

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 189 of
2024****In F/CIVIL REVISION APPLICATION NO. 21509 of 2023**

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LH OF RAMANBHAI SOMESHAR MEHTA & ORS.

Versus

JITENDRAKUMAR JAYANTILAL MEHTA & ORS.

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Appearance:

MR JAL UNWALA SR.ADV. WITH MS SHIVANGI J GUPTA(10542) for the
Applicant(s) No. 1,1.1,1.2,1.3

for the Respondent(s) No. 10,13,14,7,9

MR DARSHAN K KOTHARI(14004) for the Respondent(s) No. 1,2,3,4,5,6

MR PRAKASHKUMAR R VAGHELA(12012) for the Respondent(s) No.

1,2,3,4,5,6

RULE SERVED BY DS for the Respondent(s) No.

11,12,13.1,13.2,13.3,13.4,14.1,14.2,7.1,7.2,7.3,7.4,8,9.1,9.2,9.3,9.4,9.5

UNSERVED REFUSED (R) for the Respondent(s) No.

10.1,10.2,10.3,10.4,10.5,10.6,10.7

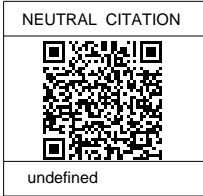
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CORAM:HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI**Date : 08/05/2024****ORAL ORDER**

1. Heard Mr.Jal Unwala, learned Senior Counsel appearing with Ms.Shivangi Gupta, learned advocate for the applicants and Mr.Darshan Kothari, learned advocate appearing for the respondent nos.1 to 6.

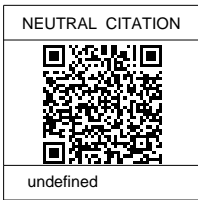
2. By way of the present application, the applicants seek condonation of delay of 372 days caused in filing the Civil Revision Application.

3. Mr.Jal Unwala, learned Senior Counsel submits that the applicants herein are aggrieved by the impugned order dated 19.04.2022 passed by the learned Additional Civil Judge, Lunawada



in Regular Civil Suit No.10 of 2020 below exh.33 whereby, the application filed by the applicants herein below Order 7 Rule 11 of the Code of Civil Procedure came to be rejected. Mr.Unwala, learned Senior Counsel placed reliance on paragraph 4 of the present application and submitted that the impugned order, as referred above, was not informed by the learned advocate for the applicants and in view thereof, the applicants were not aware about the same and, therefore, there is a delay in filing the Civil Revision Application, challenging the impugned order, rejecting the application filed under Order 7 Rule 11 of the Code of Civil Procedure. Mr.Unwala, learned Senior Counsel also placed reliance on paragraph 5 and submitted that the applicants came to know in July, 2023, collected the documents and thereafter, inquired about the case from their advocate and thereby, they came to know about the impugned order dated 19.04.2022. It is submitted that the applicants applied for certified copies of the documents. As the applicants are poor, facing financial crunch, residing in village and due to lack of knowledge, met number of advocates for preparing further application and after much deliberation and assistance of the advocate, they preferred the present application, seeking condonation of delay of 372 days caused in filing the Civil Revision Application.

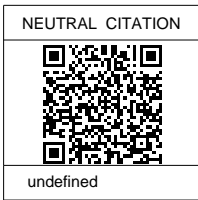
3.1. It is also submitted that the revenue records of the lands and the suit are voluminous, which took some time to examine the same and for the purpose of preparing the application, it was required to study the documents and also other documents with respect to the land records of the lands mentioned in the plaint and in view thereof, it took further time to file the present application.



4. Mr.Darshan Kothari, learned advocate appearing for the respondent nos.1 to 6 has vehemently opposed the aforesaid submissions. Placing reliance on paragraph 8 of the order dated 03.02.2011 passed by the Division Bench of this Court passed in Civil Application No.11518 of 2010 in First Appeal (Stamp) No.2411 of 2009, it is submitted that the said application seeking condonation of delay was rejected on the ground that the appeal was not accompanied by an application seeking condonation of delay.

4.1. Mr.Kothari, learned advocate also placed reliance on the ratio laid down by this Court in the order dated 02.07.2014 passed in Letters Patent Appeal No.720 of 2014 and submitted that in the said order, this Court has held that the delay cannot be condoned on the ground that the same was not informed by the advocate. There was a delay of 1142 days, which was not condoned wherein, the burden was thrown upon the advocate stating that he did not take proper steps to defend the suit.

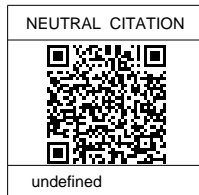
5. Mr.Unwala, learned Senior Counsel, in rejoinder, has relied upon the rojkam, which is produced by the learned advocate for the respondent nos.1 to 6. Placing reliance on the rojkam dated 31.03.2022 at page 22, Mr.Unwala, learned Senior Counsel submitted that as noted in the said rojkam, the advocate for the applicants was not present. The matter was adjourned to 19.04.2022 and application below exh.33 under Order 7 Rule 11 of the Code of Civil Procedure came to be rejected. It is submitted that the advocate for the applicants was also not present in the said proceedings.



5.1. Placing reliance on the aforesaid submissions, Mr.Unwala, learned Senior Counsel submitted that the delay of 372 days caused in filing the Civil Revision Application may be condoned in the interest of justice.

6. Heard the learned advocates appearing for the respective parties and considered objections raised by the learned advocate for the respondent nos.1 to 6 by placing reliance on the order dated 03.02.2011 passed by this Court in Civil Application No.11518 of 2010 in First Appeal (Stamp) No.2411 of 2009 whereby, the application seeking condonation of delay under the provision of Order 41 Rule 3A of the Code of Civil Procedure came to be rejected.

7. The Apex Court also considered an identical issue. This Court deems it fit to refer to the ratio laid down by the the Apex Court in the case of State of M.P. and another vs. Pradeep Kumar and another reported in (2000)7 SCC 372 wherein, the Apex Court also considered the question, as referred to in paragraph 10 of the said judgment and observed that "What is the consequence if such an appeal is not accompanied by an application mentioned in sub-rule (1) of Rule 3-A?". The Apex Court, in paragraph 11 held that though sub-rule (1) of Rule 3-A has used the word "shall", the rule cannot be interpreted harshly and make non-compliance punitive to the appellant. It is held that it can happen that due to some mistake or lapse, an appellant may omit to file an application (explaining the delay) along with the appeal. In paragraph 19, it is held that the Rule is not 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. The defect is held to be



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.

8. It is appropriate to refer to paragraphs 10, 11 and 19 of the aforesaid judgment, which read thus:-

“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.

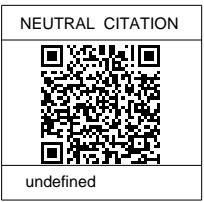
11. No doubt sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being 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.

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.”

9. In light of the aforesaid, the objections raised by the learned advocate appearing for the respondent nos.1 to 6 stand rejected. Further, in the opinion of this Court, for an inaction on the part of the learned advocate, substantial justice cannot be given a go-bye. The learned advocate appearing for the respondent nos.1 to 6 also is not in a position to controvert the submission made by Mr.Unwala, learned Senior Counsel that as per the rojkam, on 31.03.2022, the learned advocate appearing on behalf of the original defendant nos.3/1 to 3/3 - applicants herein was not present and no opportunity of hearing was granted and the order impugned came to be passed on 19.04.2022 whereby, the application below Order 7 Rule 11 came to be rejected.



10. For the forgoing reasons, the present application succeeds and the same is allowed. Delay of 372 days caused in filing the Civil Revision Application is hereby condoned. Rule is made absolute to the aforesaid extent.

Hitesh

(VAIBHAVI D. NANAVATI,J)