SUPREME COURT OF INDIA

Bank of India

Vs.

Mehta Brothers

C.A.No: 2982 of 2001

(Tarun Chatterjee and Dalveer Bhandari JJ)

23.09.2008

JUDGMENT

TARUN CHATTERJEE, J.

1. The appellant - Bank of India, a body corporate constituted under the Banking Companies [Acquisition and Transfer of Undertakings] Act, 1970 filed a suit for recovery of Rs.91, 58,480.09 against the defendants - respondents on 30th of August, 1982, inter alia, alleging that on the request of defendant nos. 1 to 5, namely, M/s Mehta Brothers and Ors. On 26th of June, 1979, the appellant Bank issued an irrevocable Letter of Credit for US $ 6,10,900, equivalent to Indian currency about Rs.50,00,000/-, in favour of M/s Bentrex and Co., Singapore. The said Letter of Credit was expressly made subject to the terms and conditions of Uniform Customs and Practice for Documentary Credits [1974] Revision, International Chamber of Commerce Publication No.290. On 1st of September, 1979, the beneficiary drew a site draft for an amount of US $ 6,10,740 and presented the same along with other documents to Deutsche Bank Asia [formerly known as European Asian Bank], a body corporate incorporated in West Germany being a foreign company under the Companies Act, 1956 - defendant No.6 - respondent no. 6 (in short `the respondent No.6') for negotiations. On 4th of September, 1979, respondent no.6 after negotiating the documents dispatched the original and duplicate set of the documents from Singapore directly to the Chandni

Chowk Branch of the appellant Bank and called upon the New York Branch of the appellant Bank or reimbursement under the Letter of Credit. The appellant Bank further alleged that this was done without furnishing the necessary certificate of compliance which was required under the terms of letters of credit. On 5th of September, 1979, the New York Branch of the appellant Bank on receipt of the aforesaid claim, in good faith, paid on account, without prejudice, the said amount of US $ 6,10,740. On 13th of September, 1979 the appellant Bank received the documents from respondent no.6 and found that there were many discrepancies in the documents and they were not as per the Uniform Customs and Practice of Documentary Credits [1974 Revision]. On 14th of September, 1979, by a telex the appellant Bank pointed out to respondent no.6 some of the discrepancies in the documents and stated that the documents were being held at its risk and responsibility. Respondent no.6 was requested to reverse the reimbursement already claimed by it from the New York Branch of the appellant Bank. On the same day respondent no.6 by its telex to the appellant Bank rejected the claim of the appellant Bank alleging that these discrepancies were of minor nature and all the terms and conditions of the Letter of Credit were complied with. On 14th of September, 1979, Mehta Brothers- defendant nos. 1 to 5 - respondent nos.1 to 5 (in short `respondent nos. 1 to 5') also did not honour and return the documents as they were not at all in accordance with the terms of Letter of Credit. The appellant Bank - further alleged that respondent no.6 had failed and neglected to reply and reimburse to the appellant Bank the amount received by it from the New York Branch. Respondent no.6 had failed to furnish to the New York Branch of the appellant Bank the certificates of compliance in terms of the said Letter of Credit, for that reason also respondent no.6 acted in breach of its obligation under the Letter of Credit to do so and, therefore, was not entitled to claim and return the payment received thereunder. Despite repeated requests and reminders, respondent nos. 1 to 5 did not honour and return the said documents and went on contending that there were discrepancies in the documents. Respondent nos. 1 to 5 also stated that their claim with the insurance company was likely to be finalized soon and the amount payable thereunder shall be received by the appellant Bank directly from the insurance company for the adjustment of the amount due and payable by them under the Letter of Credit. Respondent nos. 1 to 5 as also respondent no.6 had denied their respective liability to repay to the appellant Bank the amounts claimed by it and the appellant Bank was in doubt as to the persons from whom it was entitled to redress, accordingly, the appellant Bank joined respondent nos.1 to 5 and respondent no.6 as parties to the suit in order to determine the question as to which of the defendants was liable to the appellant Bank and to what extent. If separate suits were brought against respondent nos. 1 to 5 and respondent no.6, common question of law and fact would arise, therefore, the appellant Bank had a right to relief against respondent nos. 1 to 5 or respondent no. 6.

2. Upon the aforesaid allegations, the appellant Bank had filed the aforesaid suit for recovery of Rs.91,58,480.08, being the amount of Letter of Credit and interest. Decree was claimed primarily against respondent no.6 and alternatively, against respondent nos. 1 to 5 in case, the court would come to the conclusion that respondent no.6 was not liable to pay any amount to the appellant Bank. It would be appropriate at this stage to reproduce the reliefs claimed in the suit itself which read as under:

"[a] This Hon'ble Court will be pleased to decree and order defendant no.6 to pay to the plaintiff the equivalent in rupees at the time of payment, the sum of US $11,46,492.99 together with interest thereon at 21% per annum with quarterly rests from the said 30th day of August, 1982 untill

payment and costs of the suit and

such further and other reliefs as this Hon'ble Court may deem fit.

[b] That in the event of this Hon'ble Court holding that defendant no.6 is not liable to pay any amount to the plaintiff, this Hon'ble Court will in the alternative be pleased to decree and order defendant Nos. 1 to 5 jointly and each severally to pay to the plaintiff bank the said sum of Rs.91,58,480.00 with further interest at the 21`% per annum with quarterly rests from the 30th day of August, 1982 until payment.

[c] Costs of the suit and

[d] Such other and other reliefs which this Hon'ble Court may deem fit."

3. On 24th of July, 1984 a written statement on behalf of respondent no.6 was filed. Although, respondent no.6 filed the written statement but finally no body appeared on its behalf and accordingly the suit had proceeded against it ex parte. The suit was decreed on 10th of March, 1987 ex parte against respondent no.6 with costs. However, the suit against respondent nos. 1 to 5 was dismissed on contest and they were left to bear their own costs. However, the appellant Bank did not file any appeal in so far as that part of the decree by which the suit against respondent nos. 1 to 5 had been dismissed. Accepting this position, on 4th of April, 1988, two applications were filed by respondent no.6 under Order 9 Rule 13 of the Code of Civil Procedure (in short the `Code') for setting aside the ex parte decree and under Section 5 of the Limitation Act for condonation of delay in filing the application under Order 9 Rule 13 of the Code. By an order dated 28th of February, 1991, the learned single judge of the High Court allowed both the applications filed by respondent no.6. Accordingly, the ex parte decree passed against respondent no.6 was set aside subject to payment of Rs.25,000/- as costs out of which Rs.15,000/- was payable to the appellant Bank and Rs.10,000/- to respondent nos. 1 to 5. While setting aside the ex parte decree against respondent no.6, by the same order, the learned Single Judge also set aside that portion of the decree whereby the suit against respondent nos. 1 to 5 was dismissed. To set aside that part of the decree, the learned single judge had relied on the proviso to Order 9 Rule 13 of the Code. Feeling aggrieved by the said judgment of the learned single judge, respondent nos. 1 to 5 filed first appeal being FAO [OS] No.78 of 1991 before the High Court of Delhi. The appellant Bank also filed FAO [OS] No.100 of 1991.

4. By the judgment and final order dated 9th of November, 2000 passed by a Division Bench of the High Court of Delhi in FAO (OS) No.78 of 1991, the Division Bench had set aside the order dated 28th of February, 1991 of the learned single judge to the extent that the said order had set aside an ex parte decree dated 10th of March, 1987 dismissing the suit of the appellant Bank against respondent nos. 1 to 5. In so far as the respondent no.6 was concerned, the Division Bench of the

High Court affirmed the order dated 28th of February, 1991 setting aside the ex parte decree dated 10th of March, 1987 passed against the respondent no. 6. It is against this judgment of the Division Bench of the High Court, the appellant Bank filed this special leave petition which, on grant of leave, was heard in presence of the learned counsel for the parties.

5. We have heard the learned counsel for the parties and examined the judgments of the High Court including the Division Bench as well as the Single Judge. We have also considered the materials available on record including the plaint of the suit of the appellant Bank in respect of which the reliefs claimed by it which has been noted herein earlier and the application under Order 9 Rule 13 of the Code and the objections thereto.

6. Having heard the learned counsel appearing for the parties and after going through the materials on record, the moot question that needs to be decided in this appeal is as follows:

"Whether, under the proviso to Order 9 Rule 13 of the Code of Civil Procedure, a decree passed in favour of the contesting defendants can be set aside as against a defendant also being part of the same suit, on an application made by him, for setting aside an ex-parte decree against him."

7. The learned counsel appearing on behalf of the appellant Bank vehemently argued before us that on account of the ex- parte decree against the respondent no. 6, the alternative claim against respondent nos. 1 to 5 was dismissed without trial, therefore, the Division Bench of the High Court was in error in setting aside the decree of dismissal passed in favour of respondent nos. 1 to 5. Thus, according to Mr. K.N.Bhatt, learned senior counsel for the appellant Bank, on respondent no. 6's default being condoned, the suit filed by the appellant Bank was rightly restored in toto by the learned single judge which, however, was set aside in appeal. Learned senior counsel for the appellant Bank further contended that in the present case, the ex-parte decree passed by the learned single judge was of such a nature that it could not be set aside only against respondent no. 6 and hence the order of the learned single judge setting aside the decree in its entirety was fully justified. On the interpretation/construction of the provisions of Order 9 Rule 13 of the Code, in particular, its proviso, the learned counsel appearing for respondent nos. 1 to 5 strongly urged that on a plain reading of this provision under Order 9 Rule 13 of the Code and the proviso therein, there should not be any difficulty to come to the conclusion that the language of Order 9 Rule 13 is very clear and that the said provision will apply only to a decree which has been passed ex- parte and to the defendants against whom, ex-parte decree has been passed and not against the defendants who have been successful in the suit and the suit has been dismissed in their favour. According to the learned counsel for the respondent nos. 1 to 5, the proviso to Order 9 Rule 13 of the Code also contemplates setting aside of an ex-parte decree only against the defendants who were proceeded ex-parte but had not made an application for its setting aside. Relying on paragraph 8 of a Full Bench decision of the Assam High Court reported in Khargesh Chandra Vs. Chandra Kanta Barua, AIR 1954 Assam 183, learned counsel for respondent nos. 1 to 5 contended that two significant changes in the provisions under the Code of 1908 namely, the words, `as against him' have been added after

the words `shall make an order setting aside the decree and the proviso' to the rule. According to the learned counsel for respondent nos. 1 to 5, these changes left no room for doubt that as a general rule, the decree was to be set aside as against the defendant making the application under Order 9 Rule 13 of the Code but in exceptional cases, contemplated by the proviso, it could be set aside against all or any of the other defendants. Further, relying on paragraph 8 of the aforesaid decision, the learned counsel for the respondent nos. 1 to 5 argued that the decree set aside must be a decree "against the defendant and not a decree in their favour". Accordingly, the learned counsel for the respondent Nos. 1 to 5 contended that proviso to Order 9 Rule 13 of the Code cannot have any application as the decree dated 10th of March, 1987 was in favour of respondent nos. 1 to 5 and not against them. It was next contended on behalf of learned counsel for the respondent nos. 1 to 5 that the learned single judge was not correct in reviving the suit in its entirety on the ground that the decree was one and indivisible. According to the learned counsel for the respondent nos. 1 to 5, in view of the liability of the respondent Nos. 1 to 5 and in view of the alternative reliefs claimed in the suit itself, the decree was separate and, therefore, it could be split up. Therefore, the learned counsel for the respondent nos. 1 to 5 contended that the Division Bench of the High Court was fully justified in setting aside that portion of the decree by which the suit against respondent nos. 1 to 5 was dismissed.

8. Mr. Jayant Bhushan, learned senior counsel appearing for respondent no.6 supported the contention of the learned senior counsel appearing for the appellant Bank and contended that since the decree was indivisible and in view of the nature of the order of the trial court deciding the issues which were interlinked, the learned single judge was fully justified in setting side a decree in toto and restored the suit against all the defendants.

9. Having heard the learned counsel for the parties and after noting the arguments advanced by them, we are of the view that the judgment of the Division Bench of the High Court which is impugned in this appeal so far as that part of the order of the Division Bench setting aside the order of the learned single judge restoring the suit in its entirety cannot be sustained in law. Now, let us interpret the provisions under Order 9 Rule 13 of the Code and particularly examine the scope of the Proviso to Order 9 Rule 13 of the Code. In the light of the issue framed by us, as noted herein earlier, we need to ascertain whether under Order 9 Rule 13 of the Code, it is permissible for the court, on an application of a defendant against whom a decree has been passed ex-parte, to set aside the decree also against the other defendants appearing in the same suit and dismissed on contest.

10. At the risk of repetition, we may also examine whether the Division Bench of the High Court was justified in setting aside the judgment of the learned single judge to the extent that the decree of dismissal passed in favour of respondent nos. 1 to 5 could also be set aside along with the ex parte decree being set aside against respondent no. 6 or, whether under Order 9 Rule 13 of the Code, the court on an application by a defendant against whom the decree has been passed exparte can set aside the decree not only against the defendant applying for setting aside the ex parte decree but also the decree passed in favour of the other defendants who appeared and contested the suit.

11. Before we examine the scope and impact of Order 9 Rule 13 of the Code and the proviso to it and the definition of "decree" made in the Code and other relevant provisions, we may look into earlier provisions made in the Code of Civil Procedure, 1882. Section 108 of the 1882 Code dealt with applications for setting aside an exparte decree which read as under:

"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 made for an order to set it aside, and if he satisfies the Court that the summons were not duly served, the Court shall pass an order to set aside such decree upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a date for proceeding with the suit"

From a plain reading of the provisions made under Section 108 of the Code of Civil Procedure, 1882, it is evident that on the Court being satisfied with the merits of an application for setting aside of an ex-parte decree, it was required to set aside the decree and proceed with the suit. The words used in this section, namely, "the decree" "set aside the decree" and "proceeding with the suit" would clearly show that in Section 108 there was no provision to set aside an ex parte decree only against the defendant against whom the ex parte decree was passed and who had, accordingly, made an application for setting it aside. Therefore, it is clear from this provision that if an ex parte decree was to be set aside by the court, the same had to be set aside in toto i.e. as against all the defendants in the suit. In our opinion, the expression "proceeding with the suit" would also clearly show that the intentions of the Legislature that the court was required to proceed with the suit, i.e. between all the plaintiffs and the defendants. However, in the interpretation of Section 108 particularly "decree", "ex parte decree" and "proceeding with the suit" there was a difference of opinion expressed by different High Courts in India, that is to say, as to whether the ex parte decree had to be set aside in toto, or whether the same was required to be set aside only as against the party against whom the ex parte decree was passed. This difference of opinion of different High Courts was, however, removed by the introduction of Order 9 Rule 13 of the Code.

12. At this stage, it would be relevant to mention and reproduce the provisions of Order 9 Rule 13 of the Code which reads as under:

"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 were 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 here 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 Bank has withdrawn the appeal, no application shall lie under this rule for setting aside that ex-parte decree."

13. We have carefully examined the provisions under Order 9 Rule 13 of the Code as well as its proviso and other relevant provisions under Order 9 of the Code. A reading of Order 9 Rule 13 of the Code would clearly show that under this provision it was clarified that an ex parte decree was ordinarily to be set aside only against the defendant against whom the decree was ex parte and the suit was to be revived only qua the said defendant applying for setting aside the ex parte decree. It is true that the heading of Order 9 Rule 13 of the Code starts with the expression "setting aside of an ex parte decree". But if we examine this provision under Order 9 Rule 13 of the Code as well as its proviso in depth and in detail, it would not be difficult for us to come to a conclusion that under Order 9 Rule 13, it has been clarified that an ex parte decree is ordinarily to be set aside only as against the defendants against whom the decree has been ex parte and the suit is to be revived only qua the defendant who applied for setting aside the ex parte decree. Keeping this in mind, let us now examine whether the proviso to Order 9 Rule 13 of the Code gives ample power to the court to set aside the decree passed in favour of the contesting defendants at the time of setting aside the ex parte decree against other defendants. Therefore, let us now deal with the proviso to Order 9 Rule 13 of the Code. It provides that in cases where the decree is of such a nature that the same cannot be set aside only as against the defendant applying for setting it aside, the decree could also be set aside as against any or all of the other defendants. Therefore, in our view, this proviso confers power on the court to set aside the entire decree if the court is of the view that the decree passed was of such a nature that the same could not be set aside only as against the defendant applying for setting aside the decree, the decree could also be set aside as against any or all of the other defendants. Therefore, this proviso clearly confers powers on the Court to set aside the entire decree where the said decree was of such a nature that it is expedient in the interest of justice to set aside the decree as against any or all of the other defendants also. After carefully examining the provision under Order 9 Rule 13 of the Code along with its proviso, the following, therefore, emerges:-

14. As noted herein earlier, the heading of Order 9 Rule 13 of the Code starts with "setting aside decrees ex parte" But, if we read the entire provision under Order 9 Rule 13 of the Code, it would be clear that the said provision provides that the decree must be ex parte against one defendant or ex parte against all the defendants. The proviso also does not provide that the decree can be set aside against the defendants, other than the applying defendant, only if it is ex parte against them also. The only requirement for the applicability of this order is that the decree should be ex parte against

the defendant applying to have it set aside. Thus, the language of the order does not suggest that for the order to apply the decree must be entirely ex parte. Secondly, if the proviso was to apply only if the decree was ex parte against the other defendants also, that would have rendered the proviso practically infructuous, as in such a situation, the other defendants would have an independent right to have the decree set aside against them. In our view, the idea behind the proviso is that if the decree is being set aside as against some defendants, and the decree as against the other defendants is connected, interlinked or dependent on that part of the decree which is being set aside, the decree may have to be set aside as against the other defendants also. There is another aspect to be considered by us relating to the provision under Order 9 Rule 13 of the Code The proviso to Order 9 Rule 13 does not use the expression "ex parte decree" but it had used the term "decree". Therefore, the question would be whether the proviso to Order 9 Rule 13 says that the decree would mean an ex parte decree. This can be looked at from two angles. We shall consider both of them and then determine which of the two is the most appropriate. One of the ways to look at that the term "decree" over here means the ex parte decree, which was passed against the defendant who had afterwards applied for setting it aside. This interpretation can be illustrated with the help of the following hypothetical situation. Let us assume that there are many defendants and the decree is passed ex-parte against all the defendants, defendant No.1 subsequently applies for setting aside the said ex-parte decree, according to the proviso to Order 9 Rule 13 of the Code, if the decree is of such a nature that it cannot be set aside as against the defendant No.1 only, then it would be open for the court to set aside the decree as against all or any of the other defendants as well. Of course, we are considering the decrees which have been passed ex parte against all of them at the present moment. Thus, according to this interpretation, for the court to be able to exercise power under this proviso, the word "decree" used in the proviso must be construed to mean ex-parte decree only. The arguments which can be made in support of this interpretation may be summarized as follows:

a) The heading to Order 9 Rule 13 says, "ex parte decree",

b) The expression "ex-parte" is used under Order 9 Rule 13 only once and then it uses the word either "decree" or "it" in this context. Therefore, if we read the proviso, it should mean ex parte decree only. Therefore, according to the above-discussed interpretation, only that decree can be set aside under the proviso to Order 9 Rule 13 of the Code, which was passed ex- parte. Therefore, a decree which is not ex-parte, that is to say, a decree against persons who appeared and contested, cannot be set aside, much less persons who not only appeared but in whose favour the suit was dismissed. This is the one look on the interpretation of the proviso to Order 9 Rule 13 of the Code. Let us now take up the second way to look at this proviso by interpreting that the word "decree" used in the proviso means a decree in general and not necessarily an ex- parte decree. In support of this interpretation we may note the points emerged :

If the subsequent words used in the proviso were to mean ex-parte decree, the Legislature would have expressly provided so. Therefore, from the intention of the Legislature it cannot be said that the ex parte decree can only be set aside and not a decree passed in toto.

At this juncture, we may look at the second proviso to Order 9 Rule 13 of the Code which runs as under:-

"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.

Therefore, looking at the second proviso to Order 9 Rule 13 of the Code and also the explanation, we see that the word "decree" is preceded by the word "ex parte" This would, in our view, effectively mean that the Legislature while drafting the proviso No.1 to Order 9 Rule 13, intentionally omitted "ex parte" before the word "decree" because they intended to mean decree in general.

15. Therefore, if we go by the above mentioned interpretation, a decree can be set aside as against all or any of the other defendants, regardless of the fact whether they appeared, contested or not. Keeping this interpretation of the first proviso to Order 9 Rule 13 of the Code in mind, let us now take up the other question to be answered in this case, which is whether a decree can be set aside against a defendant against whom the suit has been dismissed on contest. At the first blush, we thought it fit to think that a defendant who contested a suit and got the suit dismissed on contest it would be unjust to call back the said defendant who had already contested the matter and got the suit dismissed. This is because, it would amount to jeopardizing his interest but it would also result in unending litigation for him.Therefore, before expressing any opinion on the issue posed before us, we have to solve this aspect also. For this reason, we wish to ascertain that there cannot be a rigid answer to this problem. As regards the question as to whether the term "decree"in the first proviso connotes ex-parte decree or the decree in general, we have already come to a firm opinion, as discussed herein above, that it actually meant a decree in general. It may be kept on record that, in our view, the intention of the Legislature to use the word "decree" in the first proviso to mean decree in general in view of the changes in the expression made in the Code of Civil Procedure, 1882 and the Code of Civil Procedure, 1908.

16. Therefore, keeping this in mind, let us now consider whether a contested decree by some of the defendants can be set aside while considering the application for setting aside the ex parte decree against one of the defendants. This would, in our view, certainly depend on the nature of reliefs claimed by the plaintiff in his plaint and the nature of the decree in question. If the decree is indivisible, the court would be at liberty to set aside the decree not only against the defendant who applied for setting aside the ex parte decree passed against him, but also as against all or any of the other defendants. In the instant case at our disposal, the Division Bench of the High Court had set aside that part of the order of the learned single judge by which the learned single judge had set aside the order of dismissal of the suit as against the respondent Nos. 1 to 5 on the application under Order 9 Rule 13 only by the respondent No. 6 for setting aside its ex-parte decree, on the ground that the decree passed was divisible. Therefore, the question remains to be considered as to whether

the decree passed in the suit filed by the appellant Bank is indivisible or not. To answer this query, it would be necessary for us to look into the issues framed in the suit and the reliefs claimed in so far as it is relevant, but before doing that we may note that the suit was filed by the appellant Bank seeking a decree against respondent no. 6 and in the alternative, as against respondent nos. 1 to 5 if the respondent no. 6 was found not to be liable. The issues which were framed in the suit in so far as it is relevant for the disposal of this appeal may be set down below:

1) Whether the defendant no. 6 did not comply with the terms and conditions of the letter of credit and if it acted in breach of its terms in claiming reimbursement of the amount of $6 10740/- from the appellant Bank branch in New York.

2) Did the defendant nos. 1 to 5 wrongly fail to retire the documents? If so, to what effect?

3) ----

4) -----

5) ----

6) ----

7) Whether the claim of the plaintiff lies in the alternative, i.e., one against defendant no. 6 and in the alternative against defendants no. 1 to 5?

8) In case it is held that defendants no. 1 to 5 are liable to any amount are they entitled to pay that amount in installments?

17. We have already quoted the relevant reliefs claimed by the appellant Bank in their plaint and the issues now quoted herein above. As has been noted herein earlier, the suit was decreed ex parte holding that respondent no. 6 only was liable and in view of such issue being decided, the suit against respondent Nos. 1 to 5 was dismissed. Such dismissal of the suit, as noted herein earlier, as against respondent Nos. 1 to 5 was held by the Court that since respondent No.6 alone was liable to pay the decretal amount to the appellant Bank the suit had to be dismissed against respondent Nos. 1

to 5 as the relief claimed in the suit was in the alternative, that is to say, if the suit is decreed against respondent No.6 only or it is held by the court that respondent No. 6 only was liable to pay the decreetal amount, respondent Nos. 1 to 5 cannot be held to be liable for the amount claimed. However, as an illustration, we may refer to Issue No.1 in which it was held that the documents negotiated by respondent No.6 were deficient and thus there was non compliance/breach of the terms and conditions of the Letter of Credit by respondent No.6. Having found this Issue No.1 in favour of the appellant Bank and against respondent No.6 and the remaining issues, namely, Issue Nos. 2, 7 and 8 which were also decided may be referred to at this stage.

Issue No.2 - "In view of my decision in Issue No.1, the defendants 1 to 5 were justified in refusing to retire the documents. Issue is decided accordingly.

Issue No.7 -"It was not shown to me how the suit in the alternative was not maintainable"

Issue No. 8 -"In view of my finding that defendants 1 to 5 were not liable to pay any amount, this issue does not arise.

18. From the examination of the issues and the findings arrived at by the learned single judge, it is pellucid that the suit against respondent Nos. 1 to 5 was found to be maintainable in law but they were held not to be liable because respondent No. 6 alone was held to be liable. At this stage, it may be kept on record that a suit being Suit No. 475 of 1980 has been filed by respondent No.1 against the Oriental Fire and General Insurance Company, which has now been adjourned sine die at the instance of respondent no. 1 in view of the judgment of the Division Bench of the High Court which affirmed the decree passed in favour of respondent Nos. 1 to 5 by dismissing the suit against them. In the aforesaid pending suit, there has been an order passed by the Court which may be relevant for us to reproduce and we quote as under :-

"It has been submitted by the learned counsel for the plaintiff that the proceedings in the suit may be adjourned sine-die in view of the judgment in Suit No. 1182 of 1982 in Bank of India Vs. Mehta Brothers given on 10th of March, 1987. It is further submitted that it should be left open to the plaintiff to get the proceedings revived as and when necessary. The request of the learned counsel for the plaintiff is not being opposed on behalf of the defendant. In view thereof further proceedings in this suit are adjourned sine die. It should be open to the plaintiff to apply for reviving the proceeding as and when necessary."

On a plain reading of this order and the stand taken by respondent No.1 in the aforesaid suit, it is clear to us that respondent No.1 has reserved liberty to revive the pending suit, if necessary.

19. As has been noted herein earlier, the ex-parte decree passed by the learned single judge was set aside in toto on an application made by respondent no. 6, that is to say, the suit has also revived against respondent nos. 1 to 5 who contested the suit and got the suit dismissed in the above manner. According to the learned single judge, the decree passed in the suit was a single indivisible decree and the ex parte decree was accordingly set aside not only against respondent no. 6 but also against respondent nos. 1 to 5 as well. It is against this decision of the learned single judge, as noted herein earlier, an appeal was preferred to the Division Bench of the High Court, which, however, upheld the finding of the learned single judge on the setting aside of ex parte decree passed against respondent No.6. But at the same time the appellate court differed with the view of the learned single judge holding that the decree passed was indivisible and held that the learned single judge was not justified in setting aside the decree against respondent Nos.1 to 5 who contested the suit and got the suit dismissed. According to the Division Bench of the High Court, the said decree was actually two distinct decrees, i.e., one against the respondent no. 6 and one in favour of the respondent nos. 1 to 5, and on that finding the Division Bench had set aside the finding of the learned single judge on the question whether the decree was divisible or not and accordingly, had set aside the order of the learned single judge to that extent and against which the present appeal has now been preferred by the appellant Bank.

20. In our view, the Division Bench was not justified in setting aside the above part of the order of the learned Single Judge on the ground that the decrees were two distinct decrees: one against respondent No.6 and one in favour of the respondent Nos. 1 to 5. It is to be noted that the judgment of the learned single judge as well as of the Division Bench had not proceeded on the basis that the decree was entirely ex parte against all the defendants. Therefore, we have to see the nature of the decree for the purpose of coming to a proper conclusion whether the decree could be indivisible or the decree that was passed were two separate distinct decrees. In this connection, it would be important to refer to a minority decision of the Assam High Court in the case of Khargesh Chandra Vs. Chandra Kanta Barua [AIR 1954, Assam 183], which would be relevant for us to illustrate and answer this question. Accordingly, we quote the observations made by the Assam

High Court with which we are in full agreement which are as follows :

"(51).......What is to be considered is not whether the plaintiff is estopped from claiming relief against the defendant without going to the appellate court, since there has been an adjudication between him and the defendant who appeared at the earlier hearing, but whether the defendant who was absent at the time (for sufficient reasons) should not get a chance to reopen the entire suit in his interest, if the justice of the case so demands. To my mind, the intention of the Legislature is to give him such relief and therefore the proviso to Order 9 Rule 13, Civil Procedural Code, admits of no narrower interpretation, and when the decree is of such a nature that proper relief cannot be given to the applying defendant without setting aside the decree against other defendants (no matter in what shape it existed), the decree may be set aside as against the other defendants also."

At this stage, paragraph 8 of the Full Bench decision of the Assam High Court in Khargesh Chandra (supra) may also be dealt with. The said paragraph noted two significant changes which were effected in Order 9 Rule 13 of the Code namely, the words "as against him" were added after the words "shall make an order setting aside the decree" and the proviso to the Rule. Accordingly, from this paragraph of the Full Bench decision, the changes left no room for doubt that as a general rule, the decree was to be set aside against the person making the application under Order 9 Rule 13 of the Code, but in exceptional cases, contemplated by the proviso, it could be set aside against all or any of the other defendants. Emphasis was made in this paragraph that the decree to be set aside must be a decree "against the defendants and not a decree in their favour".

It is needless to say that the learned single judge of the Delhi High Court had followed the minority decision of the Assam High Court and held that the decree was indivisible which was set aside by the Division Bench in the aforesaid manner. In our view, considering the issues framed in the present suit and the reliefs claimed by the appellant Bank and the findings arrived at on such issues, as noted herein above, we are of the opinion that the learned single judge was fully justified in restoring the suit in toto and was correct in setting aside the entire decree and restore the suit in its entirety on an application under Order 9 Rule 13 of the Code which also, in view of our discussions made herein earlier, was correct in the approach of Order 9 Rule 13 of the Code.

Reliance on paragraph 8 of the Full Bench decision of the Assam High Court as relied on by the learned counsel for respondent Nos. 1 to 5 cannot be considered to be a good law in view of the fact that it itself accepts the position that in exceptional cases contemplated by the proviso under Order 9 Rule 13 of the Code, the ex-parte decree could be set aside not only on the defendant who applied for setting aside the ex-parte decree but also on or any other defendants. In view of the discussions made hereinabove, we are not in a position to agree with the submission of the learned counsel for respondent Nos. 1 to 5 who placed strong reliance on paragraph 8 of the aforesaid decision to contend that the decree to be set aside must be a decree "against defendants and not a decree in their favour", irrespective of the fact whether the decree was passed in favour of the defendants on contest.

As noted herein earlier, we have already discussed that in the judgment, it was held that respondent No. 6 against whom the ex-parte decree was passed, was only liable to pay the decretal amount to the appellant Bank. The suit was dismissed as against respondent Nos. 1 to 5 only on the ground that the claim of the appellant Bank was satisfied against respondent No. 6 and in view of such relief already obtained by the appellant Bank against respondent No. 6, Issue Nos. 2, 7 & 8 were held in favour of respondent Nos. 1 to 5 and as a result of that, the suit was dismissed on contest as against respondent Nos. 1 to 5. Accordingly, we are of the firm opinion that the ex parte decree was indivisible and rightly set aside not only against respondent No.6 but also against respondent Nos.1 to 5. Since no argument was advanced by the learned counsel for the appellant Bank that the findings of the learned Single Judge as well as the Division Bench on the question whether there was sufficient cause for respondent No.6 to get the ex-parte decree set aside, we do not intend to examine the correctness of the findings of the learned single judge as well as of the Division Bench to the extent that respondent No. 6 had made out sufficient cause for non-appearance on the date, the

suit was decreed ex-parte against it.

23. Before we conclude, we may mention one short submission of the learned counsel for respondent Nos. 1 to 5. According to the learned counsel for respondent Nos. 1 to 5, it was not open to the appellant Bank to restore the suit in to on the application under Order 9 Rule 13 of the Code filed by respondent No.6, because the appellant Bank did not choose to prefer any appeal against the order of dismissal of the suit passed in favour of respondent Nos. 1 to 5. In view of our discussions made herein above in which we have already come to the conclusion that the decree was indivisible and was dependent on the decision of the issues indicated herein earlier, it was not possible for the court to set aside the ex parte decree only against respondent No.6. Therefore, we do not think that this argument of the learned counsel for respondent Nos. 1 to 5 would be of any help. That apart, the learned single judge having set aside the decree in toto and restored the suit in its entirety, it was not necessary for the appellant Bank to file any appeal against the dismissal of the suit as against respondent Nos. 1 to 5.

24. Accordingly, we set aside the judgment of the Division Bench of the Delhi High Court so far as it had set aside the order of the learned Single Judge restoring the suit in its entirety and therefore, the judgment of the learned single judge is restored to its original file. Since, the suit of the appellant Bank was filed in the year 1982 without expressing any opinion on the merits of the suit, we request the learned single judge to decide the suit at an early date preferably within six months from the date of supply of a copy of this order to him.

25. For the reasons aforesaid, the appeal is allowed and the impugned judgment of the Division Bench is set aside to the extent indicated above and the judgment of the learned Single Judge is restored. There will be no order as to costs.