

(1982) 03 PAT CK 0007
In the Patna High Court
Case No : S.A. No. 5 of 1981 (R)

State of Bihar and Others

APPELLANT

Vs

Ray Chandi Nath Sahay and Others

RESPONDENT

Date of Decision : 30-03-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 3A
Limitation Act, 1963 — Section 5

Citation : AIR 1983 Patna 189

Hon'ble Judges : U. Sinha, J; S. Roy, J

Bench : Division Bench

Judgement

1. The application filed u/s 5 of the Limitation Act for condoning the delay in filing this appeal has been placed before this Bench as ordered by R. C. P. Sinha, J., by order dated 21-2-1982. The impugned judgment and decree was passed on 22-3-1980. It is not disputed that limitation expired on 3-1-1981. The appeal was filed on 12-1-81. It was ready for filing on 10-1-1981 But it could not be filed on that day as the Additional Registrar was not available. The 11th January, was the Sunday. The appeal was, therefore, filed on 12-1-1981. The fact that the appeal was ready for filing on 10-1-1981 must be accepted, as the memorandum of appeal bears the endorsement of the Administrative Officer on that date. There is, therefore, adequate explanation for 10th, 11th and 12th January. The appellant is thus only to explain the delay between 4th Jan., 1981 and 9th Jan., 1981 (both days inclusive). The matter was referred to the Division Bench as in view of R. C. P. Sinha, J., the question of interpretation of the provisions contained in R- 3A of Order 41 of Civil P. C. (hereinafter to be referred as the Code) was involved. It was submitted before us that the appeal not having been accompanied by an application for condonation of the delay it was not properly presented and, there-fore, the delay in filing the appeal cannot be condoned. Rule 3A of the Code lays down that if the appeal is filed beyond the period of limitation it shall be accompanied by an application explaining the circumstances showing that the appellant has sufficient cause for not preferring the appeal

within time.

2. Learned Government Pleader No. 1, appearing on behalf of the appellant has submitted that the provisions of Order 41 Rule 3A of the Code are not mandatory and, therefore, this Court is not precluded from considering whether there was sufficient cause for not filing the appeal within time. The application for condonation of the delay was filed in this case on 6-2-1981. If the provisions of Rule 3A of the Code are mandatory, the appeal cannot be held to have been filed properly on 12-1-1981. Learned Government Pleader No. 1 placed reliance upon *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, and *State of Madhya Pradesh v. Azad Bharat Finance Co.* AIR 1967 SC 270 for the proposition that the expression "shall" is not always expressive of the mandatory character of a provision in all cases. Despite the use of the word "shall" the provision may only be directory. The test to determine whether the provision is mandatory or directory is to be tested with regard to the fact whether the provision provides sanction for not complying with the direction. Rule 3A of the Code does not lay down that if the appeal, filed beyond time, is not accompanied by an application u/s 5 of the Limitation Act the Court shall reject it. In that view of the matter, I have not the least hesitation in holding that the provisions of Rule 3A of the Code are not mandatory, Mr. N. K. Prasad, learned counsel for respondent No. 1 with his usual fairness conceded that the provisions of Rule 3A of the Code are not mandatory. He, however, submitted that the effect of Rule 3A would be that the appeal would be deemed to have been properly represented on the day the application for condonation was filed and, therefore, the appeal in this case must be held to have been filed on 6-2-1981 when the limitation petition was filed.

We regret, we cannot accept this effect of non-compliance of Rule 3A of the Code, The filing of limitation petition is entirely different from the filing of an appeal. For proper presentation of appeal all that is needed is that the memorandum of appeal accompanied by a copy of the judgment and of the decree as provided in Rule 1 of Order 41 of the Code. The ambit of Rule 1 cannot be enlarged and has not been enlarged by Rule 3A of the Code. We regret, we find it difficult to accept the interpretation placed by Mr. Prasad upon the provisions of Rule 3A and the consequence of non-compliance thereof. This view of our appears to be supported by that of the Supreme Court in *Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others*, in paragraph 7. The appeal, therefore, must be held to have been filed on 12-1-1981 and not on 6-2-1981 although it was not accompanied by an application u/s 5 of the Limitation Act. Learned counsel for respondent No. 1 submitted that there was adequate explanation for not filing the appeal between 5th and 9th January, 1981. But there is no explanation for not filing the appeal on 3rd and 4th January 1981. The appeal if filed, on 3-1-1981 it would have been within time. There is, therefore, no question of explaining why it was not filed on 3-1-1981. The only question, therefore, is in regard to the explanation for not filing the appeal on 4-1-1981. In the special facts and circumstances of this case as presented in the

petition filed u/s 5 of the Limitation Act, we are satisfied that the appellant has made out sufficient cause for not filing the appeal on 4th of January, 1981. In that view, therefore, there was sufficient cause for not filing the appeal before 12-1-1981. The application, therefore, is allowed and the delay in filing the appeal is condoned.

3. As the appeal is ready in all respects, let it be listed, for hearing under Order 41 Rule 11 of the Code on 13-4-1982.