

(1930) 10 MAD CK 0024
In the Madras High Court

(Pujari) Ayilu Reddi

APPELLANT

Vs

(Pujari) Venkata Reddi and Others

RESPONDENT

Date of Decision : 29-10-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22(4)

Citation : AIR 1931 Mad 133

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—This second appeal arises out of a memorandum of cross-objections filed by the present appellant in A.S. No. 169

of 1926 on the file of the District Court of Chittoor. This memorandum of objections was dismissed by the learned District Judge without hearing it

on the merits, because the appeal itself was rejected for non-payment of deficient court-fee which the appellants were directed to pay under an

order of Court. It is now contended on behalf of the appellant, that the lower Court was wrong in not hearing the memorandum of objections in

spite of the rejection or dismissal of the appeal. The general rule is that the memorandum of objections has to be heard, when the appeal itself is

heard and decided on the merits. Before the passing of the CPC of 1908, there was no express provision as to whether a memorandum of

objections could be heard or not when the appeal itself was withdrawn or allowed to be dismissed by the appellant for non-prosecution. Under

Order 41, Rule 22, Clause (4) of the present Code, provision is made for the hearing of the memorandum of objections even when the original

appeal is withdrawn or dismissed for default. In the present case, the original appeal cannot be deemed to have been withdrawn. But the question

is, whether it should be deemed to have been dismissed for default within the meaning of the aforesaid rule.

2. It is argued on behalf of the appellant, that the word "default" does not mean simply default in appearance, but it is comprehensive enough to

include other kinds of default, such as non-prosecution of the appeal. Order 41, Rule 18, contemplates the dismissal of an appeal on account of

failure of the appellant to pay the requisite charges for service of notice on the respondent. That is one kind of default for which an appeal may be

dismissed. Rule 10, Order 4, provides for the rejection of an appeal if security for costs demanded by the Court is not furnished by the appellant

within the time fixed. That is another kind of default which entails the dismissal of the appeal. The decision of the Patna High Court reported in

Mowar Sheobaksh Singh v. Mowar Thakur Deyal 1919 4 Pat. L.T. 164 is a direct authority for holding that the rejection of an appeal for failure

to furnish security for costs under Rule 10, Order 41, amounts to a dismissal for default within the meaning of Rule 22, Clause (4) of the same

order. In such a case, it has been held that the respondent is entitled to have his memorandum of objections heard. Though there is no direct

authority, it seems to me clear that the dismissal of an appeal for non-payment of the necessary process fees for service of notice on the

respondent would be a dismissal for default within the meaning of Rule 22, Clause (4). There is also an observation by Phillips, J., in *Krishnasami*

Aiyangar Vs. Kuppu Ammal and Another, that dismissal for default contemplated in Rule 22, Clause (4), is dismissal for default of prosecution.

The point arising for decision in this case, is, whether the non-payment of deficit court-fee by the appellant in spite of the express order of the

Court directing him to pay would be default within the meaning of Rule 22, Clause (4). In this connexion the wording of Order 17, Rule 3, may

also be taken into consideration.

3. The non-performance of any act necessary to the further progress of the suit would be a default which would entail the dismissal of the suit. If it

be so, the non-payment of the deficit court-fee which is a necessary step for the further progress of the appeal could well nigh be deemed to be

default for which an appeal could be dismissed or rejected. That being so, there is good ground for holding that the rejection of dismissal of the

appeal in the present case would be a dismissal for default within the meaning of Rule 22, Clause (4), Order 41, Civil P.C. There is a decision of a

single Judge of the Punjab Chief Court reported in *Dunichand v. Azizkhan* [1912] 11 P.R. 1912, in which it has been held that in a case of this

kind the memorandum of objections cannot be heard and determined. Beyond referring to Order 41, Rule 22, Clause (4), as laying down two

exceptions to the general rule, the learned Judge has not discussed the meaning and import of the word "default" in that rule. No reasons appear

to have been given for holding that default in the payment of deficit court-fee would not come within the meaning of the expression "default" in that

rule. The other rulings referred to above would at least indicate that the word "default" cannot be restricted to default in appearance, but would

also cover other kinds of default. It seems to me that a reasonable construction of the word default occurring in that rule would include any

default made by the appellant which would amount to non-prosecution of the appeal. This view seems to be in accordance with the underlying

principle, that it should not be left to the mere volition of the appellant to prevent the respondent from having his memorandum of objections heard.

I am, therefore, of opinion that it was in the power of the appellant to have averted the dismissals of the appeal by supplying the deficit court-fee

within the time fixed by the Court. Owing to his default, the appeal had to be dismissed. The respondent in a case like this, may very well invoke

the benefit of Rule 22, Clause (4), Order 41, Civil P.C.

4. As I hold that the memorandum of objections should be heard by the lower appellate Court in spite of the rejection or dismissal of the appeal, it

is unnecessary to consider the further question; whether this is a fit case in which the memorandum of objections should be converted into or

treated as an appeal and delay excused u/s 5, Lim. Act.

5. There is a memorandum of objections, filed by the defendants in this appeal. By means of this memorandum of objections, it is not open to

them to challenge; the correctness of the rejection of their appeal by the lower appellate Court. The main appeal before this Court is against the

dismissal of the present appellant's memorandum of objections in the lower Court. The proper course for the defendants was to have appealed

against the dismissal or rejection of their appeal. That matter cannot be raked up

by means of the present memorandum of objections.

6. The only other question remaining is the order as to costs made by the lower appellate Court when it dismissed the memorandum of objections.

That order seems to have been passed in the special circumstances of this case and I do not think fit to interfere with the exercise of the lower

Court's discretion. The present memorandum of objections is dismissed, but without costs. The main appeal is allowed and the memorandum of

objections filed by the present appellant is remanded to the lower appellate Court for re-hearing and disposal on the merits. As regards the costs

of this appeal, the defendants-respondents will pay one-half of the appellant's costs and bear their own. The other costs will abide the result of the

memorandum of objections to be heard by the lower appellate Court. The court-fee paid on the memorandum of appeal will be refunded to the

appellant.