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MA-2551-2022

IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

ON THE 25<sup>th</sup> OF MARCH, 2025MISC. APPEAL No. 2551 of 2022

*HIRALAL SHRI KANHAIYALAL YADAV (DECEASED) THROUGH LRS.  
SMT. PREMLATA AND OTHERS*

*Versus**SMT. GYARSIBAI AND OTHERS*

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Appearance:

Shri Nilesh Agrawal - advocate for the appellant.

None for the respondent though served.

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Heard on : 07.03.2025

Pronounced on : 25.03.2025  
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JUDGMENT

The appellant has preferred this appeal being aggrieved by the-order dated 14-03-2022 passed in Original Civil Suit No.02A/2015, by the Learned Seventh Additional District Judge, Indore whereby the application preferred for substitution of legal heirs of plaintiff due to his demise has been rejected and the suit is dismissed as abated.

2. The case of the petitioner in nutshell is that plaintiff-Hiralal (being son of Shri Kanahaiyalal Yadav, the original owner suit land) filed a civil suit against the defendants for the relief of declaration and injunction, a written statement was also filed by the defendants wherein they have disputed the factum of execution of will



by plaintiff. During the pendency of the trial sole plaintiff-Hiralal died on 02.10.2019 and his legal representatives were not aware of the pendency of the present suit could not contact the counsel. Thereafter counsel himself contacted the LRs of plaintiff and informed them about the case, then an application under Order 22 Rule 3 of CPC was filed, however, the application was filed after 165 days from the death of plaintiff, therefore the application was dismissed on merits vide the impugned order, hence the present appeal.

3. Learned counsel submitted that counsel for the plaintiff was regularly appearing before the trial Court and was proceeding with the matter. The counsel was not aware of the death of plaintiff and the legal heirs of the plaintiff who happens to be illiterate labourers unaware of the pendency of the suit, therefore, they did not contact their counsel. Counsel further submitted that the defendants are the real relatives to the plaintiff and they were bound to inform the death of plaintiff before the trial Court, but they have not informed about the death of plaintiff neither to the counsel for the plaintiff nor before the trial Court. When the counsel for the plaintiff came to know about the death of plaintiff, he himself went to the village of the plaintiff and informed about the pendency of the suit, thereafter an application under Order 22 Rule 3 of CPC was filed by the LRs of plaintiff with a delay of 165 days, however, the same was not accompanied with an application for condonation of delay in preferring the application.

4. Counsel further submitted that the respondent did not interfere with the possession of the disputed suit during the pendency of the trial before the Court below, however, suddenly they came with anti social elements and forcefully taken the possession of the suit land. A complaint was filed by the appellant before the concerned police station, hence counsel prayed that the respondents be



injunctioned not to interfere in the possession of the appellant over the suit property and the parties be directed to maintain the status quo as it exists today. Counsel relied upon the judgment of Hon'ble Supreme Court in the case of *State of M.P. and another vs. Pradeep Kumar and Another* reported as (2000) 7 SCC 372 in support of his contention wherein Hon'ble Supreme Court while allowing the appeal held as that there is no rule prescribing the rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without accompanying the application to condone delay the consequence cannot be fatal. The court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up along with the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and the appeal presented again without further delay.

5. Counsel prayed that in view of the aforesaid law laid down by Hon'ble Apex Court, the appeal be allowed, the delay be condoned and the trial Court be directed to proceed accordingly. Further it is contended that both the parties be directed to maintain the status quo as it exists today.

6. Since no one is present on behalf of the respondent even after being served, the matter is decided ex-parte.

7. On hearing learned counsel for the appellant, I have perused the record.



8. Appellants, who are legal heirs of plaintiff Hiralal, have preferred this appeal praying for setting aside the impugned order whereby their application under Order 22 Rule 3 of CPC has been dismissed on merits as being filed beyond the time limit i.e. with a delay of 165 days and since the sole plaintiff -Hiralal has died the case has been abated. The said application has been dismissed on the ground of delay and the same has not been accompanied with the application for condonation of delay or affidavit. As per the submission of learned counsel for the appellant the legal heirs of plaintiff-Hiralal were illiterate village labourers and they were also not aware of the case pending before the trial Court with regard to the property and when the counsel came to know about the death of plaintiff he himself went to the village and updated the legal heirs about the case pending with regard to the disputed property, hence, the delay has occurred.

10. With regard to not filing of an application for condonation of delay or an affidavit, the Hon'ble Apex Court, in the case of *State of M.P. and another vs. Pradeep Kumar and Another* reported as (2000) 7 SCC 372, has held as under:

8. Learned counsel for the appellants contended that the High Court has placed a very narrow construction on Rule 3A of Order 41 of the Code of Civil Procedure (for short 'the Code') which resulted in preempting the right of appeal conferred by the statute, because the court had the power to condone the delay on showing reasonable explanation for it. In order to decide the said question we have to make a short survey of the relevant Rules in the Code.

9. Order 42 Rule 1 of the Code says that the rules in Order 41 shall apply, so far as may be, to appeals from appellate decrees. Order 41 Rule 1 says that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in that behalf. It is further required that the memorandum shall be accompanied by a copy of the decree appealed against. A copy of the Judgment must also be filed along with the said memorandum unless the appellant court dispenses with it. Rule 2 is not of much importance on the question involved in this appeal and hence we may skip it and proceed to Rule 3 which



says that "where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there." It is Rule 3-A of Order 41 of the Code (which rule was inserted in the Code by CPC Amendment Act, 1976) which is now sought to be applied and hence that Rule is extracted below:

"3-A Application for condonation of delay.-

(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."

10. What is the consequence if such an appeal is not accompanied by an application mentioned in sub-rule (1) of Rule 3-A? It must be noted that the Code indicates in the immediately preceding rule that the consequence of not complying with the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said rule and that is to return the memorandum of appeal to the appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without accompanying the application to condone delay the consequence cannot be fatal. The court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up along with



the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

11. No doubt sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being pointed out by the court. The word "shall" in the context need be interpreted as an obligation case on the appellant. Why should a more restrictive interpretation be placed on the sub-rule? The rule cannot be interpreted very harshly and make the non-compliance punitive to appellant. It can happen that due to some mistake or lapse an appellant may omit to file the application (explaining the delay) along with the appeal. It is true that the pristine maxim "Vigilantibus Non Dormientiobus Jura Subveniunt" (Law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.

11. In the case of *Surendra Mani vs State Of Up And 5 Others*, reported as *2025:AHC:5575*, Allahabad High Court has held as under:

18. We may also point out that a Division Bench of the Patna High Court has adopted the same view even earlier in *State of Bihar & Ors. v. Ray Chandi Nath Sahay and Ors.*, AIR (1983) Patna 189.

19. The object of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court



has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 of the Code."

20. Thus, while interpreting the provisions of sub-Rule 1 of Rule 3-A of Order 41 C.P.C. where the statute required for filing an application for condonation of delay, the Supreme Court has interpreted the same not to be fatal, in case separate application is not filed whereas there is no such provision either under the Act, 1901 or under Section 5 of the Limitation Act requiring for a separate application.

21. In view of case laws discussed above, I am of the view that delay in filing an application can be condoned if the sufficient ground exists, in the opinion of the Court, which prevented the party to approach the Court within time, even on an oral prayer made by the party. Not necessarily in every case, a written application has to be insisted upon.

12. In conspectus of the aforesaid law, the matter has been considered. Accordingly, the impugned order dated 14.03.2022 is hereby quashed and the delay of 165 days in preferring the application is hereby condoned. Resultantly, the case is remitted back to the concerned appellate Court. Parties are directed to appear before the concerned appellate Court on 21.04.2025. Learned Appellate Court is directed to consider and decide the application for taking the LRs on record afresh on merits in accordance with



law, without being influenced by this order.

14. With the aforesaid, the appeal stands disposed of.

15. Let the record of the Court below along with certified copy of this Judgment be sent to the concerned appellate Court for necessary information and compliance.

Certified copy as per rules.

**(PREM NARAYAN SINGH)**  
**JUDGE**

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