

(1932) 05 MAD CK 0009
In the Madras High Court

T.S. Subbaraya Devai

APPELLANT

Vs

R. Sundaresa Devai

RESPONDENT

Date of Decision : 03-05-1932

Acts Referred:

Citation : AIR 1933 Mad 5 : 140 Ind. Cas. 226 : (1932) 36 LW 586

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—This is a revision petition filed u/s 115, Civil P. C, against an order of the Subordinate Judge of Trichinopoly dated 4th

September 1930 by which he restored to file a pauper petition, O.P. No. 7 of 1930, which had been previously rejected on 26th July 1930. The

facts of the case may be thus briefly stated. The respondent filed an application for permission to sue in forma pauperis. This application was

numbered as O.P. No. 7 of 1930 and it came on for orders on 26th July 1930. The Subordinate Judge passed the following order on that day:

Petitioner had not taken steps even to summon witnesses to prove the incumbrances on his property. There is no satisfactory explanation for not doing so. Petition dismissed.

2. Then there was an application for restoring O.P. 7. On that the Subordinate Judge passed the following order:

I am unable to construe the order of this Court dismissing the petition as one on the merits. No witnesses had been summoned to prove the

incumbrances. His pleader was absent and he was unable to say what, really happened in the case. It is brought to my notice that his sister was

expected by a later train with the mortgage deeds in question. Mr. Balakrishna

Ayyar who appears for the petitioner says that she did turn up that day. Under these circumstances I feel I ought to give him an opportunity to prove his pauperism. The petition will be restored on petitioner paying Rs. 25 to the other side for their costs in one week.

3. The revision petition is against this latter order. The second petition was filed under O. 9, Rule 9 taken with Section 141 and also under Order

47, Rule 1. Mr. Vaidyanatha Ayyar who appears for the petitioner contends that neither provision of law applies to this case and that the petition is

not maintainable. Now it seems to me what happened on 26th July was this. The pauper petition stood posted for that day. The vakil for the

petitioner was absent. This appears from the later order. The party himself appearing must have asked for adjournment. The Subordinate Judge

observed that steps were not taken even to summon witnesses to prove the incumbrances on the property. He was therefore of opinion that there

were no grounds for granting adjournment. The application for adjournment was therefore refused. The pauper petition then was dismissed

because it was not prosecuted. The petitioner might at least have gone into the witness-box but he did not. So that it seems to me that there were

two applications on that day, one, for permission to sue as a pauper and secondly an application to have that matter adjourned. The adjournment

application was refused. The other petition merely followed by a consequential order. Now it seems to me that Order 9, Rule 9 taken with Section

141 is applicable in so far as the pauper petition was dismissed for default on the first occasion. In the course of his argument Mr. Vaidyanatha

Ayyar referred to the following cases: Pichamma v. Sreeramulu (1918) 41 Mad 286, which refers to the distinction between an order passed

under Order 17, Rule 2 and an order passed under Order 17, Rule 3. If a suit is disposed of on the merits and not for default the remedy is by

way of appeal. But it seems to me that in this case the pauper application was dismissed for default. The Subordinate Judge did not say that he

finds that the plaintiff was not a pauper.

4. The next decision referred to, Krishnamurthy v. Ramayya AIR 1926 Mad 875, where it was held that if a pauper petition was dismissed it does

not bar a second application to sue as a pauper. This may be; but it does not touch the present question whether the first pauper petition which

was dismissed for default may not be restored. Two other cases are referred to: (Vemareddi) Ramaraghavareddi and Others Vs. Raja of

Venkatagiri, and Alagasundaram Pillai Vs. Pichuvier, . In the first of these cases it was held that default of appearance was not a reason

contemplated by Order 47, Rule 1 and that Order 9, Rule 9 was not applicable to execution proceedings. In the second of the case's it was held

that Order 9, Rule 9 was not applicable to execution proceedings. The same view was taken in Arunachalam, minor, by mother and guardian

Periammai Vs. P.K.A.C.T. Veerappa Chettiar through his authorised agent S. Ramaswami Aiyar, . In this case we are not concerned with an

execution application but with an application for permission to sue in forma pauperis. It may be that even to such an application Order 9, Rule 9 by

itself is not applicable but Order 9, Rule 9 taken with Section 141 may be applicable. A similar reasoning will not avail to execution applications

according to the three cases abovementioned because execution proceedings are proceedings in suits, and there is no need to refer to Section 141

and Order 9, Rule 9 by itself is not applicable to execution proceedings. I do not think it follows from those three cases that Order 9, Rule 9 does

not apply to cases where an application to sue in forma pauperis was dismissed for default. I therefore think that so far as the pauper application

was concerned it was dismissed for default and Order 9, Rule 9 taken with Section 141 is applicable to it and that the Subordinate Judge

exercised jurisdiction.

5. The other point argued is that Order 47, Rule 1 is not applicable to an order of this kind, i.e., remedy by way of review. It is true that the cases

mentioned show that a dismissal for default is not a ground for review under Order 47, Rule 1. But I think the said application may be regarded as

one for review of the order dismissing the application for adjournment. When the application for an adjournment was dismissed, he could find no

ground for granting an adjournment because all the proper facts were not represented to him. But later on it was mentioned to him that the

plaintiff's sister had actually started with the mortgage deeds and had arrived later on in the day. This was a fact not known on 26th July but

known to the Subordinate Judge only later on. Now, a review is permissible only on the ground of discovery by the party of other evidence which

could not be known to him with due diligence or other sufficient cause. The Privy Council has held in Chhajju Ram v. Neki AIR 1922 PC 112,

that the sufficient cause must be at least ejusdem generis with the earlier reason. Now the discovery of a ground by the party is one of the grounds

mentioned earlier in the section. The discovery of a reasonable ground for adjournment by the Court later on, I think is a ground ejusdem generis

with the earlier reason and the Court had found later on that the party did take some steps, though he had not taken out summons, to get his sister

down to the place with all the mortgage documents. This fact being discovered by the Court as a good reason for review within the meaning of the

Privy Council decision, I think the Subordinate Judge had good ground for reviewing his order dismissing the application for adjournment. And if

that order is set aside, automatically the pauper application becomes restored. So even from the point of view of Order 47, Rule 1 I do not think

the order of the Subordinate Judge is irregular.

6. Finally I must consider on the facts of this case even if I am not strictly correct in either of the grounds mentioned by me above, I am not bound

to exercise jurisdiction u/s 115 except in cases where not doing so will cause grave injustice. I am not satisfied that this is a case where I should

interfere u/s 115 even if there was an irregularity. For all these reasons I decline to interfere with the order passed by the learned Subordinate

Judge and dismiss the revision petition with costs.