2022 SCC OnLine Gau 2257 : (2023) 2 Gau LR 932 : (2022) 4 GLT 916

In the High Court of Gauhati

(BEFORE DEVASHIS BARUAH, J.)

Assam Gramin Vikash Bank ... Petitioner;

Versus

Frakash Borah and Another ... Respondents.

CRP(IO) No. 176 of 2022

Decided on August 6, 2022

Civil Procedure Code, 1908, O. 9, R. 7 — Object of — Provision has been engrafted into the Code to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation — It does not put an and to the litigation nor does it involve the determination of an issue in controversy — Proceeding is of very summary nature — Till the hearing of the suit has not been concluded, the defendant cannot be penalized from participating in a further proceeding of the suit or whatever may still remain of the trial even without any application under order 9, rule 7, CPC — No allegations or statements made as regards petitioner in the plaint originally filed nor any relief was sought for against the petitioner-Application filed by the plaintiff seeking amendment of the plaint and thereby inserting various paragraphs whereby the allegations were made against the petitioner and reliefs sought for against the petitioner — Petitioner during the pendency of the said application filed application under order 9, rule 7 for setting aside the ex parte order against him — Application rejected on the ground that the same was filed beyond the period of limitation and the reasons were unsatisfactory — No period of limitation provided for setting aside an ex parte order under order 9, rule 6, CPC — Court below did not consider the reasons assigned in the application for setting aside the ex parte order and merely held that the reasons were unsatisfactory — No reasons assigned as to why the grounds assigned were held to be unsatisfactory — Court below failed to exercise a jurisdiction conferred upon it — Impugned order set aside

[Paras 22 to 31]

Advocates who appeared in the case:

Mr. P. Das for the petitioner.

Mr. K.K. Nandi for the respondents.

Cases referred : Chronological

Arjun Singh v. *Mohindra Kumar*, AIR 1964 SC 993.

Sangram Singh v. *Election Tribunal*, AIR 1955 SC 425.

JUDGMENT AND ORDER

1. Heard Mr. P. Das, learned counsel for the petitioner and Mr. K.K. Nandi, learned counsel for the caveator who is the respondent No. 1.

2. This is an application under article 227 of the Constitution challenging the order dated 10.7.2019, the order dated 2.11.2021 as well as the order dated 17.6.2022, passed in Title Suit No. 465/2018.

3. Taking into consideration the question involved in the instant proceedings, the instant petition is taken up for disposal at the motion stage.

4. In view of the order which this court proposes to pass the presence of the pro forma-defendant is not necessary.

5. The facts of the instant case is that the respondent N o. 1 herein as plaintiff has filed the suit being Title Suit No. 465/2018 against the pro forma-respondent herein. The case of the plaintiff in the said suit is that the pro forma-defendant herein is the owner of a plot of land measuring 1 katha, 10 lecha covered by Patta No. 344(01d) 792(New) Dag No. 606/606(Old), 1950 (New) of village No. 2, Japorigog Mouza Beltola, district Kamrup (M) Assam.

6. Upon the said land the pro forma-respondent herein started construction of a multistoried RCC building. The plaintiff being interested approached the pro forma-respondent on 20.1.2010 to purchase a duplex and the pro forma-respondent agreed to sell the duplex to the plaintiff and accordingly on 29.1.2010 the plaintiff entered into an agreement with the pro forma-respondent for purchase of the duplex having an area of 1,534 sq. ft. super built up area in the first floor and 1,700 sq. ft. super built up area in the ground floor of RCC building with undivided proportionate share of the land and a car parking space in the ground floor. The said area has been specifically described in the Schedule to the plaint. The total consideration for the said amount was Rs. 60,00,000 out of which the plaintiff had paid an amount of Rs. 5,00,000 as advance on the date of the agreement. It is also the case of the plaintiff that on various dates various amounts has been paid and as on the date of filing of the suit an amount of Rs. 55,00,000 have already been paid out of the total consideration of Rs. 60,00,000, however, on the ground that the pro forma-respondent was not willing to perform his part of the contract, the suit was filed for

specific performance of the contract dated 29.1.2010 thereby directing the pro forma-respondent to execute and register the sale deed for the suit as described in the Schedule below and if the pro forma-respondent neglects or refuses to obey the decree of the court then the necessary sale deed may be executed by the court for and on behalf of the pro forma-respondent as provided under Order XXI, Rule 34 of the CPC. Further to that the plaintiff also prayed for a precept to the Sub-Register Kamrup for registration of a sale deed; for delivery of possession of the suit properly as well as for permanent injunction.

7. The pro forma-respondent had filed, his written statement. In the said written statement, the defendant have also taken a plea that the land is mortgaged with Assam Gram in Vikash Bank, Ganeshguri, Guwahati Branch, the petitioner herein as security for repayment of loan availed by one M/s. Pee Bee Associates and as such the question of sale of the Schedule properly did not arise.

8. On the basis of the said averments made in the written statement by the defendant/pro forma-defendant herein, the plaintiff filed an application under Order I, Rule 10(2) for impleading the Assam Gramin Vikash Bank, Ganeshguri Branch, Guwahati as defendant in the suit.

9. The trial court vide an order dated 4.5.2019, allowed the petition under Order I, Rule 10(2) of the Code (Petition No. 986/2019) and. thereby the petitioner herein was impleaded as defendant in the said suit. There was also a direction for making necessary changes in the cause title of the plaint and summons were directed to be issued to the newly impleaded defendant.

10. It however, appears that the summons were duly issued and on the basis of the postal receipt dated 13.5.2019, the trial court on the basis of the presumption drew that the services upon the petitioner herein/defendant No. 2 was complete and as such, directed that the suit shall be proceeded ex parte against the defendant No. 2. Interestingly, the court while passing the order dated 10.7.2019 did not take into consideration the provisions of Order DC, Rule 6, whereby if the court drew a presumption, it has to take into consideration as to when the service of the summons could be deemed to have been received by the defendant No. 2. This is conspicuously missing in the order dated 10.7.2019.

11. Be that as it may, on 30.1.2020 an application was filed under Order IX, Rule 7 for vacating the ex parte order passed against the

petitioner-defendant No. 2. The grounds assigned, therein, in the said application are that the petitioner herein had appointed one Shri Satyabrat Deb Sharma as the Bank's advocate to defend the case and the said advocate was asked to prepare the vakalatnama and written statement of the Bank for its filing on 10.7.2019. However, on that day due to his personal inconvenience, he could not appear and. the court had fixed 28.8.2019 as next date fixed. Thereafter on 28.8.2019 the earlier advocate, i.e., Satyabrat Deb Sharma submitted the vakalatnama and written statement before the court, however, the trial court in view of the ex parte order dated 10.7.2018 did not accept the written statement and. the vakalatnama and. accordingly, the petitioner could not file its written statement on that day. Thereafter, the said advocate got selected as a Member of the Foreigners' Tribunal,

Assam and there was some communication gap between the petitioner and the said advocate. It was only on 7.12.2019 that the present advocate Mr. Prabin Das was appointed to defend the petitioner in the said case. Subsequent thereto, the application was filed under Order IX, Rule 7 of the CPC for vacating the ex parte order. To the said application, the plaintiff filed his written objection.

12. The court below vide an order dated 2.11.2021 rejected the said application. The reasons assigned in the said order was that the application for ex parte vacation was filed on 30.1.2020 beyond the period of limitation. Further to that, the ground stated was also not satisfactory.

13. It surprises this court to take note of that when the Limitation Act, 1963 does not provide a time limit for filing an application under Order IX, Rule 7 of the Code, article 137 of the Schedule to the Limitation Act, 1963 would be, thus, applicable. However, the court below rejected the said application on the ground of limitation. The other ground on which the said application was rejected was that the ground was not satisfactory without any discussion whatsoever as to why the ground was unsatisfactory. Needless to mention, the court below ought to have taken into consideration that, by that order, the right to defend the suit was foreclosed which was a substantial right of the defendant.

14. Be that as it may, it is relevant to take note of that in the original plaint there was no statement or allegations made against the petitioner-defendant No. 2 in the suit. Under such circumstances, on 30.11.2019 an application was filed under Order VI, Rule 17 of the CPC

by the plaintiff whereby various paragraphs were sought to be inserted after paragraph Nos. 16, 19, 20 and additionally three more reliefs were being sought for.

15. During the course of the hearing, the learned counsel for the respondent-plaintiff provided a copy of the amended plaint from which it could be seen what were the amendments sought for. It appears from a reading of newly inserted paragraph Nos. 16(a), 16(b), 16(c), 16(d), 16(e), 16(f), 16(g) and 16(h) that the plaintiff further challenged the action of the defendant No. 1 to mortgage the property to the petitioner herein and the initiation of proceedings under the SARFAESI Act, 2002 in respect to the property in question by the petitioner herein. It has been further mentioned that the defendant No. 2 in collusion with the defendant No. 1 intends to sell the suit property at a throw away price and the authorized officer is now prepared to take forceful possession of the suit property with the help of enforcement agent within a short period. In paragraph No.'19(a) the statements have been made to the effect that the defendant No. 2 had published on 31.10.2019 in the newspaper Assam Tribune and

the action taken under the SARFAESI Act, 2002 by the defendant No. 2 were illegal, arbitrary and collusive without jurisdiction and neither binding upon the plaintiff nor upon the Schedule property in any manner whatsoever. Additionally, reliefs were sought to be inserted by way of amendment whereby the action of the defendant No. 2-petitioner herein were put to challenge under the SARFAESI Act, 2002.

16. This application under Order VI, Rule 17, which was filed was allowed by the order dated 19.2.2022 by the trial court. It is upon the said application for amendment allowed, that for the first time statements as regards the involvement of the petitioner and allegations have been made against the petitioner, prior to that there were no statement or allegations against the petitioner herein. It was only on 8.4.2022 that the plaintiff had filed amended plaint along with service copy and the court below fixed 2.6.2022 for amended written statement, if any. However, the record reveals that on 2.6.2022, the defendant was absent for which the court passed an order to proceed ex parte against the defendant No. 1/pro forma-defendant herein fixing 17.6.2022 for PW. On 3.6.2022, an application was filed by the defendant No. 2-petitioner herein stating, inter alia, that on 2.6.2022 the advocate for the defendant No. 2 could not appear in the case as on that day he was suffering from stomach problem and as such he was

absent. It was further mentioned that the petitioner-defendant No. 2 have not received any copy of the amended plaint from the plaintiff till date and as such the plaintiff may be directed to serve a copy of the same to the defendant No. 2-petitioner herein for preparing and filing its written statement and the defendant No. 2 may be allowed to file its written statement against amended plaint. The said application filed on 3.6.2022 of the petitioner-defendant No. 2 was taken up by the court on 17.6.2022. The court rejected the said petition on the ground that against the defendant No. 2 the suit proceeded ex parte on 10.7.2019 and consequently, on 30.1.2022 the defendant No. 1 filed a petition for vacating the ex parte order dated 10.7.2019 and on 2.11.2021 the prayer of the defendant No. 2 was rejected by the court. Under such circumstances, the court came to a finding that as the matter has proceeded against the defendant No. 2 ex parte, as such the prayer of the defendant No. 2 was rejected. It is under such circumstances the petitioner-defendant No. 2 is before this court under article 227 of the Constitution.

17. I have heard the learned counsel for the parties and. perused the materials on record.

18. At the outset, this court would like to observe that the manner in which the trial court has proceeded in the instant proceeding shocks the judicial conscience of this court. The fundamentals of proceeding ex parte against

a defendant in a suit on the face of it is contrary to the well established principles of law.

19. Let this court first take up the order dated 10.7.2019.

20. Without there being a satisfaction reached under Order IX, Rule 6(1)(a) of the CPC, it is not understood how the court could have presumed the service and proceeded ex parte against the defendant No. 2 without recording satisfaction in terms with the proviso to Order V, Rule 9(5) of the Code.

21. Be that as it may, an order passed to proceed ex parte against a defendant in the instant case is nothing but a legislative tool thereby authorizing the trial court to proceed in the suit in absence of the defendant. It is not to be confused as an order passed against the defendant. This Is a well settled principle of law as has been held by the Supreme Court in. the case of *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993. Paragraph Nos. 15, 16 and 20 of the said judgment being relevant is quoted herein below:

15. This leads us to the consideration of the nature of the court's direction under Order DC, Rule 7 — the nature of that interlocutory proceeding with a view to ascertain whether the decision of the court under that provision decides anything finally so as to constitute the bar of res judicata when dealing with an application under Order DC, Rule 13 Civil Procedure Code. To earn up the relevant facts, it is common ground that the suit — 134 of 1956 had passed the stages up to rule 5 of order IX, Order IX, Rule 6 applies to a case "where a plaintiff appears and the defendant does not appear when the suit is called on for hearing. Order DC, Rule 6 provides, to quote the material part:

"Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then—

(a) if it is proved that the summons was duly served, the court may proceed ex parte;....."

This is the provision under which the Civil Judge purported to act on the 29th of May. And then comes Order IX, Rule 7 which reads:

"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."

On that very dale the court Look evidence of the plaintiff and reserved judgment. In other words, the hearing had been completed and the only part of the case that remained thereafter was the pronouncing of the judgment. Order 20 Rule 1 provides for this contingency and it reads:—

"The court after the case has been heard, shall pronounce judgment in open Court cither at once or, as soon thereafter as may be practicable on some future day; and "when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders."

Two days after the hearing was completed and judgment was reserved the defendant appeared and made the application purporting to be under Order IX, Rule 7. And it is the dismissal of this application that has been held to constitute a bar to the

hearing of the application under Order DC, Rule 13 on the merits.

16. The scope of a proceeding under Order IX, Rule 7 and its place in the scheme of the provisions of the Code relating to the trial of suits was the subject of consideration in *Sangram Singh* v. *Election Tribunal* [(1955) 2 SCR]. Dealing with The meaning of the words "The court may proceed ex parte" in Order IX, Rule 6 (1)(a) Bose, J. speaking for the court said:

"When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the court may proceed in his absence. But, be it noted, the court is not directed to make an ex parte order. Of course the fact that it is proceeding ex parte will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an ex parte decree or other ex parte order which the court is authorised to make. All that rule 6(1)(a) does is to remove a bar and no more. It merely authorises the court to do that "which it could not have done without this authority, namely to proceed in the absence of one of the parties."

Dealing next with the scheme of the Code, the learned fudge pointed out that the manner in "which the court could thereafter proceed, i.e., after Rule 6(1)(a) was passed would depend upon the purpose for "which the suit stood adjourned, and proceeded:

"If it is for final hearing, an ex parte decree can be passed, and if it is passed, then Order IX, 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.".

and referring to the effect of the rejection of application made under Order IX, Rule 7, he added:

"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. But though he has the right to appear at an adjourned hearing, he has no

right to set back the hands of the dock. Order 9, Rule 7 makes that clear. Therefore, unless he can show good cause, he must accept all (hat has gone before and be content to proceed from the stage at which

he comes in."

That being the effect of the proceedings, the question next arises what is the nature of the order if it can be called an order or the nature of the adjudication "which the court makes under Order IX, Rule 7? In its essence it is directed to ensure the orderly conduct of the proceedings by penalising improper dilatoriness calculated merely to prolong the litigation. It does not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit. Besides, it is obvious that the proceeding is of a very summary nature and this is evident from the fact that as contrasted with Order IX, Rule 9 or Order IX, Rule 13, no Appeal is provided against action of the court under Order IX, Rule 7. "Refusing to setback the Clock". It is, therefore, manifest that the Code proceeds upon the view not imparting any finality to the determination of any issues of fact on which the court's action under that provision is based. In this connection reference may be made to a decision of a Division Bench of the Madras High Court in *Sankaralinga* v. *Ratnasakhapali* [21 Mad 324]. The question arose on an appeal to the High Court by the defendants against whom an ex parte decree had been passed on March 30, 1895. Previous thereto they had put in petitions supported by affidavits under section 101 of the Civil procedure Code of 1882 corresponding to Order IX, Rule 7, to set aside "an ex parte order," accept their written statements, and proceed "with the suit on the merits. The ground alleged for the relief sought was that they were not duly served with summons. This application was rejected by the court. Thereafter, after an ex parte decree was passed, they again filed another application under section 108 under the then code, corresponding to the present Order IX, Rule 13. The ground put forward "was again the same, namely that the summons was not properly served. The District Judge having dismissed the application under section 108(Order IX, Rule 13), the defendants preferred an appeal to the High Court. On behalf of the plaintiffs-respondents the contention was raised by Mr. Bhashyam Ayyangar — learned counsel that the application to set aside the ex parte decided under section 108 was incompetent because the same question had already been decree against the defendant when he filed the application under section 101. The court composed of Subramania lyre and Benson, JJ, said, "the Contention at first sight may seem to be" reasonable, but having regard to the very wide words "in any case" used in s. 108 wtc are unable to hold that the defendant was; not entitled to make an application under 'section 108". There have been other decisions in "which a similar view has been

held and though the provisions of the Code corresponding to Order IX, Rule 7 and Order IX, Rule 13 have been in force for over a century from 1859, there has not been a single case in which the plea of res judicata such as has been urged in the appeal before us has been upheld. On the other

hand, we might point out that an exactly similar objection of res judicata was expressly raised and repelled in *Bhaoo Paid* v. *Naroo* [10 CPLR 45] in a decision rendered in 1896 in “which reliance “was placed on a case reported in 8 Cat 272.

20. On this submission, which we might mention has been urged for first time in this court, the first question that arises is whether the court has the inherent jurisdiction which learned counsel contends that it has. For the purpose of the discussion of the question in the context of the relevant provisions of the Code, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a court has the inherent jurisdiction “which is saved by section 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the court or the jurisdiction that may be exercised in relation to a matter the inherent power of the court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code, need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to “which it relates. We shall confine our attention to the topic on hand, namely applications by defendants to set aside ex parte orders passed against them and reopen the proceedings which had been conducted in their absence. Order IX, Rule 1 requires the parties to attend on the day fixed for their appearance to answer the claim of the defendant. Rule 2 deals with a case where the defendant is absent but the court from its own record is apprised of the fact that the summons has not been duly served on the defendant in order to acquaint him with the proceedings before the court. Rule 2

contains a proviso applicable to cases "where notwithstanding the absence of service of summons, the defendant appears. Rule 3 deals with a case where the plaintiff along "with the defendant is absent when the suit is called on and empowers the court to dismiss the suit. Rule 5 deals with a case where the defendant is not served properly and there is default on the part of the plaintiff in having this done. Having, thus, exhausted the cases where the defendant is not properly served, rule 6(1)(a) enables the court to proceed ex parte where the defendant is absent even after due service. Rule 6 contemplates two cases : (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which, is fixed is for the disposal of the suit and the defendant is not present on such a day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great difference in the result.

So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case Order IX, Rule 13 would come in. The defendant can, besides filing an appeal or an application for review have recourse to an application under order IX, rule. 13 to set aside the ex parte decree. The entirety of the evidence of the plaintiff might not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for "which purpose there might be a hearing on an adjourned date. On the terms of order IX, rule. 7 if the defendant appears on such adjourned date and satisfies the court by the showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled — "set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus, every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the

defendant at the hearing of a suit has been provided for and order DC, rule. 7 and Order IX, Rule 13 between them exhaust the "whole gamut of situations that might arise during the course of the trial. If, thus, provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the court to make an order necessary for the ends of justice. Mr. Pathak, however, strenuously contended that a case of the sort now on hand where a defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit : (1) where the hearing is adjourned or (2) where the hearing is completed. Where, the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the court that Order XX, Rule 1 permits judgment to be delivered after interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX, Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX, Rule 6 the court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order DC, Rule 13. There is, thus, no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the court to afford to the party the remedy of getting orders passed on the lines of Order IX, Rule 7. We are, therefore, of the opinion that the Civil judge was not competent to entertain the application dated May 31, 1958,

purporting to be under Order IX, Rule 7 and that consequently the reasons given in the order passed would not be res judicata to bar (he hearing of the petition under Order IX, Rule 13 filed by the appellant.

22. A perusal of the above quoted paragraphs of the judgment of the Supreme Court would show that the nature of an order under Order IX, Rule 7 and the object behind the said provisions. The said provision has been engrafted into the Code to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation. It does not put an end to the litigation nor does it involve the determination of an issue in controversy. Besides it is obvious that the proceeding is of very summary nature and this is evident from the fact that as contrasted with Order IX, Rule 9 or Order

IX, Rule 33, no appeal is provided against an action of the Code under Order IX, Rule 7 "refusing to set back the clock".

23. It is further pertinent to observe that the Supreme Court in *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425 had observed that the provisions of Order IX, Rule 6(1)(a) of the Code comes into play when the defendant has been served and has been afforded an opportunity of appearing, and if he does not appear, it empowers the court by dint of the said provision to proceed in the suit in absence of the defendant inasmuch as, without the said provision, the court would not have had the authority to proceed. The Supreme Court further observed that the said provision does not authorize the court to make an ex parte order. On the basis of the said provision, the court could only record in the minutes of its proceedings, that the court shall proceed in absence of the defendant. This is merely a statement of fact and not an order made against the defendant. Further to that it was also observed that a party who has failed to appear on the first or some other hearing, he has a right to appear at an adjourned hearing, but he has no right to set back the hands of the clock unless he shows good cause why he did could not appear in the first hearing or some other hearing.

24. In paragraph 20 of the judgment of the Supreme Court in *Arjun Singh* (supra), it was categorically observed that if the defendant appears on such adjourned date and satisfies the court by showing good cause for his non-appearance on the previous day or days, he might have the earlier proceedings recalled — "set the clock back" and have the suit heard in his presence. However, if the defendant fails to show good cause, then also the defendant cannot be penalized in the sense of being forbidden to take part in the further proceedings of the suit or whatever may still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of trial.

25. Thus, it would be seen from the above enunciation of law propounded by the Supreme Court, that it is not required for a defendant to vacate an order to proceed ex parte if the hearing of the suit has not concluded. However, it is only whom the defendant wants to relegate the suit back to the stage when the court passed an order to proceed ex parte, the defendant is required to file an application showing good cause why the hands of the clock should be set back to

the date of the order to proceed ex parte against the defendant. It is also clear that till the hearing of the suit has not been concluded, the defendant cannot be penalized from participating in a further proceeding of the suit or whatever may still remain of the trial even without any application under Order IX, Rule 7 of the Code.

26. If this court looks into the plaint as was originally filed, it would appear on the face of it that there were no allegations or statements made as regards the defendant No. 2-petitioner. Neither any relief was also sought for against the petitioner-defendant No. 2.

27. In the meantime, after the filing of the written statement by the defendant No. 1; on 30.11.2019, the application was filed by the plaintiff seeking amendment of the plaint thereby inserting various paragraphs whereby the allegations have been made against the defendant No. 2-petitioner and reliefs have been sought for against the petitioner-defendant No. 2. While the said application was pending, the defendant No. 2-petitioner filed an application under Order IX, Rule 7 for setting aside the ex parte against him on 10.7.2019. The same was rejected on two grounds, i.e., it was filed beyond the period of limitation and the reasons were unsatisfactory. The question of being beyond the period of limitation cannot arise because of the fact that the Limitation Act, 1963 does not provide a period of limitation for setting aside an ex parte order passed under Order IX, Rule 6 of the Code and under such circumstances the residuary Article 137 comes into play which mandates that the said application has to be filed within a period of 3 years. Even from the perusal of the judgment of the Supreme Court rendered in the case of *Arjun Singh* (supra) it would also be clear that the reasons why the Legislature never thought it necessary for putting a period of limitation for filing an application under Order IX, Rule 7 of the Code. Therefore, the first ground on which the application under Order IX, Rule 7 was rejected on the face of it suffers from non-application of mind and perversity.

28. Let this court consider the second reason. The court below did not consider the reasons assigned in the said application and merely held the reasons were unsatisfactory. The court was required to assign reasons

why the grounds assigned, were held to be unsatisfactory. It seems that the court below was satisfied by the first ground and did not find the necessity to record reasons while deciding whether good cause was shown or not. The said order dated 2.11.2021, therefore, on the face of it, in the opinion of this court, is liable to be interfered as the court

below-had failed to exercise a jurisdiction conferred upon it by law.

29. Be that as it may, as on the date on which the order dated 2.11.2021 was passed there was still no allegation against the petitioner-defendant No. 2. It was only on 19.2.2022 when the amendment application was allowed thereby allowing to insert the various paragraphs being paragraph Nos. 16(a) to 16(h), 19(a) as well as the prayers 1V(A), IV(B) and IV(C) whereby allegations have been for the first time made against the defendant No. 2-petitioner herein and relief have been sought for. Pursuant to the amendment being allowed, the amended plaint was filed on 8.4.2022 thereby fixing on 2.6.2022. Therefore it would be seen that there was no requirement till 8.4.2022 for the defendant No. 2-petitioner to file any written statement as no cause of action was disclosed against the defendant No. 2-petitioner.

30. From a perusal of the order dated 2.6.2022 the court does not record in any manner whatsoever as to whether the amended plaint was at all served upon the defendant Nos. 1 and 2, although there was a direction in the order dated 8.4.2022 to furnish the copy to the other side. Without recording the same the court directed to proceed ex parte against the defendant No. 1, however, no order to proceed ex parte against the defendant No. 2 was passed, the reasons seems obvious as the court below was under the impression that as the suit proceedings were proceeding ex parte, against the defendant No. 2, there was no requirement to pass an order to prove ex parte against the defendant No. 2. This aspect of the matter would be clear from a reading of the order dated 7.6.2022 which this court would deal subsequently.

31. On 3.6.2022 an application was filed by the counsel of the defendant No. 2 stating, inter alia, that on account of stomach problems he could not attend the court and sought for a direction that the amended plaint be served upon the petitioner-defendant No. 2. By an order dated 17.6.2022 the court below even rejected the said petition for serving a copy of the amended plaint to the defendant No. 2 against whom allegations have now been incorporated herein on the ground that the suit is proceeded ex parte against the defendant No. 2. The order dated 17.6.2022 on the face of it is in violation to the judicial mandate pronounced by the Supreme Court in *Sangram Singh* (supra), and *Arjun Singh* (supra). As already observed

herein above, the defendant cannot be penalized by not permitting him to participate in the suit proceedings if the hearing has not been

concluded. Admittedly, the hearing has not started even in the suit and., therefore, not to allow the petition dated 3.6.2022 for the copy of the amended plaint and to file written statement vide the impugned order dated 17.6.2022 is on the face of it in violation to all the tenants of law of civil jurisprudence. Under such circumstances, this court, therefore, interferes with all the orders, i.e., the order dated 10.7.2019, 2.11.2021 as well as 17.6.2022.

32. The learned counsel for the parties submit that the next date in the suit proceedings is on 10.8.2022 for plaintiff evidence. This court directs the trial court on the date so fixed to direct the plaintiff in the suit to furnish a copy of the amended plaint along with all documents to the defendant No. 2 and thereafter fix a date for filing of written statement by the defendant No. 2 in accordance with law.

33. With the above, the instant petition stands allowed thereby setting aside the order(s) dated 10.7.2019, 02.11.2021 as well as the order dated 17.6.2022.