

(1930) 12 BOM CK 0017

In the Bombay High Court

Case No : Civil Revision Application No. 217 of 1928

Babubhai Tansukhlal

APPELLANT

Vs

Madhavji Govindji and Co.

RESPONDENT

Date of Decision : 12-12-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Presidency Small Cause Courts Act, 1882 — Section 9

Citation : (1931) 33 BOMLR 759 : (1931) ILR (Bom) 503

Hon'ble Judges : Palkar, J;Broomfield, J

Bench : Division Bench

Judgement

Patkar, J.—This is an application in revision against the order of the Chief Judge of the Small Cause Court, Bombay, dismissing the plaintiff's suit in pursuance of an award under by-law 38A of the East India Cotton Association.

2. The applicant filed a suit in the Court of Small Causes at Bombay to recover a sum of Rs. 1,023-8-0, consisting of Rs. 1,000, the amount paid as deposit, together with Rs. 11 as interest, and Rs. 12 8-0 on account of profits in the transactions of sale and purchase of one hundred bales of cotton done by the defendants as the plaintiff's brokers, on December 10, 1926, and December 14, 1926. The defendants admitted the amount of the deposit and interest, and also the two contracts sued upon ; but contended that there were other contracts and several payments by them on account of the transactions which resulted in a loss to the plaintiff, and the amount of Rs. 100-10-0 was payable by the plaintiff to the defendants, and that the whole matter had been referred by the defendants to the arbitrators of the East India Cotton Association, and, therefore, the Court had no jurisdiction to try the suit.

3. The learned Chief Judge of the Small Cause Court stayed the petitioner's suit pending the arbitration. On an application in revision, No. 148 of 1927, the High Court refused to interfere with the order of stay, and directed that all the objections to the award might be taken before the learned Chief Judge. The

learned Chief Judge appreciated the force of the argument on behalf of the plaintiff that the award was null and void, as it embraced matters not recognised by law, and that the contracts on which the plaintiff sued were in sanctioned forms whereas the arbitrators in arriving at their conclusion considered other contracts which were made in contravention of the by-laws, but held that under by-law 38A, all unpaid claims, whether admitted or not, were required to be referred to the arbitration of two disinterested persons, and therefore the reference to arbitration was valid, and that if the arbitrators in investigating the dispute referred to other contracts and took into consideration the liabilities under non-sanctioned contracts, it did not amount to any judicial misconduct, and the award was binding as an adjustment of the suit according to the ruling in *Manilal Motilal v. Gokaldas Rouji* ILR (1920) 45 Bom. 245, 22 Bom. L.R. 1048, and, therefore, dismissed the plaintiff's suit, as the arbitrators had held that instead of the amount of Rs. 1,023-8-0 being due to the plaintiff, the amount of Rs. 100-10-0 was due by the plaintiff to the defendants.

4. The East India Cotton Association was incorporated under the Bombay Cotton Contracts Act, XIV of 1922. The order of the Small Cause Court staying the suit was not interfered with by the High Court. The Presidency Small Cause Court of Bombay has power to stay the suit in order to enable the parties to it to refer to arbitration under para, 18 of Schedule II of the Civil Procedure Code, 1908, which has been made applicable to the Presidency Court of Small Causes by the rules u/s 9 of the Presidency Small Cause Courts Acts, or u/s 19 of the Indian Arbitration Act, IX of 1899 according to the decision in *Tatya Rowji Vs. Hathibhai Bulakhidas*, .

5. The next question is, whether the Small Cause Court had jurisdiction to accept the award which was, as alleged by the applicant, illegal and void. It is urged on behalf of the applicant that, so far as the deposit of Rs. 1,000 was concerned, the arbitrators had no power to decide the question relating thereto, and that the arbitrators could only give an award in respect of the two contracts which were in the sanctioned form, and the award was illegal so far as it proceeded to take into consideration all other contracts alleged by the defendants which were not in the sanctioned form. We are unable to accept the argument on behalf of the applicant that the deposit of Rs. 1,000 was unconnected with the contracts on which the suit was based. The receipt for the deposit of Rs. 1,000 recites that the deposit was taken from the plaintiff for doing business in cotton. It represents the earnest or margin money required to be deposited for any loss that would have resulted from the contracts made by the plaintiff with the defendants brokers. The sanctioned contract form at page 68 of the rules refers to a margin to be paid and maintained by the broker until the completion of the contract. It would, therefore, follow that the amount of Rs. 1,000 deposited is closely connected with the contracts entered into by the plaintiff with the defendants which were in the sanctioned form. By-law 38 A framed under the Act provides as follows:-

All unpaid claims whether admitted or not and all disputes (other than those relating to quality) arising out of, or in relation to, (a) contracts (whether forward or "ready" and whether between members or between a member and a non-member) made subject to these by-laws, or (b) the rights and/or responsibilities of commission agents, muddadums and brokers not parties to such contracts, shall be referred to the arbitration of two disinterested persons one to be chosen by each disputant...

6. By-law 81 runs as follows:-

Contracts between agents and their constituents, e.g., between a member and a non-member or between a member acting as an agent and a member acting as his constituent shall be subject to the by-laws and shall be in writing in the form given in the Appendix (pages 67, 68, 69 and 70), provided that to such contracts by-laws 130 to 166 inclusive shall not apply.

A member whose constituent has agreed in writing to sign the prescribed form of contract and fails or refuses to do so after terms have been arranged shall be treated in all respects as if he had done so and both parties shall have the rights and remedies accorded by these by-laws.

7. It is, therefore, necessary that the contracts must be in writing and signed in the sanctioned form, or in the absence of any contract in the sanctioned form there must be a written undertaking by the constituent to sign. A mere oral undertaking would be insufficient according to the decision in *Ratilal v. Moujee* (1927) 30 Bom. L.R. 122. The contracts which are not in the sanctioned form are void u/s 5 of the Bombay Cotton Contracts Act, XIV of 1922. It would, therefore, follow that the applicant could bring a suit in the Court of Small Causes on the two contracts which were in the sanctioned form to recover the deposit and also the profit accruing thereunder, and it would be open to the defendants to apply under the Indian Arbitration Act to stay the action, but it is not open to the defendants to say that the action would not lie. In *Radhakison Gopikison Vs. Balmukund Ramchandra, Beaumont C. J.* referred to by-law 38 of the East India Cotton Association and observed as follows (p. 1328):-

I can see nothing in that clause to make arbitration a condition precedent to the right to bring an action. It seems to me to be an ordinary provision for referring disputes to arbitration, and such a provision does not in any way oust the jurisdiction of the Court. If an action is brought in respect of a matter covered by the arbitration clause, the defendant can apply under the Indian Arbitration Act to stay the action, but it is not open to him to say that the action does not lie.

8. With regard to by-law 81, it was held that a suit could not be maintained on a contract which was not in compliance with the statutory form, unless there was an agreement in writing to sign the prescribed form of contract.

9. In the present case it is alleged on behalf of the applicant that there were only two contracts in writing in the sanctioned form on which the suit is based, and

that the arbitrators took into consideration other contracts which were not in the sanctioned form, nor was there any agreement in writing to sign those contracts. It is urged, on the other hand, that the award (SIC) not disclose the fact that the arbitrators took into consideration contracts which were not in the sanctioned form. It is conceded on behalf of the opponents, and it is also clear from the authorities, that if a suit had been brought by the defendants on any contracts which were not in the sanctioned form in the absence of any agreement in writing to sign those contracts, it would not have been maintainable. It is, therefore, contended on behalf of the applicant that the arbitrators took into consideration contracts which were not in the sanctioned form, and that the whole award is illegal and void, as the award which is legal so far as it is based on the contracts in sanctioned forms cannot be separated from the other portion of the award which is based on contracts which were illegal and void. The remarks in the judgment of the learned Chief Judge lend support to the contention on behalf of the applicant that the arbitrators took into consideration other contracts between the parties which were not in the sanctioned form, though there is no specific and clear finding on that point. The award, if it has proceeded on contracts which were not in the sanctioned form, would be illegal and void, and if the portion of the award which is illegal and void cannot be separated from the portion of the award which is valid, the whole award would be invalid. In *Hurmukhroy v. The Japan Cotton Trading Co. Ltd.* (1920) 34 C.L.J. 253 it was held that if in the event of an award made by arbitrators on grounds some of which did, while the others did not, justify the exercise of their jurisdiction, the Court cannot hold with certainty that the arbitrators acted exclusively on grounds within their jurisdiction, and the award is null and void on the principle that if the bad is not separable from the good, the whole is bad. See also *Juggobundhu Saha v. Chand Mohan* (1915) 22 C.L.J. 237.

10. The learned Chief Judge, however, held that the award not having been set aside, he was bound to dismiss the plaintiff's suit on the authority of *Manilal Motilal v. Gokaldas Rowji* ILR (1920) 45 Bom. 245, 22 Bom. L.R. 1048, on the ground that the award was an adjustment of the suit. Where the parties to a suit refer their disputes to arbitration without the intervention of the Court and an award is made, an application to pass a decree in terms of the award is an application to record a compromise within the meaning of Order XXIII, Rule 3. It was observed by Macleod C.J. (p. 260):-

But when parties have been negotiating for a settlement, and one party contends a settlement has been arrived at, which the other party denies, or where there has been a settlement which one party seeks to avoid on any of the grounds on which an agreement can be avoided, recourse is had to Order XXIII, Rule 3, so that the Court may determine whether an adjustment has actually been made or whether an adjustment made is one which can be recorded.

11. Fawcett J., however, at page 270, held that Order XXIII, Rule 3, of the Civil Procedure Code, contains provisions corresponding to the plea of "accord and

satisfaction after writ," and that an agreement to refer to arbitration after suit together with the award thereon is on the same footing as a direct settlement between the parties, but the award to be effective for such a plea must be a valid one according to the general rules of law governing the validity of awards in arbitration proceedings.

12. It would, therefore, follow that if the award is invalid or illegal, it cannot be recorded as an adjustment of the suit. If the defendants had proceeded under the Indian Arbitration Act and got a decree on the award in the High Court, or if the plaintiff had got the award set aside under the Indian Arbitration Act, the matter would have been conclusive. But where, as in the present case, the award is sought to be recorded as an adjustment of the suit, the Court has jurisdiction to consider whether the award is legal and enforceable. The view in *Manilal Motilal v. Gokaldas Rouji* has been confirmed by the full bench decision in *Chanbasappa v. Basalingayya* ILR (1927) 51 Bom. 908, 29 Bom. L.R. 1254., where it was held that where in a suit parties have referred their differences to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under Order XXIII, Rule 3, of the Civil Procedure Code, but not otherwise. At page 948 Marten C. J. observed:-

I would only add that in my judgment the word "lawful" in Order XXIII Rule 3, refers to the nature of the compromise arrived at, not to the procedure which the parties may have followed in bringing it about. But it is of course the duty of the Court to be satisfied that there has in fact been an adjustment by compromise.

13. Under by-law 38 A. only disputes arising out of or in relation to contracts made subject to the by-laws shall be referred to arbitration. Under by-law 81 such contracts must be in writing in the form given in the appendix. It would, therefore, follow that the arbitrators had no jurisdiction to decide disputes arising out of contracts not in the sanctioned form. In cases where an arbitrator enters upon a consideration of matters which are not referred to him or which he has no jurisdiction to try by arbitration clause or submission between the parties, the appearance of the party after objection taken and protest made, does neither give the arbitrator authority to make an award nor estop him from urging that the arbitrator has exceeded his authority. See *Ringland v. Lowndes* (1864) 33 L.J.C.P. 337 and *Chetandas v. Radhakisson* (1927) 29 Born. L.R. 1087. The attendance of the applicant before the arbitrators after protest would not amount to a waiver of his right to object to the jurisdiction of the arbitrators.

14. It is urged on behalf of the applicant that he was never prepared to refer the dispute between the parties on contracts which were not in the sanctioned form to arbitration, and the award on such contracts as were not in the sanctioned form would be illegal and void. It would, therefore, appear that if the contention of the applicant, which the arbitrators entered upon a consideration of matters when they had no jurisdiction to do so, is correct, it cannot be said that the suit has been adjusted by a lawful compromise. The view of the Calcutta High Court in *Amar Chand Chamaria v. Banwari Lall Rahshit* ILR (1921) Cal. 608 that where

in a pending suit the parties go to private arbitration without the consent of the Court, the award cannot be enforced either under Order XXIII, Rule 3, or under the provisions of the Indian Arbitration Act, has not been accepted by the full bench decision in *Chanbasappa v. Basalingayya* ILR (1927) 51 Bom. 908, 29 Bom. L.R. 1254.

15. It would, therefore, be necessary to send the case back to the lower Court to decide on taking fresh evidence, if necessary, whether the arbitrators took into consideration the contracts which were not in the sanctioned form, and which were illegal and void u/s of the Bombay Cotton Contracts Act, XIV of 1922. If the Court comes to the conclusion that the arbitrators took into consideration contracts which were not in the sanctioned form, the award would be illegal and void and the legal part of the award would not be capable of being separated from the illegal part. The Court would then be entitled to disregard the award and decide the suit on the merits.

16. The lower Court, in my opinion, failed to exercise the jurisdiction vested in it by law in omitting to consider the question whether the award was a lawful compromise under Order XXIII, Rule 3.

17. We would, therefore, reverse the decree of the lower Court dismissing the suit, and send the case back for disposal of the suit in the light of the remarks made in this judgment.

18. Costs of this application will be casts in the suit.

Broomfield, J.

19. I agree.

20. As this is a matter of importance and we are differing from the learned Chief Judge of the Small Cause Court after the full Court has declined to issue a rule, I think it desirable to state my reasons.

21. The plaintiff filed his suit on February 12, 1927. The plaint was as follows:-

The plaintiff above named states the following:-

(1) That on December 6, 1926, the plaintiff engaged the defendants as his brokers to effect transactions in cotton on his behalf, and as required by the defendants deposited a sum of Rs. 1,000 with them the same day. The defendants agreed to pay interest at six per cent, per annum on that amount.

(2) That on December 10, 1926, on instructions from plaintiff the defendants effected a sale on behalf of plaintiff of one hundred bales of Broach F.G.M.G. cotton of April-May 1927 delivery at Rs. 242 per Candy.

(3) That on December 14, 1926, on instructions from plaintiff, to cover the above sale, the defendants effected a purchase on behalf of plaintiff of one hundred bales of Broach F. G. M. G. cotton of April-May 1927 delivery at Rs. 240-12-0 per Candy.

(4) That in respect of these transactions a sum of Rs. 12-80 became due by the defendants to the plaintiff after giving credit for brokerage to the defendants, as per memo of account hereto annexed and marked "A."

(5) That the plaintiff several times verbally and finally by his Vakil's letter of February 3, 1927, called upon the defendants to pay up the said sum of Rs. 1,000 and interest due thereon as mentioned in para 1 of this plaint and the sum of Rs. 12-8-0 as per para 4 hereof but the defendants have failed to pay the same or any part thereof.

(6) That the total amount due by the defendants to the plaintiff comes to Rs. 1,023-8-0 inclusive of interest up to date.

(7) The plaintiff therefore prays for judgment for Rs. 1,023-8-0 and interest thereon at six per cent till judgment and further interest on judgment at six per cent. per annum till realisation and such further and other relief as to the Court may seem fit.

22. On March 14, 1927, the defendants filed the following written statement:-

1. Deny plaintiff's right to sue.

2. Deny that plaintiff engaged the defendants as brokers.

3. Say it was one Bachoobhai Harivallabhdas Seth who was doing business in the name of Babubhai Tansukhlal by whom all the transactions mentioned in the plaint were done and all orders for the transactions given to the defendants.

4. Without prejudice say that plaintiff has not filed the suit on the whole account between the parties and say that the real account between the parties is given in the annexed particulars marked "A" and on the whole account a sum of Rs. 100-10 will be found due by the said Bachulal H. Seth.

5. Without prejudice claim credit for Rs. 300 paid as under: -

Rs, 50 on January 10, 1927.

Rs. 100 on January 18, 1927.

Rs. 150 on January 31, 1927.

6. Say that disputes having arisen between the (SIC) all matters have been referred by the defendants to the East India Cotton Association for their arbitration and the said Association have already appointed arbitrators and the matter is pending before the said arbitrators."7. Say that the suit should be stayed.

23. The suit was stayed sine die pending the result of arbitration on the defendants' reference.

24. On April 12, 1927, an award was made in the following terms:-

We were nominated arbitrators in a dispute between the above parties by the Deputy Chairman of the East India Cotton Association Limited. We notified both the parties to be present at a meeting convened on March 28, 1927, when Mr. Madhavji Govindji representing the plaintiffs and Mr. Bachulal Harivallabhdas Sheth representing the defendant with his pleader were present. The meeting was adjourned to April 2, 1927, when also both the parties were present.

After hearing them fully and carefully looking into the accounts, correspondence and papers in respect of the above matter, we find that the plaintiffs' claim of Rs. 100-10-0 is fully corroborated by their books of accounts, Sodavahi etc., that were placed before us and by the oral evidence of independent witnesses. We therefore award the plaintiffs' claim of Rs. 100-10-0 together with interest at six per cent till the date of payment, plus Rs. 70 for cost of this arbitration against the defendant.

25. Against the order of stay Revision Application No. 148 of 1927 was made to this Court. The Court refused to interfere on the ground that it was an interlocutory order, and directed that the objections to the award might be taken before the Chief Judge. The suit was then again taken up in the Small Cause Court at the stage at which it was left, except that in the meantime the award had been made.

26. The plaintiff objected that the award was null and void because the arbitrators had taken into consideration certain transactions which were not in the prescribed contract forms as required by by-law 81 of the East India Cotton Association. The terms of bylaw 81 have been set out in the judgment of my learned brother. Section 5 of Act XIV of 1922 provides that contracts in contravention of any by-law shall be void. The learned Judge said that he appreciated the force of the argument, but he held that there was a valid reference to arbitration under by-law 38A and that the award was binding on the parties as an adjustment of the suit. He cited and apparently professed to follow *Manilal Motilal v. Gokaldas Rowji* ILR (1920) 45 Bom. 245, 22 Bom. L.R. 1048. The plaintiff's suit was dismissed and he has come to this Court in revision.

27. At the outset it should be stated that the plaintiff has all along denied that he had any dealings with the defendants other than the transactions mentioned in the plaint, and, at any rate so far as the proceedings in Court are concerned, the other transactions alleged by the defendants have not been proved. On the other hand, it has not been proved that the other transactions referred to were not in the standard forms, though the plaintiff has asserted that they were not and the defendants do not appear to have ever asserted that they were. Again, it cannot be said to be apparent from the record that the arbitrators in making their award took account of any transactions not in the standard forms, although it is probable that they did so since they have awarded the defendants the exact sum claimed in their written statement. These questions, in the view we take of the case, it will be necessary for the trial Court to clear up.

28. But it appears from the judgment of the learned Chief Judge that he dealt with the case on the basis that there were some other transactions between the parties which contravened the provisions of by-law 81, and that the award covered these transactions also. For the purposes of this application we must take it that the facts are so, and consider whether on that basis the suit has been rightly dismissed.

29. As I have found some difficulty in analysing the learned Judge's reasoning, I quote the relevant passage from his judgment in full:-

The arbitration was, however, set up under by-law 38A, of the bylaws framed under the Act. It runs as follows:- "All unpaid claims, whether admitted or not, and all disputes arising out of, or in relation to, (a) contracts made subject to these by-laws, or (b) the rights and responsibilities of brokers, shall be referred to the arbitration of two disinterested persons." The facts here are that the defendant did not admit the claim of the plaintiff. The existence of that fact is enough to give jurisdiction to the arbitrators. Plaintiff contends that the claim to the margin money and Rs. 12-8-0, for profit, was an admitted claim. Defendant disputes and denies it. But; granting that it was so, still it was an unpaid claim, and all unpaid claims are referable to arbitration, whether admitted or not. The arbitrators had therefore to determine whether the claim to Rs. 1,012-8-0 was an admitted claim or not, They had jurisdiction, even if it was admitted, -which it was not, -because it was unpaid. I think power is taken in oases of admitted but unpaid claims, deliberately by the Association, in respect of brokers and others, so that where they find that there are unjustifiable instances of any broker admitting claims, but not paying them, action can be taken against him, In investigating the dispute, they had, therefore, to refer to the whole account and in doing so, if they took into consideration liabilities under non-sanctioned contracts, it would not vitiate or invalidate their award, as it would not amount to any judicial misconduct on their part. Ab initio, I find, that the reference was a valid one, as conditions calling for it under by-law 38 did exist in this case. Taking plaintiff's case at its best, there was an unpaid claim, arising under sanctioned contracts, and if there was an unpaid claim, a reference was called for, as a reference has to be made in case of "all unpaid claims." Really speaking, he should have referred the matter to arbitration, as defendant was not paying him his admitted claim.

Even if under the Limitation Act, the remedy of the parties to have the award enforced as an order of the Court or otherwise, is barred, it cannot be said that they have no other rights in respect of it. I need not discuss what they are.

I find that there was a valid reference and that there is an award published under it. It is therefore binding on parties as an adjustment of the suit, *Manilal v. Gokaldas*. Whether the plaintiff appeared before the arbitrators under protest or not, does not affect the submission and the award, as under the by-law there was a valid reference.

30. The findings appear to be: (1) There was a valid reference to arbitration under by-law 38A, and (2) as there was a valid reference and an award published under it, and as the award is not invalidated by judicial misconduct on the part of the arbitrators the fact that the arbitrators took into consideration liabilities under void contracts not being in the learned Judge's view judicial misconduct, - therefore, the award is binding as an adjustment of the suit.

31. As regards the reference to arbitration it is to be noted, first of all, that there has been no submission to arbitration in the ordinary sense by both parties to the dispute. I do not say that it would necessarily have made any difference if the plaintiff and the defendants had agreed that the whole series of transactions including the void contracts should be referred to the arbitrators, but it is important to bear in mind that there was no such agreement. The defendants placed before the arbitrators what they considered to be the subject-matter of the arbitration. The plaintiff appeared in the proceedings under protest, and he is only bound by them in so far as they can be held valid under by-law 38A: see *Chetandas v. Radhakisson* (1027) 29 Bom. L.R. 1087.

32. The learned Judge says that the plaintiff had an unpaid claim, namely, for Rs. 1,023-8-0, arising out of, or relating to, the two contracts made subject to the by-laws, that really speaking he ought to have referred the matter to arbitration himself, and that as he did not, the arbitrators had jurisdiction to consider the claim on the defendants' reference. So far I have DO difficulty in following him. But the real question which it seems to me the learned Judge has hardly faced is this: When there is an unpaid claim or a dispute arising out of, or relating to, a series of transactions consisting partly of contracts made subject to the by-laws and partly of contracts not so made, does bylaw 38A empower one party to refer the whole matter to arbitration without the consent of the other, and if a reference is so made, have the arbitrators authority to deal with the whole series of transactions? Now, there was no agreement between the parties, as I have said, and the arbitration proceedings depend for their validity on the provisions of by-law 38A. These have been set out in my learned brother's judgment. So far as Clause (a) is concerned, it is clear that arbitration is not contemplated or made compulsory in the case of contracts not made subject to the by-laws. In Clause (b) "such contracts" mean contracts made subject to the by-laws, and the meaning of the clause seems to be that when commission agents or brokers are concerned in such contracts, and there is a dispute as to their rights or liabilities, the dispute shall be referred to arbitration although they were not actually parties to the contracts. It would be putting a very unnatural interpretation on the by-law as a whole, if we were to take the words "not parties to such contracts," i.e., not parties to contracts subject to the by-laws, as though they meant " parties to contracts not subject to the bylaws," and I may say that no such construction appears to have been put upon the words either by the learned Judge or by the learned advocate for the opponents. There is nothing in the by-law then which gives power to one of the two disputing parties to refer any matters to arbitration which do not arise out of valid contracts, and the learned

Judge's finding that there was a valid reference in this case appears to me to be clearly wrong. As to the award, it is not altogether clear to me whether the learned Judge held it to be valid or not. What he says is:-

In investigating the dispute, they had, therefore, to refer to the whole account and in doing so, if they took into consideration liabilities under non-sanctioned contracts, it would not vitiate or invalidate their award, as it would not amount to any judicial misconduct on their part.

33. It seems that this might mean either that the arbitrators were justified in looking at the whole account, or that they; were not justified in doing so, but the Court could not interfere and must accept the award because there is nothing amounting to judicial misconduct. If, as I hold, the submission to arbitration as regards the whole series of transactions is invalid, it follows that the award based on a consideration of the whole series of transactions must also be invalid. The authority of the arbitrators is limited to the matters lawfully submitted to them. Several authorities were cited on this point. I need only refer to *Dagdusa Tilak Chand v. Bhukan Govind Shet* ILR (1884) 9 Bom. 82, noting that the present is not a case in which the part of the award which is beyond the submission can be separated from that which is within it. As I have suggested it is by no means clear that the award would have been valid if it had been entirely within the terms of the submission, for if the arbitrators were at liberty to take account of the contracts not in the prescribed form, they would be giving effect to contracts which the law has declared to be void, and that would apparently be contrary to public policy. In that connection I may refer to the cases cited in Mulla's Commentary on Order XXIII, Rule 3, under the heading "Lawful agreement or compromise", 9th Edition, page 822; but I need not go into the cases in detail, because, in the view I take, the point does not actually arise in this case.

34. If, on the other hand, the learned Judge's view was that the award was not a lawful one, but that he had no jurisdiction to go into that question, then on that point also, I think, he was clearly wrong. If the award had been made a decree of Court, then, of course, no order could have been made in the plaintiff's suit inconsistent with such decree. But that course has not been followed, and it is well settled that the mere making of an award even on a valid submission does not, ipso facto, oust the jurisdiction of the Court: see *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257, cited as an authority by Rangnekar J. in *Dinkarra v. Yeshvantra* (1929) 31 Bom. L.R. 1403, and also *Radhakison Gopikison Vs. Balmukund Ramchandra*, . In the case of *Manilal Motilal v. Gokaldas Rowji* ILR (1920) 45 Bom. 245, 22 Bom. L.R. 1048, which the learned Judge himself appears to have made the basis of his decision, it was held that an award could be regarded as an adjustment of the suit under Order XXIII, Rule 3, and the terms of that rule make it clear that the Court must first be in a position to hold that the award amounted to a lawful agreement or compromise.

35. For these reasons I agree with the order proposed by my learned brother.