



2025:AHC:165629

A.F.R

**HIGH COURT OF JUDICATURE AT ALLAHABAD
MATTERS UNDER ARTICLE 227 No. - 11075 of 2025**

Dr. Sammohit @ Sammohit

.....Petitioner(s)

Versus

Raju Kumar Patel

.....Respondent(s)

Counsel for Petitioner(s)	:	Harish Chandra Dwivedi
Counsel for Respondent(s)	:	

Court No. - 9

HON'BLE MANISH KUMAR NIGAM, J.

1. Heard learned counsel for the petitioner and perused the record.
2. This petition has been filed challenging the order dated 26.08.2025 passed by Additional District Judge/Special Judge, Court No. 4, Varanasi in Misc. Case No. 51 of 2025. By the order dated 26.08.2025, the appellate court has allowed the application filed by the appellant for condoning the delay in filing the appeal.
3. Contention of the learned counsel for the petitioner is that the respondent has not filed the application for condoning the delay along with memo of appeal and therefore, in view of the provisions of Order 41 Rule 3-A C.P.C., the appeal filed by the respondent is to be dismissed. It has also been contended by learned counsel for the petitioner that in case, an appeal is filed with delay, the same shall be accompanied by an application for condoning the delay in view of the provisions of Order 41 Rule 3-A C.P.C. It has been further contended that subsequent to the filing of the appeal, an application cannot be filed for condoning the delay, it has to be filed simultaneously along with memo of appeal. In this regard, learned counsel for the petitioner has relied upon the judgment of this Court in case of **Collector, Varanasi v. Rai Prem Chand and others; AIR 1992 ALL 206** as well as judgment of Kerala High Court in case of **Padmavathi v. Kalu; AIR 1980 Kerala 173**.
4. Before considering the submission, it will be appropriate to look into

the brief facts of the case which are as under.

5. An ex-parte decree was passed on 17.08.2002 in a suit being O.S. No. 51 of 2001 (Dr. Sammohit v. Radheyshyam) for specific performance of an agreement to sell executed by father of the respondent. The said decree was executed by filing an execution application which was registered as execution case No. 32 of 2002. In the execution proceedings, sale deed was executed by the court on 15.07.2003. A restoration application was filed by the defendant/respondent under Order 9 Rule 13 C.P.C. on 13.10.2021 along with an application under Section 5 of Limitation Act for condoning the delay in filing the restoration application. The application filed under Section 5 of the Limitation Act for condoning the delay in filing the restoration application was rejected by the trial court by order dated 05.03.2024. Against the order dated 05.03.2024, the petitioner filed a revision on 12.03.2024. On objection being raised by the petitioner, the respondent moved an application for converting the revision into a misc. appeal and the said application was allowed by order dated 09.08.2024. After conversion of the revision into appeal, on an objection filed by the petitioner, the respondent filed fresh memo of appeal on 28.08.2024. Thereafter, on an objection being taken by the petitioner that appeal filed by the respondent was beyond time, the respondent filed an application under Section 5 of the Limitation Act for condoning the delay in filing the appeal on 23.09.2024. The said application has been allowed by the court below by the order impugned, hence the present writ petition.

6. It would also be appropriate to look into the relevant provisions before considering the argument of the learned counsel for the petitioner.

7. Order 41 Rule 3-A of C.P.C. is quoted as under:

"3A. Application for condonation of delay. (1) When a 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 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 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."

8. Rule 3A has been added by Act of 104 of 1976.

9. Order 41 Rule 3-A(1) has been inserted to put an end to the practice of admitting an appeal subject to decision on the question of limitation. This practice was disapproved by the privy counsel in case of **Krishnasami Pandikonder v. Ramasami Chettiar; AIR 1917 PC 179** and **Sunderabai v. Collector of Belgaum; AIR 1918 PC 135**, which stressed the expediency of adopting a procedure under which a final determination of the question as to limitation would be possible before admission of the appeal. Therefore, with a view to seeing that the question of limitation does not remain lingering. Order 41 Rule 3A(1) has been inserted by Act of 104 of 1976. From bare perusal of the Rule 3-A of the Order 41, it is manifest that the purpose and requirement of filing an application under Rule 3A along with a time barred appeal is mandatory in the sense that the appellant cannot without such an application being decided insist upon the court to hear his time barred appeal that this was the very purpose said to be above by insertion of Rule 3A, 1 & 2 which is clear from the legislative history of Rule 3A. No penalty of rejection or dismissal of a time barred appeal for non compliance of the requirement of Rule 3A(1) is envisaged therein. Thus, when Rule 3A(1) neither expressly nor contextually indicates that its non compliance should, as a penalty, entail dismissal of the time barred appeal, its operation cannot be regarded as bringing about, such drastic result implidely.

10. Initially there was a divergence of opinion between various High

Courts as to whether the application for condonation of delay can be filed subsequent to the filing memo of appeal or the application for condonation of delay must necessarily be filed along with memo of appeal. This controversy came to an end after the judgment of Supreme Court in case of **State of M.P. and another v. Pradeep Kumar and another; (2000) 7 SCC 372**. The Supreme Court held that filing of memo of appeal without an application for condonation of delay, will not be fatal, defect if any, can be cured by filing subsequent application for condonation of delay. Paragraph nos. 10, 11, 12 of the judgment in case of State of M.P. & another (supra) is quoted as under:

"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.

12. 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 view of the law laid down by the Supreme Court in case of State of M.P. & another (Supra), the argument made by learned counsel for the petitioner is of no avail as the application for condoning the delay can be filed subsequent to the filing of memo of appeal. Further in the facts and circumstances of the case, against the order rejecting an application under Section 5 of the Limitation Act filed for condoning the delay, in filing the application under Order 9 Rule 13 C.P.C., the respondent filed revision within time which on objection being taken by the petitioner, was converted into an appeal. On further objection being taken by the petitioner, the respondent filed a fresh memo of appeal in the aforesaid converted appeal. Thereafter, again, in order to meet the objection raised by the petitioner as to delay in filing the appeal, the respondent filed a

separate application for condonation of delay which has been allowed by the court below.

12. In my view, revision was filed within seven days of the order passed rejecting the application under Section 5 of the Limitation Act. The said revision was subsequently converted into an appeal with the leave of the court. Even otherwise, there is no delay in filing the appeal.

13. In view of the above, this petition lacks merit and is accordingly, **dismissed.**

September 17, 2025

Ved Prakash

(Manish Kumar Nigam,J.)