APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

KANTHIMATHI AMMAL (SECOND DEFENDANT), APPELLANT,

1935, August 5.

v.

GANESA IYER, INSANE, BY HIS WIFE AND NEXT FRIEND PICHAMMAH (PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), *O. XLIV, r.* 1 *proviso —Leave to appeal in* forma pauperis*—Application for—Rejection of—Hearing of applicant prior to—Failure—Illegality, if—Court-fee—Allowing of time to applicant for payment of, on rejecting application—Discretion of Court as to—Rejection of appeal on ground of rejection of application for leave to appeal in* forma pauperis*—Appeal from—Competency of.*

An appeal lies against the rejection of an appeal on the ground that the application for leave to appeal in *forma pauperis* was refused.

Ayyanna v. *Nagabhooshanam*, (1892) I.L.R. 16 Mad. 285, *Zamindar of Tuni* v. *Bennayya,* (1898) I.L.R. 22 Mad. 155, and *Saminatha Ayyar* v. *Venkatasubba Ayyar,* (1903) I.L.R. 27 Mad. 21, referred to.

The prevailing practice is undoubtedly to give the pauper appellant an opportunity of arguing that the decree against which he wishes to appeal in *forma pauperis* is unjust and contrary to law and, on the Court coming to an adverse conclusion on a pauper application, to give the appellant some time in which to pay the court-fee. But a Court does not act illegally if it disposes of an application for leave to appeal in *forma pauperis* in a summary manner without hearing the applicant and without giving him time for payment of the deficient court-fee.

In re Paramasivam Pillai, (1915) 28 I.C. 957, referred to.

SECOND APPEAL against the decree of the District Court of Trichinopoly dated 10th February

* Second Appeal No. 768 of 1933.

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1933 and made in Serial Register No. 322 of 1933 (Original Petition No. 12 of 1933) preferred against the decree of the Court of the District Munsif of Trichinopoly in Original Suit No. 415 of 1931.

A. V. Narayanaswami Ayyar and *V. Natesan* for appellant.

K. Bhashyam Ayyangar for respondent.

JUDGMENT.

This appeal is preferred against the rejection of an appeal on the ground that the petition for leave to appeal in *forma pauperis* was refused. A preliminary objection is taken that no appeal lies. It seems to me that this objection must fail. Although in terms the learned District Judge's order is merely a rejection of the application to appeal in *forma pauperis*, it is in fact a rejection of the appeal itself and following the line of decisions of this Court, *Ayyanna* v. *Nagabhooshanam*(1) *Zamindar of Tuni* v. *Bennayya*(2) and *Saminatha Ayyar* v. *Venkatasubba Ayyar*(3), I must hold that the rejection of an appeal for a preliminary defect is a decree within the definition in section 2 of the Civil Procedure Code.

The order of the learned District Judge is in the following terms :

"I have carefully read this judgment and the appeal memo. I see no reason to think that the decree is contrary to law or erroneous or unjust. This application is therefore rejected."

The Vakil, who appeared for the appellant in the District Court, has filed an affidavit to the effect that this order was passed in chambers without hearing the appellant or his Vakil and

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(1) (1892) I.L.R. 16 Mad. 285. (2) (1898) I.L.R. 22 Mad. 155.
(3) (1903) I.L.R. 27 Mad. 21.

without giving an opportunity to pay court-fee. For the disposal of this appeal I assume these allegations to be correct, though they are not admitted by the respondent to be quite accurate. It is argued that this summary procedure is not only contrary to the usual practice of the Court but is illegal. There is no difficulty in finding that the alleged procedure is unusual. The general practice of this Court and of appellate Courts in the mofussil is to give the pauper appellant an opportunity of arguing that the decree against which he wishes to appeal in *forma pauperis* is unjust and contrary to law. It is also undoubtedly the practice of most Courts, on coming to an adverse conclusion on a pauper application, to give the appellant some time in which to pay the court-fee. But the mere fact that this is the usual practice is not in my opinion sufficient to make it law.

On the question of the necessity of hearing a pauper appellant before rejecting his appeal, Order XLIV, rule 1, is in terms opposed to the prevailing practice. The proviso to rule 1 says :

> " 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 etc."

This proviso contains no indication that it is either necessary or desirable for the Judge to hear the party before passing orders of rejection. I am fortified in the view that no hearing is legally necessary by the ruling in the case of *In re Paramasivam Pillai*(1).

As to the supposed obligation to give a pauper appellant time to pay court-fee, not only does this procedure involve the assumption that a man

(1) (1915) 28 I.C. 957.

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who has falsely alleged himself to be unable to pay court-fee should be given time to pay it, but it also involves the assumption that the provisions of section 149 of the Civil Procedure Code under which the Court may *in its discretion* allow a person to pay a deficient court-fee do not mean what they say. If the Court has discretion to allow time, surely it also must have a discretion to disallow time, and the argument that a discretion to grant an indulgence implies an obligation to grant that indulgence seems to me to be meaningless. In this view I hold that the lower appellate Court did not act illegally if it disposed of this application in chambers as alleged by the appellant in a summary manner without hearing the applicant and without giving time for payment of the deficient court-fee. I must however guard myself against any indication of disapproval of the present practice whereby in such matters pauper applicants are usually heard. The appeal is therefore dismissed with costs.

A.S.V.