

(2000) 11 DEL CK 0097

In the Delhi High Court

Case No : F.A.O. (OS) No's. 78 and 100 of 1991

Mehta Brothers and Others

APPELLANT

Vs

Bank of India and Another

RESPONDENT

Date of Decision : 09-11-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2000) 11 DEL CK 0097

Hon'ble Judges : Mukul Mudgal, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Rajiv Sawhney, Sanjeev and Kajal Chandra, for the Appellant; Vikas Mohanty, for respondent No. 1, L.R. Gupta and S.K. Kaul and Deepa Dass, for the Respondent

Judgement

This Judgment has been overruled by : Bank of India Vs. Mehta Brothers and Others, (2008) 4 BC 485 : (2008) 10 JT 471 : (2008) 12 SCALE 680 : (2008) 13 SCC 466

Devinder Gupta, J.—These two appeals arise out of common order passed by learned Single Judge on 28.2.1999 allowing the application of defendant No. 6 for setting aside the ex parte decree and condoning the delay in filing the application for setting aside the ex parte decree.

2. In the suit filed by Bank of India out of which this appeal has arisen the status of parties is that Bank of India, the appellant in FAO(OS) No. 100/91 is the plaintiff; M/s. Mehta Brothers and others, the appellants in FAO(OS). No. 78/91 are defendants 1 to 5 and Deutsche Bank Asia, formerly known as European Asian Bank, respondent No. 2 in FAO (OS). No. 78/1991 and respondent No. 6 in FAO(OS). No. 100/91 is defendant No. 6.

3. Facts in detail have been mentioned by the learned Single Judge in the impugned order and need not be stated again by us. However, briefly some of the important facts are being stated. A suit for the recovery of Rs. 91,58,480.09

was filed by the plaintiff against the defendants on 30.8.1982 inter alias alleging that on the request of defendants 1 to 5 on 26.6.1979 the plaintiff established an irrevocable Letter of Credit for US \$ 6,10,900/- (equivalent to about Rs. 50,00,000/-) in favor of M/s. Bentrex & Co., Singapore; the 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 1.9.1979 the beneficiary drew a site draft for an amount of Us\$ 6,10,740.00 and presented the same along with other documents to defendant No.6 for negotiation; on 4.9.1979 defendant 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 plaintiff and called upon the New York Branch of the plaintiff for reimbursement under the said credit; the plaintiff alleged that this was done without furnishing the necessary certificate of compliance of credit terms, which were required under the credit. On 5.9.1979 New York Branch of the plaintiff on receipt of the aforesaid claim, in good faith paid on account/without prejudice the said amount of Us \$ 6,10,740.00; on 13.9.1979 the plaintiff received the documents from defendant 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 14.9.1979 by a telex the plaintiff pointed out to defendant No. 6 some of the discrepancies in the documents and stated that documents were being held at its risk and responsibility; defendant No. 6 was requested to reverse the reimbursement already claimed by it from New York Branch of the plaintiff; on the same day defendant No. 6 by its telex to the plaintiff rejected plaintiff's claim alleging that the discrepancies were of minor nature and all the terms and conditions of letter of credit were complied with: on 14.9.1999 defendant 1 to 5 also did not honour and retire the documents under the Letter of Credit on the ground that there were discrepancies in the documents and they were not at all in accordance with the terms of letter of credit. The plaintiff further alleged that defendant No. 6 failed and neglected to reply and reimburse to the plaintiff the amount received by it from the New York Branch of the plaintiff; defendant No. 6 had failed to furnish to the New York Branch of the plaintiff the Certificate of Compliance in terms of the said Letter of Credit, for that reason also defendant No. 6 acted in breach of its obligation under the letter of credit to do so and was, Therefore, not entitled to claim and retain the payment received thereunder; despite repeated requests and reminders defendant Nos. 1 to 5 also did not honour and retire the said documents and went on contending that there were discrepancies in the documents; Defendant 1 to 5 also stated that their claim with Insurance Company was likely to be finalised soon and the amount payable there under shall be received by the plaintiff directly from the Insurance Company for the adjustment of the amount due and payable by them under the said Letter of Credit. As defendants No. 1 to 5 as also defendant No. 6 denied their respective liability to repay to the plaintiff the amounts claimed by plaintiff and the plaintiff was in doubt as to the person from whom it was entitled to redress, the plaintiff

joined defendants Nos. 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 defendant i.e. defendant No. 1 to 5 or defendant No. 6 liable to the plaintiff and as to what extent; If separate suits were brought against defendant Nos. 1 to 5 and defendant No. 6 common question of law and fact would arise, Therefore, the plaintiff had a right to relief against the defendants Nos. 1 to 5 or defendant No. 6 in the alternative.

4. On the allegations, aforementioned the plaintiff on 30.8.1992 filed suit in the Original Side of this Court for recovery of Rs. 91,58,480.08 being the amount of Letter of Credit and Interest. Decree was claimed primarily against defendant No. 6 and against defendants 1 to 5 in the alternative in case the Court would come to the conclusion that defendant No. 6 was not liable to pay any amount to the plaintiff. The prayer clause of the plaint reads:-

(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 until 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 further and other reliefs which this Hon''ble Court may deem fit. On 24.7.1984 written statement on behalf of defendant No. 6 was filed, which was duly signed for and on behalf of defendant No. 6 by Shri D.D. Udeshi, Constituted Attorney of defendant No. 6. On 16.8.1994 written statement on behalf of defendants 1 to 5 was filed. From 6.9.1982 to 13.7.1984 when the suit was taken up either in Court or before the Joint Registrar, defendant No. 66 was represented by its counsel. However, from 3.8.1984 to 29.4.1985 when on various dates the suit was taken up before the Joint Registrar the other parties were duly represented, namely, the plaintiff and defendants 1 to 5 but nobody appeared on behalf of defendant No. 6. On 21.5.1995 the suit was posted before the Court for framing issues. plaintiff and defendants 1 to 5 were duly represented. As nobody appeared on behalf of defendant No. 6, it was proceeded against ex parte. Issues were not framed on that date. The suit was adjourned to 30.7.1985 for framing of issues, which ultimately were framed on 6.8.1985. The suit was set down for trial.

5. On 18.2.1987 and 19.2.1987 evidence led by the plaintiff against defendants No. 1 to 5 and ex parte against defendant No. 6 was recorded. Defendants 1 to 5 also led their evidence. Arguments were heard on 23.2.1987. On 10.3.1987 the

suit was decreed ex parte against defendant No. 6 with costs. The suit against defendants 1 to 5 was dismissed on merits and they were left to bear their own costs. The plaintiff did not file any appeal in so far as that part of the decree by which its suit against defendants 1 to 5 had been dismissed.

6. On 4.4.1988 two applications were filed by defendant No. 6, namely, IA. 1655/88 under Order 9 Rule 13 CPC praying for setting aside the ex parte decree dated 10.3.1987 and IA. No. 1656/88 u/s 5 of the Limitation Act praying for condoning the delay, which had occurred in filing the application for setting aside the ex parte decree.

7. By the impugned order passed on 28.2.1991 learned Single Judge allowed both the applications filed by defendant No. 6. In other words, delay in filing the application for setting aside ex parte decree was condoned. Ex parte decree against defendant No. 6 was also set aside subject to payment of Rs. 25,000/- as costs out of which Rs. 15,000/- were payable to the plaintiff and Rs. 10,000/- to defendants No. 1 to 5. While setting aside the ex parte decree against defendant No. 6, by the same order, learned Single Judge also set aside that portion of the decree whereby the suit on merits had been dismissed against defendants 1 to 5. In doing so learned Single Judge relied upon the proviso to Rule 13 of Order 9 of the Code. Feeling aggrieved against the impugned order, defendants 1 to 5 have filed FAO(OS). No. 78/91. The plaintiff has also filed FAO(OS). No. 100/91.

8. We have heard learned counsel for the parties and were taken through the entire record.

9. The plaintiff Bank in its appeal [FAO(OS). No. 100/91] has questioned the legality and validity of the impugned order condoning the delay and setting aside the ex parte decree against defendant No. 6. A preliminary objection has been raised by learned counsel for defendant No. 6 about maintainability of the said appeal by the plaintiff Bank to challenge the impugned order on the ground that the plaintiff having accepted the costs is estopped to challenge the same.

10. Relevant facts as regards the aforementioned preliminary objections are that pursuant to the directions of learned Single Judge made in the impugned order learned counsel on behalf of defendant No. 6 tendered the costs by means of two cheques of Rs. 15,000/- and Rs. 10,000/- to the plaintiff and defendants 1 to 5 respectively. Defendants 1 to 5 did not accept the costs tendered to them. The plaintiff, however, accepted the costs without any protest or demur. The fact that the costs were accepted by the plaintiff when tendered on behalf of respondent No. 6, pursuant to the impugned order is not disputed. It is also not disputed that the costs were accepted much prior to the institution of appeal by the plaintiff.

11. The other appeal [FAO(OS) 78 of 1991] on behalf of defendants 1 to 5 primarily is on the ground that the judgment and decree dated 10.3.1987 was not an ex parte decree against defendants 1 to 5. It was a decree of dismissal of the plaintiff's suit and was a separate and independent decree. It was passed on

merits after due contest and on recording of evidence. Such a decree could not have been set aside, while deciding the application of defendant No. 6 filed under Order 9 Rule 13 of the Code. It could have been set aside only by an appellant court had an appeal been filed by the plaintiff Bank, which it did not file. In addition the other ground to challenge the impugned is that in case the above plea of defendants 1 to 5 is not accepted, in that case they are entitled to challenge that part of the impugned order of learned Single Judge on merits by which the ex parte decree has been set aside against defendant No. 6. No sufficient cause had been shown by defendant No. 6 for setting aside the ex parte decree. There was a delay of 13 months in applying for setting aside the ex parte decree, which had not been explained satisfactorily.

12. In addition to raising preliminary objection about maintainability of the appeal filed by the plaintiff Bank, Shri L.R. Gupta, appearing on behalf of defendant No. 6 supported the order of learned Single Judge contending that after Learned Single Judge came to the conclusion about the nature of the decree he was perfectly justified in setting it aside as against defendants 1 to 5 also. According to him, the criteria for setting aside the ex parte decree against the defendants applying for the same would be the nature of the decree and not the fact that the same on contest had been passed in favor of the other defendants. Nature of decree being indivisible, effort of the Court would be not to pass any contradictory decrees, Therefore, learned Single Judge was justified in having set aside the entire decree. However, Mr. Gupta submitted that defendant No. 6 was not otherwise concerned as to whether decree of dismissal of suit against defendants No. 1 to 5 be or be not set aside. Primarily concern of defendant No. 6 is that it be set aside only against it so as to enable defendant No. 6 to contest the plaintiff's suit on merits.

13. In so far as (FAO(OS) 100791, the appeal of the plaintiff Bank is concerned that whether or not on acceptance of costs the Bank would be estopped to challenge the impugned order, it will be necessary for us to see the nature of the impugned order that whether imposition or payment of costs was made a condition for setting aside the ex parte decree.

14. In *Bijendra Nath Srivastava (dead) through LRs. v. Mayank Srivastava and Ors.* 1994 (6) SCC 177 it was held that the principle of estoppel, which precludes a party from assailing an order allowing a petition subject to payment of costs, where the other party has accepted the costs, in pursuance of the said order, applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequences of being deprived of the right to challenge the order on merits. It was further held that this principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed not costs have been awarded independently.

15. By the impugned order while allowing application for condensation of delay

and setting aside ex parte decree learned Single Judge specifically made it clear that imposing costs of Rs. 25,000/- on defendant No. 6 was a condition precedent. The order says:

"I, Therefore, impose cost of Rs. 25,000.00 on defendant No. 6. this being conditional, out of which Rs. 15,000/- shall be payable to the plaintiff and Rs. 10,000/- to defendants 1 to 5."

16. It was also not argued before us on behalf of the plaintiff Bank that imposition of costs was not a condition precedent in allowing the application of defendant No. 6. Applying the principles laid down in Bijendra Nath Shrivastava case (supra) to the facts of the instant case in which the plaintiff Bank had accepted the costs without any reservation, much prior to the filing of the appeal will be precluded from challenging the impugned order on merits. The appeal preferred by the plaintiff Bank [FAO (OS). No. 100/91] is thus liable to be dismissed as not maintainable due to applicability of the principle of estoppel. Ordered accordingly.

17. We now take up the other appeal of defendants 1 to 5. Learned Single Judge while proceeding to set aside the ex parte decree examined the question that whether the decree be set aside only against defendant No. 6 or as against defendants 1 to 5 also. Learned Single Judge was aware of the fact the defendant No. 6 in its application had not said anything on this aspect since it was concerned only with its own problem.

18. Learned Single Judge, however, proceeded to examine the question as in his opinion it squarely arose because the plaintiff Bank had raised this plea that under proviso to Rule 13 of Order 9 CPC decree should be set aside as a whole. On reference to a number of decisions learned Single Judge opined that two views had emerged; firstly 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 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 was that if the suit has been contested by some defendants and it has been dismissed on merits against them, such a decree is not against them, so the proviso would not empower the Court to set aside the same. This according to learned Single Judge was the extreme view to take. Accordingly he preferred the first view and held that though the ordinary rule would be that where ex parte decree is passed against other defendants, it should be set aside only against those who apply for setting aside the same but the proviso enables the Court to set aside the ex parte decree as against the other defendants, who had appeared and contested the suit, when nature of decree requires that it should be set aside against all other defendants as well. In his view 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 defendants applying to have the same set aside but also against other defendants as well. Learned Single Judge brushed aside the submission on behalf of defendants 1 to 5 that decree against

all or any of the defendants can be set aside only if it is against all or any one of them and in case decree is in favor of any of the defendants it cannot be set aside in exercise of powers under proviso to Rule 13 of Order 9 CPC.

19. Learned counsel for defendant 1 to 5 is aggrieved with this part of the order that without assigning any reason learned Single Judge opted for the first view and not for the second view.

20. Learned Single Judge having opted for the first view proceeded to examine the facts of the case as regards the applicability of the said view. While doing so he observed that liability of defendants 1 to 5 on the one hand and of defendant No. 6 on the other was in the alternative. But in his view the liability of the two sets of defendants as claimed in the plaint and for the defense which had been raised in their respective written statements was very much interwoven and inextricably mixed up. He proceeded to observe that in case it held that defendant No. 6 was not liable then in that even defendants 1 to 5 might be held liable to pay the amount and on the other hand if it be held that defendant No. 6 had failed to perform these functions and did not observe due care in negotiating the documents in that case defendant No. 6 might be held liable and in that eventuality defendants Nos. 1 to 5 might have to be absolved of their liability. Therefore, he proceeded to set aside the decree of dismissal of suit as against defendant No. 1 to 5 also.

21. Another ground, which prevailed with learned Single Judge in setting aside the entire decree is that in case decree is set aside only against defendant No. 6 and ultimately it is found that defendant No. 6 is not liable, in that case prejudice caused to the plaintiff would be irreparable. Therefore, on the ground of prejudice being caused to the plaintiff, he felt that it was necessary and desirable that decree must be set aside against defendants 1 to 5 also.

22. The above reasoning of learned Single Judge was seriously assailed on behalf of defendants 1 to 5 urging that considering the nature of suit, it was not at all incumbent that the suit as of necessity must be decreed either against defendant No. 6 or against defendants 1 to 5. The third possibility was not at all examined and cannot be ruled out that may be in a given situation the entire suit of the plaintiff may be dismissed on various pleas, which might be raised by two sets of defendants in their respective written statements or it may be that the suit may be decreed as against one set of defendants and dismissed as against the other. It was vehemently contended by Mr. Sawhney appearing for defendants 1 to 5 that the suit had been dismissed against defendants 1 to 5 on merits after due trial in which the plaintiff had full opportunity of leading evidence as against defendants 1 to 5, who alone had contested the same. The plaintiff Bank felt contended in leading whatever evidence it thought fit and proper and then felt satisfied with the decree of dismissal of its suit against defendants 1 to 5. For that reason alone it was not thought proper by the Bank to challenge the decree of dismissal of its suit against defendants 1 to 5 in appeal. Now in case the Court had come to the conclusion that ex parte decree against defendant No. 6 was

liable to be set aside, it was not at all necessary to set aside, it the entire decree and thereby permit the plaintiff to prove afresh its suit against defendants 1 to 5 by leading fresh evidence, which the plaintiff Bank never thought of earlier, when it had that opportunity. Suit after setting aside ex parte decree against defendant No. 6 can very well, proceed independently and has to be tried on the basis of the pleas raised inter se the plaintiff and defendant No. 6.

23. Prior to coming into force of the Civil Procedure Code, 1908 corresponding provision for setting aside ex parte decree in the Code of 1882 was Section 108. Section 108 of the Code of 1882 was in the following terms:-

"In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree 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.

24. There has been a divergence in judicial opinion prior to 1908 on the question whether ex parte decree could be set aside against other defendants also while setting aside the ex parte decree passed against the defendant applying for it. We need not refer to the decisions and the views, which prevailed prior to coming into force the Code of 1908. Suffice it to say that in order to set at rest the said controversy, first proviso to Rule 13 of Order 19 was inserted in the Code of 1908 in addition to the words "as against him" after the words "shall make an order setting aside the decree". In other words when the present Code of 1908 was enacted Section 108 of 1882 Code was adapted with some alterations, namely, addition of words "as against him" after the words "setting aside the decree" and by adding the first proviso. Thus the controversy was set at rest making it clear that a decree can be set aside in favor of a defendant against whom it had been passed ex parte. The Special Committee, which had been appointed to consider the amendment of 1882 Code had explained in its report the object of inserting the words "as against him" as follows:-

"The Committee have inserted the words to make it dear that a decree can only be set aside in favor of a defendant against whom the decree has been made ex parte. There is some conflict of judicial authority upon this point and the Committee think that the matter may be set at rest in this sense."

25. Thus the proviso enlarges the power of the Court to set aside the decree even against all or any of the other defendants where the decree is of such a nature that it cannot be set aside as against the applying defendant(s).

26. The Select Committee inserted the first proviso and gave the following reason in doing so:-

"We think it necessary to provide specially for cases in which it may not be

possible to set aside the decree against the applicant only."

27. Rule 13 of Order 9 of the Code as it stands today is as follows:-

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

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

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Explanation : Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground Other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

28. A bare reading of the aforementioned provision makes it clear that the applicability of the proviso is dependent upon not on the question as to whether the decree is in favor or against a contesting defendant "but on the nature of decree i.e. "where the nature of decree is such" that it cannot be set aside as against the defendant applying for setting aside only than in that case it may be set aside against all or any of the other defendants. Right to set aside ex parte decree is conferred expressly only upon the party who applies to set aside the decree. Nature of decree would be the deciding factor while considering the question whether decree is to be set aside as a whole or against that defendant only, who has applied for setting aside. There are some classes of case in which decree cannot be set aside only as against the defendant applying for setting aside against other defendants also. Such classes of cases would be where the decree is joint and indivisible or where the decree proceeds on the ground common to all the defendants or when the suit result in two in consisting decrees if the ex parte decree be not set aside against the other defendant also.

29. Even after insertion of proviso there has been a conflict of opinion. One view has been taken by a Full Bench of Assam High Court in Khagesh Chandra v. Chandra Kanta Barua and Anr. AIR 1964 Gauhati 183. The Full Bench analysed various cases on the conflict as existed prior to the amendment of 1908 and thereafter also, it was noticed that there were two cases only; one before amendment of 1908 Code and another subsequent to it where the Court had

gone to the extent of setting aside a decree, which was in favor of some of the defendants, dismissing the plaintiff's claim against them. One of the said decision prior to amendment was of Calcutta High Court in re Hari Dass Karmakar 5 CLJ 202 and the other decision is that of Allahabad High Court in Ram Baran Vs. Bodh Ram and Others, . There Judges comprising Full Bench gave their separate opinion in Khagesh Chandra's case (supra) on the question, which was referred to the Bench i.e. whether the Court had jurisdiction under Order 9 Rule 13 CPC to set aside a decree under which the suit had been dismissed on contest against one of the defendants and decreed ex parte against the others; and thereby restore the whole suit for fresh trial against both the defendants. Sarjoo Parsad, C.J. in his separate decision held that the proviso to Rule 13 of Order 9 CPC does not confer any jurisdiction upon the Court to reverse a decree dismissing the suit of the plaintiff as against some of the defendants imperiling thereby the interest of those defendants also by re-opening the whole suit. The Rule confers a privilege upon the defendants against whom an adverse decree has been passed ex parte and does not impose a disability on them and that also at the instance of the co-defendant. In the absence of any appeal by the plaintiff, to whose prejudice the decree has been passed on merits and under which the successful defendant has acquired a valuable right, it cannot be held that in a collateral proceeding, at the instance of a co-defendant the decree can be set aside. The reasons for holding so, which prevailed with Sarjoo Prasad, C.J. are to the following effect:-

"The privilege given under the Rule for applying for setting aside the ex parte decree is to the defendant against whom an ex parte decree has been passed. Emphasis lies on the word "against". This privilege can be availed by the defendant, in appropriate cases mentioned in the Rule and if the Court is satisfied, the decree against that defendant may be set aside and the suit ordered to be reheard. In the context, it appears to me that the suit means the suit in so far as it effects the liability of that particular defendant and not the whole suit, including even such defendants in whose favor the suit may have been dismissed and their liability determined The rule is subject to the proviso which enlarges the power of the Court to set aside the decree even against all or any of the other defendants where the decree is of such a nature that it cannot be set aside as against the applying defendant only. If the word "decree" or "suit" in the first part of the Rule referred to the "whole suit" and the "whole decree" then the words "as against him" and the proviso would be redundant, because in that event, in any case where the application under the Rule succeeds, the whole decree will have to go and the whole suit will have to be re-tried."

30. While giving his own reasons for not accepting the views, which had been expressed, prior to the Amendment of 1908, by Calcutta High Court in Hari Das Karmakar's case (supra) and the view of Allahabad High Court in Ram Baran's case (supra), Sarjoo Parsad, C.J. observed that the decisions being on the proviso to the Rule 13 of Order 9 C.P.C., which relate to instances where the suit

had been decreed on contest or ex parte against some of the defendants have been succinctly classified under the following two board heads in the well known Commentaries of Mulla:

"I. Where the decree is ex parte against all the defendants, but the application to set aside the decree is made only by some of them.

II. where against some of the defendants, the decree is passed ex parte, but against others who have appeared and defended the suit, it is passed on the merits, and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed ex parte"

31. Sarjoo Parsad, C.J. then observed that scrutiny of all cases under the above two classifications will bear out the result that the proviso to Rule does not confer any jurisdiction upon the court to reverse a decree dismissing the suit of the plaintiff as against some of the defendants.

32. Ram Labhaya, J. in his separate judgment on an analysis of the decisions cited before the Bench opined that the Legislature did not intend to authorise setting aside of an order dismissing a suit on contest against a defendant or defendants even though it is incorporated in a decree sheet which embodied an ex parte decree against others. According to Ram Labhaya, J. the words "other defendants" in the proviso mean the defendants other than the applicant against whom the decree is passed, whether as against them it was passed ex parte or after a hearing, This statement of law would not cover cases in which the suit is dismissed on merits against defendant or defendants.

33. Deka, J. also in his separate judgment did not agree with part of the opinion expressed by Sarjoo Prasad, C.J. where distinction was tried to be drawn from the fact that since the words "as against" are used in the proviso that they only imply that the decree must be against the other defendants and not in their favour, which is an order of dismissal. Deka, J. opined that he was inclined to give a wider connotation to the word "decree" as defined in the CPC and was not prepared to rule out the case where the suit in the earlier hearing ended in an order favourable to same or one of the defendants. He proceeded to record his opinion that there is nothing in the words "of the statute" to imply such a distinction that whether the dismissal of suit as against any defendant in the hearing in which an ex parte decree was passed against the rest, would take the case out side the scope of proviso to Rule 13. He was of the view that where the nature of case demands that the suit should be restored in its original form to give relief to the aggrieved party whosoever he may be it would make no difference whether the suit was dismissed or decreed against the defendants who appeared at the first hearing and even contested. Proviso to Rule 13 of Order 9 C.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 against the other defendants.

34. From the analysis of the three separate opinions what can be found is that Sarjoo Parsad, C.J. proceeded to interpret the proviso to Rule 13 of Order 9 literally opining that it conferred no jurisdiction on the Court to set aside the whole decree and direct the entire suit to be restored to its file to the prejudice of the defendant who had successfully contested the plaintiffs claim. Ram Lubhaya, J. gave his opinion by interpreting the proviso on making reference to the intention of the Legislature. Deka, J., however, took a broader view and opined that it is the nature of decree, which is a decisive factor in coming to the conclusion that whether decree should be set aside as, a whole or only as against the defendant applying for it and not the factor that whether decree is in favor of some of the defendants after contest and against other defendants who remained absent. Thus the majority view held that where a suit is dismissed against one defendant and ex pane decree is passed against another defendant, the Court has no jurisdiction to set aside the dismissal in favor of that defendant against whom suit is dismissed on the application of the other defendants against whom ex parte decree is passed. This view has been followed in *Bhimrao Tanbaji v. Girdharilal Ramrakh and Anr.* AIR 1954 Nagpur 125.

35. In the instant case learned Single Judge did not follow the view taken by Sarjoo Parsad, C.J. and Ram Lubhaya, J. but preferred the view taken by Deka, J., which was based on the view taken by a Single Judge of Allahabad High Court in *Ram Baran Vs. Bodh Ram and Others*, wherein the Court had opined that Jurisdiction vests in the Court under Order 9 Rule 13 of the Code to re-open a decree that had been pronounced even in favor of one of the defendant after contest in a case where decree was one and indivisible. Learned Single Judge of Allahabad High Court did not follow the three decisions, namely, *Ghonnu Mal v. Sant Das* (1913) 18 I.C. 327; *Monoku v. Sita Ram* (1894) 18 Bom 142: and *Monomohini Chowdhurani and Another Vs. Nara Narayan Roy Chaudhri and Another* but followed the view of Full Bench decision of Allahabad High Court in *Bhura Mal and Ors. v. Hari Kishan Das* 24 All. 383 in which Aikman, J. had remarked that the Court must be assumed to have the power to set aside the whole decree, if the decree from its nature is one and indivisible, or if, in order to give to the defendants against whom an ex parte decree has been pronounced the relief to which they are entitled, it must be set aside as a whole.

36. In view of the conflict between two decisions of Allahabad High Court reported as *Sardar Karam Singh v. Jai Krishan* 1963 ALJ 472 and *Ram Baran's* case (*supra*) a Division Bench of that Court in *Ziley Singh v. Munchi and Ors.* 1969 All LJ 804 also had an occasion to consider the scope of the proviso to Order 9 Rule 13 CPC Learned fudges observed that the following classes of cases are possible in which an application under Order 9 Rule 13 CPC can be made:-

"(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."

37. It is the third category with which we are concerned. Earlier decisions on the points were considered including the decision in Khagesh Chandra's case (supra). The bench answered the question holding that the proviso does not empower the Court to set aside a decree dismissing the suit on merits against a defendant on an application filed under Order 9 Rule 1.3 CPC by another defendant against whom decree has been passed ex parte. In coming to this conclusion, the bench noticed the changes made in the Code of 1908 and the reasons for the same and opined that as a general rule the decree can be set aside only against the person making the application under Order 9 Rule 13 CPC. The proviso contemplates that in exceptional cases only the decree can be set aside also against the other defendants. The rule permits only a defendant against whom ex parte decree has been passed to make an application for setting it aside. In case where decree is of such a nature that it cannot be set aside against the defendant making the application alone, the proviso empowers the Court to set it aside against all or any of the other defendants also. Putting it explicitly the bench observed that if the decree is joint and indivisible against several defendants and it is not possible to set it aside only in respect of defendant or defendants making the application, then the Court may set it aside in respect of other defendants also. Thus as regards first class of cases mentioned above, proviso clearly applies. No view was expressed with respect of 2nd class of cases but as regards 3rd class of cases, in opinion of the Bench, the proviso would not apply to the cases where the suit has been dismissed on merits against some of the defendants. The Bench was of the view that in such a case though on paper there will be one decree but in fact and substance there would be two decrees, one in favor of the defendants against whom the suit has been dismissed and the other against the defendants against whom the suit has been decreed ex parte. Therefore, the decree cannot be said to be one and indivisible and in such a case the decree can be set aside without affecting the decree in favor of the other defendants.

38. Nagpur Bench of Bombay High Court has followed the second view in Vasant Jaiwantrao Mahajan Vs. Tukaram Mahadhaji Patil, . Learned Single Judge of the said Court on an analysis of various decisions as regards the proviso held that the same contemplates cases where the decree is of such a nature that it cannot be set aside against one defendant only. In other words, it was opined that it is the nature of the decree that is the determining factor and not the reasons behind the decree. Even if the defendant of the two defendants is common and even if the decree proceeds on a ground common to all the defendants, the ultimate decree should not be set aside against all the defendants unless it is of such a nature that it cannot be set aside as against one defendant only. Learned Single Judge observed that the two decrees may be inconsistent in the sense that the grounds given are inconsistent. By way of illustration learned Single Judge gave an example that in a money suit a decree against two or more

defendants may be a decree for a certain sum of money as damages for breach of a contract, and if decree against one of the defendant is set aside under Order 9 Rule 13 C.P.C. and ultimately the suit is dismissed against such a defendant on the ground that he did not commit a breach of contract, then though the grounds may be inconsistent, the original decree is not of such a nature that it cannot be set aside as against one defendant only. He observed that generally in the case of a money decree the application of the proviso to Order 9 Rule 13 CPC is not attracted. It was held that for the application of the proviso to Order 9 Rule 13 CPC 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.

39. This view also found favor with the Orissa High Court. A Division Bench of the said Court in an unreported decision in Civil Revision No. 485 of 1979 *Akura Dash v. Jagannath Dash and Ors.* decided on 14.5.1987, while reversing the contrary view as was taken by Single Judge of that Court in *Madan Naikani Vs. Ranjit Mahakur and Others*, and in the unreported decision in Misc. Appeal No. 356 of 1983, *Rabindra Prasad Kamilla v. Abhava Prasad Kamilla* decided on 23.6.1987 held that an ex parte decree can be set aside even when it is passed in favor of some of the defendants if it would give rise to two inconsistent decrees. *Ankura Dash's* case (supra) is relied upon in a later decision of Single Judge reported as *Samir Snigdha Chandra Vs. Pranaya Bhusan Chandra and Others*,

40. Rajasthan High Court has also taken a similar view in *Mst. Suraj Kunwar Vs. Champalal and Others*, that as a general rule an ex parte decree is to be set aside against the person making the application under Order 9 Rule 13 CPC Ordinarily it need not be set aside against the others. The proviso to Rule 13 of Order 9 C.P.C. should be confined to cases where the nature of the decree is that that it cannot be set aside as against some defendants only.

41. Learned single Judge in the impugned judgment did not assign any reason in following the opinion expressed by Deka, J. in *Khagesh Chandra's* case (supra). However, the view taken by learned Single Judge in the impugned judgment is that the nature of decree is the determining factor in order to apply the proviso enabling the Court to set aside the ex parte decree as against other defendants. We also find that the same is a consistent view as was adopted by Deka, J. in *Khagesh Chandra* case (supra). In any case, we may assign nor own reasons for the same. The other view that the jurisdiction of the Court is limited only to set aside a decree passed against the defendants and not that decree, which is in favor of the defendant, on a bare reading of the proviso appears to be erroneous. The reasons for the said view as have been taken are that in case the suit has proceeded on merits against one set of defendants, who after putting in appearance contested the same and on due trial the same is dismissed, in that case remedy is available to the plaintiff to file appeal against decree of dismissal of suit against the said set of defendants. In case such an appeal is not filed the

decree of dismissal of suit in so far as the said set of defendants is concerned becomes final. The decree passed in favor of the plaintiff ex parte against the defendant alone can be set aside under Order 9 Rule 13 CPC at the behest of one or more of the defendants, who are proceeded against ex parte.

42. On the Court reaching the conclusion that ex parte decree against the defendant applying for the same deserves to be set aside, the first step would be to allow his application and set aside the ex parte decree as against him upon such terms as to costs etc. as the Court may deem fit and the Court shall appoint a day for proceeding with the suit. The stage for applying the principle embodied in the proviso is the second stage that whether it should be set aside against the other defendants who have not approached the Court for setting aside the same or whether it should be set aside as a whole, irrespective of the fact that a prayer is made or not by any party, the Court is enjoined upon to consider the next question that whether the decree is of such a nature that it cannot be set aside as against the said defendant only, it may be set aside as against all or any of the other defendants also. The Legislature was aware of the controversy, which existed before the proviso was inserted in 1908 Code. The controversy was on both the counts. Had the Legislature intended to limit Court's jurisdiction in setting aside that part of the decree where suit ended in an order favourable to some of the defendants, it would have done so explicitly by saying that the decree may be set aside as against all or any of the other defendants against whom it is ex parte. But no scope for any doubt appears to have been left when the Legislature empowered the Court to set aside the same as "against all or any of the other defendants" without making any distinction on the defendants that whether those defendants had remained successful or not. The only condition to be satisfied for applying the proviso is that the nature of the decree is such that it cannot be set aside as against the defendants applying. Consequently, we are of the opinion that learned Single Judge was correct in following the view taken in the Full Bench decision of Assam High Court by Deka, J.

43. Learned Single Judge, however, fell in error in not correctly applying the said principle to the facts of the instant case. Learned Single Judge proceeded to examine the nature of decree on applying the test of prejudice that was likely to be caused to the plaintiff Bank in case decree was not set aside as a whole. Such a consideration cannot be a ground to set aside the entire decree. The other criteria applied by learned Single Judge to set aside the entire decree was about the reasons, which had prevailed with the court in dismissing the suit against defendants 1 to 5 and decreeing the suit ex parte against defendant No. 6. On the parity or those reasonings it was held that there was possibility of conflicting decrees being passed. Such a reasoning also cannot be a determining factor to find out the nature of decree. There was no question of any conflict in decrees since in a suit like this possibility cannot be ruled out that the Court might come to a conclusion that the suit is liable to be decreed against both set of defendants or liable to be dismissed against both sets of defendants or liable to be decreed in favor of one set of defendants and dismissed against the other set of

defendants. It is also not correct to say that in the instant case decree is of such a nature that it cannot be set aside as a whole. There is a decree passed by the Court dismissing the suit of the plaintiff Bank against defendants 1 to 5, which is a totally separate and distinct as regards the decree, which was passed against defendant No. 6. On the face of it the decree is not indivisible but was of a divisible, character. The decree dismissing the suit against defendants 1 to 5 does not contain any reasons and reasons given in the judgment cannot be imported to the decree. There is no question of any conflicting decrees in a suit like the one filed by the plaintiff Bank such is founded on separate cause of action against two set of defendants through on common facts. If suit is dismissed against one set of defendants, the other possibilities aforementioned cannot altogether be ruled out. Therefore, learned Single Judge was not justified in observing that it would amount to passing an inconsistent decree of that nature of decree is such that it is liable to be set aside as a whole. In this view of the matter, we need not consider the alternate submissions made by Mr. Rajiv Sawhney appearing for defendants 1 to 5 that defendant No. 6 had not made out any case for setting aside ex parte decree against it.

44. Consequently, the judgment of learned Single Judge in so far as it proceeded to set aside the decree, which had been passed dismissing the suit of the plaintiff Bank against defendants 1 to 5 is liable to be set aside. The appeal [FAO (OS). No. 78 of 1991] is accordingly allowed and the appeal [FAO (OS) No. 100 of 1991] is dismissed leaving the parties to bear their costs.

45. A copy of the judgment be placed by the Registry on the record of FAO(OS) No. 100 of 1991.