

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ **CM(M) No. 201/2018 and cm No. 6444/2018**

**Order reserved on :27.02.2019**

**Date of decision : 21.07.2020**

**SARJO DEVI @ SAROJ** ..... Petitioner

Through: **Mr. Vikram Singh Dahiya,**  
**Advocate**

versus

**DHARAMPAL (DECEASED) THROUGH LRS & ORS.**

..... Respondents

Through: **None for R-1**  
**Mr.Sanjay Relan Advocate for**  
**R-2, 3 and 4**

**CORAM:**  
**HON'BLE MS. JUSTICE ANU MALHOTRA**

**ORDER**

**ANU MALHOTRA, J.**

1. The petitioner vide the present petition seeks the setting aside of the orders dated 23.1.2017 and 4.1.2018 of the learned Trial Court whereby vide order dated 23.1.2017 in CS No. 579090/16 Old CS No. 276/16, an application under Order IX Rule 7 of the Code of Civil Procedure, 1908 filed on behalf of the defendants No. 2,3 and 4 was allowed subject to costs of Rs.10,000/- and one opportunity was granted to the defendants No. 2, 3 and 4 before the learned Trial Court

for filing their written statement and vide order dated 4.1.2018 the learned Additional District Judge -04 (North-West), Rohini Courts, Delhi dismissed the application filed on behalf of the plaintiff of that suit, i.e., the petitioner herein, under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 seeking review of the order dated 23.1.2017 with it having been observed by the learned Trial Court that there was no error apparent on the face of the record in the order dated 23.1.2017, and costs of Rs.10,000/- imposed vide the order dated 23.01.2017 were directed to be paid by the defendant nos.2, 3 & 4 to the plaintiff.

2. The notice of the petition was issued vide order dated 19.2.2018 to the respondents with observations therein to the effect:

*"The petitioner is the plaintiff of the civil suit initially filed on the original side of this Court in May,2010.The suit was transferred on account of pecuniary jurisdiction to the district courts and is now pending on the file of Additional District -04, North-West at Rohini Courts Complex. The second to fourth respondents, they being second to fourth defendants in the suit had been set ex-parte on 10.10.2011 but they appear to have resurfaced before the trial Court in April, 2016 seeking the ex-parte proceedings to be set aside by moving an application under Order 9 Rule 7 CPC. The grievance of the petitioner is that said application was allowed without any just or sufficient reasons*

*being shown for earlier default and without any application even moved for explaining the delay.*

*Issue notice. Mr. Mukesh Solanki, one of the legal heirs of deceased first respondent (first defendant) is present on advance copy and accepts notice.*

*Steps shall be taken for service of other respondents, returnable for 8th August, 2018. Additionally, notice may also issue and be served on the counsel for second to fourth respondents, if so required, by it being tendered before the trial court.*

*Meanwhile, the proceedings before the trial court are stayed.*

*Dasti under the signatures of Court Master, as prayed."*

and vide the said order dated 19.2.2018, the proceedings before the learned Trial Court were stayed.

3. The respondents No.2, 3 and 4, i.e., the defendants to the CS No. 579090/16 old No. CS276/16, put in appearance through their learned counsel and submissions were made on behalf of either side.

4. The brief facts in the instant case as set forth through the list of dates by the petitioner are to the effect:

| <i>DATES</i>      | <i>DESCRIPTION AND EVENTS</i>                                                             |
|-------------------|-------------------------------------------------------------------------------------------|
| <i>03/05/2010</i> | <i>Petitioner filed a Suit for Partition and Injunction in this Hon'ble High Court as</i> |

|                   |                                                                                                                                                                                |
|-------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                   | <i>CS(OS)835/2010 and Summons of the Suit and Notice of the application were issued to all respondents/defendants.</i>                                                         |
| <i>22/07/2010</i> | <i>Fresh Notice issued to respondents / defendants 2 to 4. Counsel for respondents / defendants 1&amp;5 attended the proceedings in this Hon'ble Court in CS(OS)835/2010.</i>  |
| <i>20/08/2010</i> | <i>Fresh Summons were issued for respondents/defendants 6 to 12. Counsel for respondent/defendant 2 to 4 attended the proceedings of CS(OS)835/2010 in this Hon'ble Court.</i> |
| <i>18/03/2011</i> | <i>Counsel of respondents/defendants 2 to 4 attended the proceedings of the CS(OS)835/2010 in this Hon'ble Court.</i>                                                          |
| <i>09/04/2011</i> | <i>Respondents/defendants 6 to 12 were also served.</i>                                                                                                                        |
| <i>01/08/2011</i> | <i>WS not filed by respondents / defendants 2 to 4 and 6 to 12. Pleadings completed in the Suit CS(OS)835/2010.</i>                                                            |
| <i>10/10/2011</i> | <i>Respondents / defendants 2 to 4 &amp; 6 to 12 were declared ex-parte by this Hon'ble Court in CS(OS)835/2010.</i>                                                           |
| <i>20/12/2011</i> | <i>Ex-Parte evidence of Petitioner (Plaintiff) concluded and ex-parte evidence of Petitioner(Plaintiff)closed in CS(OS)835/10.</i>                                             |
| <i>23/08/2012</i> | <i>Notice issued to respondents / defendants 1 &amp; 5 and LR's of deceased defendant 1, who expired on 03/06/2012, under Order 22 Rule 4 CPC.</i>                             |
| <i>29/05/2013</i> | <i>LR's of defendant 1 substituted by this Hon'ble Court in CS(OS)835/2010.</i>                                                                                                |
| <i>09/07/2014</i> | <i>Counsel of respondent / defendant 2 attended the proceedings and matter was directed to be listed for final disposal.</i>                                                   |
| <i>17/11/2014</i> | <i>Counsel of respondent / defendant 2 attended the proceedings and matter was again directed to be listed for final disposal.</i>                                             |
| <i>26/02/2015</i> | <i>Counsel for respondents / defendants 2 to 4</i>                                                                                                                             |

|                   |                                                                                                                                                                                                                                                   |
|-------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                   | <i>attended the proceedings and admitted the fact that no step has been taken by them to set aside the ex-parte order dated 10/10/2011.</i>                                                                                                       |
| <i>12/08/2015</i> | <i>Counsel for respondents (defendants) 2 to 4 attended the proceedings but still no steps were taken to set aside the ex-parte order dated 10/10/2011 in CS(OS)835/2010.</i>                                                                     |
| <i>17/12/2015</i> | <i>Suit transferred to District Courts in presence of husband of defendant 2 due to enhancement of pecuniary jurisdiction of District Courts.</i>                                                                                                 |
| <i>29/01/2016</i> | <i>Distt. &amp; Sessions Judge (N/W District) allotted the case to ADJ (N/W Distt.) &amp; Suit is numbered as CS DJ 579090/2016.</i>                                                                                                              |
| <i>04/04/2016</i> | <i>Respondents / defendants 2 to 4 filed an application under order 9 rule 7 CPC to set aside the ex-parte order dated 10/10/2011 with a delay of 1639 days.</i>                                                                                  |
| <i>23/01/2017</i> | <i>Application under Order 9 rule 7 CPC allowed by Ld. Trial Court and ex-parte order dated 10/10/2011 was set aside. Defendants 2 to 4 were instructed to file their WS on record.</i>                                                           |
| <i>22/02/2017</i> | <i>Plaintiff (Petitioner) filed an application under Order 47 Rule 1 &amp; Sec. 114 r/w Sec. 151 CPC to review the impugned order dated 23/01/2017 in CS DJ 579090/2016.</i>                                                                      |
| <i>04/01/2018</i> | <i>Ld. Trial Court dismissed the application dated 22/02/2017 for review of order dated 23/01/2017 in CS DJ 579090/2016.</i>                                                                                                                      |
| <i>19/02/2018</i> | <i>Petitioner herein invokes the jurisdiction of this Hon'ble Court under Art. 227 of Constitution of India r/w Sec. 151 CPC for setting aside the impugned orders dated 23/01/2017 &amp; 04/01/2018 of Ld. Trial Court in CS DJ 579090/2016.</i> |

5. The petitioner has thus submitted that the respondents herein i.e., the defendants No.2, 3 and 4 through their application under Order IX Rule 7 CPC after a delay of 1639 days sought the setting

aside of the *ex parte* proceedings initiated against them vide order dated 10.10.2011 and that thus the learned Trial Court was bound to dismiss or reject the said application especially when it was not accompanied with the explanation for not submitting the application for the condonation of delay in terms of Section 5 of the Limitation Act, 1963. It has further been submitted on behalf of the petitioner herein, now plaintiff before the learned Trial Court after its transfer from this Court to the Trial Court of the District Court on enhancement of the pecuniary jurisdiction of the District Courts, contending to the effect that the Court could not have used its inherent powers under Section 151 CPC in favour of the respondents No.2, 3 and 4 herein, i.e., the defendants No.2, 3 and 4 therein in as much as the defendants are liable for delay and laches. *Inter alia*, it has been submitted on behalf of the petitioner that the order does not give any good reasons and does not advert to the rulings as relied upon by the petitioner in her oral and written arguments, and that the learned Trial Court was not justified in allowing the defendant nos.2, 3 & 4 to file their written statement after 6 years 7 months and 23 days, i.e., 2427 days by ignoring the mandate of filing of the written statement in the

outer limit of 90 days as per Order VIII Rule I CPC and also the verdicts of the Hon'ble Supreme Court and the verdicts of the High Courts of this country. Inter alia, the petitioner has submitted that the learned Trial Court cannot turn back the clock to 8 years back by allowing the written statement to be filed by the defendants No. 2, 3 and 4 and reopening the evidence of the petitioner without considering the injustice meted out to the petitioner herein, i.e., the plaintiff to the suit, due to the delaying tactics adopted by the defendants.

6. The petitioner has placed on record the copies of the proceeding sheets dated 22.7.2010, 20.8.2010, 20.12.2010, 18.3.2011, 1.8.2011, 10.10.2011, 20.12.2011 and orders of this Court dated 9.7.2014, 17.11.2014, 26.2.2015, 12.8.2015, 17.12.2015 in CS(OS) No. 835/2010 pending before this Court before it having been directed to be transferred to the jurisdiction of the District Judge,(North-West), Rohini Courts, New Delhi. The suit was transferred to the District Judge, North-West, Rohini Courts on 17.12.2015.

7. On behalf of the petitioner, reliance has also been sought to be placed on the verdict of the Hon'ble High Court of Andhra Pradesh in

***B.F. Pushpaleela Devi v. State of Andhra Pradesh & Ors.***; 2002(5) ALT 103, the verdict of this Court in ***Rajesh Kumar @ Raju V. State and Ors.***; CM(M) 1031/2008 and the verdict of this Court in ***Vikas Dedeech V. Richlook Garments (P) Ltd.***; C.R.P. 33/2013 and CM No. 2741/2013 and the verdict of the Hon'ble High Court of Judicature at Madras titled ***Visalakshi V. Umapathy & Ors.***; C.R.P. PD No. 4082/2013 and M.P.No. 1/2013 a verdict dated 19.12.2014 in support of the contentions made by the petitioner contending to the effect that the application under Section XLVII Rule 1 of the CPC filed by the petitioner was erroneously disallowed and likewise the application under Order IX Rule 7 of the CPC of the defendant nos.2, 3 & 4 to the suit was allowed by the learned Trial Court and submitting further to the effect that the aspect of the gross delay in filing the application under Order IX Rule 7 CPC was condoned by overlooking the provisions of Order IX Rule 7 CPC as well as the provisions of Article 137 of the Schedule to the Limitation Act, 1963.

8. It is also submitted on behalf of the petitioner that in terms of Order IX Rule 7 of the CPC, the defendants No. 2,3 and 4 were required to file their applications to explain their non appearance on

10.10.2011 at or before the next date of hearing in the suit which was 20.12.2011. It was also submitted by the petitioner that the learned trial Court had failed to appreciate that the defendants No. 2, 3 and 4 put in appearance before the learned Trial Court through their counsel on 20.08.2010 and 08.03.2011 but still did not file their written statement and no extension of time was sought by them to file the written statement.

9. It has inter alia been submitted on behalf of the respondents No.2, 3 and 4 as indicated vide their response to the application under Order XLVII Rule 1 CPC that had been filed by the petitioner i.e., the plaintiff therein before the learned Trial Court to the effect that the contention regarding delay of 1639 days had not been taken by the petitioner during the course of submissions made on the application under Order IX Rule 7 CPC filed by the defendants No.2, 3 and 4 and that the same could not be allowed now. Inter alia, the defendants No.2, 3 and 4, i.e., the respondents No. 2,3 and 4 to the present petition submit that there was a fatal error regarding non-compliance of Order XXXII as no guardian was appointed for one minor defendant and further more the contentions that were made by the

plaintiff in the said suit for Partition and Injunction to receive her share in the suit property, premised on the aspect that the suit property is ancestral in nature were erroneous in as much as the suit property was not ancestral.

10. It is essential to observe that vide the impugned order dated 23.1.2017 the Additional District Judge-4 (NW) Rohini Courts observed to the effect:

*" Vakalatnama filed on behalf of defendant no.11. The counsel for defendant no.11 seeks sometime to file reply of the application alongwith power of attorney in favour of the mother of defendant no.11. It is further submitted on behalf of defendant no.11 that copy of plaint and documents be supplied to him. At request, copy of plaint and documents be supplied within a week from today.*

*Arguments on application u/O. 9 Rule 7 CPC heard at length. It is stated on behalf of the plaintiff that matter is at the stage of final arguments. Evidence has already been led and defendant nos. 2, 3 & 4 after putting their appearance, did not appear and have been proceeded ex- parte and now, by moving this application, they are interested in delaying the matter. It is stated on behalf of defendant nos. 2, 3 & 4 on the other hand that after the service upon them, the matter was given to one counsel who however, did not appear before the Hon'ble High Court of Delhi due to*

*which, they were proceeded ex-parte. Nothing is stated besides these submissions. Perusal of the record reflects that service upon defendant nos. 2, 3 & 4 was concluded in the year 2010 itself and they were proceeded ex-parte on 10.10.2011. Looking into the nature of the case, in the interest of justice, I deem it appropriate that defendant nos. 2, 3 & 4 should be given one opportunity, therefore, in the interest of justice, the application filed on behalf of defendant nos. 2, 3 & 4 is allowed however, subject to cost of Rs. 10,000/-. One opportunity is granted to defendant nos. 2, 3 & 4 for filing their W/S, if any, within a week from today, failing which, it shall not been taken on record.*

*Advance copy be supplied to the plaintiff within three weeks from the NDOH.*

*Put up for payment of cost and further proceedings on 17.05.2017.",*

and vide order dated 4.1.2018, the other impugned order, it was observed by the learned AdJ-04 (NW) Rohini Courts, to the effect:

*" It is submitted on behalf of defendant no. 11 that main counsel is not available as wife of main counsel for defendant no. 11 has expired yesterday.*

*Be awaited.*

*04/01/2018*

*Present: None*

*It is 3.12 now*

*I have already heard arguments on the application under Order 47 Rule 1 CPC which was filed on behalf of plaintiff on 22/02/2017 and perused the record. The said application is with prayer to review the order dated 23/01/2017. Order 23/01/2017 also perused. Vide said order my Ld. Predecessor has allowed the application under Order 9 Rule 7 CPC after imposing cost of Rs 10,000/-. In the review application under consideration it is mentioned that the application under*

*Order 9 Rule 7 CPC was filed without any application to condone the delay under Sec. 5 of Limitation Act. This is a suit for partition and injunction. Application under Order 9 Rule 7 CPC was moved by defendants 2, 3 and 4. The order dated 23/01/2017 reflects that my Ld. Predecessor has also considered the delay in moving the application under Order 9 Rule 7 CPC since the said order reflects that the defendants were proceeded with ex-parte on 10/10/2011. The present case was earlier pending before the Hon'ble High Court of Delhi and has been received by transfer to the District Courts on 29/01/2016 due to enhancement in pecuniary jurisdiction of District Court.*

*In view of overall facts and circumstances and material on record, I see no merits in the application under consideration as there is no error apparent on the face of the record. Hence review application under consideration is hereby dismissed. Previous cost of Rs. 10,000/- be paid by the defendants 2, 3 and 4 to the plaintiff by the next date if not paid so far.*

*Put up on 01/03/2018. Also for consideration of the other pending application, if any, PF/RC not filed for today. Last order be complied with. No early date is available due to heavy pendency."*

11. A bare perusal of the said order dated 23.1.2017 indicates that the defendants No.2, 3 and 4, i.e., the respondents No. 2, 3 and 4 herein were proceeded *ex parte* on 10.10.2011, it has been categorically observed by the learned Trial Court vide order dated 23.1.2017 that it was stated on behalf of the defendants No.2 3 and 4 that after service upon them the matter was referred to one counsel who however did not appear before the High Court of Delhi due to which they were proceeded *ex parte* and nothing was stated besides this submission. It is apparent that no good cause in terms of the Order IX Rule 7 of the CPC was brought forth for the reasons for not having chosen to not put in appearance after having been proceeded *ex parte* and no good cause was put forth by the defendants for the latches in not seeking the setting aside of the earlier proceedings despite putting in appearance on behalf of the respondents No. 2, 3 and 4, i.e., the defendants No.2, 3 and 4, after they were proceeded *ex parte* on **10.10.2011 despite the presence of the counsel for the respondents on 26.02.2014, 9.7.2014, 12.08.2014 and 17.11.2014, as also despite presence of the husband of the respondent No.2 on 17.12.2015** and also during the course of the proceedings pending

before this Court. That the respondents No. 2 to 4 were aware of the *ex parte* proceedings on the dates 17.11.2014, 26.2.2015, 12.8.2015, 17.12.2015 cannot be overlooked and thereafter the respondents No.2 ,3 and 4, i.e., the defendants 2, 3 and 4 chose to file an application only on 4.4.2016 seeking the setting aside of the *ex parte* order with a delay of 1639 days. It is apparent that the said delay has not been explained satisfactorily and even if it is held that there is no limitation prescribed in terms of Order IX rule 7 CPC for filing such an application seeking setting aside of the *ex parte* proceedings in as much as Order IX Rule 7 CPC provides to the effect:

"

#### **ORDER IX**

*Appearance of Parties and Consequence of Non-appearance*

..

..

..

***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."*

the application seeking the setting aside of the proceedings was not filed even on the date 9.7.2014 nor on 17.11.2014 nor on 26.2.2015 nor on 12.8.2015 nor on 17.12.2015 when there was appearance as per record on behalf of the respondents no. 2, 3 and 4. Further more, as rightly contended on behalf of the petitioner in view of the Article 137 of the Schedule to the Limitation Act, 1963 which expressly provides that where there is no period of limitation prescribed, the application seeking the grant of any relief had to be filed within three years in terms of Article 137 of the Schedule to the Limitation Act, 1963 as the said Article provides for such relief as a residuary clause from when the right to seek redressal accrued as was also considered in the verdict ***Visalakshi V. Umapathy*** (supra) by the Hon'ble High Court of Judicature at Madras the observations in which, this Court is persuaded to accept as also observed by this Court in ***Vikas Dedeech V. Richlook Garments (P) Ltd.*** in paragraphs 5 to 8 which read to the effect:

*"5. I have considered the submissions made by learned counsel for the petitioner.*

***6. In another report Y.Daniel vs. Annamma in OP(FC) No.10 of 2012 (R) decided on 15.03.2012 (MANU/KE/0205/2012) also, it was held :***

***'It was true that unlike applications under Order IX Rule 13 of Code of Civil Procedure, 1908, there was no article in Limitation Act providing any specific period of limitation for applications under***

***Order IX Rule 7 of CPC and such applications would be governed by Article 137 of Limitation Act, residuary article which prescribed period of three years".***

*7. The apprehension of the petitioner that on the basis of discussion on the application under Section 5 of Limitation Act, his application under Order IX Rule 7 CPC has also been disposed of in haste, is not well founded. Learned Trial Court has taken note of all the grounds while considering the two applications.*

***8. The contention of learned counsel for the petitioner that the applications under Order IX Rule 7 CPC are governed by Article 137 of Limitation Act, requires no discussion in view of the legal position as laid down in the above referred decision."***

***(emphasis supplied)***

and also observed in **Visalakshi Vs. Umpathy** (supra) in paragraphs 27 to 34 thereof to the effect:

*"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 vs. South Indian Bank Ltd. and another (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 Order 9 Rule 7. Such applications will be governed by Article 137, the residuary article which prescribes a period of three years.*

*29. The decision in Pilla Reddy and others vs. Thimmaraya Reddy and others ((1997) 1 MLJ 37) stands on a different footing and therefore, it need not be discussed in this case.*

*30. In an unreported judgment decided on 15.2.2013 by the Delhi High Court in Vikas Dedeech vs.*

*Richlook Garments (P) Ltd., the decisions in Palani Nathan vs. Devanai Ammal (1989 (2) L.W.63), Kasturi and others vs. Saravanan @ Sakthi Saravanan ((2010) 7 MLJ 802), Rajaji vs. R.Krishnaji (2006-1-L.W.790) and C.L Cleetus vs. South Indian Bank Ltd. and another (AIR 2007 Kerala 301) have been referred to.*

*31. After having gone through the catena of decisions, the learned Single Judge of the Delhi High Court has held that the contention of the learned counsel for the petitioner that the applications under Order IX Rule 7 C.P.C., are governed by Article 137 of the Limitation Act, requires no discussion in view of the legal position as laid down in the above referred decisions.*

*32. On coming to the instant case on hand, as adumbrated supra, the ex parte order, as against the revision petitioner/D1 was passed on 5.6.2009. But the application in I.A.No.87 of 2013 under Order 9, Rule 7 C.P.C., was filed on 7.6.2013, i.e., after the lapse of four years.*

*33. Admittedly, for filing the application under Order 9, Rule 7 C.P.C., no limitation is prescribed. It does not mean that an application under Order 9, Rule 7 C.P.C., to set aside the ex parte order can be filed at any point of time, i.e., even after several years as has been done in the present case on hand.*

*34. Since no limitation is prescribed under Order 9 Rule 7 C.P.C., like that of Order 9 Rule 13 as observed in Rajaji's case as well as in Vikas Dedeech's case (Delhi High Court), the provisions under Article 137 being residuary provision alone would be made applicable and therefore, under Article 137 of the Limitation Act, the period of limitation is prescribed as three years and since the application in I.A.No.87 of 2013 has been filed after the period of three years, it is squarely barred by limitation under Article 137 of the Limitation Act,*

***1963, as rightly concluded by the learned trial Judge, which according to this Court, does not require any interference and therefore, the revision petition deserves to be dismissed.”***

**(emphasis supplied)**

12. The verdict of this Court in ***Rajesh Kumar @ Raju Vs. State*** and Ors. in CM(M) 1031/2008 with observations in para 4 thereof, which read to the effect:

*“The limitation for moving an application under Order 9 Rule 7 CPC is prescribed in the provision itself. Order 9 Rule 7 CPC makes it clear that the application by the petitioner has to be made on or before next date of hearing. A party which is proceeded ex parte at a particular date has a right to take part in the subsequent proceedings. Order 9 Rule 7 CPC does not prevent a party from participating in the subsequent proceedings. It is only when a party wants to be relegated back to the position which he would have been in if he had appeared at the previous date of hearing, that he is required to make an application under Order 9 rule 7 CPC. However, this application must be made on or before next date of hearing. If the party chooses not to make an application on or before next date of hearing and continues to appear and participate in the proceedings, the party cannot take a stand that it should be relegated back to the original position later on when the case has proceeded further. Thus, there is no rule that an application under Order 9 Rule 7 CPC is to be filed within 30 days or within 3 years, but it must be filed on or before next date of hearing which may be after 30 days or after 3 months or whatever period. Where a party does not file an application under Order 9 Rule 7 CPC for setting aside the ex parte order of the previous date on or before the next date and continues*

*participating in proceedings, the party cannot be relegated back to the same position on which it would have been, had it not been proceeded ex parte long back. This Court in Ram Lal Kathuriya vs. Shiv Kumar Sharma 1999 VI AD (Delhi) 217 had considered a similar situation and observed as under: "On 5.8.1996, when the matter was called out, the defendant was absent after repeated calls and accordingly the suit was directed to be proceeded ex-parte against the defendant. Subsequent thereto, several date were fixed, but the petitioner did not file any application for setting aside the said ex-parte order and waited till 30.4.1997 when such an application was filed. Such an application filed after about ten months from the date of passing of the order without any explanation for the delay is not tenable. In order to have an ex-parte order set aside, the petitioner was required to assign the cause for his previous non-appearance. In the instant case, the cause shown by the petitioner is that Shri V.K. Seth, his Advocate was seriously ill and went out of this country and, therefore, the petitioner had no knowledge about the next date. The said stand taken by the petitioner is found to be without any merit as the petitioner was represented by Shri Ravinder Singh, Advocate in the suit prior to the aforesaid date namely, 5.8.1996. The impugned order was passed by the Civil Judge after considering the facts and circumstances of the case. He has also given reasons for rejecting the said application which are found to be legal and cogent."*

is also wholly in aid of the petitioner herein.

13. Taking the said aspect into account that there has been no good cause shown or any explanation for not moving an application seeking the setting aside of the *ex parte* proceedings at least from the period 9.7.2014 when the counsel for the respondent no.2 put in appearance

for the first time after the *ex parte* proceedings dated 10.10.2011 till the application under Order IX Rule 7 CPC was moved on 4.4.2016 making it thus apparent that such an application filed as a delaying tactic ought not to have been allowed by the learned Trial Court merely on the ground of taking into account the nature of the case that had been filed.

14. In the circumstances, it is imperative and essential that the said orders of the learned Trial Court dated 23.1.2017 and 4.1.2018 in CS No. 579090/16 Old No. 276/16 are set aside and they are thus set aside. However, the learned Trial Court shall proceed in accordance with law as directed hereinabove and the stay of the proceedings before the learned Trial Court vide order dated 21.5.2018 is also set aside.

15. The petition and accompanying applications are disposed of accordingly.

16. A copy of this order be sent to the learned Trial Court, i.e., District Judge, (North-West), Rohini Courts

**ANU MALHOTRA, J.**

**JULY 21, 2020/SV**