

(1950) 08 BOM CK 0001
In the Bombay High Court
Case No : O.C.J. Award No. 51 of 1949

Gordhandas Pursottam Sonawala	Vs	APPELLANT
Natvarlal Chandulal and Co.		RESPONDENT

Date of Decision : 22-08-1950

Acts Referred:

Arbitration Act, 1940 — Section 10, 11, 12, 16(3), 19
Bombay Cotton Contracts Act, 1932 — Section 14, 15, 4, 8
Companies Act, 1956 — Section 21
Contract Act, 1872 — Section 2

Citation : AIR 1952 Bom 349 : (1952) 54 BOMLR 367

Hon'ble Judges : Shah, J

Bench : Single Bench

Advocate : C.K. Daphtary, General, M.P. Amin and N.P. Nathawani, for the Appellant; M.L. Maneksha and K.T. Desai, for the Respondent

Judgement

Shah, J.

(1) This is an application for obtaining a declaration that there exists no valid and enforceable arbitration agreement between the petitioner and the respondents, and the persons who are appointed as arbitrators have no authority, and that the alleged transactions in respect of which the disputes had arisen between the parties were outside the scope of Article 96 of the articles of association and bye-law 38-A of the East India Cotton Association, Ltd. In the alternative the petitioner has prayed for revoking the authority of the arbitrators.

(2) The petition is filed under Sections 33 and 5 of the Indian Arbitration Act X of 1940. The material allegations and submissions made by the petitioner in his petition are these.

(3) The petitioner and the respondents are members of the East India Cotton Association, Limited, and do business in cotton. One Ramanlal Nagindas was in the employ of the petitioner for about four years prior to 1948. Towards the end of April 1948 the petitioner received letters from several merchants calling upon

the petitioner to give them delivery of cotton in respect of several delivery contracts. The petitioner made enquiries and found that without any authority the said Ramanlal on his own behalf but wrongfully in the name of the petitioner sold about 20,000 bales and purchased about 16,000 bales of Broach Vijay and Navsari Bardoli (cotton), and that the said transactions had resulted in a loss to the extent) of about Rs. 15 lakhs. Ramanlal had no authority to enter into the transactions and had no authority to sign contract-notes in respect of those transactions. The petitioner denied the factum and legality of the contracts alleged to have been effected by him on behalf of the petitioner. Without prejudice to his rights and contentions, however, the petitioner paid Rs. 16,00,000 to more than about 50 parties who produced contract-notes in official form purporting to be signed by Ramanlal, and satisfied the petitioner that the party had accepted the contract in good faith in the normal course of business. The petitioner, however, suspected that the respondents had colluded with Ramanlal and made claims against the petitioner on the basis of certain transactions which were not genuine. He accordingly denied his liability in respect of those transactions.

Disputes having arisen, the respondents appointed an arbitrator, and called upon the petitioner to appoint his arbitrator. The petitioner appointed his arbitrator under protest. There were in all three arbitration proceedings which were numbered 115/48, 118/48 and 59/49. It was submitted that in fact there was no arbitration agreement, that the arbitration agreement was not valid in law, and that in any case the disputes were beyond the scope of Article 96 of the articles of association of the East India Cotton Association, and hence the effect of the arbitration agreement had to be determined. It was also submitted that in view of the provisions of the Indian Cotton (Control) Order, 1945, and the notified orders issued thereunder the contracts alleged to have been entered into with the respondents were void, and that they were also void because no delivery contracts were rendered as required by the bye-laws of the Association, and the arbitrators had no jurisdiction to decide on the validity of the arbitration agreement. The board of directors of the East India Cotton Association had permitted practices in the Association in connection with cotton business, such as failure to insist upon the compliance with the clearing house bye-laws and periodical settlements in the case of delivery contracts, and consequently the board of directors, who were constituted the forum of appeal according to the bye-laws, were not an impartial and independent body, and the authority of the arbitrators should therefore be revoked.

(4) The respondents have filed a detailed affidavit controverting the allegations and submissions. They denied the allegation of collusion with Ramanlal, and asserted that the contracts were valid contracts in respect of which there existed arbitration agreements which were enforceable, and that the arbitration agreements were valid in law, and no question relating to the effect of the arbitration agreements fell to be decided. They further submitted that the contracts were not void as alleged either by reason of the provisions of the

Indian Cotton (Control) Order, 1945, or by reason of the alleged failure to comply with the bye-laws of the Association or the forms prescribed thereunder, They also stated that the practice of the association in the matter of delivery contracts was not inconsistent with the bye-laws of the association, and that no justifiable ground for revoking the authority of the arbitrators was made out,

(5) Besides the denial of the authority of Ramanlal to enter into the contracts (in respect of which no evidence had been led before me by the petitioner), the petitioner argued that some of the contracts were made at a time when transactions in cotton were completely prohibited, and practically all the rest of the contracts were entered into at rates above the ceiling prices fixed by the Textile Commissioner under the Indian Cotton Control Order, and that the contracts were void because in all but two transactions there were no contract-notes rendered as required by the rules; and even in respect of the two contracts the contract-notes departed from the official form prescribed under the bye-laws in material particulars, and hence even those contracts were void by reason of the provisions of the Bombay Cotton Contracts Act, 1932. On the ground that the contracts are void, the petitioner contended that the arbitrators are not entitled to adjudicate upon the validity or otherwise of the contracts inasmuch as a dispute as to the validity or otherwise of the contracts is beyond the scope of bye-law 38-A of the bye-laws of the East India Cotton Association, and Article 93 of the articles of association, and that there is no subsisting arbitration agreement on which the parties are required to go to arbitration.

(6) It is argued on behalf of the respondents that the contracts were not void on any of the grounds submitted by the petitioner; and in any case the present application is not maintainable because the dispute is raised not as to the existence and validity of the contracts that are the subject-matter of the dispute under the arbitration agreements, and that this Court is not entitled to consider the question of the validity or existence of the contracts which are the subject-matter of the dispute in an application u/s 33 of the Arbitration Act, It is also argued that on the terms of the arbitration agreement contained in Article 96 of the articles of association of the East India Cotton Association read with the application form of membership and bye-law 38-A, the arbitrators are entitled to decide among other disputes questions relating to the existence or validity of the contracts which are subject-matter of the dispute, and their legal effect.

It is argued further that in the present application what is sought to be raised, is not any question as to the existence, validity or effect of the arbitration agreement, but questions relating to the existence, validity and effect of the disputed contracts. It is pointed out that in the case of a dispute between a broker and a constituent where, by reason of the provisions of the bye-laws and the form prescribed thereunder the contract note is the sole repository not only of the contract of sale or purchase of cotton, but also of the arbitration agreement, and when an objection is raised as to the existence, validity or effect of the contract, it is an objection both as to the contract and the arbitration

agreement; but where, as in the case of a dispute between the members of the association the commodity contract does not incorporate an arbitration clause but the arbitration agreement is to be found in the contract which subsists between the various members to be bound by the terms of the articles of association as evidenced by the application for membership and acceptance thereof, or is to be found in the statutory bye-laws which are accepted to be applicable by reason of the undertaking in the application for election as member and acceptance thereof, the objection to the existence, validity or relating to the effect of the contract is not an objection to the existence or validity of the arbitration agreement or relating to the effect of the arbitration agreement, and it is contended that the questions raised in the petition cannot be decided, firstly, because they do not fall within the terms of Section 33, and, secondly, they fall within the exclusive competence of the arbitrators, and hence the jurisdiction of the Court is excluded.

The argument that the Court has no jurisdiction to deal with the question as to the validity, existence or effect of the disputed contracts is sought to be supported by reference to the terms of Article 98 and bye-law 38-A. It is submitted that all differences arising between members including those relating to the existence, validity and effect of the disputed contracts and all unpaid claims whether admitted or not must be referred to the arbitrators under the machinery provided under the bye-laws.

(7) To be able to appreciate the effect of the various contentions, it is necessary to refer to the provisions, and the effect of the Bombay Cotton Contracts Act IV of 1932, the bye-laws, the constitution of the East India Cotton Association and the provisions of the Indian Cotton (Control) Order, 1945, in detail.

(8) The petitioner and the respondents are both members of the East India Cotton Association, Limited. The petitioner applied for membership of the Association by application dated October 6, 1932, in the form prescribed and set out at page 107 of the official book of Bye-laws. The respondents were originally associate members, but became full members from November 15, 1947. The applications submitted by them for membership are Exhibit 2, dated April 8, 1943, and November 15, 1947, and are in the forms prescribed and set out at pages 108 and 107, respectively.

(9) The East India Cotton Association, Limited, which was incorporated under the provisions of the earlier Bombay Cotton Contracts Act; is a Cotton Association recognised u/s 4 of the Bombay Cotton Contracts Act 1932, for the purpose of regulating and controlling business in the sale, purchase or other transactions in cotton. According to the provisions of Section 4, the Association has framed bye-laws for regulating and controlling transactions in cotton. Section 8 of the Bombay Cotton Contracts Act provides: "Save as hereinafter provided in this Act, any contract (whether either party thereto is a member of a recognised cotton association or not) which is entered into after the date on which this Act comes into operation and which is not in accordance with bye-laws of any recognised

cotton association shall be void"." This section renders all contracts in cotton, subject to special exceptions, void if they are not in accordance with the bye-laws of a recognised association. The Bombay Legislature has passed Act LXIV of 1947 which seeks to regulate and control forward contracts in all commodities, and by Section 14 and as from the date an association is recognised in Bombay and Balsette in respect of cotton, the Bombay Cotton Control Act ceases to be in force. It appears that the East India Cotton Association has been recognised in that behalf since April 1, 1948. We are in the present case however not concerned with the provisions of the new Act, inasmuch as all the transactions have taken place before the date on which the new Act has been brought into operation so as to apply to transactions in cotton. Notwithstanding the repeal of the Act of 1932 by Section 15 of the Act of 1947 the right, title, obligation or liability already acquired, accrued or incurred under the old Act is not affected.

(10) The East India Cotton Association is a limited liability company incorporated under the Indian Companies Act. Article 96 of the articles of association provides as follows: "Whenever any difference arises between Members or Associate Members or Special Associate Members or Temporary Special Associate Members or between one or more of them and another or others who are not Members or Associate Members or Special Associate Members or Temporary Special Associate Members touching or in connection with the cotton trade or any transaction herein it shall be referred to arbitration in such manner as shall be prescribed by the Bye-laws. And it is hereby expressly declared that the holding of such an arbitration and the obtaining of an award thereunder shall be a condition precedent to the right of any Member or Associate Member or Special Associate Member or Temporary Special Associate Member or non-Member to commence legal proceedings against any other Member or associate member or special associate member or Temporary Special Associate Member or non-Member in respect of any such difference as aforesaid and any Member or Associate Member or Special Associate Member or Temporary Special Associate Member or non-Member shall have no right of action against any other Member or Associate Member or Special Associate Member or Temporary Special Associate Member or non-Member except to enforce the award in any such arbitration."

(11) Bye-laws 35 to 40 of the East India Cotton Association provide machinery of arbitration with regard to disputes which may arise out of or in relation to cotton transactions between members of the association or between members and non-members. Bye-law 38-A provides for reference to arbitration in case Of disputes other than those relating to quality, between members or between members and non-members. Bye-law 80 provides: "Delivery contracts between members shall be made on the official form given in the Appendix. Hedge Contracts between members may be verbal or in writing and when in writing shall be in one or other of the forms given in the Appendix. Whether verbal or written all contracts shall be subject to the Bye-laws, provided that in the case of Delivery Contracts Bye-laws 149 to 163 inclusive shall not apply."

The official form for delivery contracts is set out at page 96 of the official book of Bye-laws. Bye-law 82 provides:

"Contracts between members acting as commission agents on the one hand and their constituents on the other shall be made subject to the Bye-laws and a contract note in the form given in the Appendix (pages 92, 93, 94 and 95) shall be rendered in respect of every such contract. Bye-laws 130 to 166 (inclusive) shall not apply to these contracts."

(12) The official form prescribed is to be found at pages 92, 93, 94 and 95 of the official book.

(13) Under Rule 81 (2) of the Defence of India Rules (1939) the Government of India issued on December 29, 1945, the Indian Cotton (Control) Order, 1045, which by Clause (3) prohibited all persons in British India from entering into any contract or contracts in cotton, but the Textile Commissioner was authorised by general order to exclude from operation of the Order any class or description of contracts. On January 19, 1946, the Textile Commissioner excluded from the operation of the Order ready contracts, delivery contracts and hedge contracts relating to the crop of 1946-47 or earlier seasons, provided that the price stipulated for sale or purchase was within the limits of the floor and ceiling prices mentioned in the schedule. This Order was modified by Order dated April 12, 1946, whereby the ceiling and floor prices were decreased or increased in respect of inferior or superior qualities and the basic qualities by amounts specified therein. In respect of Broach Vijaya cotton the ceiling price was increased as from that date by Rs. 50 per candy.

(14) The Defence of India Rules lapsed on September 30, 1946; but in order to maintain continuity of certain restrictive legislation the Bombay Legislature passed Act XXII of 1946, which by Section 5 continued orders made under the Defence of India Rules in respect of certain essential commodities, if the orders were such as could be made under the Act. The essential commodities in respect, of which the Act was to apply were mentioned in the schedule, and the Provincial Government was authorized to direct additions or omissions to be made in the schedule. "Cotton" was included in the schedule by a Notification issued by the Provincial Government dated October 1, 1946. u/s 4 the Provincial Government was entitled by notified order, i.e., order notified in the Official Gazette, to provide for various matters, including control and prices at which Essential Commodities could be bought and sold. As the Cotton Control Order related to control of prices of an essential commodity, it was continued by reason of Section 5 of the Act.

(15) On August 21, 1947, the Textile Commissioner issued a press-note No. TCP-14, stating that the Government of India had on that day given their consent for trading in hedge and delivery contracts of the 1947-48 season crop in the Bombay market of the East India Cotton Association subject to the existing floor and ceiling prices and other terms and conditions.

(16) Notice was thereafter issued by the East India Cotton Association on September 5, 1947, that trading in the new crop of 1947-48 season was permitted from September 6, 1947.

(17) By Notification No. 4233/33-D, issued on September 5, 1947, the Government of Bombay amended bye-law 65-A and also bye-law No. 136.

(18) On December 23, 1947, the Notification dated January 19, 1946, was amended so as to enable business to be done in 1947-48 crop at revised ceiling and floor prices. The floor price of Broach Vijaya 3/4" was fixed at Rs. 480 and the ceiling price at Rs. 580.

(19) On January 19, 1948, the Textile Commissioner issued a press-note which stated that in pursuance of Government's general policy of decontrol, "the statutory floor and ceiling prices will be abolished with immediate effect." On January 22, 1948, the Government of India issued Resolution No. 90/1-Tex. 1/48 which also made in para. 11 the identical statement.

(20) The Advocate-General has contended that the mere issue of a press-note by the Textile Commissioner could not take the place of a notified order u/s 4, and the resolution of the Government of India cannot operate to remove the floor and ceiling prices fixed under the Bombay Essential Commodities and Cattle (Control) Act, 1946. It is also pointed out that both the press-note and the resolution mentioned "that the floor and the ceiling prices "will" be withdrawn." According to the Advocate-General, they were not orders at all but intimations of an intention to do something in future which was not carried out by necessary orders. It was also contended that the Textile Commissioner could, if at all, act by a notified order, and in fact such a notified order was issued on December 23, 1947, when the floor and the ceiling prices were altered in respect of the 1941-48 crop. If there was no notified order by the Textile Commissioner, it was submitted, that any number of press notes by the Textile Commissioner or resolutions by Government were not a compliance with the requirements of the Bombay Essential Commodities and Cattle (Control) Act XXII of 1946. Now, under the Indian Cotton Control Order the Textile Commissioner is entitled to issue a general order and he did issue the order on August 21, 1947, permitting business in 1947-48 crop to be done subject to existing ceiling and floor prices. If the authority to make a provision in respect of matters covered by Section 4 of the Act was sought to be exercised by the Provincial Government, or any officer or authority, it could only be done by a notified order. But I find nothing in the Essential Commodities and Cattle (Control) Act XXII of 1946 which affects the authority of the Textile Commissioner vested in him by the Indian Cotton Control Order to issue general orders, as distinguished from notified orders. A notified order can be effective if it is published in the Official Gazette. A general order under the Indian Cotton Control Order may, however, be issued and published in any manner the Textile Commissioner deems fit. In my view the expression "will be abolished" in the press-note issued by the Textile Commissioner means in its context "are hereby ordered to be abolished." The Textile Commissioner appears

to have used the phraseology used in the resolution of the Government of India. It is true that the resolution of the Government of India is of a later date than the publication by the Textile Commissioner of the press-note, but a cursory glance at the two publications is sufficient to show that the Textile Commissioner was really publishing the Government resolution. In my view, therefore, the Textile Commissioner has issued a valid general order removing the floor and ceiling prices. The provisions set out are all the material provisions which have a bearing on the contentions raised.

(21) Now, the principal question that arises is: Has this Court jurisdiction to adjudicate upon the question as to the existence, validity or effect of the contracts, as distinguished from the existence, validity or effect of the arbitration agreement? Normally in dealing with an application u/s 33 of the Arbitration Act, the Court is concerned with determining the existence, legality or effect of an arbitration agreement at the instance of a party challenging the arbitration agreement, and the Court is not concerned with the existence or validity of the transactions which are the subject-matter of arbitration. The question as to the existence or validity of the subject-matter of the dispute cannot directly fall within the scope of an enquiry as to the existence or validity of the arbitration agreement. But when as in the present case the petitioner desires to have the effect of the arbitration agreement determined, the Court is entitled u/s 33 in so doing to consider whether the particular dispute before the Court is within the scope of the arbitration agreement. If the Court comes to the conclusion that; a dispute is within the arbitration agreement, the arbitrator is the sole judge of it, but if it does not fall within the scope of the arbitration agreement, the Court is entitled to declare the effect of the arbitration agreement and incidentally upon the validity of the contract.

(22) What then is the arbitration agreement in the present case? The expression "arbitration agreement" is defined in Section 2(a) of the Indian Arbitration Act X of 1940 and means "a written agree-merit to submit present or future differences to arbitration, whether the arbitrator is named or not." The respondents rely upon the terms of Article 96 of the articles of association of the East India Cotton Association, bye-law 38-A and the form of the application for membership which is required to be signed by the members. They contend that both the petitioner and the respondents have, though at different times, applied to become members by applications in writing signed by them, and thereby they have undertaken to be bound by the articles of association of the East India Cotton Association. As the articles of association and the bye-laws contain an arbitration clause, the application read with the bye-laws & the articles of association constitute an arbitration agreement. Reliance is placed upon a judgment of Mr. Justice Bhagwati in "MOHANLAL CHHAGANLAL v. BISSESSAR LAL", 48 Bom LR 686 in support of the proposition that applications in writing submitted by persons who become members at different times of an association, under which they agree to be bound by the rules and regulations, and in which there is a provision for the compulsory submission of the present and further differences

between members "inter se", constitute a written agreement to submit their differences to arbitration within the meaning of the definition contained in Section 2(a) of the Arbitration Act.

(23) If the matter were "res integra", I would have found some difficulty in accepting the submission that the application forms read with Article 96 of the articles of association constitute an arbitration agreement between the petitioner and the respondents. The definition of an arbitration requires that there must be a "written agreement" to submit present or future disputes to arbitration. It is true that a written agreement to be binding need not be signed by both the parties to the agreement: see "GULAMALI ABDULHUSSEIN & CO. v. VISHWAMBHARLAL", 51 Bom LR 79. Acceptance by both the parties with the intention of entering into a contract, of terms which are reduced to writing would be sufficient to constitute a written agreement. It is again true that the articles of association of a company constitute a domestic contract between the members in their capacity as members, by reason of the operation of Section 21 of the Indian Companies Act. But it is in my judgment straining the language of Section 2(a) to hold that independent acceptance in writing by members of the rules and regulations in an application to the association constitutes a "written agreement" between two individual members in respect of their individual disputes in which neither the association, nor the other members, have any direct interest. But Mr. Justice Bhagwati has taken the view that the separate applications for membership submitted by members agreeing to be bound by the articles of association amount to a written agreement; and, I do not feel justified in not following that view. The learned Advocate General has referred me to a decision of the Calcutta High Court reported in "KHUSIRAM v. HANUTMAL", 53 Cal WN 505, wherein Mr. Justice Das refused to accept the decision of Mr. Justice Bhagwati as correct. But on a question of the nature raised before me uniformity of judicial opinion is of greater importance than a strictly legalistic interpretation contrary to opinions previously expressed and published. I, therefore, follow the judgment of Mr. Justice Bhagwati in "MOHANLAL CHHAGANLAL V. BISSESSARLAL", 48 Bom LB 686 and hold that applications for membership under which the parties agreed to be bound by the articles of association and the bye-laws constituted an arbitration agreement.

(24) Does this arbitration agreement authorize the arbitrators to decide a dispute as to the validity of the contract? In the application for membership the applicants have undertaken to "conform and to be bound by the Memorandum and Articles of Association, and the Bye-laws of the Association". Under bye-law 38A disputes arising out of or in relation to contracts (whether between members or between members and non-members) made subject to the bye-laws, are required to be referred to two arbitrators. The words of bye-law 38-A clearly indicate that in respect of those contracts which are made subject to the bye-laws the dispute shall be referred to arbitration. If the contract is not subject to the bye-laws, i.e. not in accordance with the bye-laws, there could be no obligation to go to arbitration. Bye-law 38-A applies to a large number of persons

who may not even be members of the association and seeks to exclude the jurisdiction of the Civil Court and must therefore be strictly construed.

(25) In "BABUBHAI v. MADHAVJI GOVINDJI & CO", 33 Bom L.R. 759 this Court considered the question as to the obligation of parties to go to arbitration on a question of the validity of contracts made subject to the bye-laws of the East India Cotton Association. The head-note is as follows: "Under bye-law 38A framed under the Bombay Cotton Contracts Act, 1922, the arbitrators have no jurisdiction to decide disputes arising out of contracts not in the sanctioned form." Mr. Justice Broomfield in the course of his judgment observed (p. 770):

"...So far as Clause (a) (of By-law 38A) is concerned, it is clear that arbitration is not contemplated or made compulsory in the case of contracts not made subject to the bye-laws. ...There is nothing in the bye-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."

It is true that the dispute in the case in "BABUBHAI v. MADHAVJI GOVINDJI & CO.", was between a member and a non-member, but in my view that circumstance does not justify any distinction being made between the principle of that case and the present case. The learned Judges who decided that case held that if the contract was not in the official form prescribed, there was no legal contract which was made subject to the bye-laws on which arbitration could be insisted upon. If the validity or otherwise of the contracts was the test in determining whether there can be a valid submission, in my judgment, it is a matter of little consequence that the contract is between members and not between a member and a non-member. Nor is the circumstance that there is an express arbitration clause in the case of a contract between a member and a non-member and there is no such clause in a contract under bye-law 80, of any importance. Principal to principal contracts under bye-law 80 are made as such subject to the bye-laws (including bye-laws relating to arbitration) as commission agency contracts under bye-law 82.

Express reference to the arbitration clause in the official form in the commission agency contract does no more than repeat what is necessarily implied by the statement that "the contract is subject to the bye-laws."

(26) It is true that the words of Article 96 of the articles of association apparently seem to include all disputes relating to trading in cotton, under that article any difference between the members or associate members touching or in connection with the cotton trade or any transaction therein must be "referred to arbitration in such manner as shall be prescribed by the Bye-laws". The paragraph makes provision for reference to arbitration, by reference to (1) the persons between whom the dispute arises, (2) the nature of the dispute, and (3) the manner of reference. Before a dispute is required to be referred to arbitration under Article 96 it must be shown that the dispute is a dispute relating to trade in cotton or in respect of cotton transactions. Other disputes between the members "inter se"

or between members and non-members are not required to be referred to arbitration. The article provides that a dispute must be referred to the arbitrators in such manner as is prescribed by the bye-laws. However, the expression "in such manner as shall be prescribed by the Bye-laws" in its context refers not merely to the mode of submission to arbitration, nor merely to the procedure relating to the arbitration proceedings provided by the bye-laws, but also to disputes which are required to be referred, the persons to whom they are required to be referred and the procedure of arbitration including the hearing of appeals. In my judgment bye-law 38A means no more than this : that disputes between members or associate members or between members and outsiders shall be referred to arbitration according to the bye-laws, and that the holding of arbitration proceedings shall be a condition precedent to the institution of any legal proceeding by a member, associate member or even a non-member, and that in such proceedings only the award will be enforced. Article 96 may bind the members "inter se" by reason of the provisions of Section 21 of the Indian Companies Act. But when the article provides that disputes between members and non-members shall be referred to arbitration, and holding of arbitration proceedings shall be a condition precedent to the institution of legal proceedings and only the award shall be enforced, it can have only the meaning that the disputes relating to trading in cotton and transactions therein shall be referred to arbitration in accordance with the bye-laws.

It is argued that even when disputes arise between members which do not fall within the bye-laws they must be referred to arbitration, and the procedure, if any, contained in the bye-laws would apply. In my judgment the argument contains its own refutation. The bye-laws do not provide any procedure for reference of disputes to arbitration which do not fall within the bye-laws relating to arbitration. In any case the argument requires that the words "if any" should be added after the words "in such manner" in the article to ascribe any meaning to the article which might support the contention. Again a dispute between a member and a non-member can be required to be referred under Article 96 if the bye-laws so provide and not otherwise, because obviously Article 96 by itself cannot bind non-members. In my judgment, therefore, Article 96 does not provide for arbitration in case of disputes other than those in respect of which the bye-laws make it obligatory to refer the dispute to arbitration. Any other view would require the article to be extensively rewritten in order to make it applicable according to the nature of the dispute and according as the dispute is between members or between members and non-members or between members on one side and members and non-members on the other side.

(27) In my view, therefore, Article 96 does not contemplate reference to arbitration of disputes other than those contemplated in the arbitration bye-laws of the East India Cotton Association. If that is the right view, then obviously contracts in respect of which the parties cannot go to arbitration under bye-law 38A cannot be submitted to arbitration under Article 96 of the articles of association. The authority in "*BABUBHAI v. MADHAVJI GO-VINDJI & CO.*", 33

Bom LR 759, will equally apply to arbitration proposed under Article 96. The question as to the validity of the contracts is within the competence of the Court in the arbitration agreement arising between the members of the East India Cotton Association either by reason of bye-law 38A or Article 96 of the articles of association, even if the arbitration agreement is not expressly incorporated in the contract, and exists apart from the terms of the contract.

(28) The learned Advocate General argued that once a dispute as to the existence or legality of the arbitration agreement was raised, the arbitrator ceased to have jurisdiction to decide the dispute arising under the arbitration agreement altogether, and relied upon the decision reported in "MAHOMED v. PIROJSHAW, 34 Bom LR 697. It is true that an arbitrator cannot decide whether there is in fact or in law a valid arbitration agreement, which compels any parties to go to arbitration. By deciding that there exists a valid arbitration agreement the arbitrator cannot confer jurisdiction upon himself. But in view of the provisions of Section 33 of the Arbitration Act, which for the first time incorporates a provision (in the statutes relating to arbitration in India) enabling a party challenging the existence or validity of an arbitration agreement, to apply to the Court for an adjudication thereof, and by Section 32 prohibited the parties from litigating about the same otherwise than by way of an application, it is open to the Court to declare that an arbitration agreement exists in fact or is valid in law. If the Court on an application u/s 33 holds that an arbitration agreement does in fact exist or that it is a valid agreement, the arbitrator is entitled to proceed to decide the dispute on the merits. I am unable to agree with the contention of the learned Advocate General that once an objection to the existence or legality of an arbitration agreement is taken, the arbitrator loses jurisdiction to decide the dispute on the merits for all time. Nor is it necessary for the party asserting that an arbitration agreement exists in fact and law to make a substantive application for a declaration to that effect, when the other party has challenged the existence or validity of the arbitration agreement, and has failed therein.

(29) Now, the contracts in respect of which the disputes have arisen are contracts of two different classes, contracts between principal and principal and contracts of commission agency. The first class of contracts are those contemplated by bye-law 80 and the second class by bye-law 82. It is admitted that all contracts are delivery contracts, and, therefore, subject to the limitations contained in the order of the Textile Commissioner, contracts which are excluded from the operation of the order. It is also the case of both the parties before me that all the transactions are in respect of the 1947-48 crop. According to the respondents the following transactions in cotton were entered into between the parties.

COMMISSION BASIS

HUBLI-COOMPTA

Date Purchase Bales Rate

30-1-48 100 180

595

775

Date Sale Bales Rate

March 9-2-48 100 208 March

595

803

COMMISSION BASIS

Broach Vijay

Date Purchase Bales Rate

15-4-47 200 529 0 0

16-4-47 900 534 0 0

25-8-47 100 561 0 0

25-8-47 500 560 0 0

25-8-47 500 560 8 0

26-8-47 200 564 0 0

27-8-47 600 563 0 0

Total 3000 bales

Date Sale Bales Rate

29-8-47 100 549 0 0

29-3-47 100 543 0 0

29-3-47 500 551 0 0

31-3-47 100 554 0 0

31-3-47 200 554 0 0

23-9-47 100 573 8 0

23-9-47 100 572 0 0

23-9-47 200 573 0 0

23-9-47 100 572 0 0

24-9-47 400 575 0 0

30-9-47 200 577 0 0

30-9-47 200 577 12 0

1-10-47 400 579 0 0

1-10-47 300

580 0 0

Total 3000 bales

PRINCIPAL TO PRINCIPAL

Navsati-Bardoli

Date Purchase Bales Rate

2-4-48 200 825 0 0

2-4-48 100 850 0 0

7-4-48 100 835 0 0

7-4-48 100 835 0 0

24-4-48 200 800 0 0

7-4-48 100 835 0 0

28-4-48 100

835 0 0

Total 900 bales

Date Sale Bales Rate

16-2-48 100 835 0 0

16-2-48 100 835 0 0

16-2-48 700 835 0 0

Total 900 Bales

PRINCIPAL TO PRINCIPAL

Broach-Vijaya

Date Bales Rate

6-9-47 300 561 0 0

6-9-47 100 566 0 0

16-1-48 100 580 0 0

29-1-48 100 717 0 0

6-4-48 200 682 0 0
6-4-48 100 682 0 0
7-4-48 300 692 0 0
7-4-48 100 682 0 0
7-4-48 100 682 0 0
13-4-48 200 640 0 0
14-4-48 100 650 0 0
15-4-48 100 600 0 0
15-4-48 100 680 0 0
16-4-48 100 680 0 0
19-4-48 100 700 0 0
19-4-48 100
600 0 0

Total 2300 bales

Date Bales Rate

23-9-47 100 573 0 0
23-9-47 100 574 0 0
23-9-47 100 575 0 0
23-9-47 100 576 0 0
1-10-47 100 679 0 0
13-2 48 1800
682 0 0

Total 2800 bales

(30) Now, in support of the transactions the respondents rely upon contract-notes similar to the official form in respect of two transactions, viz, Broach-Vijaya

In respect of the Hubli-Coompta transactions on commission basis there are two letters confirming the transactions entered into through the petitioner and subject to the bye-laws of the East India Cotton Association. In respect of all the purchase transactions in Broach-Vijaya, and the sale transactions between March 29, 1947, and March 31, 1947, on commission basis there is a confirmation letter dated January 15, 1948, purporting to be accepted by K.L. Martatia on behalf of the petitioner. In respect, of the rest there is not even a confirmation

letter. In respect of the Principal and Principal purchase transactions Navsari-Broach there are two confirmation notes:

and three confirmation notes in respect of three sale transactions:

In respect of Principal to Principal Broach-Vijaya there is one confirmation letter for purchase transaction dated 6-9-47, 300 bales at Rs. 561 and confirmation notes in respect of all sale transactions excepting the last one, viz. dated February 13, 1948, for 1800 bales at Rs. 682.

(31) On this analysis it is apparent that in respect of none of the transactions on commission basis there is a contract-note in the official form. The confirmation letters which are sent and accepted do not conform to the requirements of that form. In respect of two Principal and Principal transactions in Broach-Vijaya Cotton there are contract-notes similar to the official form, and in respect of some of the rest there are confirmation letters, and for the remaining there are no confirmation letters.

(32) In view of the imperative provisions of bye-law 80 which applies to delivery contracts between Principal and Principal and of bye-law 82 which applies to contracts on commission basis and the provisions of Section 8 of the Bombay Cotton Contracts Act, all contracts which are not in accordance with the bye-laws of the East India Cotton Association would be void.

(33) But Mr. Maneksha says that in respect of the Principal and Principal contracts where the transaction is not intended to be entered through brokers, the bye-laws do not provide for an official form; and he argues that if there is no official form provided, the failure to conform to the form, which could not have been intended to apply to contracts not through brokers, has not the effect of rendering the transactions void, Mr. Maneksha further submits that the confirmation notes substantially conform to the official form at page 96 of the bye-laws and hence the transactions in which confirmation letters have been written and are accepted are not void. He further argues that bye-law 82 applies as between member and non-member constituent and applies only to hedge contracts. Now bye-law 80 "ex facie" applies to all delivery contracts between members and members. It also applies to hedge contracts. Hedge contracts may be made orally or in writing, but delivery contracts must be in writing. It is undisputed that all the transactions were intended to be delivery contracts. Being delivery contracts and between members of the East India Cotton Association, they must be in the official form. It is true that the official form contemplates that a contract between members would be normally made through a broker. That, however, does not mean that there can be no contracts between members without the intervention of brokers or that the official form cannot be modified so as to suit particular requirements, provided the essential nature and legal effect of the contract remains unaltered. Bye-law 80 refers to the official form without specifying on what page that form is printed, but there are only two forms of contract between members and members (one for purchase transactions and

another for sale) and they are found printed at page 96 of the official book of bye-laws. In the absence of any other official form prescribed by the bye-laws, I do not find any substance in the argument of Mr. Maneksha that the form printed at p. 96 is not the official form referred because the page is not mentioned expressly in the bye-law whereas the pages at which the form of the official contract note to be rendered to the client is printed are expressly referred to in bye-law 82.

(34) In my judgment by reason of bye-law 80 of the East India Cotton Association delivery contracts must be made in the form printed at page 96 of the official book of bye-laws, subject to amendments to suit conditions peculiar to the parties but not so as substantially to affect the nature of the contract or its legal effect.

(35) I am unable also to agree with the submission of Mr. Maneksha that the letters of confirmation are a good substitute for the official contract form. In the first place, these letters of confirmation do not purport to be contract notes at all. Whereas the official contract note is intended to be the sole repository of the terms and conditions on which the transactions are entered, the letters of confirmation merely purport to give intimation that certain transactions in cotton have been effected, in pursuance of a pre-existing contract. Again, the letters of confirmation which are collectively put in and marked Ex. 5 do not substantially conform to the requirements of the official form. The confirmation letters dated September 24, 1947, September 6, 1947, and November 1, 1947, in respect of Broach-Vijaya cotton do not appear on their face to have been made subject to the bye-laws of the East India Cotton Association, though in the other confirmation letters it is mentioned that the purchases have been made subject to the bye-laws of the East India Cotton Association. The confirmatory letters mention details about the quality, the quantity, date of delivery, rate, special terms, and remarks. The important details which are not to be found in these letters are:

1. details about measurement,
2. brokerage, and
3. the provision for mentioning the difference above or below the settlement rate of the hedge contract.

(36) Mr. Maneksha has pointed out that bye-law 101 which deals with measurements and cubic tonnage provides that the association may by resolution suspend the operation of bye-law 101, and that the East India Cotton Association by resolution Ex. 3 dated November 30, 1942, resolved to suspend the operation of the bye-law. It does not appear, however, that the official form can be amended by a resolution of the association and that the form does not appear to have been amended by the association or by any competent authority. But in my view the omission of the measurement in tonnage does not alter the character or legal effect of the contract. Similarly, brokerage can only be

mentioned where the contract is entered into through a broker. If a contract need not necessarily be entered through a broker, failure to mention brokerage of a broker who does not intervene cannot affect the validity of the contract. But the omission of any reference in the confirmation-note to the difference above or below the settlement rate of hedge contract is in my view a substantial alteration of the nature and legal effect of the contract.

(37) Bye-laws 136 and 139 occur in the chapter relating to Clearing House Bye-laws. Bye-law 139 provides:

"All Delivery Contracts other than those excepted under bye-law 136 and Hedge Contracts shall be subject to periodical settlements through the Clearing House and in every case the parties to the contract must be members of the Association. Settlement of differences due on open contracts and of other liabilities to be settled through the Clearing House shall be made once weekly on days which shall be fixed by the Board and notified in a calendar to be published annually.

The day on which Balance Sheets are required to be submitted to the Clearing House shall be Known as Settlement Day." Now, bye-law 139 in terms applies to delivery contracts, and that entails the consequence that those contracts would have to pass through the clearing house, and they would be subject to periodical settlements. Delivery contracts do not appear to be excepted under bye-law 136; but where the differences on delivery contracts for cotton equal to stamped bales or sealed or typed samples in which delivery is to be taken within a period of six weeks from the original date of contract, the contract need not pass through clearing house.

(38) Now, none of the confirmation letters refer to the difference above or below the settlement rate of the hedge contract. The delivery contracts made in that form would not be settled through the clearing house, and the requirement of a periodical settlement would be completely avoided. Chandulal Maganlal Vakharia on behalf of the respondents has in his affidavit dated August 20, 1949, stated in paragraph 25: "Without prejudice, I say that to the knowledge of the Petitioner and his said firm and all members of the East India Cotton Association Limited for many years past delivery contract transactions have not gone through the periodical clearings and the terms as to periodical clearings and settlement were in accordance with such practice waived by the Petitioner said firm." If according to the scheme of the bye-laws it was necessary that the delivery contracts should be subject to periodical clearings, the alleged practice of the association, assuming that it was acquiesced in by the petitioner, cannot justify the omission of an essential term of the contract if the contract is strictly carried out according to the provisions of the bye-laws. The delivery contract would, according to the bye-laws, be subjected to periodical clearings and the settlement would be made at a fixed difference above or below the hedge contract rate. It is, therefore, an important term of the contract, if the contract is entered into in consonance with the bye-laws and the form, that the contract subject to periodical settlements,

and that settlement would be made according to the scheme prescribed. If the parties omit that condition or agree to waive it in my view the resultant contract is of a character different from the contract contemplated by the official form, and its legal effect is entirely different. That the omission to provide for the periodical settlement was consistent with the alleged longstanding practice of the association is a circumstance entirely irrelevant in considering the legal effect of the contract according to the provisions of Act IV of 1932. An agreement, express or implied, to waive an illegality can never estop a person from pleading the illegality.

(39) It was pointed out that by amendments made in bye-law 53 and in the schedule to the bye-laws which now refers to hedge contracts as Indian cotton contracts and omits the numeration thereof, the expression "Hedge Contract" as used in the form at p. 96 has become meaningless, and it was argued that the reference to the settlement rate of a hedge contract in the official form which did not exist had become otiose. It is true that in some places and especially in the schedule hedge contracts are now referred to as "Indian cotton contracts". It is also true that the numeration of hedge contracts is omitted in the new schedule. But it is obvious that the expression "hedge contract" is not removed from the bye-laws. In bye-law No. 1 hedge contract is defined as "The Indian Cotton Contract as specified in bye-law 53."

(40) In numerous bye-laws hedge contracts are referred to; see e.g., bye-law 80 and also bye-laws 1, 47-A, 50, 52, 53, 54, 54-A, 58, 59, 61, 63, 84, 85-A, 128 and 136.

(41) It is, therefore, impossible to accept the argument that the effect of the alteration of the nomenclature or the amendment of the schedule has had the effect of superseding the form in so far as it requires the contract made in the official form to mention the difference above the hedge contract rate for settlement.

(42) It is further argued that even though there are no contract notes in the official form as provided at page 96 in respect of Principal to Principal contracts and in the form prescribed at pages 92 to 95 of the official book of bye-laws in respect of the commission agency contracts, the petitioner was not entitled to rely upon the absence of contract-notes, because he himself was in default. Belying upon the decision in "NEW ZEALAND SHIPPING CO. v. SOCIETE DES ATELIERS ET CHANTIERS DE FRANCE (1919) A C 1 and "CHUNILAL v. AHMEDABAD FINE SPINNING & WEAVING CO.", 24 Bom L R 295, it was argued that the petitioner himself being guilty of a dereliction of duty, he should not be allowed to take advantage of the condition which he himself brought about. The principle of the cases in my view can apply to cases primarily arising in breaches of valid contracts, or transactions which become void by reason of supervening circumstances. Where, however, as in the present case, there can be no contract, other than a contract in writing and in a specified form, because a party fails to execute the contract, with the result that there is no valid contract, the Court

cannot by relying upon the rule that a party cannot take advantage of a condition brought about by him, bring into existence a contract which was not made and clothe it with legal validity (including the affixing of stamp-duty) which it cannot have, in the absence of form prescribed. This Court cannot proceed upon the ground that even though the petitioner failed to render a contract note, a contract note duly stamped and executed in the form provided must be deemed to exist and the rights of the parties must be governed thereby. If the respondents wanted that a legally enforceable contract should be brought into existence, they should have called upon the petitioner to issue the contracts, and if he persisted in his default, they should have carried the matter to the association which had authority to enforce compliance with the bye-laws and forms.

(43) The confirmation-notes which were sent in the case of some of the commission agency transactions which have been referred to earlier, cannot be a valid substitute for the contract-note in the forms printed at pages 93 to 95. A glance at the form is sufficient to show that very few of the meticulous details mentioned in the official contract form are found in the confirmation notes and important covenants are completely absent. Therefore, all principal to principal transactions in which there are no contract notes in the official form and all commission agency contracts are void by reason of Section 8 of Bombay Act IV of 1932.

(44) It was also argued that bye-law 82 applies only to contracts between a member and a non-member constituent; and reliance was placed upon the form which referred to intimations being sent by telegram, and especially to the last two clauses of the form in the following form;

"If this contract is a contract of sale, then if between us and other members of the East India Cotton Association we become, under the bye-laws, the first seller of the cotton so sold, and if the last buyer exercises the right given by bye-law 65-A, you will then be bound by the provisions of the bye-law as between you and we.

If this contract is a contract of purchase and if between us and other members of the East India Cotton Association Limited, we become the last buyers, unless we shall have received express instructions from you in writing to the contrary, before the commencement of the delivery period, or with the order if the contract is entered into during the permitted days of trading in the delivery period, we shall be at liberty at our option and without any further reference to you to exercise the right given to the last buyer under bye-law 65-A, and if we so exercise the right you will be bound by the provisions of that bye-law and between you and us."

(45) Now, bye-laws 81 and 81-A contemplate commission agency contracts between members. The terms of bye-law 82 are general and do not appear to indicate that the constituent must be a non-member. Again, the last two clauses

of the form at pages 92 to 95 were added in the year 1944 by way of an amendment. If till 1944 bye-law 82 and the form as it stood applied to member constituents as well as non-member constituents, there must be a very strong indication of intention in the bye-laws that those contracts which were contemplated to take place between members and which would normally fall within the terms of that bye-law were sought to be excluded by the amendment. The language of the bye-law does not justify the contention; nor is there anything in the form which excludes commission agency contracts between members from the operation of bye-law 82. Merely because there are certain clauses in the form of the contract which may be more consistent with, the constituent being a non-member, that is not a ground for not giving full effect to the bye-law. In my judgment, therefore, all contracts in which there are no contract-notes in the official form are void by reason of Section 8 of Bombay Act IV of 1932.

(46) The respondents have produced two contract-notes which it is contended are substantially in the official form prescribed. It is argued on behalf of the petitioner that:

- (1) measurement in tonnage is not mentioned;
- (2) that the cotton sold is Broach-Vijaya excluding Itola and Goya Gate;
- (3) that the clause relating to the difference at which the settlement would be made at a rate above or below the Hedge contract rate has not been filled in.

Now, if the departure from the form is such as to alter the nature of the effect of the contract, so as to make a contract different from the one which is contemplated to be entered into according to the terms of the bye-laws, the contract would be void. To state in a different form, if the contract has the same legal effect as the form set out in the appendix to the bye-laws, it is valid. If the departure from the official form is venial or not substantial, it will not affect the contract. Applying that test, in my judgment, there is no substantial variation of the contract form in respect of the first two departures from the official form. For the reasons mentioned earlier in dealing with the confirmation letters, the legal effect of the contract is not altered by omitting to mention the measurements. So also the exclusion of the Itola and Goya Gate cotton from the variety of Broach-Vijaya does not alter the nature of the contract. The parties may agree to purchase or sell any of the different varieties of cotton, and if in doing so they agree that the cotton agreed to be purchased or sold will not include cotton grown in any particular place or places, which but for the express exclusion would have been included in the general variety, in my view, it cannot be said that the exclusion gives the contract a legal effect different from the one contemplated by the official form and inconsistent with the bye-laws. However, in neither of the two contracts produced is the difference above or below the settlement rate of hedge contract filled in. In effect the contracts entered into are for fixed amounts for the March-April 1948 delivery, which were not to be subject

to the periodical settlement, and the settlement whereof was not to be made according to the hedge contract rates. This, as I stated earlier, is a substantial variation. Both the contract-notes are, therefore, void as they are not in accordance with the bye-laws of the East India Cotton Association, Limited,

(47) In view of my conclusion as to the illegality of the contracts as not being in accordance with the bye-laws of the East India Cotton Association, Limited, I need not discuss the question whether the contracts or any of them are illegal as being contrary to the provisions of the Indian Cotton Control Order as amended from time to time. It is necessary, however, to state that none of the contracts in my judgment contravenes the provisions of the Indian Cotton Control Order. The only ground of illegality set up was that the contracts were entered into at rates exceeding ceiling prices fixed by the Textile Commissioner. Now all the contracts in dispute are delivery contracts and they are, provided they conform to the permission granted by the Textile Commissioner, excluded from the operation of the Cotton Control Order. The ceiling price fixed under the order of the Textile Commissioner by his order dated January 19, 1946, was altered under his order dated April 12, 1946, and Rs. 50 were added to the ceiling price (of Rs. 530 originally fixed) in respect of several classes of cotton, including Broach-Vijaya. The same ceiling price was adopted under the order dated December 23, 1947. As I have held earlier, the ceiling and floor prices were abolished as from January 19, 1948. Contracts prior to December 23, 1947, are all Broach-Vijaya contracts and none of them is entered at a rate exceeding the ceiling price of Rs. 580. There is only one contract between December 23, 1947, and January 19, 1948, which is entered into at the maximum ceiling rate. The contracts subsequent to January 19, 1948, are entered at rates exceeding the former ceiling rates; but the ceiling rates having been abolished, a general permission to enter into delivery contracts must be deemed to be granted under the order dated January 19, 1946, as amended by the order contained in the press-note dated January 9, 1948. In my judgment, therefore, not one of the contracts contravenes the provisions of the Indian Cotton Control Order, 1945.

(48) It is therefore unnecessary to consider the interesting argument advanced before me, whether the provisions of the Indian Cotton Control Order remained operative after September 30, 1946, When "Cotton" was not included in the list of the essential supplies in the Act as originally passed, but was added by a notification u/s 4 of the Act under the power reserved to the Provincial Government.

(49) In the view that I have taken that the contracts are void, the dispute, arising in respect thereof, cannot be referred to arbitration. It is, therefore, unnecessary to consider the alternative prayer that the authority of the arbitrator should be revoked, I would however briefly state my conclusions on that prayer. Ordinarily the authority of an arbitrator cannot be revoked, except with the leave of the Court: See Section 5 of the Arbitration Act. It is argued that in the present case the arbitrators, who are members of the East India Cotton Association and

the Appellate Committee appointed under the scheme of the bye-laws to hear appeals, cannot be regarded as an independent body, and hence it is just and proper that the arbitration agreement itself should be cancelled. It is further argued that in view of the complicated nature of the questions of law raised, the petitioner should not be compelled to go to arbitration.

(50) Now, a party applying for leave to revoke the authority of an arbitrator and the cancellation of the arbitration agreement has to make out a very strong case. The presumed bias on the part of the members of the association does not appear to have any foundation in the present case. It is true that the petitioner has pointed out certain irregularities in the business transactions done in the East India Cotton Association, but I am not prepared to assume that respectable members of the association will for that reason be unable to take a dispassionate view of either the evidence or the points of law which may be submitted before them. In my view, again, there are no such important questions of law arising in the dispute as would justify this Court in withdrawing the case from the jurisdiction of the tribunal chosen by the parties.

(51) If, therefore, I had taken the view that the contracts are valid, I would not have passed any order of revocation as prayed. But on the view I have taken, I declare that the arbitrators have no authority to decide under Article 96 of the articles of association or bye-law 38-A of the East India Cotton Association, Limited, the dispute as to the legality of the contract. I further declare that the contracts are void inasmuch as they are not in the official form prescribed.

(52) I must state that no evidence was led by the petitioner in support of his case that the transactions relied upon by the respondents were entered into in collusion with Ramanlal, the employee of the petitioner. Mr. Maneksha desired to lead evidence in support of his case that all principal and principal contracts, except two in respect of which the official contract notes are produced, were brought about without the intervention of brokers. I expressed the opinion that in the view I took that evidence was irrelevant, and Mr. Maneksha thereupon desisted from leading his evidence.

(53) The petitioner will be entitled to his costs of the petition. Costs to be taxed as on the scale of a chamber matter (adjourned to Court).

(54) AUGUST 23, 1950. After the judgment was delivered Mr. Maneksha on behalf of the respondents submitted before me that I should pass an order, in view of my judgment, superseding the arbitration or to relieve the respondents under s. 36 of the Indian Arbitration Act X of 1940 from the necessity of fulfilling the condition of going to arbitration and obtaining an award under Article 96 before filing a suit on the contracts. I do not think that it is possible for me to pass the order which Mr. Maneksha has requested me to pass. Under the Indian Arbitration Act a Court is entitled to supersede the arbitration agreement u/s 12, Clause (2) (b) or u/s 19. Obviously, Section 12 cannot apply to the "facts of the present case. I have not permitted the authority of the arbitrators to be revoked,

nor have I removed the arbitrators or the umpire. It is only where the Court permits the authority of the arbitrator or arbitrators to be revoked or removes the umpire who has entered on the reference or the sole arbitrator or the arbitrators, that the Court has authority to direct that the arbitration agreement shall cease to have effect with respect to the difference referred. Nor can Section 19 have any application. Section 19 presupposes an award which has become void either under Sub-section (3) of Section 16 or which has been set aside. In this case no award has been made by the arbitrators. Apart from the terms of Sections 12 and 19 there is no authority vested in the Court to supersede an arbitration agreement. The proviso to Section 25, which enables an order for supersession to be made in certain cases contemplated by Sections 8, 10, 11, 12 and 19, can again not apply to the facts of the present case. Section 25 applies only to arbitration in suits, and does not apply where, as in this case, there has been reference to arbitration but not in a pending suit.

(55) I cannot also accept the submission of Mr. Maneksha that I am entitled to direct that the arbitration agreement shall cease to have effect as regards the differences in the present litigation. Section 36 can apply to those cases where the Court is of opinion that the arbitration agreement applies to any matter in dispute but for some reason the arbitration agreement shall cease to have effect as regards any particular difference. However, in the present case I have taken the view that the arbitration agreement does not apply to the particular difference which was submitted to the arbitrators. Therefore, there is no question of ordering that the arbitration agreement shall cease to have effects and I have passed no such order. In my view, therefore, it is not competent for me to pass the order that the condition precedent which is incorporated in Article 36 of the articles of association of the East India Cotton Association should be suspended. The application appears to have been made as a matter of abundant caution. But as observed in the case reported in "CHIRANJILAL RAMCHANDRA v. JATASHANKAR JOSHI", 44 Bom L R 692, it is not open I to a party to an arbitration proceeding, who completely denies the existence or legality of the contract to turn round thereafter and contend in a suit filed that the plaintiff should have resorted to arbitration proceedings. If it is open to the respondents in the present case to file a suit on the transactions (with regard to which I express no opinion whatever), it would certainly not be open to the petitioners to contend that the respondents have no right to file a suit without going to arbitration, since such a contention, if raised, is barred by the rule of approbate and reprobate. I, therefore, reject the submission made by Mr. Maneksha.

(56) Order accordingly.