

ICR [OP(C)] No.7/2026

-:1:-



2026:KER:73180

"C.R"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR. SOUMEN SEN

&

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

WEDNESDAY, THE 23RD DAY OF SEPTEMBER 2026 / 1ST ASWINA, 1948

ICR (OP(C)) NO. 7 OF 2026

PETITIONER/S:

- 1 DEVAKI, W/O. KURUMBAN,
RESIDING AT PUTHENPURA HOUSE, KOTTAPADY KARA,
KOTTAPPADY VILLAGE, KOTHAMANGALAM TALUK,
PIN – 686692.
- 2 VALSA, AGED 40 YEARS
D/O. DEVAKI, RESIDING AT PUTHENPURA HOUSE,
KOTTAPADY KARA, KOTTAPPADY VILLAGE,
KOTHAMANGALAM TALUK, PIN – 686692.
- 3 RETHY, AGED 38 YEARS
D/O. DEVAKI, RESIDING AT PUTHENPURA HOUSE,
KOTTAPADY KARA, KOTTAPPADY VILLAGE,
KOTHAMANGALAM TALUK, PIN – 686692.

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-:2:-



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4 REJANI, AGED 32 YEARS
W/O. KANNAN, RESIDING AT PUTHENPURA HOUSE,
KOTTAPADY KARA, KOTTAPPADY VILLAGE,
KOTHAMANGALAM TALUK, PIN – 686692.

BY ADV SMT. S. SUJINI

RESPONDENT/S:

CHANDRIKA AYYAPPAN,
W/O. AYYAPPAN @ AYYAPPANKUTTY,
RESIDING AT CHERANGANAL (VETTIKKAMATTOM)
PATTARUMALIL HOUSE, KOTTAPPADY KARA,
KOTTAPADY VILLAGE,
KOTHAMNGALAM TALUK, PIN – 686692.

THIS INTRA COURT REFERENCE (OP (CIVIL)) HAVING COME UP FOR
ADMISSION ON 18.09.2026, THE COURT ON 23.09.2026 DELIVERED THE
FOLLOWING:

ICR [OP(C)] No.7/2026

-:3:-



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“C.R”**JUDGMENT**Dated this the 23rd day of September, 2026.**Soumen Sen, C.J.**

1. This Intra Court Reference arose from an order of the learned Single Judge dated 20th February, 2025, in OP (Civil) Nos.519 and 972 of 2024, in view of two conflicting findings of different Benches of this Court regarding the period of limitation for filing an application under Order IX Rule 7 of the Code of Civil Procedure, 1908 (“CPC”, for brevity). In ***C.L. Cleetus v. The South Indian Bank Ltd.***¹ it was held that Article 137 of the Limitation Act, 1963 (“Limitation Act”, for brevity) applies and that such an application is governed by a limitation period of three years. The said view was followed by the Division Bench in ***Y. Daniel v. Annama***², without independently considering whether it prescribes any period of limitation for an application under Order IX Rule 7 CPC.

¹ 2007 (3) KHC 911

² Judgement dated 15th March 2012 in O.P(FC) No.10 of 2012



2. Ordinarily a Single Judge is bound by the decision of the Division Bench. However, when a Single Judge doubts the correctness of the opinion of the Larger Bench, the appropriate remedy is to place the matter before the Chief Justice for appropriate orders and for deciding the issue by constituting a Larger Bench in view of the decisions of the Hon'ble Supreme Court in the cases of **Central Board of Dawoodi Bohra Community v. State of Maharashtra**³ and **Pradip Chandra Parija v. Pramod Chandra Patnaik**⁴.

3. The issues that came up for consideration before us in this intra court reference are as follows:-

- I. *Whether an application filed under Order IX Rule 7 of the Code of Civil Procedure to set aside an ex-parte order is subject to any limitation period?*
- II. *Whether Article 137 of the Limitation Act applies to an application under Order IX Rule 7 of the Code of Civil Procedure?*

³ (2005) 2 SCC 673

⁴ (2002) 1 SCC 1



4. Before answering the aforesaid issues, it would be appropriate to refer to some of the relevant provisions in Order IX of the CPC which deal with “*Appearance of parties and consequence of non-appearance*”.

5. Order IX Rule 7 CPC deals with the procedure where the defendant appears on the day of the adjourned hearing and assigns good cause for previous non-appearance. It reads as follows:

“7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.—Where the Court has adjourned the hearing of the suit, ex parte, and the defendant, at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.”

(emphasis supplied)

6. Whereas, the procedure dealing with setting aside an *ex parte* decree comes under Order IX Rule 13 of the CPC and it reads as follows:



“13. Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.”

(emphasis supplied)



7. From the facts of the instant case, it appears that the application filed to set aside the *ex parte* order was dismissed by the court on the ground that it had been filed belatedly, without being accompanied by a petition to condone the delay. According to the learned counsel for the petitioner, an application filed under Order IX Rule 7 CPC to set aside an *ex parte* order is not subject to any period of limitation and, therefore, need not be accompanied by a petition to condone the delay. The submission of the respondent, on the other hand, was that Article 137 of the Limitation Act is applicable and that a period of three years is prescribed as the limitation period within which such an application is to be filed before the court.

8. The Hon'ble Supreme Court in ***Sangram Singh v. Election Tribunal, Kotah and Another***⁵, while deciding an election petition for setting aside the election of the

⁵ (1955) 1 SCC 323



appellant therein had come up with a contrast in the language between Rules 7 and 13 of Order IX CPC. It was held as follows:

“26. Now, as we have seen, the first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the Court cannot pass an ex parte decree on that date because of the proviso to Order 15 Rule 3(1) which provides that that can only be done when

“... the parties or their pleaders are present and none of them objects.”

On the other hand, if it is for final hearing, an ex parte decree can be passed, and if it is passed, then Order 9 Rule 13 comes into play and before the decree is set aside the Court is required to make an order to set it aside. Contrast this with Rule 7 which does not require the setting aside of what is commonly, though erroneously, known as “the ex parte order”. No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is a command or order of the court and so can only be set aside by another order made and recorded with due formality”

“27. Then comes Rule 7 which provides that if at an adjourned hearing the defendant appears and shows good cause for his “previous non-appearance”, he can be heard in answer to the suit—

“7. ... as if he had appeared on the day fixed for his appearance.”



This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.”

“29. Now Rule 2 only applies when one or both of the parties do not appear on the day fixed for the adjourned hearing. In that event, the court is thrown back to Order 9 with the additional power to make “such order as it thinks fit”. When it goes back to Order 9 it finds that it is again empowered to proceed ex parte on the adjourned hearing in the same way as it did, or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed ex parte is a right which accrues from day to day because at each adjourned hearing the Court is thrown back to Order 9 Rule 6. It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on “the day to which the hearing of the suit is adjourned”, he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing.

30. But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order 9 Rule 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in. But what exactly does that import? To determine that it will be necessary to hark back to the first hearing.”

(emphasis supplied)

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9. Thus, the distinction drawn by the Hon'ble Supreme Court between Rules 7 and 13 of Order IX CPC assumes significance. While Rule 13 specifically provides for setting aside an *ex parte* decree, Rule 7 does not contemplate setting aside any order, but only enables the defendant, upon showing good cause for his previous non-appearance, to participate in the proceedings from the stage at which he appears. The expression "as if he had appeared on the day fixed for his appearance" occurring in Rule 7 makes it clear that the provision is intended to restore the defendant to the position he would have occupied had he appeared on the date fixed, subject to his showing good cause. Therefore, an order proceeding *ex parte* under Rule 6 does not, by itself, give rise to an application for setting aside such order under Rule 7 in the same manner as an *ex parte* decree under Rule 13.



10. The Hon'ble Supreme Court in **Arjun Singh v. Mohindra Kumar and Others**⁶ was considering whether dismissal of an application under Order IX Rule 7 CPC to set aside the *ex parte* order would bar as *res judicata* for hearing an application under Order IX Rule 13 CPC to set aside an *ex parte* order. The Apex Court in paragraph 14 held as follows:-

"14. It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of

⁶ AIR 1964 SC 993



court. There are other orders which are also interlocutory but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O. IX, Rule 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages so as to preclude its being reconsidered. Even if the rule of res judicata does not apply it would not follow that on every subsequent day which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of res judicata. Thus if an application for the adjournment of a suit



is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the Other case, on proof of fresh facts, the court would be competent, may would be bound to take those into account and make an order comfortably to the facts freshly brought before the court.”

(emphasis supplied)

11. Similarly, in the case of **Vijay Kumar Madan and Others v. R.N. Gupta Technical Education Society and Others**⁷, the Hon’ble Supreme Court, while considering the scope of Order IX Rule 7 CPC, held that an application under the said provision is required when the defendant seeks to reopen the proceedings from the stage at which they became *ex parte*. The Apex Court

⁷ (2002) 5 SCC 30



further held that, though the Court is empowered to impose terms as to costs or otherwise, such terms cannot place the defendant in a worse position than he would have occupied had he not preferred the application, nor can they be so onerous as to prejudge the controversy or virtually decree the suit. However, the judgment does not prescribe any period of limitation for an application under Order IX Rule 7 CPC. Relevant paragraphs of the said judgment are as follows:

“6. Having heard the learned counsel for the parties, we are of the opinion that the impugned order of the High Court deserves to be maintained but subject to certain modifications. Under Order 9 Rule 7 CPC the court does have jurisdiction, while setting aside the ex parte order to impose costs and also to put the defendant-applicants on terms. Rule 7 of Order 9 CPC reads as under:

“7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.—Where the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court directs as to costs or



otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.”

7. Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression “upon such terms as the court directs as to costs or otherwise”. It is settled with the decision of this Court in Arjun Singh v. Mohindra Kumar [AIR 1964 SC 993] that on an adjourned hearing, in spite of the court having proceeded ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an order which probably the court may not have made in the suit itself. As pointed out in the case of Arjun Singh [AIR 1964 SC 993] the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation.”

(emphasis supplied)



12. In ***Rasiklal Manikchand Dhariwal and Another v. M/s. M.S.S. Food products***⁸, the Hon'ble Supreme Court dealt extensively with Order IX Rules 6, 7 and 13 CPC. It was held that Order IX Rule 7 has no application once the hearing of the suit has been concluded and the matter has been reserved for judgment. Rule 7 presupposes that the suit has been adjourned for hearing. An adjournment merely for pronouncement of judgment is not an adjournment of the hearing of the suit. In such circumstances, the defendant cannot invoke Rule 7 to participate in the concluded hearing.
13. The Apex Court further explained that in the case before it, on 17th March, 2005, the trial court had closed the plaintiff's evidence, proceeded *ex parte* against the defendants, heard the plaintiff's arguments and fixed the matter for pronouncement of judgment. Consequently, the subsequent application filed by the defendants under

⁸ (2012) 2 SCC 196



Order IX Rule 7 was held to be not maintainable. In this case also, the applicability of limitation was not discussed by the Hon'ble Supreme Court.

14. We shall now consider whether an application filed under Order IX Rule 7 CPC is governed by Article 137 of the Limitation Act. The issue assumes significance in view of the divergent views expressed by various Courts on the applicability of the residuary provision.

15. Article 137 corresponds to Article 181 of the old Act of 1908 and is a residuary Article for all applications, including petitions. For the purpose of filing an application in a suit where there is no specific Article in the Limitation Act, Article 137 of the Limitation Act would apply and the period of limitation prescribed is three years⁹. Article 137 refers not only to applications under CPC but to petitions original or otherwise as being

⁹ Basu, *Commentary on the Law of Limitation Act, 1963*, 11th edn. (2025), p. 816.



included within the word ‘applications’ and that those petitions and applications may be forming part of any Special Acts or Local Laws¹⁰.

16. The learned *Amicus Curiae* has relied upon several judgments of various courts which ruled that limitation is not applicable to Order IX Rule 7 of CPC. We will now discuss each one of them in detail.

17. The first case relied upon is ***Kunjan v. Kalliani Amma and Ors.***¹¹ wherein it was held as follows:

“1. Rule 7 provides that if at an adjourned hearing the defendant appears and shows good cause for his previous non-appearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. This does not mean that he cannot be allowed to appear at all if he does not show good cause. It only means that he cannot be relegated to the position he would have occupied if he had appeared. If he appears on the day to which the hearing of the suit is adjourned, he cannot be prevented from participating in the proceedings at all simply because he did not appear on a previous hearing. This has been decided in Sangram Singh v. Election Tribunal Kotah and

¹⁰ M.L. Singhal, Commentary on the Limitation Act (Act No. 36 of 1963), 2nd edn., pp. 805–806.

¹¹ 1960 KLT 1141



another MANU/SC/0044/1955 : A.I.R. 1955 S.C. 425. Therefore it is clear that the dismissal of the petition by the lower court is not correct. What the lower court should have done was to have allowed the defendant to participate in the proceedings and should have considered the case under O. 8, R. 10 of the Code of Civil Procedure. If the court considered that the case was one in which a written statement should have been put in, then the consequences entailed by Rule 10 should be suffered. And what those consequences were should have been decided by the court in the judicial exercise of its discretion, to meet the ends of justice, which means, in the words of the Supreme Court justice not only to the defendant and the other side but also to witnesses and others who may be inconvenienced.”

18. In ***Kumara Pillai v. Thomas***¹², it was held as follows:

“3. Several decisions were cited by both sides, most of which deal with the effect of an order setting aside a decree passed *ex parte*. It is unnecessary to refer to those decisions as this is not a case of setting aside an *ex Parte* decree. Wallace, J., considered the effect of an order under Order 9, Rule 7 of the CPC, in *Venkatasubbiah v. Lakshminarasimhan*, 49 Mad LJ 273 : (AIR 1925 Mad 1274) and observed:

“One cardinal principle to be observed in trials by a court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. It follows that a party should not be deprived of that right, and in fact the court has no option to refuse that right, unless the Code of Civil



Procedure deprives him of it. Is there any rule of procedure then which gives power to a court to say to a party when he appears to plead his case that it cannot hear him because at the previous hearing he was absent? I do not so read Order 9, Rule 7. That applies to a Party who wishes to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, and who wishes the Proceedings taken in his absence to be taken over again in his Presence, so that he may regain the opportunities of cross-examination, etc., which he lost by his absence. After all “ex parte” only means that the party has not been heard because he was absent and the adjournment of the hearing “ex parte” in the words of Rule 7 applies only to the hearing on the particular day when that hearing and adjournment “ex parte” was made. I do not see any ground for extending its operation to all subsequent hearings of the suit”.

4. This decision was considered in *Pemmal v. Kondamma*, AIR 1939 Mad 385. *Varadaehariar, J.* held:

“.....Among the authorities referred to by the District Munsiff it is sufficient to refer to the judgment of Wallace, J., in 49 Mad LJ. 273: (AIR 1925 Mad 1274). The principle enunciated by the learned Judge is that even a defendant who fails to show good cause for his previous non-appearance is not debarred from participating in the further conduct of the case and that the original order only covers the period during which the party was originally absent. He proceeds to point out that where good cause for non-appearance is shown, the party would be relegated back to the position which he would have been put in if he had



appeared at the previous hearing i.e., that proceedings which have taken place in his absence could be re-opened so as even to give him the opportunity of cross examining witnesses that had been examined in his absence. This principle has generally been adopted in most of the reported cases vide Pattanna v. Neeli Chetti, ILR 51 Mad 597: (AIR 1927 Mad 1197): Aramugam Pillai v. Kandaswami Pillai, AIR 1928 Mad 211 (2); and Harba v. Mt. Chandrabhaga, AIR 1931 Nag 122. The extreme view taken in Oudh is opposed to the preponderance of authority". The decision of Wallace, J., was followed by Staples, A.J.C., in AIR 1931 Nag. 122. The learned Judicial Commissioner has pointed out the remedies open to a party who failed to appear at the first hearing and against whom an order declaring him ex parte has been passed. The following passage from his judgment may be extracted:

".....O. 9, R. 6, is not meant to be a penal clause but is only meant to prevent undue delay. If the defendant chooses not to appear after he has been served, the court may proceed in his absence, but if he subsequently appears he ought not to be debarred from taking any further part in the proceedings even if he can show no good cause for his absence : all that the Code says in O. 9, R. 7, is that, if he does show good cause, the ex parte order may be set aside and the defendant heard in answer to the suit, as if he had appeared on the date fixed. That means that the case is put back to the stage at which it had arrived when the defendant first failed to appear; and the defendant suffers no loss or disadvantage through his non-appearance except perhaps an order for costs. If however the defendant fails to show good cause, he cannot claim any rehearing, and what has already taken place in his absence must stand. As regards



future proceedings however he should not be debarred from appearing and contesting the suit.”

7. I am in respectful agreement with the above view. The position is that the second defendant against whom an order declaring him ex parte was passed on the date of the first hearing is entitled to come in and take part in the trial at a later stage. If he agrees to be bound by what has taken Place during his absence he need not make an application under Order 9, Rule 7 of the CPC, and get the order set aside; he can continue from the stage at which he appears.

8. However, if he desires to cross-examine the witnesses examined before he entered appearance he can apply under Rule 7 and get an order, in which case he can claim an opportunity to cross-examine the witnesses examined before he entered appearance. In such a case, what he seeks is to be relegated back to the position he would have been in if he was present on the day on which evidence was taken. Had he been so Present he would have got an opportunity to cross-examine the plaintiff's witness. This is the right which he can exercise after getting an order under Order 9, Rule 7.”

19. In **Kamal Singh v. Sat Pal**¹³, the Punjab and Haryana

High Court observed as follows:

“4. After hearing the learned counsel for the appellant, I find force in the contention raised on behalf of the

¹³ 1985 SCC OnLine P&H 317



appellant. The defendant against whom an order declaring him to be proceeded ex parte was passed on the date of the first hearing is entitled to come in and take part in the trial at a later stage. If he agrees to be bound by what has taken place during his absence he need not make an application under Order 9 Rule 7, C.P.C. for getting the order set aside; he can continue from the stage at which he appears. However, if he desires to cross-examine the witnesses examined before he entered appearance he can apply under Rule 7 of Order 9 and get an order, in which case he can claim an opportunity to cross-examine the witnesses examined before he entered appearance. In such a case, he seeks to be relegated back to the position he would have been if he were present on the day on which evidence was taken in his absence. Had he been so present, he would have got an opportunity to cross-examine plaintiffs witnesses. This is the right which he can exercise after getting an order under Order 9 Rule 7, C.P.C. It was so held in Kumara Pillai's case Supra."

(emphasis supplied)

20. In **Rajasekar v. Govindammal (late)**¹⁴, the Madras High

Court observed as follows:

"19. The point that would arise for determination in this Revision is, as to whether, Article 137 of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure. The Hon'ble Supreme Court in Sangram Singh v. Election Tribunal, Kotah, (1956) 69 LW 1: AIR 1955 SC 425, referred to supra, had clearly held that there is no



limitation for filing a petition under Order 9 Rule 7 of the Code of Civil Procedure. As the language of the provision itself would suggest an application contemplated under Rule 7 of Order 9 is not one to set aside an act of Court, but one to seek permission to put the clock back so that the defendant can defend the suit as if he was present at the earliest stages of the suit. The logic or rationale behind those decisions which conclude that there is no limitation for filing an application under Order 9 Rule 7 can be explained from another angle.

20. A person who has been set exparte in the proceedings will definitely have a right to seek to set aside the exparte decree that is passed against him within 30 days from the date of such exparte decree. This has been made clear by the Hon'ble Supreme Court in Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993, wherein the Hon'ble Supreme Court had held that a rejection of an application under Order 9 Rule 7 of the Code of Civil Procedure, will not operate as res judicata, while the Courts considered an application under Order 9 Rule 13, made after an exparte decree is passed in the suit or proceedings. If there is nothing in law that would prevent a person who is set exparte in the year 2011, from filing an application to set aside an exparte decree that is passed in the year 2017, within 30 days of such exparte decree, I do not see how there could be a prohibition against a person, who seeks permission of the Court to relegate himself back to the position which he would have been in, if he had appeared at the previous hearing, before passing of such a decree.

21. If it is held that an application under Order 9 Rule 7 would be barred due to lapse of time be it 3



years or 30 days, it would automatically mean that an application to set aside the ex parte decree that is made within time after the decree would also be barred. Such a situation was envisaged by the Hon'ble Supreme Court when it held that an order passed rejecting an application under Order 9 Rule 7 will not operate as res judicata, if the defendant chooses to file an application to set aside the ex parte decree. If we are to go by the language of Order 9 Rule 13, the defendant, who has suffered an ex parte decree, has to only explain his absence on the day on which such ex parte decree came to be passed, if he files an application within 30 days of such ex parte decree. Therefore, in my considered opinion, an anomaly will be created, if the Courts are to conclude Article 137 or any other Article of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure.

22. I am in entire agreement with the contention of the learned counsel appearing for the petitioner that an application contemplated under Order 9 Rule 7 is, in essence not one to set aside an act of Court, but one seeking permission of the Court to re-open the proceedings and enable the defendant, who was absent to participate in the proceedings as if he were present. It has been repeatedly held that an ex parte defendant has a right to participate in the subsequent stages of the same litigation. This Court had even as early as in 1925, in *Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham*, held that the defendant who had remained ex parte can participate in the subsequent proceedings and Order 9 Rule 7 of the Code of Civil Procedure, does not prevent such participation. It only applies to a case, where a party declared ex parte seeks to be delegated back to the



position which he would have been in, if he had appeared at the previous hearing.

23. Adverting to the decisions which take the view that Article 137 would apply, I can straight away point out that those decisions are against the spirit of the judgments of the Hon'ble Supreme Court in Sangram Singh v. Election Tribunal, Kotah, (1956) 69 LW 1: AIR 1955 SC 425, and Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993. Unfortunately, the two decisions of the Hon'ble Supreme Court which have a great bearing on the issue before us, viz., the judgment of the Hon'ble Supreme Court in Sangram Singh's case and Arjun Singh's case, cited supra, were not brought to the notice of the learned Judge, who decided Visalakshi v. Umapathy, (2015) 3 LW 332: (2015) 5 CTC 67. The learned Judge has referred to the decision of the Delhi High Court and concluded that Article 137 would apply to the case on hand.

24. In G. Krishnasamy v. G. Seenivasan, referred to supra, the learned Judge has merely followed the judgment in Visalakshi v. Umapathy, to conclude that Article 137 of the Limitation Act would apply. The same is the case in Ramadoss v. Mohan, made in CRP No. 2412 of 2016 dated 23.08.2016, wherein we find no discussion, excepting that the decision in Visalakshi v. Umapathy, is applied. As regards the decision of the Division Bench of the Kerala High Court in Y. Daniel v. Annamma, referred to by the learned counsel for the respondent, the Division Bench only accepted the view in Cleetus v. South Indian Bank, (2007) 3 KLT 868, but there are earlier decisions of the Kerala High Court taking a different view.



25. As I had already pointed out the judgment in *Tarlochan Singh. v. Union Bank of India*, does not touch upon the issue. I must also point out that the judgment in *Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham*, was approved by the Hon'ble Supreme Court in *Sangram Singh's* case. In *Pilla Reddy v. Thimmaraya Reddy*, (1997) 1 Mad LJ 37, Hon'ble Mr. Justice S.S. Subramani, had after referring to almost all the cases on the point concluded that there is no limitation for an application under Order 9 Rule 7 of the Code of Civil Procedure.

26. As I had already pointed out none of the decisions which conclude that Article 137 of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure, have taken note of the earlier decisions of the Hon'ble Supreme Court in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 425, and *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993. I am sure that the learned Judges, who decided those cases, would not have taken a view as they had if only the judgments of the Hon'ble Supreme Court had been brought to their notice.

27. I therefore find that those judgments, viz., the judgment in *Visalakshi v. Umapathy*, (2015) 3 LW 332: (2015) 5 CTC 67, judgment in *G. Krishnasamy v. G. Seenivasan*, made in CRP (MD) No. 2819 of 2018 (PD) dated 04.06.2019, judgment in *Ramdoss v. Mohan*, made in CRP (PD) No. 2412 of 2016 dated 23.08.2016, cannot be held to be good law, inasmuch as, they are in conflict with the decisions of the Hon'ble Supreme Court in *Sangram Singh v. Election Tribunal, Kotah*, case, (1956) 69 LW 1: AIR 1955 SC 425, and *Arjun Singh v. Mohindra Kumar*, case, AIR 1964 SC 993. For



the foregoing reasons, I conclude that Article 137 of the Limitation Act, does not apply to an application under Order 9 Rule 7 of the Code of Civil Procedure and the same can be filed at any time before the judgment is delivered in the suit or proceeding.”

(emphasis supplied)

21. The Delhi High Court in the case of **Finolex Cables Ltd.**

v. Finolux Auto Pvt. Ltd.¹⁵, held as follows:

“10. The legal position which is not in dispute and which can be extracted from the conjoint reading of the Supreme Court judgment in the case of Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425 and Division Bench judgment of this Court in Lotus International v. Chaturbhujadas Karnani Textiles (P) Ltd., (1997) 65 DLT 300 (DB) is this:—

(a) if the defendant does not appear on the date of hearing fixed by the Court, the Court has power to proceed ex-parte against him;

(b) when the defendant joins and participates in the proceedings at a stage when the plaintiff is yet to examine his witnesses, the defendant shall have right to cross-examine the plaintiffs witnesses, provided such cross-examination has not already been foreclosed. In that event, the Court has also the power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set ex-parte under Order IX Rule 6 CPC and at what stage he has chosen to seek permission to participate in the proceedings;

¹⁵ 2007 SC OnLine Del 971



(c) the defendant can appear later and move application for setting aside the ex-parte order by showing sufficient cause for non-appearance on the date the defendant was proceeded ex-parte. If sufficient cause is shown, the Court can set aside the ex-parte order and in that case it shall restart the proceedings from the stage when the defendant was proceeded ex-parte on the premise that no proceedings were held at all on the date when the defendant was proceeded ex-parte and/or on subsequent dates; and

(d) even if the defendant is not able to show good cause, he has right to participate in the proceedings from the stage when he started appearing. However, in that event he has no right to set back the clock and, therefore, if any advantage accrued to the plaintiff on the dates when the defendant had not appeared, that advantage would continue to accrue in favour of the plaintiff.”

22. The Hon’ble Madras High Court in ***Pilla Reddy and Ors.***

v. Thimmaraya Reddy and Ors.¹⁶, also decided the issue of applicability of limitation to the proceedings under Order IX Rule 7 of the CPC. It was held in the said decision as follows:

“8. The said finding cannot be correct. It is a pending proceeding, and it is well-settled law that once a suit has been instituted, limitation will not run. In Delhi Development Authority v. Shanti Devi and Anr. AIR

¹⁶ (1997) 1 MLJ 37



1982 Delhi 159, a learned Judge of that High Court said that 'under the Limitation Act no period is prescribed for filing an application for setting aside order proceeding ex parte. Under Rule 7 of Order 9 of the Code the defendant is allowed to file an application at or before the next date of hearing and if he assigns good cause for his non-appearance on the previous date of hearing the court may set aside the order proceeding ex parte. The application by the petitioner defendant under Order 9, Rule 7 was made on the next date of hearing i.e., 16th August, 1979. Thus it is clear that the defendant petitioner filed the application in accordance with Order 9, Rule 7 of the Code. It must therefore be held that the application was filed in accordance with law. There is no rule that an application under Order 9, Rule 7, is to be filed within 30 days from the date of the order proceeding ex parte.

(Italics)

The said decision was followed by our High Court in the decision reported in Palani Nathan v. Devanai Animal (1989) 2 MLJ 259. While considering a similar question, this Court held thus:

“...For filing an application under Order 9, Rule 7, C.P.C., no limitation is prescribed and that it is open to the Court to condone her absence and set aside the ex parte order and permit her to take part in the proceedings at any stage of the proceedings. In support of the contention, the learned Counsel for the respondent drew my attention to the provision of Order 9, Rule 7, C.P.C. which reads:

Where the Court had adjourned the hearing of the suit ex parte and the defendant, at or before such hearing,



appears and assigns good cause for his previous no-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

It is only for setting aside the ex parte decree under Order 9, Rule 13, C.P.C, the question of condoning the delay under Section 5 of the Limitation Act arises in case there is a necessity for condonation of the delay has arisen. In support of his contention, the learned Counsel for the respondent relied on the decision in Venkatasubbiah v. Lakshmiharasimhan 49 M.L.J. 273: 91 I.C. 545: A.I.R. 1925 Mad. 1274: 1925 M.W.N. 647. In that case, on the day of hearing of a suit, a defendant who had filed his written statement was absent and the court declared him ex parte. On that day, the plaintiff's evidence was taken and further hearing was adjourned to a later date. On the adjourned date the defendant wanted to present his evidence. Wallace, J. in that case held:

Held: that the ex parte order covered the period during which the party was absent and did not preclude him from proceeding with the suit after that stage.

Order 9, Rule 7, Civil Procedure Code does not prevent this but applies to the case where the party being declared ex parte wishes to be relegated back to the position which he would have been in, if he had appeared at the previous hearing and had opportunities of cross-examination, etc.

This was followed in a subsequent decision in Pattanna v. Neeli Chetty Ramish Chetty and Anr. AIR 1927 Mad 1 197. In Arjun Singh v. Mohindra Kumar



[1964] 5 SCR 946, Their Lordships of the Supreme Court while considering the principle of res judicata with respect to the order passed under Order 9, Rules 7 and 13, held:

“Order 9, Rule 7 does not put an end to the litigation nor does it involve the determination of any issues in controversy in the suit. A decision of direction in an interlocutory proceeding of the type provided for by Order 9, Rule 7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order 9, Rule 13.”

In Kamal Singh v. Sat Pal MANU/PH/0100/1986 in para 4 it was held:

“The defendant against whom an order declaring him to be proceeded ex parte was passed' On the date of the first hearing is entitled to come in and take part in the trial at a later stage. If he agrees to be bound by what has taken place during his absence he need not make an application under Order 9, Rule 7, C.P.C. for getting the order set aside. He can continue from the stage at which he appears. However, if he desires to cross-examine the witnesses examined before he entered appearance he can apply under Rule 7 of Order 9 and get an order, in which case he can claim an opportunity to cross-examine the witness examined before he entered appearance. In such a case, he seeks to be relegated back to the position he would have been if he were present on the day on which evidence was taken in his absence. Had he been so present, he would have got an opportunity to cross-examine the plaintiff's witnesses. This is the right which he can exercise after getting an order under Order 9, Rule 7, C.P.C.”



In the said case, reliance was placed on the decision in Kumara Pillai v. Thomas, AIR 1961 Ker 287. In Delhi Development Authority v. Shanti Devi, AIR 1982 Delhi 159.

Under the Limitation Act no period is prescribed for filing an application for setting aside the order proceeding ex parte. Under Rule 7 of Order 9 of the Code the defendant is allowed to file an application or before the next date of hearing and if he assigns good cause for his non-appearance on the previous date of hearing the Court may set aside the order proceedings ex parte.... There is no rule that an application under Order 9, Rule 7 is to be filed within 30 days from the date of the order proceeding ex parte....

In Sangram Singh v. Election Tribunal, Kotah, [1955] 2 SCR 1, after extracting the relevant provision Order 9, Rule 7, Order 8 Rule 10, their Lordships observed:

“We have seen that if the defendant does not appear at the first hearing, the court can proceed ex parte, which means that it can proceed without a written statement; and Order 9, Rule 7 makes it clear that unless good cause is shown the defendant cannot put in a written statement unless he is allowed to do so, and if the case is one in which the court considers a written statement should have been put in, the consequences entailed by Order 8, Rule 10 must be suffered.....

What those consequences should be in a given case is for the court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases, an order awarding costs to the plaintiff



would meet the ends of justice; an adjournment can be granted or a written statement can be considered on the spot and issued framed. In other cases, the ends of justice may call for more drastic”.

Thus, it is clear from the above decisions, there is no limitation for filing a petition under Order 9, Rule 7, Code of Civil Procedure....”

(emphasis supplied)

23. In several other decisions, the Courts have taken the view that Article 137 of the Limitation Act is applicable to such proceedings. The Bombay High Court, in ***Dr. Sujitnath v. Opadma and Others***¹⁷, held that Article 137 of the Limitation Act, 1963 applies to an application under Order IX Rule 7 CPC, where the defendant seeks to set aside the *ex parte* order and re-open the proceedings. Some of the relevant paragraphs of the said decision are as follows:

“13. *A somewhat similar question was considered by learned Single Judge in Akola Z. P. Akola (supra). It was held that though Order 9 Rule 7 of the Code did not speak of the defendant applying for setting aside an ex parte order, the purport of said Rule indicated that such an application was required to be moved by the defendant. It was, therefore, held that such course*

¹⁷ 2015 SCC OnLine Bom 1092



would attract provisions of Article 137 of the said Act. Similar view has Three years When the right to apply accrues. been taken by the Kerala High Court in C.L. Cleetus (supra) wherein the argument that an application under provisions of Order 9 Rule 7 could be moved at any point of time was repelled and it was held that such application would be governed by provisions of Article 137 of the Code. Hence, said submission made on behalf of the petitioners that the application moved by the defendant Nos. 1A to 1C was required to be preferred within the limitation prescribed by Article 137 of the said Act deserves to be accepted.

Xx xx xxxx

16. *This aspect can also be viewed from another angle. In Vijaykumar Madan (supra), the Supreme Court held that an application under provisions of Order 9 Rule 7 of the Code could be made only if the defendant wishes the proceedings to be relegated back and to re-open the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearing into bi-parte. This, therefore, contemplates the defendant seeking relief of being relegated back to the earlier position after re-opening the proceedings. As the defendants seek relief in that regard, such application seeking said relief would, therefore, be governed by Article 137 of the said Act.*

17. *Having held that the provisions of Article 137 of the said Act would apply if the defendant prays for setting aside the ex parte order and seeks permission to file written statement, it would be necessary to consider whether such prayer had been made by the defendant Nos. 1A to 1C vide Exhibit-62. In said application, the said defendants sought to give reasons*



*for their non-appearance in the proceedings even after service of the summons. There are no pleadings whatsoever as regards delay in moving said application and the reasons for said delay. On the other hand, the petitioners in their reply to the aforesaid application have taken a clear stand that the delay in moving the said application had not at all been explained. The trial Court in the impugned order did not consider the aspect of delay and allowed application on the ground that the matter was required to be decided on merits. As the aspect of delay has not been considered by the trial Court, it is not necessary to examine the correctness of the reasons for allowing the application below Exhibit 62. Hence, question of applicability of the ratio of the decision in *Bhumika Ajgaonkar (supra)* does not arise.*

18. *It cannot be ignored that on expiry of period of three years being the period of limitation under Article 137 of the said Act, a right accrued in favour of the present petitioners. If the defendant Nos. 1A to 1C desired to participate in the proceedings by setting aside the ex parte order and by filing their written statement which application was moved beyond the period of limitation as prescribed, then it is obvious that the said defendants were required to seek condonation of delay in doing so. Consideration of aforesaid application for setting aside the ex parte order and for filing the written statement on record in absence of an application for condonation of delay would be an exercise without jurisdiction. The law in this regard is well settled in view of the judgment of the Division Bench in *V.K. Saboo (supra)*, *Mathuradas Mohta College of Science (supra)*, *Ballumal Jaising (supra)* and *Union of India (supra)*.”*



24. A similar view was taken by the High Court of Himachal Pradesh in ***Judhya Devi Deceased through Her Legal Representatives and Others v. Chotta Ram***¹⁸, wherein it was held as follows:

“11. *There is no Article in the Limitation Act providing any specific period of limitation for filing an application under Order 9 Rule 7 of the Code and, therefore, such application is to be governed by the residuary Article 137 which prescribes a period of three years.*

12. *Reliance for coming to such a conclusion can be placed on the judgment rendered by the Kerala High Court in C.L. Cleetus v. South Indian Bank Ltd., AIR 2007 Ker 301 wherein it was observed as under:—*

“6.....It is true that there is distinction between applications which are filed under Order IX Rule 13 and those filed under Order IX Rule 7, in that while the former seeks cancellation of decrees finally disposing of suits, the latter seeks cancellation of only orders setting the applicant ex parte, thus preventing him from participating in further proceedings in the suit. It is also true that unlike applications under Order IX Rule 13, there is no article in the Limitation Act providing any specific period of limitation for applications under Order IX Rule 7. Such applications will be governed by Article 137, the residuary article which prescribes a period of three years.....”

13. *The ratio of the aforesaid judgment has been followed by the various High Courts. Reference in this*

¹⁸ 2022 SCC OnLine HP 779



behalf can conveniently be made to an unreported judgment decided on 15.02.2013 by the Delhi High Court in Vikas Dedeech v. Richlook Garments (P) Ltd., in C.R.P No. 33/2013, by the Madras High Court in Palani Nathan v. Devanai Ammal, (1989) 2 LW 63, Kasturi v. Saravanan @ Sakthi Saravanan, (2010) 7 Mad LJ 802, Raja Ji v. R. Krishna Ji, (2006) 1 LW 790 and earlier to that Madras High Court in Raja Ji v. R. Krishna Ji, (2005) 3 Mad LJ 379 has also taken an identical view to the one taken by the Kerala High Court.

14. *Now that it is settled that limitation for filing an application for setting aside the ex parte order is three years, the moot question is whether an application seeking setting aside ex parte order dated 08.06.2015 that was filed more than four years back i.e. 05.08.2019 that too without any application for condonation of delay could have been entertained much less decided by the learned trial Court, that is for the reasons as already reproduced above, the answer to the question is in the negative.”*

25. In the case of **Visalakshi v. Umapathy & Ors.**¹⁹ it was

held by the Madras High Court as follows:-

“14. Article 137 of the Limitation Act, 1963 envisages that any other application for which no period of limitation is provided elsewhere in this division, three years of limitation is prescribed and the period of limitation starts from the date when the right to apply accrues.

15. It is the settled proposition that Article 137 of the Limitation Act, 1963 will apply to any petition or

¹⁹ 2014 SCC OnLine Mad 12854



application filed under any Act to a civil court. It is not confined to applications contemplated by or under the Code of Civil Procedure.

16. From the above context, it is thus clear that this Article applies to all petitions and applications and not confined to the applications contemplated by or under the Code of Civil Procedure.

17. It is the settled proposition that Article 137 of the Limitation Act 1963 will apply to any petition or application filed under any Act to a civil court.

“26. The learned Single Judge has also held that, “thus an order passed in a suit, finally determining the rights of the parties shall be a decree, while final order passed on an application shall simply be an order and not a Decree. Thus the word ‘Decree’ must be given the meaning assigned to it in the Civil Procedure Code. To put it differently, the prescribed period of limitation for an application under Or. 9, R. 13 C.P.C., for setting aside an ex parte Decree is 30 days, but not for an application to set aside the exparte order with the result that an application for setting aside an ex parte order, shall be governed by the residuary clause contained in Article 137 of the Limitation Act.

27. In paragraph 20, the learned Judge has observed as under:—

“20. The learned counsel appointed to assist the Court has drawn the attention of the Court to the decision reported in AIR 1988 Calcutta 358. This Court's finding that petition filed under Or. 9 R. 9 would be governed by Art. 137 of the Limitation Act is fortified by the



decision of the Full Court of the Calcutta High Court which reads:—

“As regards the limitation for filing the aforesaid application for restoration there is no specific provision in the Limitation Act 1963 and therefore such application for restoration would be governed by Art. 137 of the Act and be filed within a period of three years as prescribed therein. Although the period of limitation for making an application for restoration of a suit dismissed for default under Or. 9 is thirty days from the date of the order of dismissal, the application for restoration of miscellaneous case arising out of such application under Or. 9, when such Misc. Case is dismissed for default, is not governed by the provisions of Art. 122 of the Limitation Act in view of the fact that expressly in terms of the said Art. 122, the miscellaneous case arising out of an application under Or. 9 is not attracted.”

28. The ratio applied by the learned Single Judge of this Court in Rajaji's case, has also been applied in C.L. Cleetus v. South Indian Bank Ltd. (AIR 2007 Kerala 301), wherein the Kerala High Court has observed that,

“It is true that there is distinction between applications which are filed under Order 9 Rule 13 and those filed under Order 9 Rule 7, in that while the former seeks cancellation of decree finally disposing of suits, the latter seeks cancellation of only orders setting the applicant ex parte, thus preventing him from participating in further proceedings in the suit. It is also true that unlike the applications under Order 9 Rule 13 there is no article in the Limitation Act providing any specific period of limitation for applications under

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Order 9 Rule 7. Such applications will be governed by Article 137, the residuary article which prescribes a period of three years.”

26. Having considered the rival submissions and the statutory scheme of Order IX CPC, as well as the decisions referred to above, we are of the view that an application under Order IX Rule 7 CPC cannot be treated on the same footing as an application under Order IX Rule 13 CPC. Rule 13 expressly provides a remedy for setting aside an *ex parte* decree and the period of limitation for such an application is specifically provided under the Limitation Act. Rule 7, on the other hand, does not contemplate setting aside any decree or any concluded adjudication. It enables a defendant, who appears at or before the adjourned hearing and assigns good cause for his previous non-appearance, to participate in the proceedings as if he had appeared on the date originally fixed.



27. The distinction assumes significance in the light of the law laid down by the Hon'ble Supreme Court in **Sangram Singh v. Election Tribunal, Kotah**²⁰ and **Arjun Singh v. Mohindra Kumar**²¹, wherein the Apex Court has specifically noticed that Rule 7 does not contemplate an order setting aside what is commonly, though erroneously, described as an "ex parte order". The right to proceed *ex parte* operates with reference to the particular hearing and, if the defendant appears at a subsequent hearing, he cannot be prevented from participating in the proceedings merely on account of his previous absence. However, unless good cause is shown, he cannot seek to turn back the clock and reopen the proceedings which have already taken place.

28. The same principle is discernible from the decision of the Hon'ble Supreme Court in **Arjun Singh** (*supra*), wherein

²⁰ AIR 1955 SC 425

²¹ AIR 1964 SC 993



an application under Order IX Rule 7 was treated as an interlocutory proceeding intended to ensure the just, smooth and orderly conduct of the suit. The refusal to permit the defendant to “set the clock back” does not put an end to the litigation and does not finally determine any issue in controversy.

29. The decision in **Vijay Kumar Madan** (*supra*) also makes it clear that an application under Rule 7 is required only when the defendant seeks to re-open the proceedings from the stage at which they became *ex parte* and to convert the *ex parte* proceedings into bi-parte proceedings. Significantly, the Hon’ble Supreme Court, while explaining the scope of Rule 7, has not prescribed any period of limitation for invoking the said provision.

30. Likewise, in **Rasiklal Manikchand Dhariwal** (*supra*), the Hon’ble Supreme Court has reiterated that Rule 7 operates only so long as the hearing of the suit has not



concluded. Once the hearing is concluded and the matter is adjourned merely for pronouncement of judgment, Rule 7 has no application. The said decision also did not prescribe any period of limitation for an application under Rule 7.

31. It is true that certain High Courts have taken a contrary view and have held that, in the absence of a specific period of limitation, Article 137 of the Limitation Act would apply to an application under Order IX Rule 7 CPC. The decisions in **Dr. Sujitnath** (*supra*) and **Judhya Devi** (*supra*), following **C.L. Cleetus** (*supra*), proceed on the premise that the defendant, by seeking to set aside the ex parte order and reopen the proceedings, is seeking a relief for which Article 137 would prescribe a period of three years.

32. However, in our considered view, the aforesaid approach does not sufficiently take into account the distinction



drawn by the Hon'ble Supreme Court in **Sangram Singh** (*supra*) between an *ex parte* order under Rule 7 and an *ex parte* decree under Rule 13. More importantly, Rule 7 itself does not prescribe any period within which an application is required to be filed. The provision operates with reference to the stage of the proceedings, namely, when the suit has been adjourned for hearing and the defendant appears at or before such hearing and assigns good cause for his previous non-appearance.

33. The learned counsel for the plaintiff has referred to the decision of the Hon'ble Supreme Court in **Lal K. B. (Krishna Bahadur Lal) v. Gyanendra Pratap**²², and submitted that, in the said decision, the Hon'ble Supreme Court has held that, under Order IX Rule 7 of the CPC, provisions of the Limitation Act shall apply. However, we are unable to accept the said submission as it appears that the Apex Court, in the said decision, was considering

²² 2024 SCC OnLine SC 508



as to whether the petitioner therein was able to offer a satisfactory or reasonable ground to explain the delay of 14 years in filing an application under Order IX Rule 7 of the CPC and, in the said application, the appellant had sought the benefit of Section 5 of the Limitation Act for condonation of delay. The said decision is not an authority for the proposition that, for recalling of an order by which the Court adjourned the hearing of the suit *ex parte* due to non-appearance of the defendant for the defendant to make an application on the day of the adjourned hearing and to pray for recalling of the said order upon showing good cause for his previous non-appearance would attract the provisions of Article 123 of the Limitation Act.

34. The phrase “assigns good cause for his previous non-appearance”, as a condition precedent for the Court exercising its discretion to set aside the order for setting



the suit on the *ex parte* board, should not be confused with the phrase “the applicant satisfied the Court that he had sufficient cause” under Section 5 of the Limitation Act, so as to create an impression that the provisions of the Limitation Act would apply to such application, although the Court may apply the same test to ascertain whether the defendant had sufficient cause for non-appearance on the said date. What is important is that the order directing the suit to appear for hearing on the *ex parte* board is not an order which is final in nature and deciding the rights and liabilities of the parties. It is not a final order nor a decree which can operate as *res judicata* between the parties. It is only fixing a date for hearing of the suit, and if, on that date or before the said date, the defendant appears and assigns good cause for his previous non-appearance, the Court may exercise its discretion to recall the said order upon such terms and conditions as the Court may deem fit and proper,



including the imposition of costs, and restore *status quo ante*, that is to say, as if the defendant had appeared on the date when the hearing of the suit was adjourned and the suit was set down on the *ex parte* board for hearing.

35. The finality is attached to the said proceeding only when the suit is decreed *ex parte*, and for setting aside such *ex parte* decree under Article 123 of the Limitation Act, the defendant would have the right to file an application for setting aside such *ex parte* decree from the date of the decree or, where the summons or notice was not duly served, when the applicant had knowledge of the decree. In view of the nature of the order that the Civil Court passes in exercise of its jurisdiction under Order IX Rule 7 of the CPC for recalling the said order, the Limitation Act cannot have any manner of application. The test shall be the termination of a proceeding.



36. The expression “at or before such hearing” occurring in Rule 7 is, therefore, of considerable significance. The right contemplated under the provision is not one which becomes extinguished merely by the passage of a specified period of time. Its exercise is controlled by the stage at which the suit has reached. Once the hearing of the suit is concluded and the matter is reserved for judgment, Rule 7 itself ceases to be available, as held in the decision in ***Rasiklal Manikchand Dhariwal*** (*supra*). Thus, importing a three-year limitation period through Article 137 would introduce a restriction which is not contemplated by the statutory scheme of Order IX Rule 7.

37. Rule 6(a) of Order IX empowers the Court to pass an order declaring the defendant *ex parte* on the date fixed for his appearance. Here, we deem it relevant to notice the legislative change brought to Rule 6(1)(a) by the CPC 1976 Amendment. Prior to the amendment, the Rule



read, "... may proceed ex parte", which was by the amendment, substituted with the words, "... may make an order that the suit be heard ex parte". The rule was amended with effect from 1st February, 1977 and the word "order" was inserted. Naturally, a doubt may arise as to whether insertion of the word "order" in Rule 6(a) by the 1974 amendment would lead us to the conclusion that when the court declares a defendant as *ex parte*, it partakes of the characteristics of an order under Rule 6(a), and therefore, the law of limitation will apply.

38. In ***Sangram Singh*** (*supra*), the Hon'ble Apex Court has observed that no order is contemplated under Rule 6. It could possibly be contended that the amendment has brought in a change. However, we find that the amendment does not in any manner operate against the reasoning or the conclusion.



39. The Law Commission was of the view that even in the absence of formal evidence, where the suit proceeds *ex parte*, a decree could follow. The Statement of Objects and Reasons also suggests so. However, the Joint Committee observed that unless there was evidence before the Court, which if uncontroverted, would entitle the plaintiff for a decree, the Court should not be empowered to pass an *ex parte* decree. The relevant portion of the report as published in the Gazette of India dated 1st April, 1976 reads thus:

"Clause 59 - (Original Clause 62). - (i) The Bill provides that when the plaintiff appears and the defendant does not appear, the Court may proceed ex parte, if it is proved that the summons was duly served and may give a judgment on the basis that the facts stated in the plaint are true. The Committee feel that the Court should not be empowered to pass an ex parte decree unless there was evidence before it to indicate that, if such evidence were not controverted, the plaintiff would be entitled to a decree. In the circumstances, the Committee feel that the status quo ante should be maintained. Proposed Clause (a) of Sub-rule (1) of Rule 6 has been amended accordingly."

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40. Order VIII Rule 10 gives the court the power to pass Judgment in terms of the plaint when the defendant fails to file a written statement. So, the next question will be whether, on failure of the defendant to appear on the date fixed for appearance, the court should pass a judgment in terms of Rule 10 of Order VIII.
41. It must be remembered that, despite being set *ex parte*, the defendant is not precluded from participating in the trial of the suit and examining the witnesses, including the plaintiff, limited to the extent of demolishing the case of the plaintiff.
42. Therefore, merely because the rule postulates of an order being passed under Rule 6 of Order IX, it does not automatically follow that the plaintiff will get a decree in its favour. The Court has to consider the merits of the suit claim. [See ***Sudha Devi (Smt) v. M.P Narayanan***



and Others²³, Shantilal Gulabchand Mutha v. Tata Engineering And Locomotive Company Limited And Another²⁴, and Maya Devi v. Lalta Prasad²⁵. At the stage of Order IX Rule 6, no issues of moment touching upon the merits of the matter is decided. It is only procedural in nature giving further opportunity to the defendant to appear on or before the adjourned date and upon assigning good cause for his previous non-appearance, the defendant may be allowed to contest the suit upon such terms as the court deems fit and proper.

43. Therefore, there has been no significant change in the legal position on the implication of Rule 6(1)(a), by the mere incorporation of the term "order" in the Rule. As noticed by us, it is a formal order in the course of the proceedings, noting that the defendant has not appeared and has remained *ex parte*. There is no adjudication of

²³ AIR 1988 SC 1381

²⁴ (2013) 4 SCC 396

²⁵ AIR 2014 SC 1356



rights as against the defendant. No appeal lies against such order. As noted above, Rule 7 enables the defendant to take part in the proceedings at the subsequent hearing. So also Rule 7 expressly stipulates for an application for resetting the clock back on good cause being shown at an adjourned hearing. We find that the that the reasonings given by the Apex Court in **Sangram Singh** (*supra*) and **Arjun Singh** (*supra*) still hold good.

44. Apart from that, if the plea that limitation applies to an application under Rule 7 is accepted, it will lead to an anomolous situation. In a given case, where the defendant is set *ex parte*, and the suit gets delayed, and ultimately a decree is passed after the period of limitation fixed under Article 137, still the defendant will be entitled to file an application under Rule 13 to set aside the *ex parte* decree if his application is within time. In such a situation, can the Court refuse to entertain the



application under Rule 13 because no application under Rule 7 was filed within the prescribed period of limitation?

45. Yet another aspect to be noted is that Rule 6(a) provides that the court may order that the suit be heard *ex parte*. The specific wording of Rule 6(a) means the court cannot deliver a judgment on the failure of the defendant to appear on the date fixed for appearance. Further, Rule 7 enables the defendant to appear on a subsequent date and show cause why he could not appear on the said date for hearing. If the defendant assigns good cause for his previous non-appearance, the court may order that he be heard in answer to the suit.

46. We are also conscious of the fact that a contrary view has been taken by this Court in **C.L. Cleetus** (*supra*), which was subsequently followed by the Division Bench in **Y. Daniel** (*supra*). However, as noticed in the order of



reference, the Division Bench in **Y. Daniel** (*supra*) followed **C.L. Cleetus** (*supra*) without independently examining whether Article 137 of the Limitation Act is applicable to an application under Order IX Rule 7 CPC.

47. Having regard to the principles laid down by the Hon'ble Supreme Court in the decisions in **Sangram Singh** (*supra*), **Arjun Singh** (*supra*), **Vijay Kumar Madan** (*supra*) and **Rasiklal Manikchand Dhariwal** (*supra*), we are of the considered view that an application under Order IX Rule 7 CPC is not governed by Article 137 of the Limitation Act. Such an application can be made at the appropriate stage of the proceedings, before the hearing of the suit is concluded, subject of course to the defendant satisfying the requirements of Rule 7, including showing good cause for his previous non-appearance.



48. The contrary view expressed in **C.L. Cleetus** (*supra*) and the decisions following the same, insofar as they hold that Article 137 of the Limitation Act governs an application under Order IX Rule 7 CPC, cannot be accepted as laying down the correct legal position.

49. In view of the foregoing discussion, the questions referred to us are answered as follows:

(i) An application under Order IX Rule 7 CPC is not subject to any period of limitation prescribed under the Limitation Act, 1963.

(ii) Article 137 of the Limitation Act, 1963 does not apply to an application under Order IX Rule 7 CPC.

50. The intra court reference is disposed of accordingly. O.P(C) Nos.519 and 972 of 2024 shall be placed before the appropriate Bench as per roster.

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51. We record our appreciation for the assistance received from Adv. Sri. Jacob P. Alex, the learned *Amicus Curiae*.

Sd/-

**SOUMEN SEN,
CHIEF JUSTICE**

Sd/-

**SATHISH NINAN,
JUDGE**

Sd/-

**EASWARAN S.,
JUDGE**

krj

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P.A. TO C.J.