

**(1979) 10 KL CK 0012**

**High Court Of Kerala**

**Case No:** C.M.A. No. 65 of 1979

K. Somavally

APPELLANT

Vs

Appavu Nadar

RESPONDENT

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**Date of Decision:** Oct. 22, 1979

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1, 104, 104(2)

**Hon'ble Judges:** Khalid, J

**Bench:** Single Bench

**Advocate:** V. Vyasan Poti and N. Sugathan, for the Appellant; K.S. Rajamony, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Khalid, J.

I had dismissed this appeal with costs on 17th October 1979. After the order was written the Appellants' Counsel requested that he be heard again and therefore I directed the matter to be re-posted this day as to be spoken to. Since the question to be decided in this appeal arises frequently. I think it necessary to write the following in modification of the order, dated 17th October 1979.

2. The Plaintiffs in a suit for injunction are the Appellants. An interim application was filed for an injunction before the trial court. That was dismissed Civil Miscellaneous Appeal No. 7 of 1979 filed against the said dismissal order is now pending before the Subordinate Judge's Court, Trivandrum. Injunction Application No. 1344(A) was filed in the said Civil Miscellaneous Appeal again for an interim injunction. That was dismissed. Miscellaneous Appeal is against that order.

3. The maintainability of the Civil Miscellaneous Appeal under Order XLIII, Rule 1(r) of the CPC falls to be considered in this appeal. This appeal is seen filed u/s 104 and Order XLIII, Rule 1(r) This Civil of Code of Civil Procedure.

4. Order XLIII provides for appeals against original orders and not against orders passed in appeal. To allow an appeal of this kind would be to go against the express provisions contained in Section 104(2) CPC under which no appeal can be filed against any order passed in appeal. The Appellants' Counsel contended that Order XLIII provides for appeals against orders mentioned therein, be it passed in appeals or in suits. If this argument is to be accepted, the position would be that while there is no appeal against a final order in a Civil Miscellaneous Appeal, one is provided against an interim order. The anomaly is evident. While a party has no right of appeal to the Supreme Court from a judgment in a Civil Miscellaneous Appeal rendered by this Court he gets a right of appeal against an interlocutory order passed by this Court dismissing an application for injunction when an appeal against the injunction is pending. To contend that an appeal lies against an interlocutory order passed in appeal would be to permit a second appeal against the original interlocutory order dismissing the injunction petition. Section 104(2), CPC reads as follows:

No appeal shall lie from any order passed in appeal under this section.

The words "in appeal" occurring in the Section are very wide in their import. A careful reading of this Section shows that it takes within its mischief all orders passed in appeal.

5. This question fell for consideration before this Court in Chellappan v. K.P. Varghese AIR 1964 Ker. 33 where Madhavan Nair, J. held relying upon the decisions in Mt. Umatur Robab Vs. Mahadeo Prasad and Others, and Cherian Lookose v. Narayana Pillai Gopala Pillai 1958 KLT 829 that appeal against such an order was barred u/s 104(2) Code of Civil Procedure. To the same effect is the decision reported in Hussain Uduman Vs. Venkatachala Mudaliar and Others. I am in respectful agreement with the dictum laid down in the above decisions. I hold that the appeal is barred u/s 104(2) Code of Civil Procedure. I dismiss the appeal with costs.