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**Court :** Kerala

**Decided On :** Feb-20-1980

**Reported in :** AIR1980Ker173

**Judge :** V. Khalid, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 3A(1)

**Appeal No. :** C.M.P. No. 18193 of 1979 (in S.A. No. 1175 of 1979 E)

**Appellant :** Padmavathi

**Respondent :** Kalu

**Advocate for Def. :** A.K. Seshadri, Adv.

**Advocate for Pet/Ap. :** C.P. Damodaran Nayar and; D. Krishna Prasad, Adv.

**Disposition :** Petition dismissed

**Judgement :**

ORDER

**V. Khalid, J.**

1. This is an application to condone the delay in filing the second appeal. The second appeal was filed on 27-11-1979. The application to condone delay is seen filed on 6-12-1979. The delay is sought to be explained by the original affidavit

filed on 6-12-1979 and the additional affidavit filed on 8-2-1980. In the additional affidavit what is stated is that the petitioner was bed-ridden from 15-7-1978 and that she did not know about the dismissal of the appeal on 25-7-1976, that she did not get any communication from her advocate and it was only when sent her son on 8-11-1979, that she knew about the dismissal of the second appeal. The application for copy was made on 9-11-1979 and the copy was obtained on 22-11-1979.

2. In the additional affidavit what is stated is that her son who has been helping her is not a person competent enough to look after the affairs of the Court and that in connection with the suit she was depending upon the vakil's clerk.

3. No affidavit from the vakil's clerk is seen filed.

4. The delay in this case is from 25-7-1978 to 27-11-1979. The explanation given for the inordinate delay is neither convincing nor satisfactory. There is no affidavit by the son or by the vakil's clerk. Since the delay has not been satisfactorily explained, this petition has to be dismissed.

5. The petition is not maintainable for another reason. As already indicated though the appeal was filed on 27-11-1979, the petition to condone the delay was filed only on 6-12-1979. Under Order 41 Rule 3A (1), which reads as follows:

'3A. Application for condonation of delay.

(1) When an appeal is presented after the expiry of the period of limitations specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the applicant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period', it is mandatory for a person presenting an appeal after the expiry of the period of limitation specified therefor to file an application supported by an affidavit to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. This is a new provision inserted by the Amending Act of 1976. I had occasion to consider this aspect of the cases in the decision reported in *Commr., Trichur Municipality v. Narayanan Nair* (1980 Ker LT 101) : (AIR 1980 Ker 170). I referred to the Division

Bench decision reported in *Thayoob Sait v. Ayyappan* (1963 Ker LT 455). The case went before the Division Bench on a reference by Raghavan, J., as he then was, who doubted the correctness of the principle laid down in *Raman Adiodi v Raman* (1961 Ker LT 874). The question referred reads as follows :

'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'.

The Division Bench held :

'6. 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 in *Jagat Dhish v. Jawahar Lal*, AIR 1961 SC 832 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 appeal is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects'.

The principle laid down in the above decision should govern all defective proceedings filed in Court'. It was this observation that I had in view in the above judgment. I observed that in rare cases application for condonation of delay in filing the appeal could be filed after the appeal was presented, though I had my own misgivings about the principle of law enunciated in that judgment. At that time, I overlooked the provision contained in Order 41 Rule 3A (1). I would not have made the above observation if this rule, which made it mandatory for the

condonation petition to accompany the appeal, was brought to my notice. This petition is liable to be dismissed on this ground also.

In the result, I dismiss the petition. The parties are directed to bear their costs.

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