
(1940) 08 MAD CK 0041
In the Madras High Court

Velayudham Subbayya Nadar

APPELLANT

Vs

Kalamsetti Anjaneyalu and Others

RESPONDENT

Date of Decision : 30-08-1940

Acts Referred:

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

Citation : (1941) ILR (Mad) 389 : (1940) 52 LW 514 : (1940) 2 MLJ 570

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—The short question for decision in these revision petitions is whether an application for leave to appeal in forma pauperis

can be rejected without hearing the applicant or giving him an opportunity of being heard. In each case, the Court below rejected the application

without hearing the petitioner and the legality of this procedure is challenged before me.

2. It is not disputed that an application under Order 44, Rule 1, Civil Procedure Code, is a judicial proceeding and the order made therein should

be based upon the exercise of a judicial discretion exercised on a proper consideration of the relevant material. A Full Bench of this Court has

expressed the opinion, approving Appasami Pillai v. Somasundara Mudaliar I.L.R. (1902)Mad. 437, that an order rejecting an application for

leave to appeal in forma pauperis is an appealable "judgment" under Clause 15 of the Letters Patent. See Tuljaram Rao v. Alagappa Chettiar

(1910) 21 M.L.J. 1 : ILR 35 Mad. 1 .It is therefore difficult to see how such a proceeding can be disposed of except in conformity with the

fundamental principle in all judicial procedure that no order should be made without notice to the parties who will be prejudicially affected by the

order and without affording them a reasonable opportunity of being heard. It is satisfactory to note that the practice of the Courts in this Presidency

in dealing with applications of this kind has been in conformity with this principle.

3. The respondent relies on a recent decision of Wadsworth, J., in *Kanthimathi Ammal Vs. Ganesa Aiyar* insane by his wife and next friend

Pichammah, , following an earlier decision of Sadasiva Aiyar, J., in *In re Paramasivam Pillai* (1915) 28 I.C. 957. With all respect I am unable to

agree with these decisions. In the latter case, the learned Judge understands "perusal" in the proviso to Order 44, Rule 1 to mean ""perusal without

being supplemented by argument on petitioner's side"" and he quotes in support of his conclusion a passage from the judgment of Jenkins, C.J., in

Sakubai v. Ganpat I.L.R.(1904) Bom. 451:

It is to be noticed that the Court must come to its conclusion upon a perusal only of the application, the judgment and the decree. This proviso is

apt to be overlooked, etc.

4. The point now under consideration did not arise in the Bombay case *Sakubai v. Ganpat* I.L.R.(1904)Bom. 451, where the learned Judge was

merely pointing out the desirability of the Court recording briefly the reasons for granting leave, and it is by no means clear that ""only"" in the

passage quoted was meant to exclude a hearing of the petitioner and not material other than the application, the judgment and the decree. In the

other case *Kanthimathi Ammal Vs. Ganesa Aiyar* insane by his wife and next friend Pichammah, , the learned judge notes the prevailing practice of

hearing the applicant in such cases, but finds no warrant for it in Order 44, Rule 1 observing that:

The proviso to that rule contains no indication that it is either necessary or desirable for the Judge to hear the party before passing orders of

rejection.

5. The mere absence of an express provision for hearing the applicant is, in my view, no justification for refusing to hear him. Hearing the parties

affected before passing adverse orders is such a well-established and cardinal rule governing the procedure of Courts that the Code must be taken

to assume its observance in all cases a matter of course without any express provision in that behalf. There is no such provision, for instance, in

Section 115 but it has never been suggested that a revision petition can be

dismissed without giving the petitioner an opportunity of being heard.

Nor is the reference in Order 44, Rule 1 to a "perusal" by the Court of the documents specified sufficient, to my mind, to justify a departure from the ordinary *cursus curiae*.

6. Learned Counsel for respondents also placed reliance on S.K.M.R.M. Somasundaram Chettiar and Others Vs. Rm. Ar. Ar. Rm. Arunachalam

Chettiar and Others, , as showing that the respondent to an application for leave to appeal in forma pauperis has no right to be heard, and argued

that the petitioner could be in no better position. But the respondent would not be prejudiced by not being heard at the stage of the admission of

the petition because he would be heard in support of the judgment and decree appealed from before the matter is finally disposed of. (Cf., the

procedure under Order 41, Rule 11.) But the dismissal of a petition without hearing the petitioner is quite a different matter, as the judgment sought

to be appealed from would become final without his having had an opportunity of showing that it was contrary to law, etc.

7. I therefore set aside the rejection of the application by the Court below in each case and remit it for disposal after giving the petitioner an

opportunity of being heard. I make no order as to costs as the respondent was not responsible for the course adopted by that Court.