

(1991) 02 DEL CK 0024

In the Delhi High Court

Case No : Interim Application No's. 1655 and 1656 of 1988 and Suit No. 1182 of 1982

Bank of India

APPELLANT

Vs

M/s Mehta Brothers and others

RESPONDENT

Date of Decision : 28-02-1991

Acts Referred:

Citation : AIR 1991 Delhi 194 : (1991) 2 ILR Delhi 374

Hon'ble Judges : D.P Wadhwa, J

Bench : Single Bench

Advocate : Dr. Shankar Ghosh, Sri. and Ms. Kumud Jaiswal, for the Appellant;
P.C. Khanna, S.K. Kaul and Ms. Reva Kherapal, for the Respondent

Judgement

1. These are two applications filed by defendant No.6. These were filed on 4-4-1988. First application is under O. 9, R. 13 and S. 151 of the CPC and the second u/S. 5 of the Limitation Act, 1963. The ex parte judgment and decree which are sought to be set aside are dated 10-3-1987. The circumstances that led to the filing of these two applications may be stated in brief in so far as these are relevant.

2. The plaintiff is constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. On 30-8-1982 it filed a suit for recovery of Rs. 91,58,480.08 against defendants numbering six. Defendant No. 1 is a partnership firm, of which defendants 2, 3, 4 and 5 are the partners. 6th defendant, who is now the applicant, is the body incorporates under the laws of West Germany and is said to be a foreign company within the meaning of the Companies Act, 1956. On the request of defendants No. 1 to 5, the plaintiff on 26-6-1979 established an irrevocable Letter of Credit for US \$6,10,900/- (equivalent to about Rupees 50,00,000/-) for import of PVC Resins in favor of one M/s. Bentrex and Co., Singapore. This Letter of Credit was expressly made subject to the terms of Uniform Customs and Practice for Documentary Credits (1974 Revision), International Chamber of Commerce Publication No. 290.

Negotiation of the documents under the Letter of Credit was permitted through any bank at Singapore. It was also provided in the said Letter of Credit that the negotiating bank was to claim reimbursement from the New York Branch of the plaintiff. Such reimbursement, however, was required to be made with the certificate of the negotiating bank that the terms of the credit had been fulfilled. The beneficiaries M / s. Bentrex and Company drew a Singh Draft for an amount of US \$6,10,740.00 on 1-9-1979 and presented the same with other documents to defendant No. 6 at Singapore, being their bankers, for negotiation. On 4-9-1979, defendant No.6, after negotiating the said documents, dispatched the original and duplicate set of the documents from Singapore directly to the Chandni Chowk Branch of the plaintiff and called upon the New York Branch of the plaintiff for reimbursement under the said Credit. But the plaintiff claimed that this was done without furnishing the necessary certificate required under the credit. The New York Branch of the plaintiff, the plaintiff claims, in good faith paid and reimbursed to the defendant No. 6 on 5-9-1979 the said amount of US \$ 6,10,740.00. When the plaintiff received the documents, which was on or about 13-9-1979, it found that there were various discrepancies and the same did not conform to the terms of the credit. It, Therefore, called upon defendant No. 6 to reverse the reimbursement already claimed by it from the plaintiff's New York Branch. The defendant No. 6, however, rejected the claim of the plaintiff. Defendants No. 1 to 5 also did not honour and retire the said documents contending that there were discrepancies in the documents and further stated that they had made a claim with the insurance company (M/s Oriental Fire and General Insurance Company Limited), which was likely to be finalised and that the amount payable there under would be received by the plaintiff directly from the insurance company for the adjustment of the due and payable by defendants No. 1 to 5 under the Letter of Credit. These defendants also advised the plaintiff that they had instituted a suit against the insurance company in the Delhi High Court, it being Suit No. 475/89. It appears that the ship, which was carrying the goods from Singapore to a Port in India sank. The plaintiff, Therefore, claimed that defendants Nos. 1 to 5 on one hand and defendant No. 6 on the other denied their respective liability to repay to the plaintiff the amounts claimed in the suit and that the plaintiff was in doubt as to the person from whom it was entitled to redress and so the plaintiff had joined defendants No. 1 to 5 as well as defendant No. 6 as parties to the suit in order to determine the question as to which of the defendants, i.e. defendants No. 1 to 5 and defendant No. 6, were liable to the plaintiff and to what extent. The suit was under O. 1, R. 7 of the Code of Civil Procedure. The plaintiff claimed the suit amount as under :-

"1. Amount payable under the Letter of Credit for US \$ 6,10,740 Rs. 49,65,365.85

2. Interest at the rate of 21% per annum from 5-9-79 till 30-8-82 Rs. 41,93,114.23

Total Rs. 91,58,480.08

3. In the alternative to the interest, plaintiff also claimed a sum of Rupees 41,93,114.23 as damages as mentioned in the plaint. The plaintiff, Therefore, wanted a decree against defendant No. 6 and in the alternative against defendants No. 1 to 5.

4. Defendant No. 6 for the first time was represented on 16-11-1982 by Mr. Ashok Sagar, Advocate. Thereafter Mr. T. M. Ansari appeared for this defendant. The plaintiff filed an application (I.A.3199/82) u/S. 20(b) of the Code seeking leave of the court to file the suit against defendant No. 6 in Delhi. This was allowed by order dated 19-4-1983. While the proceedings in the suit were being held by the Deputy Registrar, on none of the hearings before him did any body appear for defendant No. 6, in spite of the fact that dates for filing documents and for admission and denial thereof had been fixed. On 29-4-1985 the suit was directed to be listed in court for framing of issues, for 21-5-1985. On this date again, since nobody appeared for defendant No. 6, proceedings were directed against this defendant ex parte. Issues were framed on 6-8-1985. These are as under :-

1. Whether defendant No. 6 did not comply with the terms and conditions of the letter of credit and did it act in breach of its terms in claiming reimbursement of the amount of \$ 6,10,740 from the plaintiff bank branch in New York?

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

3. If issue No. 1 is held against the plaintiff, can the claim of the plaintiff lie against defendant No. 6 on the plea of unjust enrichment?

4. Whether defendant No. 6 claimed reimbursement of the aforesaid amount in contravention of the terms of the Uniform customs and Practice for Documentary Credit (1974 Revision) subject to which the said credit was stated to have been issued by the plaintiff ?

5. Whether the payment to defendant No. 6 was made on account and if so to what effect?

6. Whether the plaintiff is entitled to claim any interest, and if so, at what rate and for what period and against which of the defendants?

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?

9. Relief.

5-7. Evidence in the case was recorded on 18-2-1987 and 19-2-1987 while arguments were heard on 23-2-1987. Judgment was pronounced on 10-3-1987. The suit was decreed against defendant No. 6 with costs. The suit against

defendants No. 1 to 5 was, however, dismissed and they were left to bear their own costs. The court held issues No. 1, 4 and 5 in favor of the plaintiff and against defendant No. 6. Issue No. 2 was held in favor of defendants 1 to 5. No decision was given on issues No. 3 and 8. Interest was awarded at the rate of 18% per annum, which was covered by issue No. 6. On issue No. 7, the court held that nothing was shown as to how the suit in the alternative was not maintainable, meaning thereby that the suit in the alternative was maintainable.

8. Then these two applications, which are subject matter of this order, were filed on 4-4-1988.

9. After replies were filed by the non applicants, i.e. the plaintiff and defendants 1 to 5, the following issues were framed:

I.A. 1655/1988:

Whether there is sufficient cause for setting aside the ex parte decree?

I.A.1656/1988:

Whether there is sufficient cause for condonation of delay in filing the application for setting aside the ex parte decree by defendant No. 6?

10. Parties led evidence by means of affidavits.

11. It appears that defendants 1 to 5 were having dealings with the plaintiff bank earlier to the opening of the Letter of Credit in the present suit. Defendants No. 1 to 5 contended that they had deposited with the plaintiff bank title deeds of certain immovable property and also a fixed deposit receipt of the value of Rs. 76,000.00 by way of pledge. This fixed deposit receipt was further pledged in connection with the opening of the Letter of Credit in the present suit. The plaintiff, however, contended that the title deeds of the property and the fixed deposit receipt were all to be kept as security for whatever amount was due to the plaintiff from defendants No. 1 to 5. Then dispute arose in a suit filed by the plaintiff against defendants No. 1 to 5 in the court of District Judge for recovery of an amount of Rs. 51,440.16. This amount was claimed as difference in exchange rate and some interest according thereon. The defendants in that suit wanted return of their securities on their undertaking to secure the plaintiff for the aforesaid amount of Rs. 51,440.16, they also said that in view of the dismissal of the present suit against them, they were entitled to return of these securities. The District Judge, however, did not agree with the contentions of the defendants there. Against that order, the defendants came to this court by way of revision (C. R. No. 556/ 88). That revision was disposed of by order dated 31-8-1989. The learned single Judge, who heard the revision, agreed with the submissions of the defendants that when the suit of the plaintiff was dismissed against one set of defendants and ex parte decree was passed against another set of defendants and no appeal was preferred by the plaintiff against that set of defendants against whom the suit had been dismissed, then even if application for setting aside the ex parte decree was allowed, it would ensure only qua that

defendants and the dismissal of the suit against other set of defendants would not be set aside automatically. The learned single Judge allowed defendants No. 1 to 5 the return of the securities on their depositing a sum of Rs. 70,000.00 in the court of the District Judge, this amount being the suit amount, costs and interest. I was told that in pursuance of this order the securities have since been returned to defendants No. 1 to 5.

12. There are two more applications pending consideration. They are connected with the two applications, subject matter of this order and also with the order of the learned single Judge in C.R. No.556/88, mentioned above.

13. I.A. 638 / 89 filed u/ S. 151 of the Code is by defendants No. 1 to 5. They seek permission of the court to withdraw from these proceedings and also seek clarification that as far as they are concerned, the judgment and decree dated 10-3-1987 is final and that the contest is only between the plaintiff and defendant No. 6.

14. I.A. 6948/89 is filed by plaintiff. It is under O. 39, Rr. 1 and 2 and S. 151 of the Code. The plaintiff seeks a restriction on defendants No. 1 to 5 from dealing with or disposing of, selling, mortgaging, leasing or alienating certain property stated to be subject of mortgage and also restraining defendants No. 1 to 5 from getting certain securities released from the court of the District Judge, Delhi. Mr. Khanna, learned counsel for defendants 1 to 5, said that these two applications should be taken up for consideration after the decision in the two applications subject matter of the present order, 1, Therefore, leave these two applications at that.

15. Defendant No. 6 has filed the affidavits of (1) Mr. Kalam Singh, a court clerk working in the office of the J.B. Dadachanji & Co., a firm of lawyers who were engaged by defendant No. 6, to show that he did not notice the case on the daily cause list of the court as no name of the advocate of the firm appeared therein. But this was after Mr. Kalam Singh joined this firm which was in May 1986; (2) Mr. Swapan Kumar Sahoo, Filing Clerk in the office of J. B. Dadachanji & Co., who said that since the case was not noticed in the cause list the concerned advocate who was handling the matter was not informed; (3) Mr. Dalip Dwarka Das Udeshi, duly Constituted Attorney of defendant No. 6 and also a partner of the firm M/ s. Crawford Bayley & Company, Solicitors and Advocates, Bombay, as to why no enquiry was made on behalf of defendant No. 6 as to the stage/ progress of the suit; and (4) Mr. Ravinder Narain, Advocate and partner of M/ s. J. B. Dadachanji and Co., who said that it was Mr. T. M. Ansari, Advocate, who was looking after the case but he left the firm w.e.f. March 31, 1987, and the Dealing Court Clerk Mr. V. P. S. Pali, who was earlier to Mr. Kalam Singh, also left the firm. Photo copies of the cause lists of the relevant dates when the case was either listed before the court or the Deputy Registrar and diaries of the firm of M/ s. J. B. Dadachanji & Co. have been brought on record. Three counsel did appear on behalf of defendant No. 6 on earlier dates and their names have been appearing in the cause list on some dates and these Advocates were Mr. Ashok

Sagar, Mr. T. M. Ansari and Mr. Aditya Narain. They are all stated to be working with J. B. Dadachanji and Co. No one however, filed any Vakalatnama in his favor by defendant No. 6. There is no affidavit of any one on behalf of defendant No. 6 as well. Two affidavits may be noticed: (1) of Mr. R. C. Mehta, partner of M/s. Mehta Bros. This Mr. R. C. Mehta is defendant No. 2, and (2) of Mr. D. P. Jain, a Staff Officer of the plaintiff bank. These two affidavits only show the negligent conduct of defendant No. 6 and of its counsel and are based mostly on the record of proceedings in this case. Mr. Udeshi has, however, filed his affidavit as the duly Constituted Attorney of defendant No. 6. He said he had appointed J. B. Dadachanji and Co., Advocates, New Delhi, to appear on behalf of defendant No. 6 to contest this suit and thereafter proceedings were prosecuted with all due diligence and that even an application u/ S. 20(b) of the CPC filed by the plaintiff was contested by defendant No. 6 right up to Supreme Court. Mr. Udeshi has then said that he had signed and verified the written statement on behalf of defendant No. 6 and then he referred to practice prevailing in the Bombay High Court as to how much time it takes to conclude the trial and how the hearings are notified. He said it was in this background he made no enquiries from J. B. Dadachanji Co. to the further progress of the suit. He said it was only by letter dated 7-3-1988 from the Advocates of the plaintiff that he did come to know that a decree has been passed in the sum of over Rs. 49.65 lakhs with interest at the rate of 18% per annum from 5-9-1979 and that the decree was passed on 10-3-1987. This made him sit up and he immediately sent a telex to J. B. Dadachanji & Co. for clarification and meanwhile there was a court recess from 27-3-1988 to 3-4-1988. Present application (I.A. 1655/88) was immediately filed on 4-4-1988 duly supported by his affidavit and the affidavit of Mr. Ravinder Narain, Mr. Kalam Singh and Mr. Swapan Kumar Sahoo. The application u/ S. 5 of the Limitation Act was also filed the same day. Mr. Udeshi said that prior to the letter dated 7-3-1988 of the Advocates of the plaintiff, defendant No. 6 had no intimation about the passing of the ex parte decree and he said in the firm of M / s. Crawford Bayley & Co. this matter was solely looked after by him. He said considering the fact that at earlier stages the suit was being hotly contested by defendant No. 6 it could not be said that there was any intentional non-appearance by defendant No. 6 when the proceedings were taken ex parte or when the ex parte decree was passed against this defendants. He said non-appearance of defendant No. 6 was bona fide and that conduct of the case was left with J. B. Dadachanji & Co. Advocates on its behalf and whatever was possible for the conduct of the case by defendant No. 6 it was done, first appointing M / s. Crawford Bayley & Co. as the Constituted Attorney and then engaging J. B. Dadachanji & Co., Advocates, New Delhi. In fact what defendant No. 6 says is that it should be not made to suffer because of negligence of its counsel.

16. Mr. Khanna raised a contention that there is no plea in the application by defendant No. 6 that decree passed in favor of defendants 1 to 5 be also set aside. He said that though the decree passed against No. 6 is ex parte, the suit

against defendants 1 to 5 was dismissed on merit and as such the decree is in favor of defendants 1 to 5. He also raised a plea of res judicata with reference to decision in Civil Revision (C.R. No. 556/88) which I have noticed above.

17. Now before I discuss the issues and the connected points raised, let me set out the relevant provisions of O. 9, R. 13 of the code, S. 5 and Art. 123 of the Limitation Act. Order 9 Rule 13 :-

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 satisfied the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit:

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

Provided further

Explanation :-

Section 5 Limitation Act:

5. Extension of prescribed period in certain case: - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation :- The fact that the appellant or the applicant was misled by any order practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

XX XX XX XX XX XX XX (See table below) (Contd, on col.2) Article 123: Description of suit Period of Time from which period begins Limitation to run. 123. To set aside a decree passed Thirty days The date of the decree or where the ex parte or to rehear an appeal summons or notice was not duly decreed or hear ex parte. Served, when the applicant had knowledge of the decree. Explanation:..... In the present case, since the summons of the -suit had been duly served on defendant No. 6 and it had been appearing to defend the suit, the application for setting aside the ex parte decree had to be filed within thirty days of the date of the decree. This not having been done the second application u/ S. 5 of the Limitation Act had been filed pleading sufficient cause for not filing the first application under O. 9, R. 13 of the Code within the period of limitation prescribed. Dr. Ghosh who appeared for the plaintiff submitted that the approach of the court in setting aside ex parte decree may be liberal but

once such an application is barred by limitation, plaintiff gets a vested right and ordinarily the decree shall not be set aside unless sufficient cause is proved. He said in case this court comes to the conclusion that the applications are to be allowed, then the whole of the decree should be set aside even against defendants 1 to 5. He said such was the nature of the decree. This led to a great deal of arguments if the present case was covered under the proviso to R. 13. Dr. Ghosh said it was so, but both Mr. Gupta who appeared for defendant No. 6/ applicant, and Mr. Khanna contended to the contrary.

21. Mr. Gupta also took a somewhat neutral stance on this question and he led me through various judgments of the courts on the subject. Mr. Khanna also said that the word "against" appearing in proviso to R. 13 should be given its natural meaning and the decree in the present case which is sought to be set aside was not against defendants 1 to 5 and as such the proviso was inapplicable.

22. Mr. Gupta admitted that there was a great deal of negligence on the part of the counsel in not appearing in the case, but he said, this non-appearance was not deliberate or with any ulterior motives. He said defendants 1 to 5 had no locus standi to oppose his applications, wherein he had sought setting aside of the ex parte judgment and decree against him. Mr. Gupta also referred to the method of functioning of M/s. J. B. Dadachanji and Company, and said that though he admitted negligence, the way in which this firm of lawyers functioned should not come in the way of the setting aside the ex parte decree and defendant No. 6 made to suffer. He also said that in the normal course the suit could not have been decided so early and he obliquely referred to collusion between the plaintiff and defendants 1 to 5. He said records showed that there was some understanding between these two parties to expedite the hearing and to get the ex parte decree against defendant No. 6 who had earlier been proceeded expert. Mr. Gupta then said that though in the suit the relief against defendants 1 to 5 was claimed in the alternative, the plaintiff on his own admission had said that it was defendant No. 6 who was the main defendant. Mr. Gupta also said that there was no occasion for this suit to be listed in the category of "short cause" and in normal course it should have been listed in the category of "long cause" as per practice directions of the High Court. This, he said, showed an understanding between the plaintiff and defendants 1 to 5 at the cost of defendant No. 6 with the result that the suit was not decided in the normal course as per procedure prescribed. Mr. Gupta referred to various decisions of the Supreme Court and High Courts if a client should suffer on account of the negligence of his lawyer. Mr. Gupta said that in the circumstances of the present case, while setting aside the ex parte judgment and decree, the court should not impose any terms, especially regarding payment of decretal amount into court as that could be done only in exceptional circumstances. He said, it was not defendant No. 6 who wanted to prolong the trial or that its defense in the suit was in any way frivolous. He, however, submitted that in case the ex parte judgment and decree were set aside defendant No. 6 would not press the issue of jurisdiction and would contest the suit on the basis of the

issues already framed. Lastly, he said, that continued absence of counsel for defendant No. 6 on all the dates was not quite relevant inasmuch as the counsel was not aware of the dates of hearing even though negligent and had he the notice of hearing then the default in non-appearance continuously would have been rectified. To support his plea that there was sufficient cause for setting aside the ex parte decree, Mr. Gupta referred to cause lists of this court on various dates, the diary, maintained in the office of M/s J. B. Dadachanji and Company. He said, even though the case appeared in the cause list, the name of the counsel of defendant No. 6 or even of J. B. Dadachanji and Company was not mentioned, and that this was in spite of specific direction of the Deputy Registrar that names of the counsel should be shown in the cause list.

23. Dr. Ghosh made stringent attack on the conduct of the case by J. B. Dadachanji and Company and said that the affidavits filed by defendant No. 6 in support of their plea were of no value inasmuch as the deponents therein had verified the affidavits on the basis of records without any record being produced or shown. He said, these affidavits were value less. He said that conduct of defendant No. 6 itself was negligent and there is nothing on the record to show as to what steps, if any, were taken by this defendant in the prosecution of the case. Dr. Ghosh said that primary record of J.B.Dadachanji and Company, Crawford Baley and Company and defendant No. 6 were not forthcoming. He said, plaintiff will suffer an irreparable prejudice and damage in case ex parte judgment and decree is set aside against defendant No. 6 only and it is allowed to stand qua defendants Nos. 1 to 5. He said, decree in the present case was one whole. Apart from the prejudice that would be caused to the plaintiff, Dr. Ghosh said, that there was possibility of there being inconsistent decrees and in case ultimately it is held that defendant No. 6 is not liable, a great deal of injustice would be caused to the plaintiff. He said plaintiff has sued defendants 1 to 5 on the one, hand, and defendant No. 6 on the other, in the alternative, and the plaintiff had to get a decree against one set of defendants in any case. Dr. Ghosh referred to the definition of "decree" as appearing in S. 2(2) of the Code which says that decree means "the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties.....". Dr.Ghosh said that in the present case the adjudication was that because defendant No. 6 was liable Therefore defendants 1 to 5 were not liable. This he said was one whole indivisible adjudication and if the decree is to be set aside it is this adjudication which is to be set aside, and, Therefore, whole of the decree has to be set aside. He said, decree only means an adjudication of the rights of the parties and it does not mean that any formal drawing up of a decree would be necessary. Lastly, Dr. Ghosh said that the decision of a single Judge of this Court in Civil Revision (C.R. No. 556/88) would not be res judicata as defendant No. 6 was not a party in those proceedings. He said provisions of S. 11 of the Code were inapplicable.

24. Mr. Khanna also strongly condemned the conduct of the case by defendant No. 6 and said that absence of the defendant on all the dates of hearing was not

only intentional but deliberate as well. He said this was so because defendant No. 6 had no case. He said affidavits filed by defendant No. 6 in support of its case did not at all inspire confidence and they were false to an extent. Mr. Khanna said that no plea was raised that the decree which was in favor of defendants 1 to 5 should also be set aside and merely because inconsistent decrees might result was no ground to set aside the whole of the decree. He also said that present proceedings were covered by the judgment of the single Judge of this Court in Civil Revision aforesaid. He said even if the principles of res judicata were held to be inapplicable, the judgment in Civil Revision could be a precedent to which this Court would be bound. He also said that provisions of O. 9, R. 13 were not applicable in his case as well as there was no decree which was against "him". Then he said that to be liberal in construing the provisions of O. 9, R. 13 was one thing but these should not be construed in such a way as to nullify the same. He said proviso to R. 13, had no application. Mr. Khanna took me through the pleadings of the parties to show that case against defendants 1 to 5 could not be sustained and it could not be said that defendants 1 to 5 were being sued in the alternative. Mr. Khanna said that defendant No. 6 has failed to show "sufficient cause" in both the applications. He lastly said that there was no provision in the Code where a firm of lawyers could represent the party and in the absence of any vakalatnama in his favor no lawyer could expect his name to appear in the daily cause list. Mr. Khanna said it was only under the Supreme Court Rules (O. 4, R. 20) that a partnership of advocates was recognised but not so in the Code or in the Original Side Rules of the High Court. He said if a party engages a firm of lawyers without properly authorising any particular lawyer, it must suffer the consequences of nonappearance.

25. There can be no doubt that the conduct of the case by counsel for defendant No. 6 has been grossly negligent. If the decree passed stands as of today, it would be over Rs. 1.5 crores. The Code does not recognise any firm of lawyers to represent a party. Appearance in court has to be made or done by the party in person or by his recognised agent or by pleader appearing, applying or acting, as the case may be, on his behalf. A lawyer who is authorised to appear on behalf of the party has to file his vakalatnama in his favor in the court. No lawyer as a partner of J. B. Dadachanji and Company or this firm itself ever filed any power of attorney in its favor by the party. It would not, Therefore, expect its name to appear in the daily cause list and no grievance can be made of that. As per practice on the Original Side of this Court dates are given in each case every day unless such case is in the category of "Others" or "Finals". The present case was not in either of these two categories. No responsible person in the firm was looking after this case and it was left to be followed up by Court Clerk. No one in the firm appears to have ever checked the progress of the case when various dates were fixed either before the Deputy Registrar or in the Court. No proper diary of case file is shown to have been maintained. The affidavits filed in support of the plea are said to have been filed on the basis of the record, but what is that record, has not been explained. These affidavits, to my mind, are

just value less. I do not find any sufficient cause at all explained by defendant No. 6 for its lawyers not to have appeared in court on the dates fixed. But then that is not the end of the matter. The law, as it stands today, is that the negligence of the lawyer appears to be irrelevant and if it is shown that the party has done everything possible for the conduct of the case by engaging a lawyer and giving him instructions, it cannot be denied justice on account of the negligence of its lawyer. Perhaps the law compounds the negligence of the lawyer at the cost of the other party as well. In Rafiq and Another Vs. Munshilal and Another, , the Supreme Court was considering the question of restoration of appeal which had been dismissed in default on account of nonappearance of the lawyer of the party who applied for restoration of the same. The Supreme Court observed as under (at page 704 & 705; All LJ 1981 :-

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job."

The court further observed as under: -

If we reject this appeal, then the only one who would suffer would not be the lawyer who did not appear but the party whose interest be represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned Advocate absented deliberately or intentionally. We have no material for ascertaining that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

26. In the present case, however, defendant No. 6 does not come from any rural area but certainly can be ignorant of court procedure though the suit was being tried on the original side, but then perhaps it was misled by its constituted attorney Crawford Bayley and Co. as the constituted attorney took upon itself the conduct of the case.

27. In Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , the Supreme Court observed that it had been making a justifiably liberal approach with reference to the expressions sufficient cause and held that

this expression was adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice and that being the life-purpose for the existence of the institution of the Courts. The court laid down six principles of which I find the following principles to be relevant in this case *State of Karnataka Vs. Kuppuswamy Gownder and Others*, :-

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a case would be decided on merits after hearing the parties.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice, being done because of a non-deliberate delay.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

28. In the initial stages this case was contested quite vigorously by defendant No. 6, and the matter was taken right up to the Supreme Court by defendant No. 6 against a decision in I.A. 3199 of 1982 which was filed u/ S. 20(2) of the Code. It is not that, Therefore, this defendant would lose interest in the case and would deliberately not appear. That is some thing, which I am not going to accept which though Mr. Khanna strenuously argued that default in non-appearance was not only deliberate but also willful.

29. Then, In *Vijay Kumar Nathan v. Tek Chand Jain*, 1988 (2) D L 452 a bench of this Court relying on the aforesaid two decisions of the Supreme Court, also observed that the approach of the court has to be to dispense even justice on merits in preference to the approach which scuttles a decision on merits.

30. In *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, , the court was concerned with the questions of bonafide or due diligence which considerations were material and relevant in dealing with application u/S. 14 of the Limitation Act. It said that in dealing with such an application, the court was called upon to consider the effect of combined provisions of S. 5 and 14 of this Act. The court then observed, "In construing S. 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favor of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed, The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has

been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. " It further held that it was, however, necessary to emphasize that even after sufficient cause had been shown a party was not entitled to the condensation of delay in question as a matter of right though the proof of a sufficient cause was a condition precedent for the exercise of the discretionary jurisdiction vested in the court by S. 5.

31. Could a lawyer take his client for a ride on a spacious plea of his negligence, is a question which does not fall for consideration in view of the law as prevailing now. In *Rafiq v. Munshi Lai* (supra), the Supreme Court directed the imposition of cost to be recovered from Advocate who absented himself. This I will consider at the time of setting the terms for setting, aside the ex parte decree. In one of the cases before me I had occasion to remark though not finally expressed that a lawyer should take up only as many cases which he can reasonably do in the best tradition of the profession. The occasion for this arose when a lawyer for getting an ex parte order set aside filed a statement showing that he had as many as 25 matters listed in various courts. Courts are not commercial institutions dispensing costs. In this case ex parte decree was passed on March 10, 1987 and when now I set aside the decree the clock will be set back for four years. In some cases it may be true that for negligence of a lawyer the party should not suffer, but that cannot be a uniform rule. Party must also suffer for engaging such a lawyer and the party can have its remedy in tort.

32. Now in this case, once the default in appearance was committed, it continues on all subsequent dates as there was no entry in the diary of the lawyers and every thing was forgotten about the case. Defendant No. 6, however, remained under the belief that its lawyers and the moment it was informed of the ex parte decree were conducting its case all this time; it took immediate steps in the matter. From the evidence on record Therefore, I am quite satisfied that as far defendant No. 6 is concerned there has been sufficient cause for setting aside the ex parte decree and also for condensation of delay in filing the application for setting aside the same, gross negligence of its counsel notwithstanding. But then again that is not the end of the matter. The question which still remains to be decided is: If the decree is to be set aside only against defendant No. 6 or even against defendants 1 to 5 as well and connected with this are the questions: if the plaintiff should have filed an appeal against the ex parte decree against defendant No. 6 when its suit against defendants 1 to 5 had been dismissed and if the plea that the decree could not be set aside qua defendants 1 to 5 is barred by res judicator or principles analogous to res judicata or by principles or precedence.

33. The plaintiff has sued defendants 1 to 5 on the one hand and defendant No. 6 on the other in the alternative. It has not been disputed if defendant No. 6 did not comply with the terms and conditions of letter of Credit in question and acted in breach of its terms, it could not be liable and, if not, defendants 1 to 5 would

be so liable. Mr. Khanna wanted me to go through the pain threadbare to show that the case of the plaintiff was in effect against defendant No. 6 only and the suit against defendants 1 to 5 could not have been decreed. I am afraid I will not go into this question at this stage. plaintiff has clearly stated in paras 16 and 17 of the plaint as under :-

"16. Since the defendants No.1 to 5 as also defendant No. 6 have denied their respective liability to repay to the plaintiff the amounts claimed by plaintiff and the plaintiff is in doubt as to the person from whom it is entitled to redress, the plaintiff has joined the defendants Nos.1 to 5 as well as defendant No. 6 as parties to this suit in order to determine the question as to which of the defendants i.e. defendants No.1 to 5 or defendant No. 6 is liable to the plaintiff and to what extent. The plaintiff further submits that if separate suits are brought against defendants Nos.1 to 5 and defendant No. 6 common question of law and fact would arise and that it has a right to relief against the defendants Nos.1 to 5 or defendant No. 6 in the alternative. The plaintiff has, Therefore filed this composite suit as it is entitled to do under O. 1, R. 7 of the Civil Procedure Code.

17. The plaintiff submits that the plaintiffs rights and contentions and remedies against defendants Nos.1 to 5 as herein mentioned and vice-versa."

34. Rule 8 of order: O. 1 of the Code is as under:-

"When plaintiff in doubt from whom redress is to be sought where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

35. Issue No. 7, framed in the suit, may also be reproduced herein again :-

"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?"

36. On this issue the court has held that it was not shown as to how the suit in the alternative was not maintainable. It held, Therefore, that the suit in the alternative was maintainable.

37. Having succeeded against defendant No. 6 even though ex parte, could the plaintiff still file an appeal against the judgment and decree dismissing the suit against defendants 1 to 5. To me it appears that no argument is needed to show that such an appeal would have been incompetent. When the plaintiff himself says that he is in doubt as to which of two set of defendants is liable and sues them in the alternative and the court holds that in the circumstances one set of the defendants is liable, it seems rather odd that still an appeal would be maintainable against the other set of defendants and the plaintiff still saying that he was yet in doubt. In *U Ps Sein v. Esmail Mohamed Bodi*, AIR 1935 Ran 397 the plaintiff filed a suit against two defendants for goods supplied and pleaded that one or in the alternative the other was liable. The plaintiff did not contend

that the defendants were jointly liable. The court granted a decree or full amount against one of the defendants. It was held that the plaintiff was precluded from asking for a decree against the other defendant. It was held that the plaintiff was precluded from asking for a decree against the other defendant.

38. On a similar point there is a bench decision of the Rajasthan High Court in Kanraj Vs. Vijai Singh, .

39. For one, Therefore, it does appear to me that plaintiff in the present case could not have filed an appeal and, two, he was quite satisfied with the decree against defendant No. 6 whom he had sued in the alternative and it cannot be held against him that he could have filed an appeal against dismissal of his suit against defendants 1 to 5 and he did not do that, and, three, he is precluded from filing any appeal as on the basis of his plea in the plaint he is not an aggrieved person. Some cases were cited before me with reference to relief claimed in the alternative under O. 6, R. 2 as well, though in the present case provisions of O. 1, R. 7 of the Code are applicable. In these judgments also distinction has been made between the primary relief and the other reliefs in the alternative. It has been held in these cases also that if the plaintiff read as a whole discloses that the plaintiff will be satisfied with either of the reliefs claimed, he cannot be allowed to appeal, if one of the reliefs is granted. Some of these cases are: R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, ; Union of India (UOI) Vs. Garbhu Sao and Another, ; Smt. Sunder Bai (died) by L. R. Kishorilal v. Anandi Lal died and after him Smt. Mohaniwali AIR 1983 All 23 Velayudhan Nair Gopalan Nair Vs. Ayyappan Pillai Madhavan Pillai and Others, ; and Manickam alias Manickavasagam v. Ramaswamy Gounder, 1981 (1) Mad LJ 163 In Sakku Bai Amman Vs. R. Babu Reddiar and Others, , even the appeal was held to be incompetent where the plaintiff had been granted alternative relief.

40. Now in collateral proceedings between the plaintiff and defendants 1 to 5 in another suit, a learned single Judge of this Court in Civil Revision No. 556/ 88 decided on August 31, 1989 and relying on the decisions in Ghannu Mal v. Bawa Sant Das, 1939 (18) Ind Cas 327 and Radhashyam Choudhury and Others Vs. Gourinath Roy and Others, , observed that on the application under O. 9, R. 13 of the Code filed by defendant No. 6 the decree qua defendants 1 to 5 could not be set aside. The learned single Judge in that revision was concerned with return of certain title deeds claimed by defendants 1 to 5 and plea of the plaintiff had been that in view of the pendency of the application under O. 9, R. 13 of the Code in this suit order for return of title deeds should not be made. The learned single Judge held that where the suit of the plaintiff was dismissed against one set of defendants and an ex parte decree was passed against another set and no appeal was preferred by the plaintiff against this set of defendants against whom the suit had been dismissed, even if an application for setting aside ex parte decree was allowed, it would ensure that defendant only and the dismissal of the suit against other set of defendants would not be set aside automatically. I

do not think these observations raise a bar of res judicata for one thing parties in both these cases are not the same and the issue which has been raised directly and substantially before me as not so in the revision before the learned single Judge. Observations of the learned single Judge at best are only obiter dicta and there is no binding force as such for me to follow the same. The matter was also not argued in depth before the learned single Judge in the Civil Revision, as reference to only two authorities in the judgment would show. In any collateral proceedings no court or bench can preempt another court or bench to give a decision on an issue, which arises directly, and substantially in the proceedings before the latter. The plea of resjudicata raised in the present case is negatived.

41. The most contentious question that now arises for consideration is, if the decree should be set aside only against defendant No. 6/ applicant, or also as against defendants 1 to 5. Defendant No. 6 in its application has not said anything on this score and is only concerned with its own problem. As a matter of fact it has said in so many words that defendant 1 to 5 had no locus stand to oppose its application. It is the plaintiff who has raised this plea that under proviso to R. 13 of O. 9 the decree should be set aside as a whole. Though there is nospecific issue on that but then no issue is required to be framed. It is for the court to see the nature of the decree and if it cannot be set aside only against the defendant applying it may be set aside against other defendants as well. The question that arises for consideration is of considerable importance. If the decree has to be set aside against the other defendants as well. Further can it be set aside only as regards those defendants against whom the decree is passed and cannot be set aside respecting those defendants 1n whose favor the decree is, i.e., the suit against them has been dismissed. The arguments of defendants 1 to 5, of course, is that the decree against all or any of the defendants can be set aside only if it is against all or any one of them and if the decree is in favor of any of the defendants 1t cannot be set aside under the proviso to R. 13 of O. 9. To me it appears that would be giving too literal a meaning to the proviso and it unnecessarily that way limits the scope and effect of the proviso which has to be given a meaningful interpretation for the ends of justice. The words "as against" cannot always be read as "against" and the words "as against" can also mean, "when compared with". In support of his submission Mr. Khanna relied upon a full bench decision of the Assam High Court in. Khagesh Chandra v. Chandra Kanta Barua AIR 1954 Ass 183 This is a majority judgment. In this case plaintiff sued two defendants for recovery of certain sum of money. First defendant pleaded payment and discharge of his share of the debt. His plea prevailed and the suit was dismissed against him. The other defendant did not appear and an ex parte decree was passed against him. He thereafter applied for setting aside of the ex parte decree under O. 9, R. 13. The court held that although there was on paper one decree in substance there were two decrees, one against the defendant dismissing the suit on merit and against other decreeing the suit ex parte. It was held that court had no jurisdiction in any case to set aside the whole decree and direct that entire suit should be restored to its

file to the prejudice of the first defendant who had successfully contested the plaintiff's claim and when plaintiff himself had preferred no appeal against that part of the decree. It must be noticed that in this suit the plaintiff had made both the defendants jointly and severally liable. In his dissenting judgment, Deka J. was of the view that the only point that required consideration was whether the dismissal of the suit as against any defendant in the hearing in which an ex parte decree was passed against the rest, takes the case outside the scope of proviso to R. 13. In his opinion there was nothing in the words of the statute to imply such a distinction. He held that when the nature of the case demanded that the suit should be restored in its original form to give relief to the aggrieved party whosoever he might be, it would make no difference whether the suit was dismissed or decreed against the defendants who appeared on the first hearing and even contented. Deka J. said that he was inclined to give wider connotation to the word decree as defined in the Code itself. He held as under :-

"What is to be considered is not whether the plaintiff is estopped from claiming further 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. O. 9, R. 13, Civil P.C. 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."

42. In *Ghannu Mal v. Bawa Sant Das*, 1913 (18) I. C 327 (Punjab Chief Court). there were two defendants and suit was dismissed against one defendant and an ex parte decree was passed against the second defendant. This defendant applied for setting aside the ex parte decree against him. The lower court set aside the decree against the first defendant as well. The Punjab Chief Court held that this order was manifestly wrong and prejudicial to the first defendant as the proviso to R. 13 did not apply to the case of a defendant against whom the suit had been dismissed on the merits without appeal by the plaintiff. The report does not show as to in which capacity the two defendants had been sued. In *Radhashyam Choudhury v. Gourinath Roy*, AIR 940 Cal. 9 the plaintiff had sued four persons for rent. There were two set of defendants, one set comprised of defendants 1 to 3 and the other defendant No. 4. The suit was decreed against defendant No. 4. He applied for setting aside of the ex parte decree. To these proceedings first sets of defendants were not made parties, but the learned Judge ordered retrial of the whole of the case. On retrial the suit was decreed against all the defendants. It was held that the first set of defendants did not consent to any order for setting aside the decree, which had been passed in their favor, and since they were also not parties to the proceedings for setting aside the ex parte decree, they could not have filed art appeal against the order of

retrial. It was held that since the suit had already been dismissed against first set of defendants no decree could be passed against them in the subsequent suit. It will be, thus, seen that in this case first set of defendants were not party to the proceedings under O. 9, R. 13 of the Code, while it is so before me in these proceedings.

43. In *Ziley Singh v. Munshi*, 1969 (67) All. LJ 804 a division bench of the Allahabad High Court held that proviso to O. 9, R. 13 of the Code did not empower the court to set aside a decree dismissing the suit on merits against a defendant, on an application O. 9 R. 13 of another defendant against whom the decree had been passed ex parte. In this case also there were two sets of defendants. The suit was for possession against first set and against the second set the relief was that in case the plaintiff was held not entitled to the relief against the first set, of refund of the sale consideration with interest. The suit against the first set was dismissed on merits but was decreed ex parte against the second set for recovery of a certain amount. The second set of the defendants filed for setting aside of the ex parte decree and the learned trial court not only set aside the ex parte decree against the second set of defendants but also set aside the decree passed in favor of the first set. The court observed that there were three possible classes of cases in which an application under O.9, R. 13 could be made and these were:-

- (i) where the suit has been decreed ex parte against all the defendants;
- (ii) where the suit has been decreed on merits against some defendants and ex parte against the others; and
- (iii) where the suit has been dismissed on merits against some defendants and has been decreed ex parte against the remaining. The court was, of course, concerned with the case which fell in the third class and the question was whether in such a case the court had jurisdiction to set aside the decree passed in favor of some defendants on merits, while setting aside the ex parte decree passed against the other defendants. After dealing with two earlier cases of the court which took different views and also considering the full bench Assam case and other cases, the Court observed as under (at page 808; 1969 ALJ:-

"We agree with the view taken in these cases that the proviso to O. IX, R.13 does not empower the court to set aside a decree dismissing the suit on merits against a defendant, on an application under O. IV, R. 13 by another defendant against whom the decree has been passed ex parte. Further, on the facts of the case before us, it is clear that, though on paper, the decree passed by the trial court is one decree, in substance, it amounts to two decrees one in favor of defendants 1 to 5 and the other against defendants Nos. 6 and 7. The reliefs, which the plaintiffs prayed for against these two sets of defendants, were separate and distinct reliefs. There can be no difficulty in setting aside the ex parte decree against defendants Nos. 6 and 7 and leaving the decree passed in favor of defendants Nos.1 to 5 intact."

44. It is not necessary to multiply judgments on this point and at this stage itself, reference may be made to some other decisions taking a different view. In *Seth Loon Karanv. The P.C.I. Federation Ltd.* 1958 All. LJ 367, the plaintiff purchased certain number of bales of yarn from the first defendant who was a partnership firm of which second to fourth defendants were the partners. 5th defendant was a financier of the first defendant and was proprietor of 6th defendant and was having custody of the bales. First defendant asked the 5th defendant to deliver the bales to the plaintiff. 5th defendant, however, delivered the bales but these were short. The plaintiff filed a suit for delivery of the balance of the bales. The suit was ex parte against defendants 1 to 4 and ex parte decree was passed against them. It was, however, dismissed against defendants 5 to 6 on merit. Defendants 1 to 4 filed an application for setting aside the ex parte decree and were able to show sufficient cause for their non-appearance. The question arose whether the decree was to be set aside in its entirety. Defendants 5 and 6 contended that since the suit had been dismissed against them on merit and there was no decree against them it could not be set aside. The court negatived the contention of defendants 5 and 6 and set aside the decree in its entirety. It was observed that since there was a dispute between two set of defendants inter se and the question of fact and law of one set of defendants could not but have a bearing on the other set and that under the circumstances the whole of the decree could be set aside and not merely that part of the decree which was against the defendants 1 to 4. This is how the court considered the matter (at page 371; 1958 ALJ):

We have given our earnest consideration to the facts set out in the present plaint and we are of opinion that the setting aside, of the decree as against defendants 1 to 4 who had made the application under O. IX, R. 13 rendered it necessary in the interests of justice, particularly having regard to the disowning of the liability inter se between the two sets of the defendants, as averred by them in their defenses, that the whole decree should be reopened. "

45. The court also expressed the view that ordinarily an ex parte decree can, and should, be set aside only against the defendant applying. But if a decree is indivisible, or where the liabilities of the defendants as set out in the plaint are not separable, the decree in view of the proviso to O. IX, R. 13, CPC. may be set aside in to and not in part. This bench decision of the court, it appears, was not referred to in the case of *Ziley Singh v. Munshi*, 1969 All LJ 804 There are other cases, which are cited at the bar wherein it was held that if the decree was one and indivisible it might be set aside against the order defendants also notwithstanding that the suit had been dismissed against such other defendants on merits. I will, however, refer to one such case and that is of the Bombay High Court in *Vasant Jaiwantrao Mahajan v. Tukaram Mahadaji Patil* AIR 1960 Bom. 485 In this case the court observed that the proviso to O. 9, R. 13 contemplated cases where the decree was of such a nature that it could not, be set aside against one defendant only and that it was the nature of the decree that was the determining factor and not the reasons behind the decree. The court held as

"For the application of the proviso to O. 9, R. 13, it is not sufficient that there was possibility of inconsistent decrees but what is necessary is that the original decree, which is being set aside at the instance of only one defendant, is of such a nature that it cannot be set aside as against that defendant only; if there is such an infirmity in the original decree, then only action would be taken under the proviso."

46. Though the ordinary rule would be that where an ex parte decree is passed against other defendants, it should be set aside only against those defendants who apply for setting aside the same but the proviso enables the court to set it aside even as against other defendants who had appeared and contested the suit, even if the nature of the decree requires that it should be set aside against all other defendants as well. The object of the proviso is to provide for cases where it may be necessary for the ends of justice to set aside the decree not only against the defendant applying to have the same set aside but also against other defendants as well. There are two views one is that if the decree is one and indivisible it must be set aside in its entirety and not simply against the party or parties who had made applications for setting aside the same and this would be irrespective of the fact whether the decree has been passed in favor of some of the defendants. The other view is that if some defendants have contested the suit and it has been dismissed on merits against them, such a decree is not against them and so the proviso would not empower the court to set aside the same. This, to my mind, seems to be the extreme view to take. I will opt for the first view.

47. In the present case, the liability of defendants 1 to 5 is on the one hand and defendant No. 6 is in the alternative. It will also be seen that liability of these two sets of defendants as claimed in the plaint and the defense raised in their respective written statements are very much inter-woven and inextricably mixed up. It appears to me if it is held that the documents were in order and that defendant No. 6 submitted a certificate of compliance to the plaintiff and had observed due care in negotiating the same, it could be absolved from its liability and in that event defendants 1 to 5 might be held liable to pay the amount in suit, and, on the other hand, if it is held that defendant No. 6 failed to perform its functions well and did not observe due care in negotiating the documents submitted by the beneficiary, then in that case defendant No. 6 might not be discharged from its liability. Moreover, Issue No. 1 related to the question whether defendant No. 6 complied with the terms of the Letter of Credit and Issue No. 2 related to the question whether defendant No. 1 wrongly failed to retire the documents presented to the plaintiff. If reference is made to the findings of the judgment now sought to be set aside, the court observed that for the reasons recorded first issue was decided in favor of the plaintiff and at the same time held on issue No. 2 that in view of the decision of issue No. 1 defendants 1 to 5 were justified in refusing to retire the documents. To my mind

this is one indivisible finding, namely, that since defendant No. 6 is liable, Therefore, defendants 1 to 5 are not liable. There is substance in the argument of Dr. Ghosn that this indivisible finding would be decree is defined in S. 2(2) of the Code. I have already held that suit in the alternative is maintainable and plaintiff could not have filed a n appeal against the decree dismissing the suit against defendants 1 to 5. In Full Bench Assam case the plaintiff had not sued the defendants in the alternative and the court would seem to be of the opinion that appeal could have been filed against that part of the decree dismissing the suit and which appeal in fact had not been filed. This is not so in the case before me. To me it appears that the view taken by Deka J. would be correct view.

48. Further considering the questions of the case, if decree is set aside only against defendant No. 6 and ultimately it is found defendant No. 6 is not liable, then the prejudice, which will be caused to the plaintiff, would be irreparable. As the case is pleaded, either defendants 1 to 5 or defendants No. 6 would be liable. It is not that I am considering the question of conflict of decrees that may also result, but the amount of prejudice that is bound to be caused to the plaintiff. If case of defendants 1 to 5 is correct, I see no reason why it should feel shy of contesting the case afresh and the court can certainly compensate this set of defendants with costs for the expense and inconvenience that these defendants would have to undergo when the trial starts afresh. But then equities are to be balanced and order passed may sub serve the ends of justice. The view, which I am taking, would certainly take some more time for the trial to conclude. But then if the plaintiff succeeds ultimately, it can be awarded interest for all this period.

49. I would, Therefore, hold that plaintiff has proved sufficient cause in both the applications and the ex parte decree has to be set aside in its entirety. Then the question arises as to on what terms. Defendant No. 6 is a bank and it is nobody"s case that if decree is passed against this defendant, plaintiff would not be able to execute the same and recover the amount. I agree with Mr. Gupta that it is not a case where I should direct payment into Court of the suit amount. In this connection Mr. Gupta referred to a decision of this Court in Dharm Vir Singh Vs. Goodwill India Ltd. and Others, , which in turn relied upon a bench decision of the Rajasthan High Court in Chhagan Raj and Others Vs. Sukan Mal and Another, . I think imposition of cost only should serve the ends of justice and that to make up for the expense and inconvenience that the plaintiff and defendants 1 to 5 have undergone for the fault of defendant No. 6. I do not think I should order that cost should be recovered from the counsel for defendant No. 6 as done by the Supreme Court in Rafiq v. Munshi Lal (supra). This will be for defendant No. 6 and its counsel to decide as to who bears the cost.

50. As noted somewhere above, as of today the decretal amount would be over Rs. 1.50 crores and now that judgment and decree is being set aside the clock will be set back by almost five years. I, Therefore, impose cost of Rs. 25,000/- on defendant No. 6, this being conditional, out of which Rs. 15,000/- shall be

payable to the plaintiff and Rupees 10,000/ - to defendants 1 to 5. I further direct that the trial will henceforth proceed from the stage of framing of issues. No further issue on the preliminary objections raised by defendant No. 6 in his written statement shall be allowed. In fact it was conceded by Mr. Gupta that suit may be tried on the basis of the issues already framed. Defendant No. 6 has raised a preliminary objection that suit is barred by limitation without, however, giving any particulars as to how it is so. This objection is, Therefore, overruled. Trial will proceed with utmost expedition. One date will be fixed before the Deputy Registrar for giving further opportunity to the parties to file documents and for their admission and denial. Thereafter, matter will be listed in Court for fixing dates of trial.

51. The applications are allowed in the terms abovementioned. Judgment and decree of date March 10, 1987 as well as ex parte proceedings against defendant No. 6 are set aside.

Order accordingly.