

(1963) 01 KL CK 0009
In the High Court Of Kerala
Case No : C.R.P. No. 531 and 731 of 1962

Thayoob Sait

APPELLANT

Vs

Ayyappan

RESPONDENT

Date of Decision : 11-01-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1

Citation : (1963) KLJ 636

Hon'ble Judges : T.K. Joseph, J;K.K. Mathew, J

Bench : Division Bench

Advocate : K.S. Parameswaran Nair, for the Appellant; V. Parameswara Menon and C.J. George, for the Respondent

Judgement

Joseph, J.—The facts necessary for the decision of these Civil Revision Petitions may be briefly stated: The petitioner sued in O. S. No. 337 of 1957 for a declaration that he was a lessee of the plaint property or in the alternative for a declaration of such rights as the court may find and for an injunction to restrain the defendant, the owner of the land, from entering into possession. The plaintiff was appointed a receiver of the property by the Munsiff's Court. The suit was finally dismissed by this Court in Second Appeal. Thereafter, the plaintiff filed another suit as O. S. No. 519 of 1961 for declaration of his rights to be in possession and for an injunction restraining the defendant from interfering with his cultivation. A temporary injunction in these terms was obtained ex-parte. In the meanwhile the defendant had applied in O. S. No. 337 of 1957 for recovery of possession from the plaintiff who was in possession as receiver, but the application was dismissed in view of the temporary injunction. He repeated the application after the receiver was discharged but it was again dismissed by order, dated 14th June 1962 which has given rise to C. R. P. No. 731 of 1962. The defendant entered appearance in O. S. No. 519 of 1961 and objected to the temporary injunction. It appears that the court considered the question of safeguarding the crops in the land which were almost ready for harvesting and directed the plaintiff to furnish security for the same. The value of the crops was

deposited by the plaintiff and the court passed an order on 7th October 1961 allowing the injunction. The defendant applied on 9th March 1962 for reviewing the order. A separate application to condone the delay in applying for review was filed on 26th March 1962. The court below dismissed the latter petition on the ground that it was not filed along with the application for review. The petition for review was dismissed on the ground that it was filed out of time. The defendant has preferred C. R. P. No. 531 of 1962 against the order dismissing the petition for review.

2. When these petitions came up for hearing, our learned brother, Raghavan J. referred the petition to a Bench as he felt that the view taken in *Raman Adiodi v Raman* (1961 K. L. T. 874) which was relied on by the learned Munsiff, required reconsideration. The question referred is:

Whether a party instituting any proceeding in court after expiry of the time allowed therefor should file the necessary application to condone the delay along with the proceeding itself or a subsequent application to condone the delay would also be proper.

3. The decision referred to above is the order on two applications to excuse the delay in filing two Civil Revision Petitions. What happened in that case was that the civil revision petitions were filed out of time and the office noted that fact at the time the petitions were sent up for orders only on 25th July 1960 when a Single Judge granted time to the petitioner to file applications for excusing the delay. This was not done and a further period of 10 days was allowed by another order of the Judge on 14th February 1961. The applications were filed on 24th February 1961 and when these came up for orders, Madhavan Nair J. passed the order reported in *Raman Adiodi v Raman* (1961 K. L. T. 874).

4. The above order, as we understand it, is more in the nature of an administrative direction to the office as to the procedure to be followed when a proceeding is filed out of time without an application to condone the delay, rather than a decision that such an application is to be dismissed unless it is filed along with the proceeding. After referring to the interval between the filing of the Civil Revision Petitions and the date on which it was posted before a Judge for orders, Madhavan Nair J. Pointed out that in such cases the office had only to put up the proceedings filed out of time for a judicial order. This appears to be based on Rule 26 of the High Court Rules which provides that when a petition or memorandum of appeal is filed out of time an application to condone the delay should be filed along with it. It was observed:

The above facts show that, on the petitions being filed after the normal time allowed therefor, the office of the court noted the petitions to be defective on account of delay in their institution and has posted them more than once for orders to cure the defects. This procedure is unwarranted. A party instituting any proceeding in court after expiry of time allowed therefor has to file the necessary application to condone the delay along with the proceeding itself. If the matter is

out of time, and there is no motion to get the delay condoned it has only to be dealt with as barred by limitation or vitiated by laches. It is not for the office to insist on the party making application to get the delay condoned. As the circumstances in which the present applications were compelled to be filed indicate an absolute want of bona fides in the averments made in them, the petitions are rejected.

5. We do not think this decision lays down a rule that unless the application to condone the delay is filed along with the proceeding, the same must be dismissed. The decision only points out that an appeal or petition filed beyond the period of limitation is liable to be dismissed if there is no prayer to condone the delay and that the office should put up such appeal or petition for orders without waiting for the party to give an application to condone the delay. The Supreme Court has pointed out the correct procedure to Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others, and held:

It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under Order XLI, Rule 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinized at the initial stage soon after they are filed and the appellant required to remedy the defects.

The principles laid down in the above decision should govern all defective proceedings filed in court.

6. The learned Munsiff misunderstood the decision in Raman Adiodi v Raman (1961 K. L. T. 874) and failed to consider on the merits the application for excusing the delay in presenting the petition for review. The order dismissing I. A. Nos. 769 and 879 of 1962 in O. S. No. 519 of 1961 must also therefore be set aside. The order in E. A. No. 907 of 1962 in O. S. No. 337 of 1957 must also therefore be set aside. In the result, we allow the Civil Revision Petitions, set aside the above orders and remand the two I. As. and E. A. referred to above for fresh decision according to law. In the circumstances we make no order as to costs.