

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.596 of 2022**

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Basil Michael Quadros, S/o Late J.M. Quadros, Resident of Karangarh,
P.S.-Nath Nagar, P.O. - Champa Nagar, District- Bhagalpur.

... .. Petitioner/s

Versus

1. The State of Bihar through Collector, Bhagalpur representing State of Bihar.
2. The Superintending Engineer, Rural Engineering Organization Department(In short R.E.O. Department). Their Respective Office At Mayagaj, Suraj Modi Path, P.S.-Barari, District- Bhagalpur.
3. The Executive Engineer, Rural Engineering Organization Department(R.E.O. Department). Their Respective Office At Mayagaj, Suraj Modi Path, P.S.-Barari, District- Bhagalpur.
4. James Charles Quardors Son of James Meryn Quardros @ Paul Quadros, Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour) District- Bhagalpur, Presently resident of Fort House, Karangarh, P.O. - Champanagar, P.S.- Nathnagar, District- Bhagalpur.
5. Julion Quadros Son of Late James Meryn Quardros @ Paul Quardros,Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour)District- Bhagalpur, Presently resident of Fort House, Karangarh, P.O. -Champanagar, P.S.- Nathnagar, District- Bhagalpur.
6. Asha Nashearr daughter of Late James Meryn Quadros @ Paul Quadros, Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour) District- Bhagalpur, Presently resident of Fort House, Karangarh, P.O. - Champanagar, P.S.- Nathnagar, District- Bhagalpur.
7. Allau Quadros son of Late James Meryn Quadros @ Paul Quadros, Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour) District- Bhagalpur, Presently resident of Fort House, Karangarh, P.O. - Champanagar, P.S.- Nathnagar, District- Bhagalpur.
8. Palleim Quadros daughter of Late Meryn Quadros @ Paul Quadros, Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour) District- Bhagalpur, Presently resident of Fort House, Karangarh, P.O. - Champanagar, P.S.- Nathnagar, District- Bhagalpur.

9. Ashly Quadros Daughter of Late James Meryn Quadros @ Paul Quadros, Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour) District- Bhagalpur, Presently resident of Fort House, Karngarh, P.O. - Champanagar, P.S.- Nathnagar, District- Bhagalpur.
10. Christohar Quadros Son of Late James Meryn Quadros @ Paul Quadros, Resident of Dariyapur, P.O.- Dariyapur, P.S. Shahkund (Now Sajour) District- Bhagalpur, Presently resident of Fort House, Karngarh, P.O. - Champanagar, P.S.- Nathnagar, District- Bhagalpur.

... .. Respondent/s

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Constitution of India---Article 227---Code of Civil Procedure--- section 96, 107; Order 41 Rule 3A(2), 11, 13--- Indian Limitation Act---section 5---Admission of time barred appeal---petition to challenge the admission of Title Appeal by the learned District Judge, Bhagalpur---argument on behalf of Petitioner that the appeal was admittedly barred by law of limitation as it has been filed after more than 11 years and the learned District Judge was duty bound to first grant an opportunity of hearing to the petitioner and only thereafter to consider the issue of limitation and proceed with the matter on merits in the appeal---respondents countered by submitting that there is no specific bar which restrains the appellate court to hear and decide the appeal along with application for condonation of delay.

Held: if the appeal has been filed beyond the period of limitation, mandatorily the notice is required to be issued to the respondent---issuance of notice to the respondent is for giving an opportunity to the respondent to make submission on the point of limitation since a vested right accrues to him---it is not a mere formality and Order 41 Rule 3A of the Code only states the obvious that no person should be condemned unheard--- Issuance of notice only would not suffice but an opportunity of effective hearing is to be given to the respondent otherwise the provision would be meaningless--- appellate court is duty bound to consider first the application for condonation of delay as it is a condition precedent for hearing of the appeal--- learned first appellate court should not have proceeded in the matter for hearing the appeal on merits keeping the issue of limitation pending till the final judgment of the appeal---impugned order set aside--- learned first appellate court directed to first decide the issue of limitation and maintainability of the appeal before it proceeds further in the matter. (Para 4, 6, 8, 9, 12)

(2000) 7 SCC 372

.....Relied Upon.

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Champanagar, P.S.- Nathnagar, District- Bhagalpur.

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... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Ranjan Kumar Dubey, Advocate
Mr. Kumar Gaurav, Advocate
Mr. Shashank Kashyap, Advocate
For the Respondent/s : Mr. Sanjay Prasad, AC to AAG 4

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
Date : 26-07-2024

The instant petition has been filed by the petitioner under Article 227 of the Constitution of India against the order dated 06.09.2018 passed by the learned District Judge, Bhagalpur in Title Appeal No. 96 of 2017 by which he has admitted the appeal.

2. Briefly stated, the facts of the present case are that the petitioner along with respondent nos. 4 to 10 filed Title Suit No. 337 of 2003 seeking following reliefs:-

“(A) It be held and declared that Govt. of Bihar (Defendant No.1) has absolutely no right to construct a village link road from Village-Dariyapur to Village-Harnath-Via-Village-Chandrama through the suit land by its wing being Defendant No.2 and 3 without any Notification of acquisition and payment of



compensation to the Plaintiffs.

(B) A decree for permanent Injunction restraining the Defendants from filling earth and/or making construction of village link road through and over the suit land be passed in favour of the plaintiffs and against the defendants and if for any other reason, the defendants during pendency of the suit succeed in their mission in getting the village link road constructed and completed then in that even a Decree for recovery of possession thereby directing the Defendants to bring the suit land in its original position/condition as it was prior to the institution of the suit, be passed.

(C) Cost of the suit be awarded to the plaintiffs.

(D) Any other relief or reliefs.”

The respondents 1st set were defendants before the learned trial court and they appeared and filed their written statement contesting the suit. The matter proceeded and the issues were settled, evidence recorded and after hearing the parties, the learned Sub-Judge-7th, Bhagalpur decreed the suit on contest vide its judgment and decree dated 06.03.2006 and 23.03.2006, respectively. Being aggrieved with the aforesaid judgment and decree dated 06.03.2006, the defendants/respondents 1st set filed Title Appeal No. 69 of 2006 in the court of learned District Judge, Bhagalpur which was admitted and notice was issued to the petitioner and respondents



2nd set who appeared and contested the appeal. As the defendants left the *pairvi* in appeal, the appeal was dismissed vide order dated 11.01.2015 for want of proper *pairvi*. Thereafter, the defendants/ respondents 1st set filed a fresh appeal bearing Title Appeal No. 96 of 2017 against the judgment and decree dated 06.03.2006 along with a separate application for condonation of delay in filing the appeal. On 06.09.2018, the learned District Judge admitted the appeal. Order dated 06.09.2018 passed in Title Appeal No. 96 of 2017 has been challenged in the present petition.

3. Learned counsel for the petitioners submitted that the impugned order dated 06.09.2018 is not sustainable as it is an illegal order passed without consideration of the provisions of law. As the law is well settled that if the appeal is barred by law of limitation then the court is duty bound to hear on the point of limitation first, that too, only after giving opportunity of hearing to the other side, in the present case the petitioners, then only the court can proceed with the appeal on merits. In the present case the appeal was admittedly barred by law of limitation as it has been filed after more than 11 years. The learned District Judge was duty bound to first grant an opportunity of hearing to the petitioner and only thereafter to



consider the issue of limitation and proceed with the matter on merits in the appeal. But the learned first appellate court did not give any opportunity of hearing to the petitioner and admitted the appeal in spite of appeal being barred under the law of limitation and proceeded to hear the matters on merits while holding that the issue of limitation shall be considered at the time of final judgment and went on to issue notice to the petitioner/respondent 2nd set. This order is completely perverse as it is against the law as well as even the previous orders passed by the same learned first appellate court as after the appeal was filed, vide order dated 04.09.2017, the learned District Judge taking note of the application for condonation of delay in filing the appeal observed that it appeared necessary to hear other side on the petition filed for condonation of delay and ordered for issuance of notice.

4. Thereafter, without waiting for appearance of the petitioner/respondent 2nd set, the learned first appellate court admitted the appeal and thus passed an illegal order. Learned counsel referred to Order 41 Rule 3A of the Code of Civil Procedure (in short 'the Code') which prescribes the procedure when appeal is presented after expiry of the period of limitation. Learned counsel further submitted that Order 41 Rule 3A (2) of



the Code provides that if the court sees no reason to reject the application without issuance of notice to the respondent, notice thereof shall be issued to respondent and the matter shall be finally decided by the court before it proceeds to deal with the appeal under Order 41 Rule 11 or Rule 13 of the Code as the case may be. Learned counsel further submitted that this provision is mandatory as the use of word shall indicate and the appeal along with application for condonation of delay cannot be heard on admission under Order 41 Rule 11 of the Code unless the application for condonation of delay is heard first and question of limitation is decided finally by the first appellate court and only when the court decides to condone the delay, the appeal shall be placed for admission under Order 41 Rule 11 of the Code. If application for condonation of delay is dismissed under Order 41 Rule 3A of the Code, then consequently the appeal shall also dismissed as a consequence of rejection of the application for condonation of delay under Section 5 of the Indian Limitation Act. On this aspect, the learned counsel placed his reliance on the decision of the Chhattisgarh High Court in the case of *Shaintan Mal Khatri Vs. Milku & Anr.*, reported in *AIR 2014 Chh 143*. Learned counsel further referred to a decision of Madhya Pradesh High Court in the case of



Ramesh & Ors. Vs. Laxmi Bai, reported in ***AIR 2021 MP 56*** where in almost similar manner, the learned District Judge decided that the application for condonation would be decided along with first appeal on merit, the learned Single Judge held that first appeal is not competent before the Court as the same was not filed within time, provisions put a bar on the appellate court to decide the appeal unless the application for condonation of delay is decided in favour of the appellant. Learned counsel further referred to the decision of the Hon'ble Supreme Court in the case of ***Gagandeep Pratishthan Pvt. Ltd. & Ors. Vs. Mechano & Anr.***, reported in ***(2002) 1 SCC 475*** where the Hon'ble Supreme Court deprecated the grant of interim order appointing receiver without deciding the question of delay in filing the appeal as well as objections as to the maintainability.

5. Learned counsel further submitted that the defendants while filing the appeal concealed material facts and made false averments. The defendants did not take steps for restoration of the Title Appeal No. 69 of 2006 which they have filed earlier against the judgment and decree of Title Suit No. 337 of 2003. Instead of getting the earlier filed title appeal restored, the defendants filed another title appeal wherein they made a submission that the defendants came to know about



judgment and decree passed in Title Suit No. 337 of 2003 for the first time in the month of June, 2017 when the parties for the first time filed petition before the Additional Collector, Bhagalpur along with photostat copy of judgment and decree. Obviously, it was a completely false averment as Title Appeal No. 69 of 2006 was dismissed on 11.01.2015 and this fact was intentionally and purposely been suppressed in limitation petition, thus, the defendants/appellants played fraud upon the court and tried to mislead it and thus making themselves liable for punishment. Learned counsel further submitted that in the limitation petition the ground taken for condonation of delay is that Government Pleader, Bhagalpur who had contested the case on behalf of the defendants/appellants/respondent 1st set had not informed the appellants about judgment and decree passed in the title suit. But this averment is contrary to the fact that same defendants have filed Title Appeal No. 69 of 2006. Further wrong averment was made that a letter was issued to file appeal for setting aside the *ex parte* judgment and decree contrary to the fact that the decree of the learned trial court was passed on contest. In the entire limitation petition, the defendants/appellants/respondents 1st set have neither disclosed the date on which they came to know about the judgment and



decree passed in Title Suit No. 337 of 2003 nor they have disclosed the case number filed before the Additional Collector, Bhagalpur in which said judgment and decree was filed. Learned counsel further submitted that considering the structure of the Government machinery, some leeway may be given to the Government so far as condonation of delay is concerned but when the matter was contested and earlier appeal was filed in the year 2006, there remains no question of lack of knowledge. In similar circumstances, the Hon'ble Supreme Court frowned upon the condonation of delay of four years in filing the appeal ignoring the judicially accepted parameters for exercise of discretion under Section 5 of the Indian Limitation Act and set aside the order passed by the High Court condoning the delay of four years in the case of ***Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation & Anr.***, reported in ***AIR 2010 SC (Supp) 697***. Learned counsel further submitted that in the case of ***Office of Chief Post Master General & Ors. Vs. Living Media India Ltd. & Anr.***, reported in ***AIR 2012 SC 1506***, the Hon'ble Supreme Court held that the provision for condonation of delay is an exception and Government department should not use it as anticipated benefit. It has further been held that the law shelters everyone under the



same light and should not be swirled for the benefit of a few. The law of limitation undoubtedly binds everybody including the Government. The Hon'ble Supreme Court went on to dismiss the appeal refusing to condone the delay of 427 days holding that there has been delay at every stage of official procedure already showing that persons concerned have not evinced diligence in the matter though they had knowledge of limitation for filing the appeal and no cogent and acceptable explanation was given by the department. Thus, the learned counsel submitted that the impugned order is not sustainable and the same needs set aside.

6. *Per contra*, learned counsel appearing on behalf of the respondents 1st set submitted that the impugned order is legal and there is no need to interfere with the same. Learned counsel submitted that there is no specific bar which restrains the appellate court to hear and decide the appeal along with application for condonation of delay. Learned counsel further submitted that law does not bar filing of the fresh appeal if the previously filed appeal was dismissed for default and relied on the decision of ***Surajdeo Narain Singh & Anr. Vs. Pratap Rai & Anr.***, reported in ***AIR 1923 Patna 514*** to stress that the Title Appeal No. 96 of 2017 is maintainable and dismissal of the



previous appeal would not operate as *res judicata*. Learned counsel further submitted that office of the answering respondents were never apprised about the dismissal of the previously instituted appeal by the conducting lawyer representing the State and as such the answering respondents remained in dark for a long period. Thus, the learned counsel submitted that there is no infirmity or illegality in the impugned order and the same needs to be affirmed.

7. I have given my thoughtful consideration to the rival submissions of the parties in the light of facts and circumstances of the present case. Section 96 of the Code provides for appeal from original decree and provision reads as under:-

“96. Appeal from original decree- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

¹*[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature*



cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ² [ten thousand rupees.]]”

Thereafter, Section 107 of the Code provides as under:-

“107. Powers of Appellate Court.-(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-

- (a) to determine a case finally;*
- (b) to remand a case;*
- (c) to frame issues and refer them for trial;*
- (d) to take additional evidence or to require such evidence to be taken.*

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.”

Now conditions of limitation have been imposed under Order 41 Rule 3A of the Code which reads as under:-

“[3A. Application for condonation of delay.-(1) When an appeal is presented after the expiry of the period of limitation specified therefore, 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 hereof 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 fact 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.]”

8. The conjoint reading of the aforesaid provisions make it clear that hearing of appeal under Section 96 of the Code would be subject to such conditions of limitations as prescribed which includes conditions under Order 41 Rule 3A of the Code. If an appeal is filed after expiry of the period of limitation specified therefor, the same shall be accompanied by an application supported by affidavit stating the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period. If the court is of the view that application should not be rejected without issuance of notice to the respondent, the notice shall be issued to the respondent and thereafter the matter could be dealt



with under Order 41 Rule 11 or Order 41 Rule 13 of the Code as the case may be. The use of word shall in Order 41 Rule 3A (2) of the Code makes the provision mandatory. Therefore, if the appeal has been filed beyond the period of limitation, mandatorily the notice is required to be issued to the respondent. Now issuance of notice to the respondent is for giving an opportunity to the respondent to make submission on the point of limitation since a vested right accrues to him. It is not a mere formality and Order 41 Rule 3A of the Code only states the obvious that no person should be condemned unheard. If a right has been vested in the respondents on account of expiry of limitation period, no adverse order, in the instant case, admission of the appeal, could be made in the absence of the respondents as it would violate the principles of natural justice which finds expression in the provision of Order 41 Rule 3A of the Code. Issuance of notice only would not suffice but an opportunity of effective hearing is to be given to the respondent otherwise the provision would be meaningless. The Hon'ble Supreme Court in the case of ***State of M.P. & Anr. Vs. Pradeep Kumar & Anr.***, reported in ***(2000) 7 SCC 372*** held that object of enacting Rule 3A of Order 41 of the Code seems to be two fold. The first is, to inform the appellant himself that the appeal



is time barred and 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 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 the application for condonation of delay as a condition precedent. So the appellate court is duty bound to consider first the application for condonation of delay as it is a condition precedent for hearing of the appeal.

9. In the light of the discussion made so far, I have no hesitation in holding that the learned first appellate court should not have proceeded in the matter for hearing the appeal on merits keeping the issue of limitation pending till the final judgment of the appeal. On this account the impugned order is bad in the eyes of law.

10. I am not inclined to go into the merits of the limitation petition though it has been argued at length by the learned counsel for the petitioner but dismissal of previously instituted title appeal is an issue which is required to be considered by the learned first appellate court as it goes to the root of the matter and raises an issue on the maintainability of the present appeal. The authority cited by the learned counsel



for the respondent in the case of *Surajdeo Narain Singh & Anr.* (supra) has clearly held that there is nothing in law to prevent entertainment of a fresh appeal on the dismissal for default, of a previously filed appeal, provided the latter appeal was otherwise in order and was filed within the period of limitation. So there could not be any quarrel with the fact that even another appeal could be entertained if the previous appeal has been dismissed in default but for entertaining such appeal, the latter appeal should be in order and should be filed within the period of limitation. Since the learned first appellate court was not apprised about the previously instituted appeal, it was not expected from the learned first appellate court to record any finding on this point and to consider the maintainability of the latter appeal before it.

11. In the light of discussion of facts and case laws, I am of the considered opinion that the impugned order dated 06.09.2018 passed by the learned District Judge, Bhagalpur in Title Appeal No. 96 of 2017 is not sustainable and, hence, the same is set aside.

12. The learned first appellate court is directed to first decide the issue of limitation and maintainability of the appeal before it proceeds further in the matter.



13. With the aforesaid directions, the present civil
miscellaneous petition stands allowed.

(Arun Kumar Jha, J)

balmukund/-

AFR/NAFR	AFR
CAV DATE	02.07.2024
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