

+ W.P.(C) 2683/2006

SH. VIJAY CHADHA Petitioner
Through Mr. Yasobant Das, Sr. Adv. with
Mr. A.K. Srivastava, Mr. Arvind
Kumar Tiwary, advs.

CENTRAL BANK OF INDIA & ORS. Respondents
Through Mr. A.K. Matta, Sr. Adv. with Ms.
Reema Khorana, adv. for R-1.
Mr. Jagdeep Anand, adv. for R-4 & 5

1. Whether reporters of local papers may be allowed to see the judgment? Not Necessary
2. To be referred to the Reporter or not? Not Necessary
3. Whether the judgment should be reported in the Digest? Not Necessary

This writ petition arises out of an order dated 30th November, 2005 passed by the Debt Recovery Appellate Tribunal, Delhi whereby Miscellaneous Appeal No. 300/2002 filed before it by respondents No. 4 & 5 in this petition has been allowed and an *ex parte* decree passed by DRT-I set aside qua the said respondents only. The petitioner's grievance is that although he was a party to the appeal mentioned above and had filed an appropriate reply to the same in which it was *inter alia* contended that the *ex parte* decree passed by DRT-I ought to be set aside not only qua appellants/respondents No. 4 & 5 in the present writ petition but also qua the petitioner yet the Tribunal had neither noticed the said prayer nor dealt with the submission that the decree was indivisible within the meaning of the proviso to Order 9 Rule 13 of the Code of Civil Procedure.

2. Appearing for the petitioner, Mr. Das, learned senior counsel made a two fold submission before us. Firstly, he contended that the question whether or not the decree could be set aside only against the appellants in the appeal filed before the appellate tribunal or had to be set aside against the rest of the respondents also, being an indivisible decree within the meaning of proviso to Order 9 Rule 13 of the CPC ought to have been addressed by the appellate Tribunal and a proper view on the same taken. The Tribunal had not, however, examined the said matter and thereby deprived this Court of the advantage of its opinion on the subject. The Tribunal could, therefore, argued the learned counsel, be asked to examine the said aspect and pass a fresh order on the request made by the petitioner for setting aside the decree qua him also.

3. Alternatively, it was submitted that the decree in question was an indivisible decree within the meaning of proviso to Order 9 Rule 13 of the CPC and could, therefore, be set aside qua respondents 4 and 5, only if, it was set aside also against the petitioner herein.

4. On behalf of the respondents, it was, on the other hand, argued by Mr. Matta that the decree was not indivisible as argued by the petitioner and that the same had attained finality as no appeal had been filed against it. The question of setting aside the decree qua the petitioner just because it was being set aside against the respondents No. 4 & 5, did not, therefore, arise. He submitted that so long as the decree against the principal borrower viz; respondent No. 2 remained undisturbed, the liability of the petitioner as guarantor, being co-extensive with the liability of the said respondent, could not be disputed. He further argued that the money decrees were, as a general rule divisible in nature and that the proviso to Order 9 Rule 13 would not apply in cases where a decree could be passed by the

tribunal against only some of the defendants in the suit. That was, according to him, the position in the instant case also, inasmuch as the tribunal could, while deciding the suit decree the same against some while dismissing it against some other depending upon whether the plaintiff was able to substantiate the claim against the said defendants. Reliance was, in support, placed by Mr. Matta upon the decisions of this Court in *Mehta Borthers & Ors. Vs. Bank of India and Another* **2001 II AD (Delhi) 506**. Reliance was also placed upon a decision of the High Court of Bombay in *Vasant Jaiwantrao Mahajan Vs. Tukaram Mahadaji Patil* **AIR 1960 Bombay 485** and the decision of the Supreme Court in *Kewal Ram Vs. Smt. Ram Lubhai & Ors.* **AIR 1987 Supreme Court 1304** and *State Bank of India Vs. M/s Indexport Registered And Ors.* **(1992) 3 Supreme Court 159**.

5. On the question of failure on the part of the Appellate Tribunal to examine the above issue while deciding the appeal, Mr. Matta submitted that the question does not appear to have been pursued before the tribunal with the result that the tribunal has not examined the same. In case, however, the Court felt that the tribunal ought to have examined that aspect, the matter could be remitted back to it to enable it to pass a proper order on the subject.

6. We have given our careful consideration to the submissions made at the bar and perused the record. It is not in dispute that the petitioner had submitted a proper reply to the memo of appeal before the tribunal in which it had specifically raised the contention that the decree in question had to be set aside even against the petitioner as the same was indivisible. In the said reply, the petitioner had specifically urged:

“3. Even though this respondent no.4 has not preferred any appeal against the order dated 08.05.2002 but being party respondent would be entitled to reap the benefits of Appeal filed under Order 41

Rule 33 of the Code of Civil Procedure and the principles thereof. That any decree or order of a Tribunal or Court, if, is non est on account of any infirmity in the proceedings, as in the present case then that Order cannot be permitted to remain valid as against co-defendant notwithstanding the fact that the order of the Tribunal is joint and several

10. That in any view of the matter, the impugned order is liable to be set aside, and the appeal is liable to be allowed and the case should be remitted back to the original Tribunal for readjudication after giving reasonable opportunity of hearing to all parties concerned."

7. It is common ground that the tribunal has not examined the above prayer nor even examined the question whether the decree in question could be set aside only against the appellants/respondents 4 & 5. Whether or not the decree was indivisible in nature within the meaning of proviso to Order 9 Rule 13 of the CPC appears to have completely escaped the notice of the tribunal, resultantly depriving this Court of the advantage of the opinion of the tribunal on the question whether the decree was divisible and could, therefore, be set aside qua only some of the parties. Mr. Matta was, in that view, fair in submitting that the matter could be sent back to the tribunal to enable it to examine the issue in the light of the contention sought to be urged by the petitioner. Any such remand would not, however, affect the order already passed by the tribunal by which it has set aside the decree against Respondents No. 4 & 5 because that part of the order is indeed not assailed by the petitioner. What the petitioner prays for is the extension of the said benefit even to him by setting aside the decree qua him also. In the circumstances, therefore, we consider it unnecessary to express any opinion on the question whether the decree was indeed indivisible as was argued by Mr. Das. The better course, in our opinion, is to remit the matter back to the

appellate tribunal with a request to examine the issue whether the petitioner is entitled to an order of setting aside qua him also.

8. In the result we allow this writ petition but only in part and to the following extent:

- i) The Debt Recovery Appellate Tribunal shall examine the prayer made by the petitioner for setting aside of the *ex parte* decree passed by the DRT-I even qua the petitioner in terms of the proviso to Order 9 Rule 13 read with Order 41 Rule 33 of the Code of Civil Procedure and pass appropriate orders on the same in accordance with law.
- ii) Since the matter has been pending for considerable period, we hope and trust that the tribunal would endeavour to dispose of the issue as far as possible within a period of six months from the date a copy of this order is received by it.

8. No Costs.

9. Order Dasti.

T.S. THAKUR,J

ARUNA SURESH, J

JANUARY 23, 2008
anb