

**(1984) 08 PAT CK 0027**  
**In the Patna High Court**  
**Case No : A.F.A.D. No. 250 of 1981**

Mosmat Ram Kali Kuer and Others

APPELLANT

Vs

Indradeo Choudhary and Another

RESPONDENT

**Date of Decision :** 17-08-1984

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 3, 100  
Limitation Act, 1963 — Article 116, 12, 5

**Citation :** AIR 1985 Patna 148 : (1985) PLJR 128

**Hon'ble Judges :** S.B. Sanyal, J

**Bench :** Single Bench

**Advocate :** Uma Shankar, Govt. Pleader and Tarkeshwar Verma, for the Appellant; Thakur Prasad and Murli Manohar Prasad, for the Respondent

**Final Decision :** Allowed

## **Judgement**

S.B. Sanyal, J.—This second appeal is by the plaintiffs. The appeal arose out of a suit u/s 30 of the Land Acquisition act. The appeal of the appellants was dismissed by the court of appeal below on the ground of limitation only. There has been no decision on merit.

2. Learned Counsel for the appellants contended that the court of appeal below erred in law in holding the appeal to be time barred. He further submitted that even if the appeal was barred by time it was incumbent upon the appellate court to afford an opportunity to the appellants to mend the matters to avoid miscarriage of justice, the circumstance being an explainable one. Mr. Thakur Prasad, on the other hand, submitted that the appeal filed was incompetent, as it was filed without a copy of the decree, which was drawn up earlier. He further contended that merely because the court granted time to file copy of the decree, that will not extend the period of limitation.

3. In order to appreciate the rival contentions few dates have to be stated.

4. On 5-5-1980 the trial court rendered the judgment and decree is said to have

been drawn up on 15-5-1980. On 28-5-80 the Indradeo Pat. 149 appellants claimed to have applied for a copy of the judgment and decree. But on the same date they were granted only copy of the judgment. The appellants filed the appeal on 5-6-1980 along with a petition that the office had reported the decree not to be ready, therefore, the memorandum of appeal was not being accompanied by a copy of the decree. Having not received a copy of the decree even thereafter the plaintiffs again applied for a copy of the decree on 20-6-1980, which was made available on 7-7-1980 and on the same date the copy of the decree was filed. In support of the fact that the appellants applied for the copy of the judgment and decree on 28-5-80 a certified copy of the register maintained by the Copying Department of the relevant date was produced before me, wherefrom it appeared that an application for copy of the judgment and decree was made on 28-5-1980.

5. When the memorandum of appeal was filed without copy of the decree, the lower appellate court did not return the memo on 5- 6-80 as it was not in consonance with the requirement of Order 41 Rule 1, but the said memo was entertained and the appeal was admitted on 7-7-1980 when a copy of the decree was filed. The objection as to limitation was raised when the appeal was taken up for hearing on merit.

6. The court of appeal below relying on large number of cases of different High Courts held on interpretation of Order 41 Rule 1 of the Civil P.C. that an appeal filed without being accompanied by copy of decree is an incompetent one. It further held that the appeal became competent only when the certified copy of the decree was filed, i.e. on 7-7-1980, on which date period of thirty days for filing of the appeal had long expired. There having been no petition of condonation of delay u/s 5 of the Limitation Act, the court of appeal below dismissed the appeal as being time-barred.

7. Having heard the learned Counsel for the parties I am of the opinion that the court below committed grave error of law in dismissing the appeal on the ground of limitation. My reason therefor, is court-below's failure to refer to the application for grant of copy of the judgment and the decree together within the period of limitation i.e. on 28-5-1980. The court below ought to have verified the assertion of the petitioner as to whether on 28-5-1980 an application for a certified copy of the judgment and decree was actually made or not and whether the appellant was only given a certified copy of the judgment and not of the decree. If it is a fact that on 28-5-1980 the appellant applied both for the certified copy of the judgment and the decree and the office only issued the certified copy of the judgment, in that event, the appellants cannot be held guilty of any laches whatsoever. No one can be made to suffer for negligence and/or omission of an act of a court or by its officers.

8. It is true that the certified copy of the decree should be filed along with the memorandum of appeal and the said provision is mandatory. In the absence of the decree the filing of the appeal will be incomplete, defective and incompetent.

It is now settled law that if a decree has been drawn up and an application for certified copy of the same has been made by the appellant after the decree was drawn up, the office of the appellate court, should return the memorandum of appeal to the appellant as defective if the memo of appeal is unaccompanied by decree. When the decree is filed by the appellant the question of limitation only may be examined on merit. See Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others, . This course, however, was not adopted in this case nor an opportunity was afforded to file an application for condonation of delay in presentation of the appeal.

9. It has been held by Courts that if an appeal is presented out of time and is admitted by the court the respondent cannot be allowed to raise a preliminary objection to the appeal when the case is taken up on merit. An application ought to be made by way of motion. Court will never allow people to wait upon their right, while the other party incurs expenses. See Murugappa Naicker Vs. Thavammal, Further, if in an explainable circumstance an appeal is filed, without a formal or written application for excusing the delay in presenting the appeal, then the court should afford a reasonable opportunity to the parties to mend matter to avoid miscarriage of justice (See Meghraj Vs. Jesraj Kasturjee and Another, .) Some cases have taken the view that language of Section 5 does not provide that an application in writing must be filed before relief under the said provisions can be granted See Mt. Kulsoomun Nissa and Another Vs. Noor Mohammad alias Sultan Haider and Another, . Sulaiman, J, Chief Justice speaking for the Bench in the case of Mt. Kulsoom-un-Nissa (supra) while dealing with the question of limitation observed :

"..... We think that the lower court should have allowed the defendant to get round the technical objection of the absence of a formal application for extension of time."

10. I am in respectful agreement with the views expressed in the aforesaid decision. In the instant case had the court of appeal below called for the register of the Copying Department, he would have immediately found that proper application for grant of copy of judgment and decree together was made within the period of limitation, but unfortunately the office of the District Judge granted only copy of the judgment on 28-5-1980. If a copy of the decree was actually applied for, then the entire period from 28-5-1980 to 7-7-1980 has to be excluded as that was the time taken for the grant of the copy of the decree. Merely because the plaintiffs again applied for the copy of the decree on 20-6-80, as the office of the court might have misplaced the earlier application for grant of the copy of the decree shall not be permitted to act to disadvantage and jeopardy of the appellant.

11. I am further satisfied from the facts that the plaintiffs had made all efforts within their command to approach the court in tune within a period of limitation and there does not appear to be any negligence on their part in presenting the appeal. If any person is to be blamed for this predicament, it is the office of the

court below. I am satisfied that even if there is some delay in filing the appeal, there is sufficient cause for the same, which is condonable in exercise of power conferred u/s 5 of the Limitation Act. The Supreme Court in the case of The State of Rajasthan Vs. Ram Nath Nirottamdas Chaturvedi, condoned the delay in filing an appeal in the High Court. This court also possesses the power to condone the delay in its discretion (See Sheikhupura Transport Co. Ltd. Vs. Northern India Transport Insurance Co., ). I find that the delay if any is patently explainable and instead of further delaying the matter, I in exercise of my discretion condone the delay and direct the Court below to proceed with the appeal on merit.

12. In the result, the appeal is allowed, the case is sent back to the appellate court, which shall now proceed to dispose of the appeal on merit. There will be no order as to costs.