

(2023) 09 GUJ CK 0068

In the Gujarat High Court

Case No : R/Special Civil Application No. 16969 Of 2023

Harish Raysingh Malivad

APPELLANT

Vs

Mehmood Mohammad Hussain

RESPONDENT

Date of Decision : 29-09-2023

Acts Referred:

Gujarat Motor Vehicles Rules, 1989 — Rule 229

Code Of Civil Procedure, 1908 — Section 115, Order 9 Rule 4

Citation : (2023) 09 GUJ CK 0068

Hon'ble Judges : Gita Gopi, J

Bench : Single Bench

Advocate : Dhruv R Thakkar

Final Decision : Disposed Of

Judgement

Gita Gopi, J

[1] Mr. Dhruv R. Thakkar, learned advocate for the applicant submits that the applicant is before this Court since MACP no.27/2017 came to be dismissed for default vide order dated 28.3.2022 without any decision on merits. Mr. Thakkar submits that the restoration application was filed along with the delay condonation application since the applicant was not aware of the dismissal and there had been the delay of 9 months and 18 days in preferring the restoration application, but by order dated 1.7.2023, MACMA no.54/2023 came to be dismissed for default.

[2] Mr. Thakkar submits that the main claim petition was filed for the minor and the learned Tribunal dismissed the main claim petition being MACP no.27/2017 observing that the notice has not been served to opponents no.1 and 2 and the matter has remained pending since long for non-service and it was observed that the applicant had failed to initiate any efforts for service and on being found that the applicant has remained absent continuously, the learned Tribunal had found that the applicant was not interested in proceeding and therefore, the matter

came to be dismissed. Mr. Thakkar submits that the learned Tribunal has failed to even see that it was the matter of a minor and again by an order dated 1.7.2023, MACMA no.54/2023 on the very same ground came to be rejected considering the absence of the applicant and his lawyer of not taking any efforts to serve the opponents though a hand packet for the service of notice was given. Mr. Thakkar submits that the learned Tribunal could through on its own agency could have served the opponents. The observation of having given the hand packet itself suggests that the necessary process fee would have been paid. Mr. Thakkar submits that it is the duty of the Court on payment of the process fee to get the notice served. The prayer for receiving hand packet from the Court is only to assist the Court for the service. Mr. Thakkar further submits that respondent no.3-insurance company was on record which is of the local jurisdiction which was already served and since the matter was of the injury of the minor, the learned Tribunal could have followed the judgment in the case of Master Mallikarjun Vs. Divisional Manager, The National Insurance Company Limited & Anr., reported in AIR 2014 SC 736 to grant the compensation, where presence of the driver and owner would not be even necessary and thus, stated that non-service of opponents no.1 and 2 who were from Madhya Pradesh could never have been made a ground for dismissal of the matter. Mr. Thakkar has relied upon the judgment dated 28.8.2018 passed by this Court in Special Civil Application no.2463/2018 and the judgment dated 31.7.2023 passed by the Hon'ble Supreme Court in Civil Appeal no.4758/2023.

[3] Referring to the case in the case of Bharatbhai Narsinghbhai Chaudhary & Ors. v. Malek Rafik Malek Himmatbhai, reported in 2011

(2) GLR 1324, Mr. Thakkar submits that no claim petition can be dismissed without decision on merits.

[4] It is necessary to reproduce relevant part of the decision in the case of Bharatbhai Narsinghbhai Chaudhary (supra), which is as under:-

"A District Judge, who functions as a Claims Tribunal, is not only within the administrative control of the High Court, but also subordinate to it under Section 115 of the Code. A Claims Tribunal is a 'Court' although with limited jurisdiction and not a mere 'Tribunal'. The powers of appeal given to the High Court under the Act against the decision of the Tribunal constituted under the Act, will definitely lead to conclusion that the said Tribunal is subordinate to the High Court and the nomenclature given to the Motor Vehicles Tribunal that, it is a Tribunal, will not take it out of the purview of the Civil Court. (Para 5)

Under Rule 3, therefore, even if, neither party appears when the suit is called for hearing, it is not compulsory for the Court to dismiss the suit. The Court may adjourn the suit. In the event of dismissal of the suit, it is open to the plaintiff to apply for restoration of the suit and the Court may set aside the order of dismissal and restore the suit. An order dismissing a suit for default of appearance of parties is not a "decree" under Sec. 2(2), and hence, is not

appealable. An order of dismissal of a suit based on erroneous application of Rule 3 can be said to be a "case decided" within the meaning of Sec. 115 of the Code. Hence, where the Court has acted with illegality or with material irregularity in the exercise of jurisdiction, a revision would lie against such an order. (Para 5.7)

The provisions of the Code are applicable to govern the procedure in a Motor Accident Claim case as provided under Rule 229 of the Gujarat Motor Vehicles Rules, 1989. There is no separate procedural law, made applicable to conduct the Motor Accident Claim petitions. Therefore, application for restoration, made under Order 9, Rule 4, in the instant case, is absolute, legal and sustainable, and therefore, the revision, arisen out of such order, passed below such application, is also undoubtedly maintainable. (Para 5.11)

On perusal of the application and other relevant papers, it appears that the restoration application was filed by the applicants on 22nd November, 2001 and another restoration application is filed on 28th January, 2004, under Order 9, Rule 4 of the Code, wherein, the applicants have described the reasons and tried to justify their case for restoration of the application. On perusal of the papers, it appears that the applicants are poor persons and coming from the lower strata of the society as they belong to Tribal community. Therefore, instead of entering into the technicalities and with a view to do the substantial justice, the Court below was required to adopt lenient view.

(Para 6)."

[5] Here in this matter, dismissal of the claim petition was on the ground that the applicant failed to serve respondents no.1 and 2. It is to be taken note that respondents no.1 and 2 are from Madhya Pradesh. The order of the Court suggests that the respondent no.3-insurance company had been served. The restoration application was given with a prayer to condone the delay and that too, came to be dismissed. In view of the proposition of law laid down in the case of Bharatbhai Narsinghbhai Chaudhary (supra), as soon as restoration application is moved, the learned Tribunal should be proactive enough to hear the matter as the main claim petition itself cannot be dismissed for default without any decision on merits. The case of the applicant being a minor would be governed by the judgment in the case of Master Mallikarjun (supra). The yardstick has been laid down to grant compensation to the minor and if at all the matter falls under exceptional case of beyond the basic limits of the yardstick laid down, then the matter has to be dealt with accordingly, but under no circumstances, could any claim petition be dismissed without any decision on merits.

[6] In view of the above, the order dated 1.7.2023 passed by the MACP (Main), Dahod in MACMA no.54/2023 in MACP no.27/2017 is hereby quashed and set aside. Consequently, the order dated 28.3.2022 passed by the MACT (Main), Dahod in MACP no.27/2017 is also quashed and set aside. MACP no.27/2017 is ordered to be restored on the file of the Tribunal with a direction that the matter be decided on merits by providing an opportunity to all concerned to adduce the

evidence on record. Let this exercise of recording of evidence be completed within a period of six months on receipt of writ of the Court.

[7] Accordingly, the present petition stands disposed of.