

**(1962) 02 KL CK 0032**  
**In the High Court Of Kerala**  
**Case No : C.M.A. No. 194 of 1961**

Ramayyan

APPELLANT

Vs

Ashtamoorthi Namboodiri and Another

RESPONDENT

**Date of Decision :** 23-02-1962

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 11  
Limitation Act, 1963 — Section 5

**Citation :** (1962) KLJ 681

**Hon'ble Judges :** T.C. Raghavan, J

**Bench :** Single Bench

**Advocate :** V.G. Sankaranarayana Pillai and T.N. Subramonia Iyer, for the Appellant; G. Viswanatha Iyer, for the Respondent

## **Judgement**

T.C. Raghavan, J.—The Respondent in A. S. No. 420 of 1961 of the District Court of Kottayam has filed this Civil Miscellaneous Appeal questioning the correctness of an order of injunction passed against him pending the appeal. It is necessary to note a few facts to understand the appellant's contentions. The appellant was the defendant in the suit, which was dismissed for default. An application for restoring the suit was filed, which was also dismissed. Thereafter the plaintiffs filed a Civil Miscellaneous Appeal against the dismissal of the petition for restoration of the suit and also filed A. S. No. 420 of 1961 against the dismissal of the suit itself. Along with the latter the plaintiffs filed an application for excusing the delay in filing the appeal and before that application was disposed of the learned District Judge has granted an injunction pending appeal, which is now being challenged before me.

2. The learned District Judge in paragraph 2 of his judgment observes that in such a case the appellant should not be without relief until the application to excuse the delay is disposed of and if he has made out a prima facie case for condoning the delay as well as for granting the injunction the injunction can be granted. According to the learned District Judge Section 5 of the Limitation Act

does not even contemplate the filing of an application and it only says that the appellant should satisfy the court that he has sufficient cause for not filing the appeal in time. It is in this view that the learned Judge has granted the injunction.

3. But the learned District Judge does not seem to have noted Order XLI, Rule 1 of the Code of Civil Procedure. Sub-rule 3 of this Rule lays down that when an appeal is presented after the period of limitation and an application to excuse the delay in filing the appeal has also been filed, the court shall not proceed to deal with the appeal in any way otherwise than by dismissing it either under R. 11 of O. XLI or on the ground that the court is not satisfied as to the sufficiency of the reason for extending the period of limitation, until notice has been given to the respondent and his objections, if any, to the court excusing the delay have been heard. This provision, which was incorporated in our Code only in June 1959, indicates that the court can only dismiss the appeal either under R. 11 or on the ground that it is not satisfied as to the sufficiency of the reason for excusing the delay. If the court proposes to deal with the appeal in any other manner, it can do it only after notice has been issued to the respondent on the application for condoning the delay and his objections have been heard. On this point an observation of Madhavan Nair J. from the decision of the Madras High Court in *Dara Sivarao v. Kola Subbarao* (A.I.R. 1934 Mad. 303) has been brought to my notice. Considering the provision in the Madras CPC the learned Judge observes :

Under this Rule the question of delay is decided before hand and the appeal is not admitted till that point has been decided in the appellant's favour.

Whatever might have been the procedure before the amendment I am of the opinion that after the insertion of the aforesaid sub rule in our Code the appeal is not admitted until the petition for condoning delay is disposed of in the appellant's favour.

4. In the case before me the notice has not yet been issued to the respondent on the petition for condoning the delay, nor have his objections been heard. Until that is done and the appeal admitted the court has no jurisdiction to pass any interlocutory order in the appeal itself. Mr. Subramonia Iyer, the learned advocate of the appellant, submits at the bar (and this is not disputed by the respondents' Learned Counsel either) that the application for condoning the delay is posted along with the appeal. I would observe that this practice is not warranted, at any rate, after the incorporation of the new sub rule (3) to R. 1 of O. XLI in our Code. Until the delay is excused there is no appeal before court; and hence the petition for excusing the delay must be disposed of first and then alone can any question regarding an interlocutory order in the appeal be considered. Therefore, the order of the learned District Judge is set aside and the petition is remanded for fresh disposal. The learned Judge is directed to dispose of the petition for excusing the delay in filing the appeal after notice to the respondent and hearing their objections, if any. The petition for injunction will be considered only thereafter. In the circumstances, I do not pass any order regarding costs. The

learned District Judge is directed to dispose of the matter at an early date.