

APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nayar.*

POLEPEDDI KRISHNAMOORTHY (PETITIONER),
PETITIONER,

1926.
February 24.

v.

POLEPEDDI RAMAYYA AND OTHERS (RESPONDENTS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 5 (a), 6, 7 and 15—Application to sue in forma pauperis—Summary rejection by Court under r. 5 (a), without enquiry under r. 6—Effect of rejection—Second application to sue in forma pauperis, whether barred under r. 15 of the same Order.

When an application to sue in *forma pauperis* is summarily rejected by the Court under Order XXXIII, rule 5 (a) of the Civil Procedure Code, without an enquiry under rule 6 and a consequent order under rule 7, a second application for the same purpose is not barred under Rule 15 of the same Order.

Chinnammal v. Papathi Ammal, (1925) 85 I.C., 982, followed; *Atul Chandra Sen v. Peary Mohan*, (1916) 33 I.C., 812, dissented from; *Bal Kaur v. Shib Das*, (1920) 56 I.C., 207, and *Howa v. Sit Shein*, (1917) 42 I.C., 803, referred to.

PETITION under section 115 of the Civil Procedure Code to revise the order of A. VENKATARAMA AYYAR, District Munsif of Tirupati, passed in Original Petition No. 25 of 1923.

The petitioner filed an application for leave to sue in *forma pauperis* in the District Munsif's Court. That petition was rejected by the District Munsif under Order XXXIII, rule 5 (a) of the Civil Procedure Code, on the ground that the petition did not comply with rule 2 of the Order, in that the application did not contain a schedule of any movable or immovable

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property belonging to the applicant with the estimated value thereof. No enquiry was made into the pauperism of the petitioner and the order expressly stated that it ought not to be understood that any opinion was expressed on the question whether the petitioner was a pauper or not. The petitioner subsequently filed a second application to sue in *forma pauperis*. The respondent objected that the application was barred under rule 15 of Order XXXIII. The District Munsif upheld the objection and dismissed the application as barred. The petitioner preferred this Civil Revision Petition.

B. C. Sankara Narayana and *B. C. Panchanathan* for petitioner.

N. Chandrasekhara Ayyar for respondent.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—The question for decision is whether, when an application to sue in *forma pauperis* is rejected under Order XXXIII, rule 5 (a), a second application is barred by the provisions of rule 15 of that Order. The Calcutta High Court in *Atul Chandra Sen v. Peary Mohan*(1) has held that there is no distinction between orders of rejection passed under rule 5 and orders of refusal passed under rule 7 and this view has been adopted in *Ali Afzual v. Purna Chandra*(2). There is also a case *Ranchod Morar v. Bezanji Edulji*(3) where a similar view appears to have prevailed.

On the contrary, we have the authority of the Lahore High Court in *Bal Kaur v. Shib Das*(4) and of a Full Bench of the Burma Chief Court in *Howa v. Sit Shein*(5) that a distinction should be made between these two classes of orders. They have held accordingly that an order passed summarily under rule 5 (a) is not a bar to

(1) (1916) 33 I.C., 812.

(3) (1896) I.L.R., 20 Bom., 86.

(2) (1924) 40 O.L.J., 188.

(4) (1920) 56 I.C., 207.

(5) (1917) 42 I.C., 803 (F.B.).

a second application. The leading case is the one in 33 I.C., 812 which distinctly holds that there is no distinction between orders under rule 5 and orders under rule 7. No reason is given for coming to this conclusion; and, as pointed out by the Burma Chief Court, there is at least a verbal difference between these two orders. I am inclined to think that there is more than verbal difference. The orders are different in kind. Under rule 5 the Court rejects an application summarily and without enquiry, whereas under rule 7 an order is passed after due enquiry into the merits of the application. The principle underlying rule 15 appears to be that of *res judicata*, viz., that the Court will not entertain a second application when the first has been dismissed on the ground that the petitioner is not entitled to sue as a pauper. Any order passed under rule 5 (a) is of a summary nature based on the petition itself or on facts which are apparent at the time of presentation of the petition. For instance, if the petition does not contain a schedule of property or if it is presented by the alleged pauper's agent, it has to be rejected, and if we are to apply the ruling of the Calcutta High Court, it can never be re-presented. This goes a good deal further than the principle of *res judicata* for it gives the force of *res judicata* to a summary order passed without enquiry or contest and consequently, I think it is doubtful whether that is the intention of the legislature. It is noticeable that rule 15 refers to an order "refusing to allow an applicant to sue as a pauper" and these words are the identical words used in rule 7, clause (3) and it is clear that rule 15 applies to such an order. I can see no reason for extending it to include an order rejecting an application when such order does not either in terms, or by implication, refuse to allow an applicant to sue as a pauper. For instance the rejection and return of a petition presented by an agent can hardly

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be said to amount to a refusal to allow the petitioner to sue as a pauper for there is no provision specifically prohibiting its re-presentation by the pauper himself. In the present case the order rejecting the application is very specific. The District Munsif states that he has to reject the petition but that he ought not to be understood as expressing any opinion on the question whether the plaintiff is a pauper or not. There is clearly no adjudication on the merits by this order. I am therefore of opinion that such an order is not a bar to the subsequent presentation of a petition based on the same right to sue. This view was adopted by my learned brother in *Chinnammal v. Papathi Ammal*(1) which was a case where the first petition had been dismissed for default. I would therefore hold that when there has been no enquiry under rule 6 and a consequent order under rule 7 the order rejecting the application is not a bar to a second application.

I may mention here that both in I.L.R., 20 Bom., 86 and 33 I.C., 812 there had been an enquiry under rule 6 although the Court purported to pass an order under rule 5.

I would therefore allow the petition and remand the case for disposal on the merits. The respondent will pay the petitioner's costs.

MADHAVAN
NAYAR, J.

MADHAVAN NAYAR, J.—I entirely agree. In my judgment in 85 I.C., p. 982, I have indicated the view that Order XXXIII, rule 15, Civil Procedure Code, contemplates an enquiry and dismissal of "the application to sue as a pauper" on the merits. Since that has not taken place in this case, the present application is not barred under the provisions of that order. It must therefore be disposed of on the merits.

K.R.

(1) (1925) 85 I.C., 982.