

(1976) 02 BOM CK 0043

In the Bombay High Court

Case No : Award Petition No. 30 of 1968

Extrusion Processes Pvt. Ltd.

APPELLANT

Vs

Kashibhai S. Patel

RESPONDENT

Date of Decision : 26-02-1976

Acts Referred:

Arbitration Act, 1940 — Section 14, 16, 2, 20, 21
Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 114
Hindu Minority and Guardianship Act, 1956 — Section 8
Penal Code, 1860 (IPC) — Section 193, 194, 403, 465, 467

Citation : (1976) 78 BOMLR 661

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vimadalal, J.—This is a petition filed by a private limited company registered under the Companies Act and its shareholders representing one group, viz. the group of the second petitioner, against shareholders of the other group represented by the first respondent and some others, to set aside an award made by one N.M. Shah on June 30, 1967. Respondents Nos. 12 to 22 and 42 have not appeared at the hearing before me, but I have been told by Mr. Bhatt on behalf of the petitioners that they are supporting the petitioners. The facts of the case are very complicated, but it is not really necessary to refer to them in detail, as I am only concerned with the question as to whether the award made in the present case should be set aside on any of the grounds relied upon by the petitioners. It may be stated that, according to petitioners Nos. 2 to 5, disputes really started because respondents Nos. 1 to 7 and others commenced carrying on a business competing with the business of the first petitioner-company in breach of the articles of association of that company, through the instrumentality of the 8th respondent-company. On the other hand, according to respondents Nos. 1 to 7 and 23 to 35 and 37 to 41 whom Mr. Modi represents (hereinafter

referred to as "the contesting respondents"), the disputes between the parties arose on account of the fact that petitioners Nos. 2 to 7 so exploited their voting rights as to edge out the contesting respondents from having any voice in the management of the company. This resulted in a large number of proceedings between the parties in the High Court, in the Bombay City Civil Court, the Court of Small Causes, and in the Criminal Courts. Whilst all the said proceedings were still pending, the parties arrived at an agreement which is dated July 3, 1966 to refer all the disputes which were the subject-matter of the various pending proceedings in different Courts, as well as all personal disputes between them, to the arbitration of one N.M. Shah who, by profession, is a chartered accountant. Protracted proceedings ensued before the said arbitrator before whom the hearing ran into over a hundred and twenty hours. Before, however, I deal with those proceedings and the various contentions of the petitioners in regard to the same, it would be convenient to set out the main provisions of the arbitration agreement entered into between the parties on July 3, 1966, a copy of which has been annexed to this petition and marked "B".

2. Clause 1 of that agreement refers to the dispute between the two groups of Mohanbhai (petitioner No. 2) and Kashibhai (respondent No. 1), and states that the said Mohanbhai and Kashibhai thereby agreed to have all their disputes settled through the arbitration of the said N.M. Shah as sole arbitrator. Clause 4 of the said arbitration agreement provided that the arbitrator was first to hear "the pending proceedings" which would be adjourned or withdrawn according to the directions given by him, and the parties would have to obey those directions faithfully without any delay or excuse. Clause 5 provided that the arbitrator would also decide personal and other disputes which each party would submit in writing in detail within the time fixed by the arbitrator. It may be stated that that was done by the parties. Clause 6 of the said arbitration agreement is in the following terms:

After hearing the parties in respect of their various disputed and claims and after making the awards in respect of such disputes and claims, the Arbitrator shall fix the price of both the types of shares of Extrusion Processes Private Ltd. (Petitioner No. 1) held by the second party, (Respondent No. 1) his friends and relatives. A list of such persons desirous of selling their shares is also annexed herewith.

Clause 9 of the said arbitration agreement provided that the arbitrator was to give his award within six months from the date of the said agreement or "within such extended period from time to time with consent of the parties to agreement hereto." The said clause then proceeded to voice the illusion from which the parties apparently suffered that the award given by the arbitrator would be final and no party was to question it in a Court of law and his award would be binding to all the signatories to the said arbitration agreement. As the time for making the award expired, a further agreement was entered into between the parties on November 9, 1966 extending the time for the arbitrator to make his award to

June 30, 1967 and, taking full advantage of that extension, the arbitrator made his award on the very last day.

3. Pursuant to the directions given by the arbitrator under Clause 4 of the arbitration agreement which has been set out above, each side withdrew several proceedings pending in different Courts, but it is common ground that certain proceedings were not withdrawn by the respective parties who should have done so. The petitioners did not withdraw High Court Suits Nos. 232 of 1965 and 310 of 1964, the later of which was withdrawn by them only after the award in the present case was made. The contesting respondents, on the hand, have not withdrawn High Courts Suits Nos. 541 and 542 of 1965 and Bombay City Civil Court Suit No. 3330 of 1963, as well as the inquiry pending pursuant to a show cause notice issued in the Bombay City Civil Court Suit No. 2450 of 1963. As the said proceedings were not withdrawn, the course which the arbitrator followed was to pronounce his award in regard only to the subject-matter of the proceedings which were withdrawn, and to leave the subject-matter of the proceedings which were not withdrawn to be decided by the respective Courts in which they had been filed, as clearly stated by him in Clause 9 of his award.

4. The award so made by the arbitrator on June 30, 1967 is sought to be set aside by the petitioners on various grounds by a mammoth petition running into 155 paragraphs, but I propose to confine myself to the grounds which were stated before me in the course of the hearing of this petition. Those grounds were as follows:

(1) The Arbitrator had misconducted himself in various ways, exhibiting a clear bias in favour of the contesting respondents in the manner set out in paragraph 12 and the paragraph that followed paragraph 42 of the petition;

(2) The Arbitration Agreement dated 3rd July 1966 is bad in law on the ground that it was not signed by all the parties thereto;

(3) The agreement for extension of time dated the 9th of November 1966 was not signed by 6 of the parties who had signed the Arbitration Agreement dated 3rd July 1966;

(4) In so far as the Arbitration Agreement related to defendants Nos. 6 and 7 in Bombay City Civil Court Suit No. 5 of 1964, who were minors, that Agreement, and the Award consequent thereon, are void in law;

(5) The Arbitration Agreement is unlawful and void in law in so far as it seeks to refer four criminal complaints, one inquiry and one contempt proceeding to the Arbitrator;

(6) Though one of the parties to the Arbitration Agreement had died pending the reference proceedings, no notice was given to his heirs;

(7) Notice of the filing of the Award has not been given to all those affected thereby; and

(8) The Award is bad by reason of the fact, that though the Arbitration Agreement is one composite agreement, the Arbitrator has not declared his Award in respect of all the matters referred to him.

5. I will now proceed to deal with each of these grounds of challenge to the award. It may be mentioned that none of them presents any difficulty, except the last one. As far as the first ground is concerned, viz. the misconduct of the arbitrator, since the petitioners have not chosen to lead any evidence, the same must fail and it must be held that the petitioners have not proved any of the acts of misconduct alleged by them in the petition. As far as the second ground, viz. the fact that the arbitration agreement dated July 3, 1966 is not signed by all the parties, is concerned, even a cursory perusal of Section 2(a) of the Arbitration Act, 1940 (hereinafter referred to as "the Act") leaves no room for doubt that all that is required by law is that an arbitration agreement must be in writing, but it is not necessary that it should bear the signatures of the parties thereto. Indeed, that is now well-settled by now (*Gulamali Abdulhussein & Co. v. Vishwambharlal* (1948) 51 Bom. L.R. 79 and *Union of India (UOI) Vs. A.L. Rallia Ram*, . All that is necessary is that the parties concerned should have consented to the arbitration agreement. Since the petitioners have not led any evidence to the contrary, there is no reason why I should hold that they had not so consented. This ground of attack formulated by Mr. Bhatt must, therefore, also be rejected. I also reject Mr. Bhatt's third ground of challenge, viz. that the agreement for extension of time dated November 9, 1966 has not been signed by six of the persons who had signed the arbitration agreement dated July 3, 1966. Section 28(2) leaves the parties to an arbitration agreement without the, intervention of the Court to make their own provision for enlargement of the time for making the award. All that it lays down is that such provision must require the consent of the parties. In the absence of any provision in Section 28(2) or in Clause 9 of the arbitration agreement in the present case that such consent must be in writing or that it should be signed by all the parties, there is no substance in Mr. Bhatt's contention on this point. As the petitioners have not chosen to lead evidence to the contrary, there is no reason why it should be held that all the parties to the arbitration agreement had not consented to the extension of time for making the award. The mere fact that six of those who had signed the arbitration agreement had not signed the agreement for extension of time cannot necessarily lead to that conclusion.

6. That brings me to Mr. Bhatt's contention that the arbitration agreement, and the award consequent thereon, are bad in law because they seek to affect persons who were minors, viz. defendants Nos. 6 and 7 in Bombay City Civil Court Suit No. 5 of 1964. The first argument of Mr. Bhatt in regard "to this ground of challenge was that before entering into the said arbitration agreement dated July 3, 1966, it was incumbent in law for the guardian of the said minors to obtain the leave of the Bombay City Civil Court in Suit No. 5 of 1964 under Order XXXII, Rule 7 of the Code of Civil Procedure. In support of that contention, Mr. Bhatt relied on the decision of a Division Bench of this Court in the case of

Sadashivappa Gangappa Vs. Sangappa Chanvirappa Mahamadkoti, and the decision of the Privy Council in the case of AIR 1946 72 (Privy Council) but in the view which I take on this point, it is unnecessary for me to deal with either of those decisions. On first impression, that argument appeared to be proper, but as Mr. Modi has rightly pointed out, the arbitration agreement in the present case was one which was entered into outside the Court, and the only order which was required to be obtained from the Bombay City Civil Court in the said Suit No. 5 of 1964 was an order withdrawing the suit which any plaintiff can obtain without the consent of anybody. There was no question of the Court taking cognizance of any "agreement or compromise" within the terms of Order XXXII, Rule 7 of the CPC which would necessitate the leave of the Court under that statutory provision. In my opinion, Order XXXII, Rule 7 did not come into play at all as far as the Bombay City Civil Court Suit No. 5 of 1964 was concerned. I, therefore, hold that this contention of Mr. Bhatt must be rejected. Reliance was next sought to be placed by Mr. Bhatt on the provisions of Section 8 of the Hindu Minority and Guardianship Act, 1956, which enacts that the natural guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no ease bind the minor by a personal covenant. Unlike an agreement entered into by a minor himself, a contract entered into by the natural guardian of a minor is, however, not altogether void, but is merely one which is voidable and cannot bind the minor if he chooses to set it aside. That is precisely the position as it emerges from the decision of the Privy Council in the case of Musammat Har Naraini Kunwar v. Sajjan Pal Singh (1940) L.R. 67 I.A. 386 : 43 Bom. L.R. 141 in which a Hindu widow entered into an agreement to refer certain claims to ancestral property by the collaterals of her husband to arbitration in a dual capacity, viz. in her own right and also as mother and natural guardian of her minor daughters. By their award the arbitrators decided that the widow should remain in possession and occupation of the ancestral property during her life, but after her death, it should be divided among the collaterals of her husband, her daughters having no share therein. After the death of the widow, the sole surviving daughter filed a suit out of which the appeal ultimately arose before the Privy Council, claiming that under the Hindu law she alone was entitled to succeed to the Ancestral property on the death of her mother and that the agreement to refer and the award were not binding on her. The subordinate Judge decreed the suit, but the High Court, on appeal set aside that decree and dismissed the suit. On appeal to the Privy Council, it was held (at page 392) that the widow had no power to bind her minor daughter by the agreement to refer, and that consequently her right to the property in suit was unaffected by the award. The decree of the High Court was, therefore, set aside by the Privy Council and that of the subordinate Judge restored. Turning to the facts of the present case, in the light of that legal position, it may be mentioned that the defendants Nos. 6 and 7 in the Bombay City Civil Court Suit No. 5 of 1964 are not parties to the present petition but Mr. Bhatt has contended that the arbitrator had, in paragraph 10(i)(c) of his award, taken the view that

225 ordinary shares in the increased capital had been wrongly allotted to the group of the second petitioner, which included the said defendants Nos. 6 and 7 in the Bombay City Civil Court Suit No. 5 of 1964, and that a reference to para. 10(viii) and (ix) shows that the arbitrator had taken the said fact into account in fixing the price of the shares of the first petitioner-company under Clause 6 of the arbitration agreement. What I have to consider, however, is whether as a result of the said arbitration agreement and the award consequent thereon, any personal covenant has been imposed on the said minors which they can challenge as not being binding upon them. If as a result of what the natural guardian does, a personal covenant is sought to be imposed on the minor, the minor will not be bound by the same and can avoid it either by adopting appropriate proceedings, as in Musammat Har Naraini's case already cited above, or by way of defence to proceedings in which that personal covenant is sought to be enforced against the minor. In the present case, the award does not seek to impose any personal liability on the minor defendants Nos. 6 and 7 in the Bombay City Civil Court Suit No. 5 of 1964. The highest that can be said is that in fixing the price of the shares of the first respondents' group, the arbitrator has taken into account the fact that, in the increase of capital, some shares had been wrongly allotted to the said minors. Moreover, even if the award in the present case had imposed a personal liability or obligation on the minors, it would not be void, but would only be voidable at the instance of the minors on that count. The minor defendants Nos. 5 and 6 in the Bombay City Civil Court Suit No. 5 of 1964 are not parties to the present petition and have not sought to avoid the said decision of the arbitrator, either in this petition in the course of defending any other proceedings, If the award were otherwise valid, it could not, therefore, be set aside on the ground I am now considering.

7. That brings me to the next contention of Mr. Bhatt, viz. that the arbitration agreement is bad in law because it purports to refer four criminal proceedings, one inquiry pursuant to a show cause notice issued by the Court, and a contempt motion in High Court Suit No. 232 of 1965, to arbitration. It is common ground that of the four criminal complaints, three were complaints of the offence of defamation u/s 500 of the Indian Penal Code, and one was a complaint of criminal misappropriation u/s 403 of the Indian Penal Code. All those complaints were, in fact, withdrawn. It may be mentioned that u/s 345 of the Code of Criminal Procedure, 1898, which was in force at the material time, the offence of defamation u/s 500 of the Indian Penal Code is compoundable by the parties themselves, and the offence of criminal misappropriation u/s 403 of the Indian Penal Code is compoundable with the permission of the Court. Reliance was sought to be placed by Mr. Bhatt on the decision of the Privy Council in the case of Kamini Kumar Basu v. Birendra Nath Basu but the offences in that case were offences under Sections 465, 467, 193 and 194 of the Indian Penal Code, all of which were, as stated in the judgment of the Privy Council itself (at page 100, col. II), non-compoundable. The decision of the Privy Council in the said case that the consideration of the reference or the ekrarnama therein being the non-

prosecution of the criminal complaints for those offences was unlawful (at page 102, col. I) is, therefore, distinguishable on facts from the present case in which none of the offences in question was non-compoundable. As far as the complaint of offence of criminal misappropriation is concerned, in consonance with the presumption of the regularity of all acts and proceedings in a Court of law (vide Illustration (e) to Section 114 of the Indian Evidence Act), I presume that the complaint for the said offence was withdrawn with the permission of the Court concerned. It may be pointed out that Clause 4 of the arbitration agreement in the present case, does not provide that the same would have to be withdrawn without complying with the requirements in regard to the leave of the Court u/s 345 of the Code of Criminal Procedure, 1898. I agree with the view taken by the Madras High Court on the point in the case of T.A. Meenakshi Sundarammal and Another Vs. K. Subramania Ayyar and Others, that it is only where recourse is not had to Section 345, Criminal Procedure Code, and the agreement between the injured person and the offender is to terminate the criminal proceedings against the offender otherwise than in accordance with that section, that the agreement would fall within the mischief of Section 23 of the Indian Contract Act, and that what Section 345, Criminal Procedure Code permits cannot be viewed as unlawful or as opposed to public policy. As far as the inquiry pursuant to a show cause notice issued by the Bombay City Civil Court in Suit No. 2450 of 1963, and the contempt motion in High Court Suit No. 232 of 1965 are concerned, there can be no question of the arbitrator deciding anything in regard to the same, as the subject-matter of the said inquiry and the said motion would entirely be matters between the Court and the party against whom the inquiry was being made or the contempt motion taken out. The mere fact that the arbitration agreement happens to mention these proceedings in the list annexed to it cannot make any difference to that position or bind the Court concerned, and the same must be disregarded as of no effect whatsoever.

8. The next ground on which the award has been challenged by Mr. Bhatt was that one of the parties had died on January 20, 1967 pending the reference, and no notice was issued to his heirs. In that connection, it may be pointed out that the deceased belonged to the respondents No. 1's group and his heirs, who are respondents Nos. 30 to 35 in the present petition are represented before me by Mr. Modi and, as averred in paragraph 14 of the affidavit in reply of respondent No. 1 dated February 1, 1971, the arbitration proceedings continued with their knowledge and acquiescence. There is, therefore, no substance in this contention of Mr. Bhatt. The next contention of Mr. Bhatt was that the award is bad because notice of the filing of the award has not been given to some of the adult defendants in the Bombay City Civil Court Suit No. 5 of 1964, and to minor defendants Nos. 6 and "7 in the said suit. I, however, fail to see how a subsequent act like the failure to give notice of the filing of the award can possibly vitiate an award already made prior thereto, if it is otherwise valid. At the most, the failure to give a notice of the filing of the award might affect what follows, viz. the proceedings to obtain a decree on the award, as and when the

same is applied for, but it can have no relevance on the question of the validity of the award already made, and cannot be a ground for setting aside the same. Moreover, it is clear that u/s 14(2) of the Act, the obligation to serve such a notice is the obligation of the Court, and the failure to discharge that obligation cannot, therefore, possibly affect the validity of the award. There is, therefore, no substance in this contention of Mr. Bhatt also, and the same must be rejected.

9. That brings me to the last and the most substantial objection to the" validity of the award, viz. that the award is bad by reason of the fact that though the arbitration agreement is one composite agreement, the arbitrator has proceeded to declare his award only in respect of some of the matters referred to him. It is further contended on behalf of the petitioners that, at any rate, Clause (viii) of paragraph 10 of the award in which the arbitrator has proceeded to fix the price of both the types of shares of the first petitioner-company held by the group of the first respondent pursuant to Clause 6 of the arbitration agreement dated July 3, 1966 is bad, in so far as the said Clause 6 expressly states that the arbitrator was to fix the price of the said shares only after arriving at his decision in respect of the various disputes and claims referred to him. An alternative contention which was at one time sought to be raised by Mr. Bhatt in the course of his arguments, and which is to be found in paragraph 14 of the petition, to the effect that in regard to the fixation of the price of the said shares the said N.M. Shah was not an arbitrator, but was really only a valuer, was subsequently given up by Mr. Bhatt. Mr. Modi had three answers to these contentions of Mr. Bhatt. The first answer of Mr. Modi was that the petitioners cannot be permitted to take advantage of their own wrong in refusing to withdraw two pending proceedings which they were required to Withdraw. His second answer was that the award is severable, in so far as the disputes which were referred related to the subject-matter of various suits and proceedings, each of which was independent and severable. Mr. Modi's contention was that the award must, therefore, in any event, be held to be valid in so far as it related to all the disputes decided by the arbitrator thereby. In the alternative, Mr. Modi's third answer to Mr. Bhatt's contentions on this point was that, in the event of the view being taken that the award was a composite award and the arbitrator has left undecided some matters which were referred to him, the Court should, acting in the exercise of its powers u/s 16(a) of the Act, remit the award for the reconsideration of the arbitrator in regard to the matters which he was required by the arbitration agreement to decide, but has not decided. In regard to Mr. Modi's first answer, he contended that a direction to the petitioners to withdraw High Court Suit No. 232 of 1965 was implicit in the minutes of the meeting held on October 15, 1966. A perusal of the minutes of the subsequent meeting held on November 9, 1966 shows that the arbitrator's direction for withdrawal of High Court Suit No. 232 of 1965 which related to the main claim of the petitioners against the contesting respondents, was conditioned on respondent No. 1 procuring the signatures of Bipin Patel and Jivabhai Patel to the letter of undertaking, which were admittedly never obtained by him. Moreover, the contesting respondents

had also failed to withdraw three legal proceedings which were pending. Since two wrongs do not make a right, the failure on the part of the petitioners to withdraw Suit No. 232 of 1965 would be no justification for the contesting respondents having acted likewise. This contention of Mr. Modi must, therefore, be rejected. The second answer which Mr. Modi sought to give to Mr. Bhatt's contention on the point I am now considering is, in my opinion, clearly unsustainable. It is clear on a perusal of the arbitration agreement dated July 3, 1966 that the intention of the parties was to refer all their disputes to arbitration and it was never contemplated that some only of them should be decided by the arbitrator. In fact, Clause 5 of the arbitration agreement shows that the parties went so far as to include within the compass of the reference even personal disputes between them which were to be identified by being submitted in writing in detail to the arbitrator. This intention of the parties is clearly manifest also in Clause 6 of the arbitration agreement which is designed to put an end not only to past disputes, but to future friction, as well by providing that the arbitrator was first to dispose of all the past disputes and was then to fix the price at which the group of the first respondent was to sell its shares to the group of the second petitioner. I, therefore, find it impossible to accept Mr. Modi's argument that by the arbitration agreement the parties referred several independent and severable disputes to arbitration, and that the bad part of the award could, therefore, be separated from the good part. Even if I am wrong in that view of the matter, the decision of the arbitrator fixing the price under Clause (viii) of paragraph 10 by his award is clearly bad, in view of the express terms of Clause 6 of the arbitration agreement under which he could fix the price of the said shares only after all the disputes referred to him had been decided by him.

10. That brings me to the third answer which Mr. Modi sought to give to Mr. Bhatt's contention of this point, viz. that the Court should, in that view of the matter, remit the award back to the arbitrator u/s 16(a) of the Act for deciding the points which he has not decided by that award. It is obvious that the Court would not make an order of remission of the award, or any part of it, to the arbitrator if the remission would, in certain circumstances, result in infructuous proceedings before the arbitrator. In the present case, what Clause 4 of the arbitration agreement contemplated was that all pending proceedings between the parties were to be withdrawn as directed by the arbitrator, and the arbitrator was then to proceed to decide those disputes along with others mentioned in that agreement. It is common ground that both sides have not withdrawn some of those pending proceedings. If I were to remit the award back to the arbitrator to decide what he has left undetermined in respect of the subject-matter of those proceedings which have still been kept pending, and notwithstanding the directions of the arbitrator, the parties do not withdraw those proceedings, the question that would arise would be whether the arbitrator could proceed to determine them. The awkward situation that would arise in that contingency, which I do not consider to be unlikely in the present case, would be that, in respect of each such dispute, there would be two parallel proceedings, one in

Court and the other before the arbitrator. Such a situation could never have arisen if the parties had obtained an order of reference u/s 23(i) of the Act for, then, as provided in Sub-section (2) of Section 23, the Court could not have proceeded with the suit in which that order of reference had been obtained. No order of reference having been obtained in any of the proceedings which were pending in the present case, the larger and rather important question that arises is as to what is the effect of a reference in a pending suit in which the parties go to arbitration without obtaining an order of reference from the Court in accordance with Sub-section (1) of Section 23 of the Act. In order to consider that question, it is first necessary to refer to the relevant statutory provisions, and then deal with the authorities bearing on the point. Section 2(a) of the Act defines the expression "arbitration agreement", and Section 2(e) defines the term "reference" separately as meaning a reference to arbitration, and it is, therefore, clear that the two terms are not synonymous. Section 21 enacts that where in a suit the parties agree to refer the matters in difference between them to arbitration, they may apply in writing to the Court for an order of reference, and Sub-section (1) of Section 23 empowers the Court to pass an order of reference in appropriate terms. Sub-section (2) of Section 23, as already stated above, provides for a statutory stay of the suit pending a reference, consequent on an order of reference made by the Court. Section 34 of the Act deals with the contingency of a party to an arbitration agreement ignoring that agreement and filing a legal proceeding, and lays down that in such cases the Court can stay the legal proceedings if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement between the parties. Section 35 provides for the case of a reference already being in progress at the time when one of the parties thereto commences legal proceedings, and enacts that in such cases, unless a stay of proceedings is obtained u/s 34, all further proceedings in the reference would be invalid. It is apparent from Sections 34 and 35 of the Act that the same principle underlies both those sections, in so far as both of them are designed to avoid conflict of jurisdiction as between the arbitrator and the Court by two separate proceedings resulting, perhaps, in two different decisions in regard to the same dispute. Neither of those sections can, however, be of any avail in the present case, for both of them deal with a situation in which legal proceedings are commenced subsequent to the arbitration agreement between the parties. It is significant to note that, even in such cases, Section 35 makes further proceedings in the reference invalid, unless a stay of the legal proceedings is obtained u/s 34. That brings me to Section 47 of the Act which is very material for the purpose of deciding the point which I am now considering, and must, therefore, be set out in verbatim. It is in the following terms:

47. Act to apply to all arbitrations. Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

11. Mr. Modi on behalf of the contesting respondents concedes that if, after the matter is remitted to the arbitrator in the present case, the parties were not to withdraw the proceedings which are still pending, inspite of the directions of the arbitrator, the decision of the arbitrator on the remitted disputes cannot be enforced as an award. He, however, contends that the decision of the arbitrator in regard to the matters remitted to him could be made the subject-matter of a decree on a compromise in accordance with the provisions of Order XXIII, Rule 3 of the Code of Civil Procedure. It is, in that context, that it becomes necessary to consider the provisions of Section 47 of the Act and the proviso thereto. Mr. Modi's submissions with regard to the same are as follows:

(1) The substantive part of section Section 47 applies to all references to which any of the provisions of the Arbitration Act apply.

(2) The proviso to Section 47 is, therefore, applicable only to those references and awards to which none of the provisions of the Act apply, e.g., the references under the Co-operative Societies Act, or under the Acts regulating industrial disputes.

(3) Applying these principles, it would, according to Mr. Modi, follow that the reference to arbitration in the present case, both with regard to suits which have been withdrawn as well as in regard to suits which have not been withdrawn by the parties, is a reference to which the substantive part of Section 47 applies, and not the proviso to that section; and since the proviso does not apply to it, a consent decree in terms of the award can be passed under Order XXIII, Rule 3 of the Code of Civil Procedure, even if one of the parties disputes the award, as laid down by a Division Bench of this Court in the case of *Manilal Motilal v. Firm Gokal Das* A.I.R [1921]. Bom. 310 : 22 Bom. L.R. 1048 and by a Full Bench of this Court in the case of *Chanbasappa v. Baslingayya* AIR [1927] Bom. 565 : 29 Bom. L.R. 1254. Before dealing with those authorities and with the other authorities on the point, it will be convenient to dispose of two other subsidiary arguments of Mr. Modi on this point. According to Mr. Modi, in a case in which the parties seek to refer the subject-matter of the dispute in a suit without obtaining an order of reference t even "if the view taken be that such a reference would not be one which falls within the substantive part of Section 47 but falls within the proviso thereto, the consent of the parties contemplated by the proviso could be obtained at any time after the award, and a decree can be passed under Order XXIII, Rule 3, CPC in terms of the award, even if the parties do not consent at the time when the compromise is sought to be recorded. It is not really necessary for me to decide that point, for Mr. Modi conceded that, on the facts of the present case, no such consent can be spelt out after the making of the award. I do not, therefore, propose to discuss the authorities which he sought to cite on the point. Suffice it to say that, in my opinion, the terms of the proviso to

Section 47 are quite clear, in so far as they lay down that it is with the consent of all the parties that the Court can even proceed to take ""into consideration"" the award as a compromise or adjustment of a suit. This, in my opinion, leaves no room for doubt that the consent of the parties must be consent obtained at the stage when the Court is called upon to consider the question as to whether the award should form the basis of a compromise or adjustment of a suit in the manner contemplated by Order XXIII, Rule 3, Civil Procedure Code, or Order XXI, Rule 2, Civil Procedure Code. Another contention which Mr. Modi sought to advance, viz. that the agreement to withdraw the suits, if directed by the arbitrator, was the basis on which the parties went to arbitration, and the award must, therefore, be held to be valid in regard to the suits which were actually withdrawn, was given up by him in the course of the hearing, and I need not, therefore, deal with it.

12. I will now proceed to discuss the authorities which were cited by the learned Counsel appearing before me on the three propositions of Mr. Modi which I have enumerated above. In the case of Manilal Motilal already referred to above, the facts of the case were that the plaintiffs had filed a suit against the defendants claiming a certain sum as damages for the breach of a contract, but by a subsequent agreement of reference, they referred the matters in dispute therein to arbitration without the intervention of the Court. The arbitrator made his award allowing a certain amount by way of damages to the plaintiffs, and the defendants moved the Court that the award should be recorded as an adjustment or compromise of the suit, and for a decree being passed in terms thereof, A single Judge of this Court who heard that motion dismissed it on the ground that the award could not be recorded as an adjustment under Order XXIII, Rule B of the Code of Civil Procedure. Setting aside the order of the single Judge, the law on the point was summarised by the learned Chief Justice in the following terms (p. 315) :

It may be as well to summarise the procedure to be adopted by parties in a suit who enter into an agreement to refer the matter in dispute in the suit or part of it to arbitration.

They may make the agreement an order of Court and then paras. 1 to 16 of the Second Schedule apply.

If they do not make the agreement an order of Court,

- (a) they cannot ask for the agreement to be filed under para. 17;
- (b) they cannot ask for the award if made to be filed under paras. 20 and 21;
- (c) if an award is made and both parties accept it they can apply for a consent decree in terms thereof, and there will be no need to apply for an order recording the terms of the adjustment;
- (d) if the plaintiff disputes the award for any reason and proceeds with the suit defendant can plead the award and have the case set down for hearing on the

issue whether the award is binding as an adjustment;

(e) if the defendant disputes the award, the plaintiff can set the case down for trial on the issue whether the adjustment should be recorded;

(f) either party can file a suit to enforce the award and apply for a stay of the original suit.

The same question arose before a Full Bench of this Court in the case of *Chanbasappa, v. Baslingayya*, also referred to above, in which, after considering several authorities on the point, it was held (at page 574, col. I) that an application could be made in such case under Order XXIII, Rule 3 of the Code of Civil Procedure, inasmuch as the suit must be held to have been wholly adjusted by a lawful compromise, and that the compromise as represented by the agreement for reference and the subsequent award could be recorded and a decree passed in accordance therewith so far as it related to the suit. The decisions in these cases were, however, sought to be distinguished by Mr. Bhatt on the point that they were given at a time when the proviso to Section 47 of the Act did not find place on the statute book. In support of that contention, he drew my attention to the judgment of Bachawat J., sitting as a single Judge of the Calcutta High Court, in the case of *Jugaldas Jugaldas Damodar Modi and Co. Vs. Pursottam Umedbhai and Co.*, . The facts of that case were that whilst a suit and a cross-suit between the parties were pending, the parties to those suits, by an agreement in writing, referred their disputes to arbitration and agreed to withdraw those suits, but proceeded to arbitration without obtaining a formal order of reference from the Court. The arbitrator made an award which was filed in Court, and an application was made for a decree in terms of that award. The other side thereafter filed a petition for setting aside that award and for superseding the arbitration, inter alia, on the ground that an agreement to refer matters in dispute in pending suits without an order of reference by the Court was void, illegal and not enforceable at all, and that the arbitration and the award were, therefore, invalid. Bachawat J. held (para. 19) that if the parties to a pending suit agreed to refer their dispute and proceeded to arbitration without an order of reference by the Court, the arbitration was not under the provisions of the Arbitration Act, 1940. That view of Bachawat J. provides a complete answer to the contention of Mr. Modi that the reference in the present case is one which falls within the substantive part of Section 47. I respectfully concur in that view of Bachawat J., and I have no hesitation in holding that it is not merely matters like references under the Co-operative Societies Act, or under the legislation dealing with industrial disputes, that could be said to be references which are not under the provisions of the Act, but that cases like the present one in which disputes in pending suits are referred to arbitration without orders of reference are also cases in which the reference cannot be said to be under the provisions of the Act, since the Act clearly contemplates that an order of reference should be obtained in such cases, Bachawat J. then went on to observe (para. 21) that if the parties proceeded to arbitration without an order of

reference, the award could not be enforced under the Arbitration Act, 1940, a proposition which Mr. Modi has not disputed. It was pointed out in the judgment in Jugaldas Damodar's case (paras. 24 to 28) that the view taken by the Calcutta High Court, differing from the view taken by the Bombay High Court in the two cases cited above, had always been that an award on a submission of matters in difference in pending suits without an order of reference by the Court, could not be enforced in the suit as a compromise under Order XXIII, Rule 3 of the Code of Civil Procedure, but that a distinct and subsequent agreement to abide by such award was always enforceable as a compromise, because what was enforced in such cases as a compromise was not the award, but the subsequent agreement between the parties directly settling the dispute. Bachawat J. pointed out (para. 34) that Section 47 of the Act now has a proviso which had no counterpart in the previous arbitration law, and observed that it was well-known that the said proviso was enacted to resolve the conflict of opinion in favour of the Calcutta view. It was held (para. 37) that the joint consent of all the parties was necessary under the proviso at the point of time when the Court was to take the award into consideration as a compromise or adjustment, that antecedent consent was immaterial, that the proviso did not render the award valid nor did it make it enforceable as an award *proprio vigore*, and that the proviso enabled the recognition of the award for a limited purpose by; consent, with the result that where such consent was withheld, it could not be recognised even for that limited purpose. The learned Judge, therefore, proceeded to declare the award invalid u/s 33 of the Act. I agree fully with all the views expressed by Bachawat J. in his judgment in Jugaldas Damodar's case. I hold that the decision of this Court in Manilal Motilal's case and Chanbasappa's case are no longer applicable after the coming into force of the Arbitration Act of 1940 containing the proviso to Section 47 thereof. In the case of Naraindas Vs. Vallabhdas and Others, what had happened was that a certain claim to maintenance had been the subject-matter of earlier proceedings which had already culminated in a decree in Court. Pending execution proceedings, the disputes between all the parties, including the auction purchasers, were referred to arbitration, and the arbitrators made their award, to which objections were filed on various grounds. The Supreme Court proceeded to; deal with the law on the point of the legal effect of a reference to arbitration without the intervention of the Court, pending a suit, in the following terms (para. 7) (p. 644) :

...It is always open, to parties to refer a dispute to arbitration without the intervention of the court. In case, a suit is pending in respect of the subject-matter of the dispute, there can be no valid reference during the pendency of the suit, to arbitration without the order of the court. The underlying reason for that is to avoid conflict of jurisdiction by both the court and the arbitrator dealing concurrently with the same dispute. An award given on a reference during the pendency of a suit relating to dispute which is the subject-matter of reference without obtaining the order of the court cannot be enforced. The only exception to this rule is provided by the proviso to Section 47 of the Arbitration Act (Act

10 of 1940) according to which "an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending". In such an event, the award is enforced as a compromise or adjustment of the suit because all the interested parties give their consent to the award.

(Italics mine).

It was, however, held by the Supreme Court that, as in the case before them, no suit was pending in respect of the subject-matter of the dispute which was referred to arbitration, it was not essential that the parties should consent to the award before the same could be enforced, and the decision of Bachawat J. in Jugaldas Damodar's case, already discussed above, was distinguished on that ground as not being applicable to the case before the Supreme Court. Reference was also made in the course of the hearing before me to another decision of the Supreme Court and that was in the case of Ramvullabh v. Dwarka Das & Co. (1965) 68 Bom. L.R. 485 , S.C but it is not necessary to deal with the said decision which was a decision in regard to an application for the filing of an arbitration agreement u/s 20 of the Act, except to state that what was held in the said case (at p. 487) was that an arbitration agreement entered into whilst a suit between the parties was pending could not be enforced by an application u/s 20, a view which is in consonance with the decision -of the Calcutta High Court in Jugaldas Damodar's case, and the decision of the Supreme Court in Naraindas" case already discussed above. Following those decisions, I, therefore, hold that, as far as the subject-matter of the pending suits in the present case were concerned, the reference to arbitration was not a valid reference, and the award of the learned arbitrator dated June 30, 1967 is not a valid, award and cannot be enforced as such. I must not, however, be taken to hold that the arbitration agreement dated July 3, 1966 is itself invalid. Indeed, that is not what the Supreme Court has laid down in Naraindas's case. What is invalid in such cases is the reference, and the award consequent thereon. In that connection, it may be pointed out that the term "reference" is defined separately from the expression "arbitration agreement" in Section 2 of the Act, and it must, therefore, follow that the two concepts are entirely different. The invalidity of the reference before the arbitrator is one thing, and the invalidity of the arbitration agreement which preceded it is another. I do not hold the latter to be invalid. I further hold that unless all the parties interested give their consent to the award being "taken into consideration" as a compromise or adjustment of a pending suit u/s 47 of the Arbitration Act, 1940, the award cannot be enforced even as a compromise or adjustment under Order XXIII, Rule 3 of the Code of Civil Procedure. In that view of the matter, remitting the award for the reconsideration of the learned arbitrator in regard to disputes which are the subject-matter of the suits which are still pending would be an exercise in futility, for the simple reason that the award which he may pass on such remission would be invalid and cannot be enforced, as an award or otherwise, unless the parties choose to consent to

the same being recorded as a compromise or adjustment in which case what would be enforced would be not the award but the subsequent agreement between the parties directly settling the dispute in terms of the award. Remission of the award in the present case u/s 16(a) of the Act cannot be made in the fond hope that the parties would so consent, having regard, particularly, to the admitted state of relations between the parties. In my opinion, a Court can make an order remitting an award for reconsideration u/s 16(a) of the Act only in cases in which the award which the arbitrator may make after the matter is remitted could be enforced as an award which, it is obvious, is not the position under the authorities discussed above. Reference may be made in that connection to the decision of the Privy Council in the case of AIR 1944 76 (Privy Council) in which it has been held (at page 78, col. 1) that when what purports to be the decision of arbitrators is a nullity, there is no power to remit it. In any view of the matter, therefore, Mr. Modi's submission that I should make an order remitting to the arbitrator the subject-matter of the disputes is the pending suits which he has not decided, cannot be entertained and must be rejected.

13. In the result, I make the petition absolute in terms of prayer (b). I also order the contesting respondents to pay the petitioners' costs of the petition.