

(2003) 08 MAD CK 0045

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 771 of 2003, CRP. No's. 558 and 814 of 2003 and CMP. No's. 5556, 5078, 5079, 5984 and 5985 of 2003

Cibiraj rep. by his mother M. Jayanthi and M. Jayanthi

APPELLANT

Vs

C. Marimuthu and Others

RESPONDENT

Date of Decision : 29-08-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 43 Rule 1A

Citation : (2004) 1 LW 335 : (2003) 3 MLJ 515

Hon'ble Judges : S.K. Krishnan, J;E. Padmanabhan, J

Bench : Division Bench

Advocate : V.K. Muthusami, for M.M. Sundaresh, for the Appellant; Alagirisamy, S.C. for A.K. Kumarasamy for R. 2, for the Respondent

Judgement

E. Padmanabhan, J.—C.M.A.No.771 of 2003 has been preferred under Order XLIII Rule 1 (na) CPC challenging the fair and decretal

order dated 11.9.2003 passed in Pauper O.P.NO:(Unnumbered) of 2003 in O.S.No.312 of 1995 on the file of the Subordinate Judge, Sankagiri.

2. The very same appellants also have preferred C.R.P.No.558 of 2003 challenging the judgment and decree dated 24.2.2003 made in

O.S.No.312 of 1995 on the file of the Subordinate Judge of Sankagiri dismissing the suit for default on the sole reasoning that the additional court

fee has not been paid and also on the basis that the plaintiff's counsel was not prepared to conduct the suit.

3. The very same petitioners also preferred CRP.No.814 of 2003 challenging the order of return dated 27.3.2003 made in unnumbered I.A.,No

(Unnumbered)of 2003 in O.S.No.312 of 1995 on the file of the Subordinate Judge of Sankagiri.

4. All the above three matters and connected Civil Miscellaneous Petitions are consolidated since they arise out of one and the same suit between the same parties, besides one order is consequential to the other.

5. Heard Mr.V.K.Muthusamy, learned senior counsel appearing for the appellant in the CMA as well as the petitioners in both the Revision

Petitions, Mr.K.Alagirisamy, learned senior counsel appearing for the second respondent in all the matters. The first respondent and respondents 3

to 5 despite service have not chosen to appear. Notice to the 6th respondent was dispensed with at the instance of the appellant/petitioners.

6. For convenience, the parties will be referred as arrayed before the trial court. The suit O.S.No.312 of 1995 on the file of the Subordinate Judge

of Sankagiri has been instituted against the defendants 1 to 6 for partition and separate possession of 3/8th share in suit properties including

Transport business, lorry spares, cars etc., dividing partnership shares standing in the name of Chellappan and defendants 1 and 2 into 8 equal

shares and allot 3/8 share in favour of the plaintiffs, for mesne profits in respect of the first plaintiff's 3/8 share, to create a charge, to pay Rs.5000/-

per month for the maintenance of the first plaintiff, to appoint a receiver, to declare the sale deeds in favour of the third defendant as null and void

and to restrain the defendants 1 and 2 from alienating and encumbering the suit property till the disposal of the suit and for other consequential

reliefs.

7. The suit property consist of A to E schedules. We are not concerned with the details of the property or sale deeds. There is no dispute as to the

relationship between the plaintiffs 1 and 2 as well as defendants 1 and 2. The first plaintiff is the minor son born out of lawful wedlock between the

first defendant and second plaintiff. The second defendant is the mother of the first defendant. The second plaintiff is the wife of the first defendant.

8. Pending the suit the plaintiffs also moved I.A.No.772 of 1995 under Order 39 Rule 1 seeking ad-interim orders of injunction restraining the

defendants from alienating or encumbering the suit properties. The trial court granted injunction. When the suit was pending the plaintiffs filed

Pauper O.P.No.... of 2003 on 29.1.2003 for leave to sue as indigent persons in the very suit in respect of their claim for mesne profits from all suit

schedule properties which mesne profits was estimated and the plaintiffs have to

pay an additional court fee of Rs.1,32,862.50, consequent to their moving an application for amendment of the plaint which was ordered in I.A.No.605 of 2002 and I.A.897 of 2002. According to the plaintiffs they are not in possession of the properties, they have no income, the monthly maintenance has not been paid, they have no capacity to raise any funds to pay the court fees.

9. The said pauper O.P. was moved under Order XLIII Rule 1 CPC just after amendment of the Plaint including schedules and also claiming substantial sum as mesne profits from various plaint schedule properties. The petitioners declared that they are indigent persons, they have no income to pay the court fees due on the plaint, they have not alienated any movable or immovable property, nor they have entered into any agreement to sell the properties within two months prior to the date of filing of the petition and that they own only the wearing apparels and utensils.

It is also averred that the defendants are in enjoyment of the entire suit schedule properties and enjoying the income exclusively and the plaintiffs are not in a position to pay court fee payable consequent to amendment of plaint.

10. The said Pauper O.P. Was presented on 29th January, 2003. The learned Subordinate Judge ordered notice in the Pauper O.P., returnable on

5.2.2003. On 5.2.2003 the second respondent filed a counter and respondents 1,3 to 5 adopted the same. The O.P. Was taken up for enquiry on

6.2.2003. As seen from the endorsement, O.P., was heard on 6.2.2003 and orders was reserved by the learned Subordinate Judge. The O.P., has not been numbered, but was taken up for enquiry and the Subordinate Judge passed an order holding that the petitioners are not indigent persons. Challenging the same, the present CMA has been preferred.

11. On 10.2.2003, when the O.P., was dismissed, the court below insisted for the suit O.S.No.312 of 1995 being taken up. The suit came to be

posted on 24.2.2003. On that date the court below passed the following order:-

Additional court fee not paid. The plaintiffs' counsel not prepared to conduct the case. Suit is dismissed for default with cost

12. As against the said order of dismissal of the suit, CRP.No.558 of 2003 has been filed. Thereafter an plaintiffs moved the interlocutory

application seeking for restoration of the suit dismissed on 24.2.2003 which has been returned and represented and the said I.A., remains

unnumbered and as against the order of return of the application, CRP.NO.814 of 2003 has been preferred. In the circumstances all the above

maters are taken up together for final disposal.

13. Mr.V.K.Muthusamy, learned counsel appearing for the appellants in the CMA and for petitioners in both the Revision Petitions, contended

that the applications were moved before the court below on the original side and to avoid technical objections as well, the above revision petitions

have been preferred before this court. If we decide the Civil Miscellaneous Appeal, the result in the two revision petitions has to follow as the

illegalities and irregularities pointed out are not only consequential but also they are patent, according to the learned counsel.

14. In this Civil Miscellaneous Appeal and two Revision Petitions, the following points arise for consideration:-

(i) Whether the rejection of Pauper O.P., suffers with illegality, error of jurisdiction and vitiated by non application of mind to the relevant materials

and failure to follow the procedure prescribed under Order XLIII Rules 1, 1-A, 5 and 7 of the Code of Civil Procedure?

(ii) To what relief the appellants in CMA are entitled to?

(iii) Whether the order dismissing the Plaint is vitiated by illegalities, material misdirection and error of jurisdiction?

(iv) Whether the order refusing to entertain the I.A., for restoration of the suit suffers with illegalities, material irregularity, error of jurisdiction and

liable to be set aside?

(v) To what relief the petitioners in the two Revision Petitions are entitled to?

15. The first two points could be considered together. Initially when the suit for partition was instituted, the plaintiffs valued the suit claim, paid the

requisite court fee and the Plaint was taken on file. Pending the suit there were certain other interlocutory proceedings and there were also further

revisions before this court arising out of the interlocutory proceedings. The plaintiffs moved the trial court by filing I.A.No.605 of 2002 for

amendment of the plaint as well as to include certain of the items in the suit schedule by filing I.A.No:897 of 2003. Both the applications were

rejected. Challenging the same, the plaintiffs moved this court by preferring C.R.P.Nos.260 of 2003 and 261 of 2003. This court allowed the

CRPs and the Plaint has been amended including certain items and also

amending the reliefs including the relief of mesne profits. As a result of the amendment, the value of the suit claim shoot up phenomenally and consequently additional court fee payable as per the amended plaint came to Rs.1,32,862.50.

16. As the plaintiffs have no income or no wherewithal to pay the court fee, they moved the court below under Order XLIII, Rule 1 C.P.C., for leave to sue and continue the suit as indigent persons. The said O.P. was presented on 29.1.2003 and without numbering the O.P., the learned subordinate Judge granted time to the contesting defendants to file their counter. The second defendant filed a counter which was adopted by the defendants 1, 3 to 5 on 5.2.2003. The enquiry in the O.P., came to be posted on 6.2.2003. On 6.2.2003 both sides were heard and orders were reserved. Thereafter on 10.2.2003 the O.P., has been rejected by the learned Subordinate Judge holding that the plaintiffs are not indigent persons and therefore O.P., deserves to be rejected.

17. The learned counsel for the petitioners pointed out that the learned Subordinate Judge went to the merits or demerits of the suit claim which will not arise at the stage when an O.P., is filed under Order XLIII Rule 1 C.P.C seeking for leave to sue as indigent persons. It is also pointed out that the learned Subordinate Judge instead of deciding the O.P., in terms of Order XLIII Rule 1 and 1.A,C.P.C rejected the O.P., as this Court has directed the suit to be disposed of on or before 28.2.2003 by order dated 10.1.2003.

18. The Court below it is rightly pointed out proceeded as if the plaintiffs have decided not to proceed with the matter and they were interested only in prolonging the matter. The court below also proceeded as if the plaintiffs are being paid maintenance and therefore they are in a position to pay the court fee payable on the plaint and therefore the plaintiffs are not indigent persons and they are in a position to pay the court fee. The learned counsel for the appellants rightly pointed out the innumerable illegalities and ex facie apparent on the face of the orders and the illegalities committed by the learned Subordinate Judge as well as material misdirection.

19. It is settled law that in an application filed under Order XLIII Rule 1, the court is called upon to decide whether the person is an indigent person and to ascertain indigency, the court has to hold an enquiry and examine

whether or not the person is an indigent at the first instance. In terms of Rule 3 of O.XLIII C.P.C., the original petition has to be presented by the applicant in person. Rule 4 of Order XLIII provides for examination of the applicant regarding the merits of the claim and property of the applicant. The application under Order XLIII, Rule 1 would be rejected where it is not framed and presented in the manner prescribed under Rule 2 and 3 or where the applicant is not an indigent person or where the applicant has within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as indigent person. Factually and it is also fairly stated that that is not the case here.

20. It is not as if the court below has examined the original application filed by the plaintiffs in terms of Rule 4 and 5 of Order XLIII, nor it has found any one of the grounds enumerated in the said rules for rejection of the application for permission to sue as an indigent person. Further, in terms of Rule 6, where the court finds there is no reason to reject the application on any of the grounds as prescribed in Rule 5, it shall fix a date giving ten clear day's notice to the opposite party and the Government Pleader for receiving such evidence as the applicant may adduce in proof of his indigency and for hearing any evidence which may in proof of his indigency for hearing any evidence which may be adduced in disproof thereof. Thereafter the court in terms of Rule 7 to Order XLIII on the date so fixed shall examine the witness if produced by either party and may examine the applicant and shall make a full record of their evidence. Such recording shall be confined to matters specified in Clause (b) (c) and (e) of Rule 5 or any of the matters specified in Rule 5. The court has to consider material evidence that may be adduced and hear the arguments which the parties may desire to offer in terms of sub Rule (2) of Rule 7. Only thereafter the court has to either allow or refuse to allow the application to sue as an indigent person. The above rules prescribe the procedure to be followed and adopted and deviation if any is impermissible and vitiates the proceedings.

21. In the present case, concedingly neither the court below has examined the application in terms of Rule 4, nor had invoked Rule 5, nor notice has been issued to the opposite party and the Government Pleader giving 10

days notice in terms of Rule 6, nor Rule 7 to Order XLIII has been followed. These violations pointed out in respect of the said rules vitiates the proceedings as the said rules have been given a go by and the mandatory rules have been overlooked. This illegality which is apparent and ex facie notice vitiates the proceedings. The learned Subordinate Judge has sacrificed the substantive procedure in his anxiety to give a summary disposal or rejection of the suit. This has resulted in denial of substantial justice and the very purpose of Order XLIII CPC has been defeated.

22. In this case, as already pointed out, the plaintiffs if at all were only receiving monthly maintenance as per the orders and even in respect of monthly maintenance, it is being rightly pointed out for several months maintenance has not been paid by the first defendant. The maintenance is for livelihood. It is nobody's case that the plaintiffs are possessed of properties, nor they are in a position to raise funds, nor they have any other income. The second plaintiff who was initially employed as a Teacher had to resign and she is not earning less, the court would not have ordered payment of maintenance of Rs.5000/= per month. The averment that the plaintiffs are not in possession of funds, nor they are not in a position to raise huge fund has been lost sight of by the court below.

23. The deficit court fee payable by the plaintiffs as already pointed out alone comes to Rs.1,32,862.50/=. Neither the plaintiffs are in a position to pay the court fee, nor they are in a position to raise any funds, nor it could be even pointed out that the plaintiffs are not indigent persons.

24. Without any material the court below proceeded as if the second plaintiff is employed and this is not only an illegality but also factually incorrect. Even assuming that the second plaintiff is employed or the plaintiffs are receiving the maintenance from the first defendant, the additional court fee payable on the amended plaint comes to Rs.1,32,862.50 and it will be impossible for them to pay such a large sum. Therefore the plaintiffs moved the court below for leave to sue as indigent persons.

25. The plaintiffs are not possessed of sufficient means to pay such a huge sum as additional court fee. The subject matter of the suit claim cannot also be taken into consideration as the plaintiffs cannot make use of any portion of the suit claim to carry on the litigation or to raise funds and no one will come forward to advance huge sum when the very claim is being

litigated. That apart even in terms of Explanation 1.A to Rule 1, subject matter of the suit has to be excluded.

26. In this case the entire subject matter is not in possession of the plaintiffs, nor they are deriving any income from the suit properties which might have enabled them to raise funds or arrange funds. That is not the case here. The petitioners depend on the maintenance amount for their daily food. It is rightly pointed out that the plaintiffs are indigent persons in terms of Explanation 1 to Rule 1.

27. It is also well open to the plaintiffs to continue the further claims inform pauperis though suit has been instituted by paying court fee ordinarily and therefore the plaintiffs have moved for permission under Order XLIII Rule 2. The court below lost sight of the entire fact and the object with which Order XLIII was introduced. The court below also lost sight of the fact that the plaintiffs have to pay additional court fee of Rs.1,32,862.50 a substantial sum and they have neither the income nor they are possessed of property, nor they are in a position to raise funds to pay the additional court fee. As already pointed out, Ten days notice has not been served on the opposite parties, nor a notice has been ordered on the Government Pleader in terms of Rule 6 of Order XLIII.

28. The mandatory rules of Procedure have not been followed by the learned Subordinate Judge. On the other hand, the learned Subordinate Judge proceeded as if the plaintiffs are merely interested in dragging the suit proceedings which is not relevant nor a relevant material to be taken into consideration. The courts are expected to render substantial justice and the same shall not be denied to litigants on mere adverse inferences.

Further the courts should always be anxious to save and serve the interest of minors as far as possible as courts are also the guardians of minors.

The courts should also always bear the foremost interest of minors, hapless women and alike and shall endeavour to advance justice rather than disallow technicalities and minor objections be allowed to be pressed against them.

29. The receipt of monthly maintenance will not be a ground to reject the Petition for leave under Order XLIII C.P.C. Merely because there is a direction to dispose of the suit on or before a particular date, there is no valid reason at all to reject the application filed under Order XLIII, Rule 1

and deny substantial and ultimate justice and the court below should have very well addressed the High Court for extension of time or directed the parties to seek for extension of time. Instead, the rejection of O.P., cannot be appreciated at all. Merely because some other interlocutory application has been rejected, it cannot be assumed that the plaintiffs are not interested in prosecuting the matter. At any rate, the said aspect cannot be a ground to reject an application filed under Order XLIII Rule 1 of C.P.C.

30. An application under Order XLIII Rule 1 of C.P.C., could be rejected only in terms of Rule 5 and such rejection could be on anyone or more of the grounds set out in Rule 5 of Order XLIII and not on any a priori consideration. For the above reasons this court finds that the rejection of the O.P., without even numbering, without following the mandatory procedures prescribed under Order XLIII cannot be sustained at all. Had a notice been issued to the Government Pleader and if a report has been filed by the Government Pleader with respect to the indigency, this court might have examine the claim of the plaintiffs on merits. In this case, as already pointed out, on the date fixed for the hearing, the plaintiffs have not been examined at all. Nor a report has been called for from the Collector through the Government Pleader. Nor a ground which may fall under any one or more of of the clauses in Rule 5 has even been indicated or suggested to reject the application.

31. As no notice has been ordered to the Government Pleader and the Collector of the District concerned in terms of the Rules, while setting aside the orders passed by the court below, which is impugned in this appeal, this court remits the Pauper O.P.,(unnumbered) of 2003 to the learned Subordinate Judge, Sankagiri for de novo consideration after notice to the opposite party as well to the Government Pleader to follow the procedure prescribed under Order XLIII Rule 1A, Rules 4,5,6 and 7, examine the reliefs, namely whether the petitioners are indigent persons and whether they should be enabled to continue the suit as indigent persons by granting exemption from payment of court fees.

32. The very fact that the O.P., has not been numbered and none of the procedures contemplated by Order XLIII has been followed by the learned Subordinate Judge is fatal to the order passed by the learned Subordinate Judge. The learned Subordinate Judge ought to have disposed

of the Pauper O.P., on merits after following the Procedure in terms of the Rules referred to above which are required to be complied in letter and

spirit. Thus, points 1 and 2 are answered in favour of the appellants. It is needless to state that the court below shall give priority to the O.P.,

besides proceed further according to law after numbering the O.P., and pass orders on merits.

33. As regards the third point, after the rejection of the Pauper O.P., the plaintiffs were called upon to proceed with the trial of the suit. The

counsel for the plaintiffs, it is represented sought for time to prefer an appeal before this court and they expressed their inability to proceed with the

trial of the suit. On that, the court below passed the following Order:-

Additional court fee not paid. The plaintiffs counsel not prepared to conduct the case. The suit is dismissed for default with cost.

34. Obviously, the plaintiffs could not pay the court fee as they have moved for leave to sue as indigent persons and their petition has been

dismissed summarily without following the procedures and therefore the plaintiffs could not pay the court fee as well. Admittedly, the plaintiffs are

unable to pay additional court fee. In terms of Order VII Rule 11, the court could reject the Plaint if the contingency falling under one or more of

the clauses in rule 11. Under Clause (c) of Rule 11, when the deficit court fee is not paid or when the plaintiff does not make good the deficit court

fee even after granting time the court may reject the claim. In terms of Clause (c) of Rule 11, the court may grant extension of time. But in this case

the court has dismissed the suit for default. If the court fee is not paid then one of the consequences will be the plaint has to be rejected. When

additional court fee is not paid the court also cannot proceed further, nor it could compel the plaintiff to proceed with the trial of the suit. Therefore,

on that score, the court will not at all be well founded in dismissing the suit for default, much less with cost.

35. That apart, in terms of Order XLIII Rule 7 (b) of C.P.C., the court has to either allow or refuse to allow the application to sue as indigent

person. In terms of Rule 15 if an order refusing to allow the application to sue as indigent person is passed, it shall be open to the applicant to

institute a suit in the ordinary manner in respect of such right and the plaint shall be rejected if the plaintiff fails to pay either at the time of the

institution of the suit or within such time thereafter as the court may allow. Therefore, the court has to allow time to the plaintiff and thereafter only

the plaint if at all could be rejected and the plaint cannot be dismissed as has been done in the present case.

36. In the present case, the learned Subordinate Judge dismissed the suit for default and passed a decree dismissing the suit. The very decree

passed is also not in conformity with the fair order, nor it is in conformity with Order XLIII, Rule 15. Rule 15.A also should not be lost sight of as it

enables the court to grant time to the applicant to pay deficit court fee within such time as the court may fix even if an application is rejected under

Rule 5 or Rule 7 of Order XLIII. In other words, in law and on facts, it is only a rejection of the plaint and no question of dismissal of the suit for

default is either contemplated or provided for. Therefore the Revision is well maintainable challenging the said order.

37. It is incidentally contended by the by the learned senior counsel Mr.K.Alagirisamy, appearing for the second respondent that the plaintiffs

should have filed an appeal and not revision petitions and therefore the decree has been allowed to reach finality. This contention of the learned

senior counsel cannot be countenanced in the light of the above discussions. The court below committed a patent illegality in dismissing the suit

claim. When the court fee required to be paid has not been paid, then dismissal of the suit is not contemplated, nor it is provided for. Therefore the

very order dismissing the suit is without jurisdiction and the said order could be set aside by this court in exercise of revisional power. That apart,

the very order is not an appealable order. The suit has been dismissed in terms of the decretal order, which is an illegality. At any rate, this court is

of the considered view that substantial justice has to be rendered and more so to a minor and his mother who are indigent persons and they shall

not be made to run from pillar to post on mere hyper technicalities.

38. Justice should not only be seen to be done, but also should be done. At any rate this court is of the considered view that it is not required to

prefer an appeal as sought to be contended by the learned senior counsel for the respondent and this court in its inherent power will be well

founded in setting aside the dismissal of the suit for default in the light of the above discussions. Hence, the third point is also answered in favour of

the petitioners in the revision. Hence, CRP.No.558 of 2003 is allowed.

39. As regards the 4th point, the plaintiffs moved the court below to restore the suit by filing an I.A., under Order 9 Rule 9 CPC. Though, in our

considered view the said application is not required, however, the plaintiffs to be on the safer side have filed the application. The said application

has been rejected by the court below as if such an application is not maintainable without payment of additional court fee. Repeated returns were

made. The learned subordinate Judge dismissed the suit for default when it has to be returned for payment of deficit or additional court fee. It is

rather un-understandable either to decline to entertain the application under Order 9 Rule 9 CPC taken out to restore the suit. This would show

that the court below has allowed itself to be misled by the procedural irregularities and had also lost sight of the difference between rejection of a

plaint and dismissal of a plaint. In our considered view, it is not necessary even to move an application under Order 9 Rule 9 for restoration since

we set aside the order not only rejecting the pauper O.P. Application, and the consequential order of dismissal of the suit for default.

40. CRP.No.814 of 2003 has been filed to avoid technical objection and it may not be necessary for us to decide the merits of this CRP as

already dismissal of the suit has been set aside in CRP.No:558 of 2003.

41. In the result,

(i) CMA.No.771 of 2003 is allowed;

(ii) said O.P. (unnumbered) in O.S.No.312 of 1995 on the file of Sub Court, Sankagiri is remitted back to the learned Subordinate Judge of

Sankagiri to proceed in terms of Order XLIII C.P.C., and in the light of the discussions set out above;

(iii) CRP.No.558 of 2003 is allowed and the suit OS.No.312 of 1995 will stand restored to file to proceed further according to law and after the

disposal of the Pauper O.P., already filed by the plaintiffs remanded for proceeding further as per the order in CMA;

(iv) CRP.No;814 of 2003 is closed as unnecessary.

42. Consequently, connected CMPs are closed. The parties shall bear their respective costs in these proceedings.