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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE HIRDESH
ON THE 24th OF NOVEMBER, 2023**

MISC. APPEAL No. 5144 of 2022

BETWEEN:-

1. SANTOSH SINGH GOND S/O LATE SHRI CHAIN SINGH, AGED ABOUT 28 YEARS, OCCUPATION: FARMER VILLAGE KADAMSARA TEHSIL JAITHARI DISTRICT ANUPPUR M.P. (MADHYA PRADESH)

2. KUWAR SINGH GOND S/O LATE SHRI CHAIN SINGH, AGED ABOUT 26 YEARS, OCCUPATION: FARMER VILLAGE KADAMSARA TEHSIL JAITHARI DISTRICT ANUPPUR M.P. (MADHYA PRADESH)

.....APPELLANTS

(BY SHRI R.S. RATHORE - ADVOCATE)

AND

1. PANKAJ GUPTA S/O SHRI LALLU GUPTA, AGED ABOUT 36 YEARS, VILLAGE GHIROUL POLICE STATION CHACHAI DISTRICT ANUPPUR M.P. VEHICLE DRIVER BOLERO PICK UP MP 65 GA/1178 (MADHYA PRADESH)
VEHICLE DRIVER BOLERO PICK-UP MP-65-GA/1178

2. JITENDRA GUPTA S/O ANAND KUMAR R/O VILLAGE LAPATA, P.S. AND TEHSIL JAITHARI, DISTRICT ANUPPUR (MADHYA PRADESH)
VEHICLE OWNER BOLERO PICK-UP MP-65-GA/1178

3. TATA A.I.G. GENERAL INSURANCE COMPANY LIMITED, BRANCH OFFICE-1, SATNA RAMPUR BAGHELAN DISTRICT SATNA (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI NEERAJ DUBEY - ADVOCATE)

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This appeal coming on for admission this day, the court passed the following:

ORDER

1. The present Misc. Appeal under Order 43 Rule 1 (C) of CPC has been filed against the order dated 10.09.2022 passed in MJC No.6/2021 passed by Shri R.P. Sevetiya, Second District Judge, Annuppur whereby the trial Court rejected the application under Order 9 Rule 9 of CPC for restoration of the claim No. 07/2019 in its original number filed by the petitioners.

2. It is undisputed that the appellants filed Claim Case No. 07/2019 before the Second Addl. MACT Annuppur which is dismissed by the Tribunal in non-presence of the appellants on date 01.09.2021.

3. The brief fact of the case is that the appellants had filed a claim case before the Tribunal vide MACC No. 7/2019 for seeking compensation due to accident by the respondent No. 1/driver of the offending vehicle. Such claim case has been listed on 01.09.2021 before the Tribunal. The appellants could not mark their presence before the trial Court, therefore, Claim Case No.7/2019 has been dismissed for want of prosecution. Copy of the order dated 01.09.2021 is Annexure P-1.

4. Being aggrieved by such order dated 01.09.2021, appellants have filed an application under Order 9 Rule 9 of the CPC for restoration of the original case which is registered as MJC No. 6/2021 and prays for restoration. Application under Order 9 Rule 9 of CPC is Annexure P/2.

5. Respondent appeared before the Tribunal and filed their reply and denied the averment of the application.

6. On date 10.09.2022, after hearing the submission of both the parties and taking the evidence, Tribunal dismissed the application under Order 9 Rule

9 of CPC, without appreciating the material fact and circumstances, the order is Annexure P-3.

7. Being aggrieved with the aforesaid order, the appellants filed this Misc. Appeal on the ground that the impugned order passed by the learned trial Court is illegal, arbitrary against the law and fact and is liable to be set aside. He further submitted that appellants have never received any notice nor they know about the passing of the ex-parte order dated 01.09.2021. When they came to know about the ex-parte order, on the date of appearance, appellants appeared but learned counsel for the appellants did not appear due to this reason their presence could not be marked. He further submitted that on date 01.09.2021, appellants were present before the Court, but their counsel was busy in other Court so he was unable to mark his presence before the Court. So their case was dismissed and therefore, prays for setting aside the impugned order dated 10.09.2022 and restore the MACC No. 7/2019 in its original number.

8. On the other hand, learned counsel for the respondents supported the impugned order and pray for rejection of this Misc. Appeal.

9. After hearing the learned counsel for both the parties and perusing the record it is worth referring to provision enshrined under Order 9 Rule 9 of CPC which is extracted hereunder :-

9. Decree against plaintiff by default bars fresh suit (1)

Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when

the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

10. The Supreme Court in case of **G. P. Srivastava v. R.K. Raizada and Others**, while construing the sufficient cause employed. Para-7 held as under:

7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an exparte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do inaction is imputable to the erring party. Sufficient cause for the purpose of hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and to the date on which the absence was made a ground for

proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in this favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.

11. In case of Raj Kishore Pandey v. State of Uttar Pradesh and Others , Para 8 held as under :

8. In our opinion, whether the applicant has made out sufficient cause or not, in the application filed, the Court is required to look at all the facts pleaded in the application. No doubt, the consideration of the existence of sufficient cause is the discretionary power with the court, but such discretion has to be exercised on sound principles and not on mere technicalities. The approach of the Court in such matters should be to advance the cause of justice and not the cause of technicalities. A case, as far as possible, should be decided on merits.

12. In case of **Rafiq and Another v. Munshilal and Another**, the Supreme Court held that the obligation of the party is to select his advocate, brief him, pay the fees and trust the learned Advocate to do the rest of the things. It is thus a duty of lawyer to attend the proceedings. The Supreme Court held as under:-

3. *“The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court’s procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.”*

13. Thus, in the light of the aforesaid principle laid down by the Apex Court in the instant case, appellants filed a suit for compensation before

Tribunal. Appellants have contested the case, could not come to the Court on 01.09.2021 for hearing and claim came to be dismissed on default on same date, thereafter, appellants filed promptly, after 16 days an application for restoration of claim petition before the Tribunal by showing sufficient cause for his non-appearance as his counsel is busy in another Court by filing Annexure P-5.

14. On perusing the record submitted by the appellants, Annexure P-1, it was found that only on 01.09.2021, appellants were not present before the Court and case was dismissed by the Court below.

15. Appellants filed vide Annexure P-5, a document by which it shows that learned counsel for the appellants was present before the 3rd Civil Judge, Junior Division Annuppur and cross-examine the witness. In case of **Ashok Rajiv Vadodriya v. Municipal Corporation of Greater Bombay, AIR 2004 Page 8**, it is held thus :-

"If the notices of motion for restotation of suits in the case are not allowed, it is only the plaintiffs who would suffer and not the advocate who did not appear or the clerk who did not note the correct date of hearing in the diary. In the circumstances, appellants-plaintiffs cannot be made to suffer merely because their chosen advocate defaulted.

"It is a duty of an advocate engaged for conducting a cause on behalf of suitor to keep himself dully informed of the proceeding in court and be present when his case is called out. The litigant cannot be said to have any responsibility, legal or otherwise, after having engaged the service of an

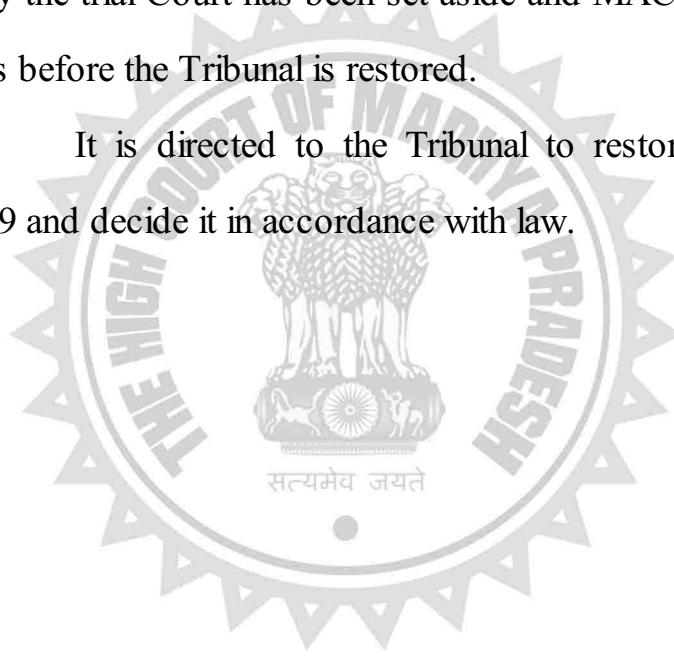
advocate and Vakalatnama is filed in his behalf, to attend the court to take dates of the proceedings and convey them to his advocate."

16. On perusal of the trial Court record there is just one date which has been defaulted by the appellants and trial Court adopted a very strict view in rejecting the application filed by the appellants, which is not correct and liable to be set aside.

17. So as per above discussion, in view of this Court, impugned order passed by the trial Court has been set aside and MACC No.7/2019 filed by the appellants before the Tribunal is restored.

18. It is directed to the Tribunal to restore the original MACC No.7/2019 and decide it in accordance with law.

vkv /-



**(HIRDESH)
JUDGE**