Supreme Court of India
Rani Choudhury vs Lt. Col. Suraj Jit Choudhury on 24 August, 1982
Equivalent citations: 1982 AIR 1397, 1983 SCR (1) 372
Author: R Pathak
Bench: Pathak, R.S.

PETITIONER:
RANI CHOUDHURY

Vs.

RESPONDENT:
LT. COL. SURAJ JIT CHOUDHURY

DATE OF JUDGMENT24/08/1982

BENCH:
PATHAK, R.S.
BENCH:
PATHAK, R.S.
SEN, AMARENDRA NATH (J)

CITATION:
1982 AIR 1397 1983 SCR (1) 372
1982 SCC (2) 596 1982 SCALE (1)657

ACT:
Interpretation of "Explanation" in a statute-Explained.
Maintainability of an application under Rule 13 of order lX, when an application under section 96 Civil Procedure Code with an application under section 5 of the Limitation Act has been dismissed-Scope of, Rule 13 of order IX, C.P.C.-Words & Phrases-"on any ground other than the ground that the appellant has withdrawn the appeal", meaning of.

HEADNOTE:
The appellant wife filed on 1.9.1979, a petition under section 13 of the Hindu Marriage Act, against the respondent for dissolution of her marriage with him and for a decree for divorce. The next date of hearing was fixed for 6.12.1979. On 10.11.1979, the respondent husband had addressed a letter to the court requesting the court for an adjournment of the case fixed for 6.12.1979 on the ground that because of special assignment it would not be possible for hi to be present in Court on that day. On that date, the court refused to grant the adjournment and passed an ex-parte decree in favour of the appellant. The respondent husband, thereafter preferred an appeal under section 96 of the Civil Procedure Code before the High Court with an

application under section 5 of the Limitation Act to condone the delay in filing. The High Court dismissed the condonation application as well as the appeal. Thereafter the respondent husband moved the Trial Court with an application under Rule 13 of order IX with an application under section 5 of the Limitation Act. Both the applications were dismissed. The respondent husband moved the High Court against the said orders of dismissal which was accepted rejecting the contention of the appellant wife that the newly added Explanation to Rule 13 of order IX C.P.C. is a bar to the maintainability of the application itself filed by the respondent husband under that Rule. Hence the appeal by the appellant wife, after obtaining special leave of the Court.

Allowing the appeal the Court,

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HELD: Per Pathak, J. (Concurring with A.N. Sen, J.)

1. No doubt the provision is described as an 'Explanation', but it is not the rubric which decisively defines the true nature of a statutory provision. Its true
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nature must be determined from the content of the provision, its import gathered from the language employed, and the language construed in the context in which the provision has been enacted. What was the law before the amendment; what was the mischief and defect for which the law did not provide, what remedy has Parliament resolved and appointed to cure the mischief, and the true reason of the remedy. [376 E-G, 377 A-B]

Rule in Heydon's case, 76 English Reports 637; Swantraj & Ors. v. State of Maharashtra [1974] 3 SCR 287, followed.

2:1. The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. Prior to it a defendant burdened by an ex-parte decree could apply to the trial court under Rule 13 of order IX C.P.C. for setting aside the decree. He could also appeal under section 96 against the decree. The mere filing of the appeal did not take away the jurisdiction of the trial court to entertain and dispose of application for setting aside the ex-parte decree. It was where the appeal was disposed of, and the appellate decree superseded the trial court decree by reversing, confirming or varying it that the trial court could not proceed to set aside its ex-parte decree. For the trial court decree was said to have merged with the appellate decree. Prior to the Amendment Act, the courts were open to a duplication of proceedings, and although the immediate relief claimed in the two proceedings was not identical both ultimately aimed at a redecision on the merits. The earlier disposal of either resulted in the other becoming infructuous. The plaintiff, therefore, was in the unfortunate position of being dragged through two courts in simultaneous proceedings. [376 A-C, 377 C-D]

2:2. Public time and private convenience and money was sought to be saved by enacting the Explanation. By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 of order IX for setting aside an ex-parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendent to decide whether he would prefer an adjudication by the appellate court on the merits of the decree or have the decree set aside by the trial court under Rule 13 of order IX. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under r. 13 of order IX. The disposal of the appeal on any ground whatever, apart from the withdrawal, constituted sufficient reason for bringing the ban into operation. [377 D-G, 378 A]

2:3. In the present case, the appeal was dismissed as barred by limitation and the order was one disposing of the appeal on any other ground. [378 A]

M/s. Mela Ram & Dons v. Commissioner of lncome-tax, [1956] S.C.R. 166, followed.

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Per Amarendra Nath Sen, J.

1:1. A proper interpretation of the Explanation, makes it clear that where there has been an appeal against an ex-parte decree and the appeal has not been withdrawn by the appellant and has been disposed of any ground, the application under Rule 13 of order IX of the Code of Civil Procedure will not lie and cannot be entertained. [384 G-H]

2:2. The words used in the Explanation are clear and unambiguous. The language used in the Explanation makes it clear that the withdrawal of the appeal is considered to be disposal of the appeal, as contemplated by the Explanation. Though an appeal may be disposed of on very many grounds, the Legislature has thought it fit to provide in the Explanation that only when an appeal against an ex-parte decree is disposed of on the ground that the appellant has withdrawn the appeal, the bar created to the maintainability of an application under order IX, Rule 13 of the Code for setting aside the ex-parte decree will not apply. The Legislature must be presumed to know that there are various ways of disposal of an appeal and that in all other cases of the disposal of the appeal on any other ground than the ground of withdrawal of the appeal, there will be a bar to the maintainability of the application under order IX, Rule 13 and no application will lie for setting aside the ex-parte decree. Withdrawal of appeal by an appellant does not result in any adjudication on merits. Even, then, the withdrawal of an appeal is still considered to be a disposal

of the appeal, but not creating a bar for the maintainability of the application under order IX Rule 13 [383 E, 384 B-G]

1:3. In the instant case, the appellant had not withdrawn the appeal. His application for condonation of delay was rejected by the High Court and therefore, the appeal was dismissed on the ground of limitation. The appeal filed against the ex-parte decree was, therefore, disposed of on grounds other than the ground of withdrawal of the appeal. The application under order IX, Rule 13, after the disposal of the appeal, therefore, became incompetent. [385A-B]

2:1. The words used in the Explanation make it abundantly clear that disposal of the appeal as contemplated in the Explanation is not intended to mean or imply disposal in merits resulting in the merger of the decree of the Trial Court with the decree, if any, of the Appellate Court on the disposal of the appeal. The Explanation speaks of "the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal" and these words make it abundantly clear that disposal of the appeal by the appellant is also considered to be the disposal of the appeal on the ground of withdrawal; and, the disposal of the appeal from the ex-parte decree on the ground of withdrawal of the appeal by the appellant has only been exempted from the operation of the Explanation. If the intention was that the Explanation would not be attracted and there would be no disposal of an appeal within the meaning of the Explanation unless the appeal was disposed of on merits resulting in the merger of the decrees of the Trial Court with the decree of the

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the Appellate Court, it would not have been necessary to provide specifically that the disposal of an appeal on the ground of withdrawal would be exempt, because the disposal of an appeal on the ground of withdrawal would not be disposal of the appeal within the meaning of the Explanation, as on the withdrawal of an appeal there is no decision on merits and there is no merger of the decree with any decree of the Appellate Court. The legislature could also have simply provided in the Explanation for the disposal of an appeal on merits and it would not have been necessary to use the other words, "on the disposal of an appeal on any ground other than the ground that the appellant has withdrawn the appeal. The words used, "disposal of the appeal on any ground other than the ground that the appellant has withdrawn the appeal" will undoubtedly attract within its ambit the disposal of an appeal on the ground of the same being dismissed for non-prosecution, though in the case of such disposal of the appeal there will be no effective adjudication of the appeal on merits and the disposal of the appeal may not have the effect of the decree of the trial court appealed against

being merged with any decree of the Appellate Court on the disposal of the appeal. [390D-H, 391 A-C]

2:2. The disposal of an appeal on the ground of limitation may or may not be adjudication on the merits of the appeal, depending on the particular facts and circumstances of the case and may or may not result in the merger of the decree of the Trial Court with the decree, if any, of the appellate Court; but there cannot be any manner of doubt that when an appeal from the ex-parte decree is dismissed on the ground of limitation, the appeal is disposed of on any ground other than the ground that the appellant has withdrawn the appeal. As the dismissal of the appeal on the ground of limitation results in the disposal of the appeal on any ground other than the ground of the withdrawal of the appeal by the appellant, the Explanation is attracted, and the application for setting aside the ex-parte decree becomes incompetent after the disposal of the appeal and cannot be entertained. [391 C-F]

Ckandri Abdul Majid v. Jawahar Lal, A.l.R. 1914 P.C. 66: Kalumuddin Ahmad v. Esabakuddin & Ors., A.I.R. 1924 Cal. 830; discussed and held inapplicable.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5 (N) of 1982.

(From the Judgment and order dated the 14th September, 1981 of the High Court of Delhi at New Delhi in F.A. No. 29 of 1981) Soli J. Sorabjee, A. Minocha, Mrs. Veerna Minocha and Dr. Roxna Swamy, for the Appellant.

Rameshwar Nath for the Respondent.

The Judgment of the Court was delivered by PATHAK, J. I agree that the appeal must succeed. The real question is whether the Explanation(l) to r. 13 of O. 9 of the Code of Civil Procedure bars the appeal filed by the respondent against the ex parte decree. The Explanation was enacted by the Code of Civil Procedure (Amendment) Act, 1976 with effect from February 1, 1977. Prior to its enactment, a defendant burdened by an ex parte decree could apply to the trial court under r. 13 of O. 9 for setting aside the decree. He could also appeal under s. 96 against the decree. The mere filing of the appeal did not take away the jurisdiction of the trial court to entertain and dispose of the application for setting aside the ex parte decree. It was where the appeal was disposed of, and the appellate decree, superseded the trial court decree by reversing, confirming or varying it that the trial court could not proceed to set aside its ex parte decree. For the trial court decree was said to have merged with the appellate decree. There are of course cases where the trial court decree does not merge with the appellate decree. Such instances arise when the appeal is dismissed in default, or where it is dismissed as having abated by reason of the omission of the appellant to implead the legal representatives of a deceased respondent or where it is dismissed as barred by limitation. So there a

limited area where the trial court decree merges in the appellate decree and when that takes place an application before the trial court for setting aside the decree loses all meaning. It was a limited area defined by the operation of the doctrine of merger. From February 1, 1977 the area was extended enormously. With the Explanation in operation, no application for setting aside an ex parte decree can lie where the defendant has filed an appeal and the appeal has been disposed of on any ground other than the ground that the appeal has been withdrawn by the appellant. No doubt the provision described as an "Explanation", but as is well known it is not the rubric which decisively defines the true nature of a statutory provision. Its true nature must be determined from the content of the provision, its import gathered from the language employed, and the language construed in the context in which the provision has been enacted. In the present . case, the rule in Heydon's case,(l) approval of and applied by this Court in Swantraj & Ors. v. State of Maharashtra (2) and many other cases, is attracted. What was the law before the amendment, what was the mischief and defect for which the law did not provide, what remedy has Parliament resolved and appointed to cure the mischief, and the true reason of the remedy.

It has been observed earlier that a defendant intending to avoid an ex parte decree could apply to the trial court for setting it aside and could 'also appeal to a superior court against it. The courts were open to a duplication of proceedings, and although the immediate relief claimed in the two proceedings was not identical both ultimately aimed at a redecision on the merits. Moreover, on the two proceedings initiated by the defendant, the application under r. 13 of O. 9 would subsequently become infructuous if the appeal resulted in a decree superseding the trial court decree. It was also possible to envisage the appeal becoming infructuous if the trial court decree was set aside on the application under r. 13 of O. 9 before the appeal was disposed of. The plaintiff was in the unfortunate position of being dragged through two courts in simultaneous proceedings. Public time and private convenience and money was sought to be saved by enacting the Explanation. The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under r. 13 of O. 9 for setting aside an ex parte decree only if the defendant had opted Dot to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate court on the merits of the decree or have the decree set aside by the trial court under r. 13 of O. 9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under r. 13 of O.9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation.

In the present case, the appeal was dismissed as barred by limitation. That it was an appeal even though barred by time is clear from M/s. Mela Ram & Sons v. Commissioner of Income-tax,(1) where Venkataram Ayyar, J., speaking for the court, after referring to Nagendranath Dey v. Suresh Chandra Dey,(2) Raja Kulkarni and Ors. v. The State of Bombay(3) and Promotho Nath Roy v. W.A. Lee(4) held that "an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal." There can be no dispute then that in law what the respondent

did was to file an appeal and that the order dismissing it as time-barred was one disposing of the appeal.

Accordingly, the appeal is allowed, the judgment and order passed by the High Court are set aside and the ex parte decree passed in favour of the appellant is restored. There is no order as to costs.

AMARENDRA NATH SEN, J. Whether the dismissal of an appeal against an ex parte decree on the ground that the appeal is barred by limitation attracts the provisions contained in the Explanation in O. 9. R.13 of the Code of Civil Procedure and creates a bar to the maintainability of an application under O. 9. rule 13 of the Code of Civil Procedure for setting aside the ex parte decree, is the question which falls for determination in this appeal by special leave granted by this Court.

The question arises in the following circumstances:- The appellant filed a petition against the respondent under S. 13 of the Hindu Marriage Act for the dissolution of her marriage with respondent and for a decree of divorce. The said petition was filed by the appellant on 1.9.79 and the appellant obtained an ex-

parte decree on 6-12-1979. It appears that on 10-11-79 the respondent husband had addressed a letter to the Court requesting the Court for an adjournment of the case fixed on 6-12-1979 on the ground that because of special assignment it would not be possible for him to be present in Court on that day. The Court refused to grant an adjournment and on that date an ex-parte decree for divorce was passed in favour of the appellant. The respondent husband preferred an appeal against the ex-parte decree in the High Court. As the appeal had been filed in the High Court beyond time, the respondent husband also made an application under S. 5 of the Limitation Act for condonation of delay in filing the appeal. By its judgment and order dated 17-3-1981, the High Court dismissed the application tor condonation of delay, holding that no sufficient cause for condonation had been made out. The High Court by the same order and Judgment also dismissed the appeal holding-"the appeal being barred by time is dismissed". The respondent moved an application before the Trial Court under O. 3, rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree. The respondent had also moved an application under S. 5 of the Limitation Act for condonation of delay in making the application under O.9, rule 13 of the C.P. Code. The learned Trial Judge held that no sufficient cause had been made out for condonation of delay and in that view of the matter the learned Trial Judge dismissed both the applications. Against the order of the Trial Judge, the respondent filed an appeal in the High Court. The main contention of the husband, the appellant in the High Court, was that the Trial Court was in error in coming to the conclusion that no sufficient cause for condonation of delay had been made out and the Trial Court had also erred in not setting aside the ex-parte decree as there was sufficient cause for non-appearance of the husband on the date fixed for the hearing of the petition for divorce. On behalf of the wife, the respondent in the appeal before the High Court, it was urged that the Trial Court was clearly right on merits in coming to the conclusion that no sufficient cause had been made out for condonation of delay and for setting aside the decree and it was further urged that in view of the provisions contained in the Explanation in order 9, rule 13 of the Code of Civil Procedure, the application for setting aside the ex-parte decree was not maintainable, as the appeal preferred by the husband against the ex-parte decree had already been dismissed by the High Court. The High Court for reasons recorded in its Judgment

dated 14.9.1981 came to the conclusion that sufficient cause bad been made out by the husband for condonation cf delay in presenting the application under O. 9, rule 13 beyond the prescribed time, that sufficient cause had been made out by the husband for his non-appearance at the hearing of the petition on 6-12-1979 when the ex-parte decree for divorce was passed and that the Explanation in order IX, rule 13 did not create any bar to the maintainability of the application under order 9, rule 13, as the appeal against the ex-parte decree had been dismissed not on merits but on the ground of Limitation. The High Court held: "Thus I am of the view that the disposal of an appeal against the ex-parte decree means disposal on merits for debarring the defendant applicant from filing or continuing an application for setting aside the ex-parte decree under order 9 rule 13 of the code. If an application for condonation of delay in filing appeal has not been accepted it means no appeal was preferred in law and dismissal of appeal as barred by time would not be disposal of the appeal as contemplated under Explanation to order 9 rule 13 of the Code. I, therefore, hold that the appellant's application under order 9, rule 13 of the Code of Civil Procedure is maintainable".

Against the Judgment and order of the High Court this appeal has been preferred by the wife with special leave granted by this Court The main contention raised on behalf of the appellant is that on a true interpretation of the Explanation in order 9, rule 13 of the Code of Civil Procedure the application for setting aside the ex-parte decree must be held to be incompetent and not maintainable. It has been urged that the High Court erred in holding that the Explanation did not impose any bar to the maintainability of an application in a case where the appeal is not dismissed on merits. The argument it that the said interpretation by the High Court is wrong and is clearly unwarranted by the plain language used in the said Section. It is urged that it is not right to hold that when an appeal is filed beyond time and is dismissed on the ground of limitation, there is no appeal in the eye of law and therefore, no disposal, of an appeal as contemplated in the Explanation. The learned counsel has submitted that the decisions of the Privy Council in the case of Chandri Abdul Majid v. Jawahar Lal (1) and of the Calcutta High (I) AIR 1914 P. C. 66.

Court in the case of Kalumuddin Ahmed v. Esabakuddin & ors

(l) are of no assistance in interpreting the provisions contained in the Explanation in order 9, rule 13 of the Code of Civil Procedure.

The learned Counsel has further submitted that the High Court went wrong in interfering with the findings of the Trial Court that no sufficient cause had been made out for condonation of delay in filing an application under order 9, rule 13 of the Code and in any event there is no justifiable reason for non-appearance of the respondent on the due date for the hearing of the matter.

On behalf of the respondent-husband, it has been urged that on a true interpretation of the Explanation, the High Court has correctly held that the Explanation will not apply to a case where the appeal preferred against an ex-parte decree is dismissed not on merits but on the ground of limitation. It is the argument of the learned counsel that the Explanation will only apply when the appeal is dismissed on merits, as in such a case the decree of the Trial Court gets merged with the decree of the appellate Court and naturally the trial Court loses its competence to set aside the ex-parte decree which was originally passed by the trial court, but has subsequently merged in the

decree passed by the appellate court. The learned counsel argues that the Explanation seeks to embody the principle that when a decree of the Trial Court gets merged in the decree of the appellate court, the Trial Court loses seisin over the matter and becomes incompetent to deal with a decree of the appellate court. It is his argument that as in the instant case the appeal was dismissed on the ground of limitation and not on merits, there is no question of any merger of the decree P of the trial court with any decree of the appellate court. He argues that an appeal preferred beyond time, unless delay in filing the appeal is condoned, becomes incompetent and is indeed no appeal in the eye of law. He has placed reliance on the two decisions of the Privy Council in Chandri Abdul Majid (supra) and Kalimuddin Ahmed (supra), considered by the High Court in its judgment.

The learned counsel further argues that in the facts and circumstances of this case, the High Court was perfectly justified in holding that sufficient cause was made out for not making the appli-

cation under order 9, rule 13 within the time prescribed and for condoning the delay in making the application, and the High Court was also clearly justified in coming to the conclusion that the respondent husband was prevented by sufficient cause for not being able to appear on the date fixed for hearing. He submits that in any event this Court in this appeal should not interfere with these findings of the High Court in the larger interfere of the administration of justice and this Court should not deprive the husband of the opportunity of contesting the claim of the wife.

The principal question as to whether the application made by the husband for setting aside the ex-parte decree is competent or not in view of the provisions contained in the Explanation in O. 9, rule 13 of the Code of Civil Procedure turns on a proper interpretation of the Explanation. Order 9, rule 13 of the Code of Civil Procedure reads as follows:

> "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 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 that ex-parte decree."

Order 9, rule 13 makes provision for the setting aside of an ex-parte decree against the defendant. It lays down the conditions and also the procedure for the setting aside of an ex-parte decree. The Explanation was introduced into this provision by the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976) and it has come into force from 1.2 1977. The proceeding by the wife was initiated on 1.9.1979 and the ex-parte decree of divorce in her favour was passed on 6.12.1979. The application by the husband has been made for setting aside this ex-parte decree. The Explanation, therefore, operates; the real question being whether in the facts and circumstances of this case, the bar created by the Explanation to the setting aside of an ex-parte decree is attracted to the present application.

A plain reading of the Explanation clearly indicates that if any appeal against an ex-parte decree has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside the ex-parte decree under order 9, rule 13 of the Code will be entertained. The words used in the Explanation are clear and unambiguous. The language used in the explanation clearly suggests that where there has been an appeal against a decree passed ex-parte 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 order 9, rule 13 of the Code for setting aside the ex-parte decree. An appeal may be disposed of on various grounds. It may be disposed of after proper hearing on merits and this is usually the normal way of disposal of an appeal. An appeal may be disposed of also for non prosecution thereof. Though the dismissal of an appeal on the ground of non prosecution of the same is not disposal of the appeal on merits, yet the dismissal of the appeal for non-prosecution results in the disposal thereof. An appeal may also be dismissed on the ground of limitation, if condonation of delay in filing the appeal is not allowed by the Court. An appeal may also be liable to be dismissed for non compliance with any condition relating to the filing of the appeal and also for other reasons. An appellant is also entitled to withdraw the appeal and the withdrawal of the appeal also results in the disposal of the appeal, though in such a case no merits of the appeal are adjudicated upon. The language used in the Explanation makes it clear that the withdrawal of an appeal is considered to be disposal of the appeal, as contemplated in the Explanation. It is significant to note that though an appeal may be disposed of on very many grounds the Legislature has thought it fit to provide in the Explanation that only when an appeal against an ex-parte decree is disposed of on the ground that the appellant has withdrawn the appeal, the bar created to the maintainability of an application under order 9, rule 13 of the Code for setting aside the ex-parte decree will not apply. The Legislature must be presumed to know that there are various ways of disposal of an appeal. The Legislature has, however, thought it fit to provide that when an appeal has been preferred against an ex-parte decree, the disposal of the appeal on any ground excepting the solitary ground of disposal of the appeal by withdrawal of the same by the appellant, will create a bar to the maintainability of an application under Order 9, rule 13 of the Code of Civil Procedure. By specifically providing in the Explanation that the disposal of any appeal from the ex- parte decree on any ground other than the solitary ground of withdrawal of the appeal by the appellant, the legislative intent is made manifestly clear that in all other cases of the disposal of the appeal on any other ground than the ground of withdrawal of the appeal, there will be a bar to the maintainability of the application under order 9, rule 13 and no application will lie under order 9, rule 13 for the setting aside of an ex-parte decree. Withdrawal of an appeal by an appellant does not result in any adjudication on merits. Even then,

the withdrawal of an appeal is still considered to be a disposal of the appeal; and the disposal of an appeal only on this ground of withdrawal of the appeal by the appellant, it is made clear in the Explanation, will not create any bar to the maintainability of the application under order 9, rule 13 of the Code of Civil Procedure. On a proper interpretation of the explanation we are of the opinion that where there has been an appeal against an ex- parte decree and the appeal has not been withdrawn by the appellant and has been disposed of on any ground, the application under order 9, rule 13 of the Code of Civil Procedure will not lie and cannot be entertained.

In the instant case, an appeal had admittedly been filed against the ex-parte decree. The appeal was beyond time. The appellant had not withdrawn the appeal. The appellant had filed an application for condonation of delay in preferring the appeal. The application for condonation of delay had been rejected by the Court and the appeal had been dismissed an the ground of limitation. The dismissal of the appeal on the ground of limitation resulted in disposal of the appeal though not on merits. The appeal filed against the ex-parte decree was, therefore, disposed of on grounds other than the ground that the appellant had withdrawn the appeal. The application under order 9, rule 13 after the disposal of the appeal, therefore, became incompetent in view of the provisions contained in the Explanation and could not therefore be entertained by the Court. The view expressed by the High Court must, therefore. be held to be erroneous.

In support of the view taken by the High Court, the High Court referred to and relied on the decision of the Privy Council in the case of Chandri Abdul Majid (supra). The decision of the Privy Council, in our opinion, has no material bearing on the question involved in the present appeal. In the case before the Privy. Council, the Judicial Committee was concerned with the question as to the commencement of the period of limitation in respect of a decree passed by the Trial Court, affirmed by the High Court on appeal and a further appeal therefrom to the Privy Council was dismissed by the Privy Council for non- prosecution of the appeal. The appellant before the Privy Council was in the position of a mortgagor and the Respondents of mortgagees under a mortgage dated 3rd September, 1868. In 1889 a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage and on the 12th May, 1890, a decree was passed by him for the sale of the property unless payment was made on or before the 12th August, 1890. An appeal was brought from that decree to the High Court and on the 8th April, 1893 that appeal was dismissed and the decree of the Subordinate Judge was confirmed. The mortgagor obtained leave to appeal to the Judicial Committee but did not prosecute his appeal; and on the 13th May, 1901, the appeal was dismissed for want of prosecution. The Mortgagor decree-holder made an application to the Subordinate Judge on the 11th June, 1909 for an order absolute to sell the mortgaged properties; it appears that an order had been 'made on the said application for execution in favour of the decree-holder and ultimately the validity of the execution proceedings went to the Privy Council for consideration. The main argument before the Privy Council was that the decree which was sought to be enforced had been constructively turned into a decree of the Privy Council by virtue of the dismissal of the appeal by the Privy Council on 13.5.1901 for non-prosecution of the appeal and the period of limitation, therefore, was 12 years from 13.5.1901. The Judicial Committee rejected this contention holding that the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. The Judicial Committee held that as there was no decree by the Judicial Committee adopting

or confirming the decision appealed from, and as there was never any stay of the decree passed by the High Court affirming the decree of the Subordinate-Judge, the period of limitation will run from the date of the passing of the decree by the High Court and the period will be three years from the date of the decree! passed by the High Court. The Privy Council allowed the appeal holding that the application dated 11.6.1909 for sale of the mortgaged properties was barred by limitation. While considering the question whether the period of limitation should be effective from the date of the dismissal of the appeal by the Judicial Committee for non prosecution thereof, the Judicial Committee had made the following observations:

> "The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

This position was made abundantly clear by the Judicial Committee by the observations immediately following:

> "To put it shortly, the only decree for sale that exists is the decree, dated 8th April, 1893, and that is a decree of the High Court of Allahabad."

In the case of Kalimuddin Ahamed v. Esabakuddin and ors the material facts were: -

A partition suit was instituted on 20.12.1918 against several defendants, among whom the appellant before the High Court was No. 4. Two of the defendants contested the suit and on 22.9.1919 a preliminary decree from partition was made on contest against two of the defendants and ex-parte against the others. The appellant did not appear at all in the first Court and he was one of the defendants against whom the decree was made ex-parte. On 17.12.1919 the first defendant alone preferred an appeal against the decree to the High Court and on 20.12.1919 the appellant presented an application to the Trial Court under order 9, rule 13 of the Code of Civil Procedure. This application was kept pending until after the disposal of the appeal preferred by the first defendant. One of the respondents in the appeal filed by the first defendant died and as the appellant did not take proper steps to bring the heirs on the record, the appeal was dismissed as against them and then against the others it was held that in the absence of the heirs of the deceased respondent the appeal could not proceed and the appeal was accordingly dismissed on 5th January 1922. Thereafter the application of the appellant under 9, rule 13 of Code of Civil Procedure came up for hearing and on 8th April 1922 a petition of compromise between the plaintiff and the appellant was presented and in accordance therewith the Court ordered that the suit should be restored to its original number as against the applicant who was defendant No. 4 in the suit in regard to three only of the plots mentioned in the plaint. In making this order, the Court proceeded on the compromise alone without any enquiry as to the causes which prevented defendant No. 4 from appearing at the trial. In July. 1922, a different Judge was presiding over the Court and on 5th July, 1922, he expressed doubt as to the legality of the order passed by his predecessor on 8th April, 1922 and after hearing the arguments he delivered his judgment on 7th July, 1922 holding that the order passed by his

predecessor on 8th April, 1922 was made without jurisdiction because there was no longer any ex-parte decree over which the Court had control and the said order was a nullity and utterly void so that no proceeding to set it aside were necessary and the fact of the order being made on consent as against the plaintiff could not convert it into a valid order. Against this judgement, an appeal was filed in the High Court. A division Bench of the Calcutta High Court treated the appeal as a revision petition under S. 115 and set aside the order, holding that when an ex-parte decree was appealed against and also an application to set aside was made but the appeal was dismissed for not bringing the representatives of the deceased respondent on record, the ex-parte decree did not merge in the appellate decree and an order passed on consent on the application to set aside the decree was not without jurisdiction. The decision of the Judicial Committee in Abdul Majid's case was also considered in this case. Walmsley, J. held at p1832 as follows :

> "The order of this Court may be a decree, without being such a decree as to supersede the decree of the lower Court. All that this Court decided was that having regard to the nature of the appeal, a certain defendant was a necessary party, and that in the absence of that defendant, . or on her death her representatives, the appeal could not proceed. On the merits of the appeal in other respects there was no adjudication, but on the contrary an express - refusal to adjudicate. Consequently it is of no importance whether the order did or did not amount to a decree. What . is of importance is that it was not a decree in which that of the lower Court was merged:"

Mukherjee, J., the other learned Judge on the Bench observed at p. 834 :

> "Now the consideration of the question as to whether the learned Subordinate Judge had jurisdiction to pass the order of the 8th April, 1922 involves a consideration of the following questions (a) whether the order of this Court passed on the 5th January 1922, amounted to a decree or not, (b) if it was a decree, whether the ex-parte decree can be held to have a merged into it, (c) whether the learned Subordinate Judge had jurisdiction to set aside the ex-parte decree and restore the suit, and (d) whether his successor could declare or was right in declaring the aforesaid order a nullity.
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> As to (a): The definition of the word 'decree' in the Code of Civil Procedure, in so far as it purports to be a definition at all, lays down the following essential and distinguishing elements viz., that the decision must have been expressed in a suit, that the decision must have been passed on the rights of the parties with regard lo all or any of the matters in controversy in the suit, that the decision must be one which conclusively determines those rights. Then certain orders which may or may not satisfy the above requirements are either expressly included in or excluded from the definition. The whole object of defining a 'decree' in the said Code appears to be to classify orders in order to determine whether an appeal or in certain cases a second appeal lies therefrom. Apart from that object . this definition is of no value. I am not prepared to accept the contention of the respondent that because an order rejecting a plaint is a decree, an order dismissed an appeal on the ground that it was improperly constituted is by mere analogy to be treated as a decree. I am unable to reconcile

> either in principle or in theory why an order rejecting a plaint should stand on a different footing from orders of dismissal for default, and yet one is a decree and the other is not. It is true that an order of rejection of a plaint has been expressly included in the definition of a 'decree' but the legislature has included it and no analogy can be drawn therefrom. The question whether an adjudication is an order or decree is to be tested not by general principles, but by the expressions of the Code, and those words are to be construed in their plain and obvious sense." The learned Judge further held at p. 835:- "Here the position was that the plaintiff had got a decree as against the defendants in respect of a certain share; one of the defendants viz., the defendant No. 1, had preferred the appeal; excepting the question as to whether the appeal was maintainable in the absence of the minors, the heirs of the defendants No. 6, no other question was gone into, and in fact none could be litigated, and that is more important is what the rights of the defendant No. 4 were as against the plaintiff or whether the ex- parte decree passed against him was a good or valid one, or whether it should stand at all, could scarcely be determined in that appeal.
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> There is no authority for the proposition that under circumstances such as these, the ex-parte decree can possibly be said to have merged in the decree by passed the appellate Court."

It may be noticed that in neither of these two decisions there was or could be any occasion for interpreting the Explanation which came to be incorporated years later and these two decisions have mainly proceeded on the basis of merger of the decree passed by the Trial Court with the decree of the Appellate Court.

The words used in Explanation make it abundantly clear that disposal of the appeal as contemplated in the Explanation is not intended to mean or imply disposal on merits resulting in the merger of the decree of the Trial Court with the decree, if any, of the Appellate Court on the disposal of the appeal. The Explanation speaks of "the appeal has been disposed of on any ground other then the ground that the appellant has withdrawn the appeal" and these words make it abundantly clear that disposal of the appeal may be on any ground and the withdrawal of on appeal by the appellant is also considered to be the disposal of the appeal on the ground of withdrawal, and, the disposal of the appeal from the ex-parte decree on the ground of withdrawal of the appeal by the appellant has only been exempted from the operation of the Explanation. If the intention was that the Explanation would not be attracted and there would be no disposal of an appeal within the meaning of the Explanation unless the appeal was disposed of on merits resulting in the merger of the decree of the Trial Court with the decree of the Appellate Court, it would not have been necessary to provide specifically that the disposal of an appeal on the ground of withdrawal would be exempt, because the disposal of an appeal on the ground of withdrawal would not be disposal of the appeal within the meaning of the Explanation, as on the withdrawal of an appeal there is no decision on merits and there is no merger of the decree with any decree of the Appellate Court. The legisla-

ture could also have simply provided in the Explanation for the disposal of an appeal on merits and it would not have been necessary to use the other words, "on the disposal of an appeal on any ground other than the ground that the appellant has withdrawn the appeal. The words used, "disposal of the appeal on any ground other than the ground that the appellant has withdrawn the appeal" will undoubtedly attract within its ambit the disposal of an appeal on the ground of the same being dismissed for non- prosecution, Though in the case of such disposal of the appeal there will be no effective adjudication of the appeal on merits and the disposal of the appeal may not have the effect of the decree of the Trial Court appealed against being merged with any decree of the Appellate Court on the disposal of the appeal.

The disposal of an appeal on the ground of limitation may or may not be adjudication on the merits of the appeal, depending on the particular facts and circumstances of the case and may or may not result in the merger of the decree of the Trial Court with the decree, if any, of the appellate Court; but there cannot be any manner of doubt that when an' appeal from the ex-parte decree is dismissed on the ground of limitation, the appeal is disposed of on any ground other than the ground that the appellant has withdrawn the appeal. As the dismissal of the appeal on the ground of limitation results in the disposal of the appeal on any ground other than the ground of the withdrawal of the appeal by the appellant, the explanation is attracted, and the application for setting aside the ex-parte decree becomes in-competent after the disposal of the appeal and cannot be entertained.

As in our view, the application for setting aside the ex-parte decree does not lie and cannot be entertained, in view of the provisions contained in the Explanation, it does not become necessary for us to go into the merits of the application to consider whether sufficient cause had been shown by the respondent for his nonappearance at the hearing at the date fixed and also for not preferring the application with n the time prescribed.

The appeal, therefore, succeeds. The judgment and order passed by the High Court are set aside and the ex-parte decree passed in favour of the appellant OD 6.12.1979 is restored. In the facts and circumstances of this case, we do not propose to make any order for costs.

S.R. Appeal allowed.