in the order ""The petition is rejected"". The other side relies on the order to show that the whole matter was gone into and reliance is specially placed on the words"" The mistakes pointed out by the petitioners are quite unimportant and cannot in any way modify the conclusion I have arrived at in that order"". It seems to me that the facts in this case are closely similar to those in *Vadilal v. Fulchand* I.L.R.(1905)

Bom. 56. But though the lower appellate Court has relied on this case for its decision, I am inclined to think that it supports the appellants. It is

stated there at page 57:

A rule nisi was issued requiring *Vadilal* (counter-petitioner in that case) to show cause why the application should not be granted and he resisted

the application on the ground that it was time-barred.. The Subordinate Judge overruled the said plea, and dismissed the application (on 14th

September, 1903) on the following ground:

As to the merits I do not think that the applicant can succeed. Mr. Karpurram has thrown all costs on the applicant *Fulchand* and *Vadilal*'s

default was due to *Fulchand*'s default. He raised frivolous objections in *Vadilal*'s application for execution and I consider the order made is a

good one. The application for review is rejected with costs".

4. On appeal against this order the appellate Judge amended the order granting review to a certain extent. It was held that no appeal lay from the

order of 14th September, 1903 and the proper procedure was to file an appeal from the order of 20th December, 1902. So far as I gather from

this case, the Court which refused review in the first instance did not issue anything which it called a ""rule nisi"" because we find no reference to a

discharge of any such rule in its final order. On the procedure which the Bombay High Court laid down in that case the High Court must have held

that in spite of the failure to say anything in the order about the discharge of the rule the rule was in fact discharged in that order and the third stage

had not been reached. I gather therefore that by the statement at page 57 that a ""rule nisi"" was issued what was meant was the issue of a notice to

the counter-petitioner to show cause why the application should not be granted. Now, applying this view it seems to be on all fours with the

present case. It is quite clear that the mere fact that the merits were considered

will not prevent the order being one in the second stage. The Subordinate Judge in that case, as already stated, apparently did not realise that there are three stages and his order appears to be exactly similar to the one in the present case. He says, "" The application for review is rejected with costs."" I may note that in the text of the judgment quoted above it is said that the application was ""dismissed"". If there is any distinction between dismissal and rejection, I think it strengthens the argument for the appellants. In that case the word used by the Court itself was "" rejected "" as in this. But the High Court seems to have considered that even if the application had been dismissed the result would have been the same and the proceeding's would not have passed the second stage. On full consideration, therefore, I consider that the facts in *Vadilal v. Fulchand* I.L.R. (1905) Bom. 56 appear to be precisely the same as those in the present case and that this case really supports the contention of the appellants rather than that of the respondent seeing that it was there held that the order was passed at the end of the second stage. I therefore allow this appeal and the original appeal will be remanded for decision on the other points.

5. Costs of this appeal will abide the result of that appeal.