**(1985) 01 MP CK 0013**

**Madhya Pradesh High Court (Indore Bench)**

**Case No:** Miscellaneous Appeal No. 318 of 1983

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| Tulsiram and Another | | APPELLANT |
| | Vs | |
| Gurbir Singh and Others | | RESPONDENT |

**Date of Decision:** Jan. 11, 1985

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 19 Rule 1, Order 19 Rule 2(1), Order 19 Rule 3(1), Order 22 Rule 4, Order 22 Rule 9
- Motor Vehicles Act, 1939 - Section 110A, 110A(3), 110D

**Hon'ble Judges:** K.L. Shrivastava, J

**Bench:** Single Bench

**Advocate:** S.K. Jain, for the Appellant; B.K. Samdani, for the Respondent

**Final Decision:** Allowed

**Judgement**

K.L. Shrivastava, J.
This order shall also govern the disposal of Misc. Appeal No. 304 of 1983 which the, Appellants have filed in relation to the death of their daughter Mamta aged 2 years on identical facts.

2. The present Misc. Appeal u/s 110-D of the Motor Vehicles Act, 1939 (hereinafter referred to as ''the Act'') arises out of the award dated 11.8.1983 passed by the Motor Accidents Claims Tribunal, Mandleshwar, West Nimar, whereby the claim petition u/s 110-A of the Act has been dismissed as time barred.

3. The facts giving rise to the appeal are these. The Appellants are the parents of the deceased Sulochana aged 6 years who died in a bus accident dated 9.8.1981 which occasioned several deaths. During the pendency of several claim petitions the claim petition in question in connection with the said accident was also filed on 9.3.1982 and with it an application (I. A. No. 1) for condonation of delay was also filed stating therein as under:

(1) xxx xxx xxx

The affidavit dated 11.8.1983 filed in support of the application reads as under:

(2) xxx xxx xxx

(3) xxx xxx xxx

4. The provisions regarding limitation and condonation are embodied in Section 110-A (3) of the Act and are in these terms:

Section 110-A (3): No application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident:

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months if it is satisfied that the Applicant was prevented by sufficient cause from making the application in time.

5. The learned Tribunal, on objection by the N.A. 3, passed the impugned order detailing the reason in these terms:

xxx xxx xxx

6. The only point for consideration in this appeal is whether the learned Tribunal erred in dismissing the claim petition as time barred.

7. A perusal of the order sheet recorded by the Tribunal on 8.3.1983 reveals that the parties wanted time to advance arguments on the I.A. No. 1. It was for that purpose that the case was adjourned to 10.5.1983. However, it was taken up on 2.5.1983 and adjourned to 11.8.1983 for evidence as summer vacation was to commence from 9.5.1983 and, therefore, the case could not have been taken on 10.5.1983. On 11.8.1983, without mentioning as to whether the parties did or did not want to adduce evidence, it has been stated that arguments were heard on the application. It has also been mentioned that an affidavit was filed by the Applicants in support of their application for condonation of delay.

8. It is well settled that in the context, the proviso regarding sufficient cause has to be construed so as to advance substantial justice. The Supreme Court did take a lenient view in Wadhya Mal''s case 1981 ACJ 459 (SC). The D.B. decision in Sannehalamma''s case 1974 ACJ 24 (Mysore) is also pertinent.

9. On the question of condonation of delay, it has been observed by this Court as under in the decision in Jashodabai''s case 1984 MPWN 382:

From the order extracted hereinabove it is apparent that the Tribunal did not apply its mind to all the facts that are averred in the application for condonation of the delay. It depends on the facts and circumstances of individual case. A cause may be sufficient in. the context of the facts and circumstances of one case, it may not be so in other case in the context of facts and circumstances of that case. To buttress this

view of mine, I would refer to the decision of the High Court of Himachal Pradesh in State of Himachal Pradesh Vs. Dole Ram, and of the High Court of Karnataka in Krishna Bai and Others Vs. B.S. Desai and Others, . In these cases poverty, illiteracy and backwardness have, in the facts and circumstances of these cases, been treated to be sufficient cause for condonation of delay.

10. Now as to the evidence in the case, it may be pointed out that Section 30 (c) of the CPC provides that subject to such conditions and limitations as may be prescribed, the court may at any time, either of its own motion or on the application by any party, order any fact to be proved by affidavit. Order 19, Rule 2 (1) ibid lays down that upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order attendance for cross-examination of the deponent. Order 19, Rule 3 (1), Code of Civil Procedure, lays down that the affidavits shall be confined to such facts as the deponent is able, of his own knowledge, to prove except on interlocutory application on which the statement of his belief may be admitted, provided that grounds thereof are stated.

11. In the decision in Anand Sftarup v. Krishanchand 1961 JLJ 1239, it has been pointed out that affidavit cannot be taken as evidence unless it is permitted to be given under the provisions of Order 19, CPC .

12. In the decision in Gopikabai''s case AIR 1953 Nag 135, it has been held that under Order 30 read with Order 19, Rule 1 there must be an order in each case stating the particular fact or facts which are to be proved by an affidavit. In the aforesaid decision, it has been observed that the practice of the civil courts in M.P. to require an affidavit to support the allegations in the application under Order 22, Rule 4 or Rule 9, CPC is not warranted by law and will not override this provision. The decision in Omparkash''s case 1982 WN 302, is also pertinent.

13. In the D.B. decision in Kanhaiyalal''s case AIR 1954 Nag 260, it has been held that the CPC does not make any distinction between applications in interlocutory and substantive. In the D.B. decision in Mithailal''s case 1967 MPLJ 776, it has been held that there is a distinction between an affidavit filed on a motion and an affidavit which is filed in order to prove a fact. An affidavit in support of an application is no evidence. It is intended merely to satisfy the court, prima facie, that the allegations in the application are true so that the court may issue notice to the opposite party and the court may act upon it if the opposite party does not contest the allegations in the application. A party contesting the correctness of the fact stated in the opponent''s application should be allowed to adduce oral evidence in support of its case. In the decision in Baboolal''s case 1976 MPLJ 843, it has. been held that such an affidavit can be acted upon if the opposite party does not contest the application or if the parties agree that the affidavit should be substituted for evidence or the court has taken recourse to provisions of Order 19, Rule 1, Code of Civil Procedure. The D.B. decision in Radhakishan''s case 1980 (II) WN 280, may also be usefully perused.

14. In the decision in Onkarlal''s case 1983 JLJ (N) 37, no affidavit in support of the reply was filed. In the absence of a counter-affidavit, the affidavit in support of the application was held to be the evidence of the facts alleged therein. In absence of any counter-affidavit there was no occasion for holding any inquiry, more so, when the parties chose to argue in the state of facts as they stood then. Reliance was placed on the D.B. decision in Kanhaiyalal''s case AIR 1954 Nag 260, in which it has been held that an affidavit is the evidence of the facts alleged therein. When the opposite party does not controvert the affidavit or remains absent, it would be refining a technicality to order the Applicant to file another affidavit and not to read the affidavit already filed. The order receiving affidavit is tantamount to ordering it and complies with the law. In my view the proper course would be that the court expressly states that the affidavit evidence has been agreed upon between the parties or that it has been ordered by it.

15. As stated earlier, the case stood adjourned to 11.8.1983 for evidence of the parties on the application for condonation of delay in filing the claim petition. The order sheet of date is silent as to what transpired on that date and the parties without any oral evidence, elected to argue the matter. It may be pointed out that from the order sheet, it appears that the affidavit in support of the claim petition was filed by the Applicants after the arguments had been heard. There is nothing to indicate as to whether the NA No. 4 decided to close without filing any counter-affidavit. In Jashodabai''s case 1984 MPWN 382, it has been pointed out that the question of condonation depends on the facts and circumstances of each particular case.

16. In the circumstances of the case and in the light of the legal position discussed above, I find that it is desirable that the contesting parties have a fair and full opportunity of having their say on the matter. I am of the view that the impugned order deserves to be set aside.

17. The appeals are, therefore, allowed and the impugned awards are set aside. The cases are remanded to the learned Tribunal for fresh decision on all the grounds including the ground as to the mental condition in the light of the aforesaid observations. The Tribunal may order the relevant fact or facts to be proved by affidavit as envisaged by the relevant provisions or may afford the parties an opportunity to lead such evidence as they desire in connection with the controversy touching the question of condonation of delay in filing the application u/s 110-A of the Act. In case they do not want to file affidavit or to cross-examine or to adduce evidence, the fact should be expressly mentioned in the order sheet. In the circumstances, the parties shall bear their own costs in this Court as incurred.