

(1932) 03 MAD CK 0015
In the Madras High Court

S.K.M.R.M. Somasundaram Chettiar and Others	APPELLANT
Vs	
Rm. Ar. Ar. Rm. Arunachalam Chettiar and Others	RESPONDENT

Date of Decision : 03-03-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 44 Rule 1

Citation : AIR 1932 Mad 523 : (1932) ILR (Mad) 982 : (1932) 36 LW 33 :
(1932) 63 MLJ 28

Hon'ble Judges : Ramesam, J; Madhavan Nair, J

Bench : Full Bench

Judgement

Ramesam, J.—This is an application for leave to appeal in forma pauperis against the decree of the Sub-Court of Devakottah in an original

suit. This petition originally came on before our brother Jackson, J., who called for a report from the Sub-Court on the pauperism of the appellants

who are defendants in the original suit. The report was in their favour. The matter next came on before our brother Wallace, J., when it was

claimed by the learned advocate for the respondent that he should be first heard before the petition is disposed of. Having regard to the practice of

this Court not to hear the respondent at this stage, the learned Judge referred the matter for disposal before a Bench of two Judges. This is how it

conies on before us.

2. Undoubtedly the practice of this Court has been for at least the last 32 years, during which period I have been in touch with it, not to hear the

respondent on the question whether the decree of the Court below is "contrary to law or to some usage having the force of law, or is otherwise

erroneous or unjust," as provided for in the proviso to Order 44, Rule 1. I do not mean to say that a practice ought to be adhered to merely

because it is of long standing, even though we now find it to be erroneous; but I think it may be said that a long-standing practice is prima facie

proof that it is really correct; for otherwise some learned advocate of this Court would have objected to it and would have claimed to be heard.

Anyhow, we have now to consider the question on the merits.

3. The learned advocate for the respondent relied upon two decisions, *Tilak Mahto Vs. Akhil Kishore and Others*, and *Basant Kuar v. Chandu*

Lal AIR 1929 Lah.514. In the first of these decisions a Full Bench of the Patna High Court dissented from an earlier decision of Dawson Miller,

C.J., and another learned Judge and disapproving the practice of that Court came to the conclusion that the respondent was entitled to be heard as

of right before leave was granted. In the second case the Lahore High Court had previously come to the same conclusion at a time when the Patna

High Court followed the opposite practice. In what follows, the arguments in these two decisions will be noticed among others. In the first place it

must be observed that Order 44, Rule 2 provides for an inquiry into the pauperism of the applicant and also provides that if the applicant was

allowed to sue or appeal as a pauper, such further inquiry is unnecessary. Accordingly the practice of this Court has been to give notice to the

respondent in cases where the appellant had not already been found to be a pauper so as to give him an opportunity to show that the applicant is

not a pauper. Order 44 does not provide for a notice to be given to the respondent in all cases. The proviso to Rule 1 says,

The Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think....

4. On the face of it this suggests that the Court should come to its conclusion about the erroneous nature of the Lower Court's decree on a perusal

of the application and the judgment and decree appealed against. At this stage even the rest of the record ought, not to be seen. *Vide Veerappa*

Chatty v. Ma Tin AIR 1925. Rang. 250. If it was intended by the Legislature that the Court should issue a notice to the respondent before granting

leave, this proviso would have expressly referred to it. It would have run:

Upon a perusal thereof and of the judgment and decree appealed from, and upon hearing the respondent after notice, etc.

or some words to that effect. Prima facie, therefore, a notice to the respondent is

not contemplated by the rule, and it cannot be said that at least in those cases where notice has gone in respect of the pauperism the respondent has a claim to be heard. This will introduce an anomaly that in one set of cases the respondent has got a right to be heard before leave is granted and in another set he has no such right, the difference merely arising out of the fact that the applicant has or has not been previously found to be a pauper. To avoid this anomaly the learned advocate for the respondent contends that the respondent is entitled to be heard in all cases, and in support of this proposition he relies on Form No. 11 in

Appendix G to the Civil Procedure Code. In the Form the notice is thus described:

Notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper, etc.

5. It seems to me that the Form appended to the Code should not be allowed to extend the meaning of the sections and the rules in the Code. The

Form has to be construed with reference to Order 44, Rule 1 and not that Order 44, Rule 1 should be construed with reference to the Form. In

my opinion, Form No. 11 only refers to cases where notice is given with reference to Rules 1 and 2 and the respondent is given an opportunity;

and as the notice is given only with reference to pauperism, the Form itself only gives an opportunity to the respondent to show that the applicant is

not a pauper. It has nothing to do with reference to the question mentioned in the proviso.

6. The learned advocate next argued that in the first part of Rule 1 all provisions applicable to suits by paupers are extended to appeals in so far as

those provisions are applicable; and that Order 33 which is applicable to pauper suits shows that a pauper application should be rejected if the

allegation in the plaint do not show a cause of action. Rule 7, Clause (2) which refers us to Rule 5 shows that if the plaintiff's allegations do not

show a cause of action, the pauper application should be rejected. But reading Rules 7 and 5, it is clear that the provisions of these rules are not

directly applicable to pauper appeals. They are applicable only if the language of these rules can be altered. In my opinion, these rules are not

applicable to appeals and because these rules are not applicable and the Appellate Court cannot address itself to the question whether the plaint

shows a cause of action, the Legislature proceeded to enact a provision

analogous in the proviso, viz., that the Appellate Court should address itself to the question whether the Lower Court's decision is erroneous or unjust. The insertion of the proviso is practically an additional argument that Rules 5 and 7 are inapplicable to appeals. The applicability of Rules 5 and 7 is one of the main grounds for the conclusion of the Patna High Court. But for the reasons mentioned above, I am unable to agree with the decision of that Court.

7. It is true that both in the case of pauper suits and pauper appeals the Legislature thought it necessary to impose some limitation on the right of suit or appeal in forma pauperis for the protection of the litigant opposed to the pauper from frivolous suits or appeals. Such protection in the case of suits appears in Order 33, Rule 5. This rule not being applicable to appeals, analogous protection in the case of appeals is mentioned in the proviso. Once the proviso is there, I do not think we can fall back upon Order 33, Rules 5 and 7. The proviso being complete by itself, we cannot import into it the idea that apart from the rule the respondent is, as a matter of general principle, entitled to notice before leave is given. It is true that an order passed without notice to the respondent ought not to be binding upon him; but nobody says that leave once having been given the order granting leave is conclusive, that the judgment appealed against is erroneous or contrary to law; and at the actual hearing of the appeal the respondent would have an opportunity of showing that the decree appealed against is in accordance with law and is not erroneous or unjust. So that, I do not agree with the Lahore High Court in thinking that if leave is granted it amounts to an order binding on the respondent without his having been heard. Mr. Patanjali Sastri relied on the analogy of a decision in *Krishnaswami Panikondar v. Ramaswami Chettiar* (1917) L.R. 45 I.A. 25 : ILR 41 M. 412 : 34 M.L.J. 63 (P.C.) where the Privy Council observed that before excusing the delay in the filing of appeals, notice should always go to the respondent in the first instance. That relates to an entirely different matter and I do not see any analogy between the two proceedings. At the end of the period prescribed for filing an appeal the respondent gets a vested right in the judgment and that right ought not to be lightly disturbed and therefore notice ought to go to him before the delay is excused. But apart from that consideration the real ground for the

observation of the Privy Council was that there should be no uncertainty about the question of the delay in filing the appeal until the final hearing of the appeal and until heavy costs are incurred.

8. I do not mean to say that if the Court is inclined to hear the respondent before making the order it may not hear. I do not suggest that there is

anything illegal if the Court hears the respondent. All that I intend to lay down is that the respondent is not entitled to be heard as a matter of right

and the Court is not bound to hear him. In my opinion the present practice is salutary and the opposite practice will either lead to double

expenditure of time or to injustice. Above all, this conclusion of mine is supported not only by the plain language of the proviso which vides the

word ""perusal"" but also two decisions of our Court. Vide Parasuramudu v. Raraanna (1925) 49 M.L.J. 353 and Meruva Parasuramudu Vs.

Mandavilli Ramanna, . In this particular case we think leave to appeal as a pauper ought to be granted. I accordingly give leave.

Madhavan Nair, J.

9. I entirely agree. The question is whether the long-established practice of this Court not to hear the respondent when leave is granted to the

appellant to file his appeal in forma pauperis is in consonance with the provisions of the CPC relating to pauper appeals. The respondent has come

before us in response to the notice issued to him in connection with the inquiry into the pauperism of the appellant. He now contends that at this

stage he is entitled as of right to be heard on the question whether the decree of the Lower Court is contrary to law or to some usage having the

force of law or is otherwise erroneous or unjust.

10. The answer to the point raised by the respondent is, in my opinion, to be found in the proviso to Rule 1 of Order 44 which relates to the

procedure on the application made by a pauper for the admission of his appeal. The proviso runs thus:

Provided that the Court shall reject the application unless, upon, a perusal thereof and of the judgment and decree appealed from, it sees reason to

think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

11. Prima facie there is nothing in this proviso to show that the respondent should be heard before the admission of the appeal filed by a pauper. It

states that the Court shall peruse the application, and the judgment and the decree appealed therefrom and shall reject the application unless it sees

reason to think that the ""decree is contrary to law...unjust"". It is clear from this that the Code enjoins upon the Court to make up its mind by itself

regarding the admission or rejection of the appeal without any help from outside, i.e., without hearing the respondent. It shall peruse the application

and the judgment and the decree appealed therefrom and then decide the question. Of course the Court as a matter of indulgence may, if the

respondent is present, allow him to help it in making up its mind, but I do not think the respondent can at this stage insist that he should be heard. If

the Legislature thought that the respondent should be heard it might well have embodied a provision to that effect in this proviso.

12. Two main grounds are urged by the respondent in support of his contention that he has a right to be heard before leave is granted to the

appellant. First, he relies on Form No. 11 in Appendix G to the CPC which describes the notice of appeal in forma pauperis under Order 44,

Rules 1 and 2. The notice is in these terms:

Notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will

be given to you of doing so on the aforementioned date.

13. In my opinion this Form should not be interpreted in a way which will modify the provision of the Code already referred to which is very

explicit. As pointed out by my learned brother this Form refers to cases where notice is given to the respondent with respect to the inquiry relating

to the pauperism of the appellant and in such cases the respondent may argue that the applicant is not a pauper. It should be remembered that the

respondent has no right to receive notice in all cases. I do not think that because notice is issued to the respondent in connection with the inquiry

into the pauperism of the appellant, he has a right to take advantage of this opportunity to argue that the appeal should not be admitted. If this

privilege is accorded to him then the scope of the proviso to Rule 1 of Order 44 is considerably extended.

14. The next argument of the respondent has reference to Rule 1 of Order 44. This rule states that pauper appeals are

...subject in all matters, including the presentation of such application, to the

provisions relating to suits by paupers, in so far as those provisions are applicable.

15. Order 33 contains the provisions relating to suits by paupers. Rule 5 of this Order specifies the various grounds on which a Court shall reject

as application to sue as a pauper one of which is where the allegations in the suit do not show a cause of action. If the petition is not rejected then

the Court shall fix a day of which notice will be given to the Government Pleader and the opposite party for receiving evidence as to the pauperism

of the applicant (see Rule 6). On the day so fixed, after taking the evidence produced before it, Sub-rule (2) of Rule 7 says that

the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the

evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5.

16. Under these provisions it is clear that when the pauperism of the applicant is enquired into the respondent has a right to be heard on the

question whether the applicant is or is not subject to any of the prohibitions contained in Rule 5 It has been held by the Patna High Court that by

force of Order 44 Rule 1, Rules 5 and 7 of Order 33 are applicable to pauper appeals, and as under these rules the respondent is as a matter of

right entitled to be heard, so he has a right to be heard when leave to appeal in forma pauperis is granted to the appellant. This decision is strongly

relied on by the respondent in support of his contention. It seems to me that having regard to the language of Rules 5 and 7 the provisions of those

rules cannot be applied to pauper appeals. Further, special provision with regard to the procedure to be adopted for the admission of pauper

appeals is enacted in the proviso to Rule 1 of Order 44. This shows clearly that the Legislature never intended that Rules 5 and 7 of Order 33

should be applied to pauper appeals. A procedure for the admission of the pauper appeals complete in itself having been provided for in the

proviso to Rule 1, there is no need to refer to other provisions of the Code to supplement that procedure. For these reasons I am, with great

respect, not inclined to accept the reasoning in *Tilak v. Akil* AIR 1931 Pat. 183 (F.B.). The fact that the appellant is allowed to appeal in forma

pauperis does not mean that the respondent is precluded from arguing at a later

stage that there is no substance in the appeal and that it should be dismissed.

17. Lastly, it was urged having regard to the decision of the Privy Council in (1917) L.R. 45 I.A. 25 (Privy Council) that as in the case of the

successful party in a time-barred appeal who has obtained the "valuable right" of a final decree in his favour by mere effluxion of time, the

respondent here has also acquired "the valuable right" of a final decree in his favour on account of the "pauperism" of the appellant, and that

therefore as in the other case the respondent in this case also should be heard at the time when the appeal is admitted. It is clear to my mind that

the two cases are not at all similar and that the observations of the Privy Council in (1917) L.R. 45 I.A. 25 (Privy Council) have no bearing on the

question before us which in my opinion should be decided with reference to the special rules provided for the purpose in the Code itself.

18. The view that I have taken of the proviso to Rule 1 of Order 44 is supported by two decisions of this Court. In *Parasuramudu v. Ramanna*

(1925) 49 M.L.J. 353 Srinivasa Aiyangar, J., expressed the opinion that he was not satisfied that "he (the respondent) has got any locus standi to

appear at this stage and require to be heard..." In *Meruva Parasuramudu Vs. Mandavilli Ramanna*, it was held that

Order 44, Rule 1 of the CPC does not contemplate that, before granting leave to appeal in forma pauperis, the Court should arrive at a definite

and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust; it is enough if the applicant shows that

he has prima facie a good case, and if he does so, leave to appeal should be granted. (See the head-note.)

19. This decision shows by implication that the respondent has not under Order 44, Rule 1 a right to be heard, for, if he has such a right the Court

would be in a position to arrive at a definite and final conclusion on the question whether the decree complained against is contrary to law or to

some usage having the force of law or is otherwise erroneous or unjust, which according to this decision is not contemplated by the rule.

20. For the above reasons I would overrule the respondent's arguments that he has a right to be heard at this stage.

21. I agree with my learned brother that in this case leave to appeal as a pauper

should be granted.