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**(1972) 08 AHC CK 0022**  
**In the Allahabad High Court**  
**Case No : First Appeal No. 226 of 1957**

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| Kailashpati Singhania and Others | Vs | APPELLANT  |
| Ram Gopal Gupta and Others       |    | RESPONDENT |

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**Date of Decision :** 25-08-1972

**Acts Referred:**

Arbitration Act, 1940 — Section 17, 32  
Civil Procedure Code, 1908 (CPC) — Section 100, 101, 47  
Limitation Act, 1908 — Article 106, 120

**Citation :** AIR 1973 All 316

**Hon'ble Judges :** Gopinath, J;A.K. Kirty, J

**Bench :** Division Bench

**Advocate :** B.L. Gupta, J. Swarup and V.B. Singh, for the Appellant; S.K. Aggarwal, K.L. Misra, Kameshwar Pd., Shanti Bhushan and Ashok Gupta, for the Respondent

**Final Decision :** Partly Allowed

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## Judgement

Kirty, J.—This appeal by the plaintiffs arises out of Suit No. 203 of 1953 instituted on 25th August, 1953, Two reliefs were sought by the plaintiffs; one was for a decree for Rs. 1,48,532/- with pendente lite and future interest at the rate of six PER cent per annum, while the other was in respect of half share of the plaintiffs in certain assets. It was prayed that a commissioner be appointed for purposes of ascertaining the amount due to the plaintiffs in respect of such assets. The suit was contested by both the defendants and was dismissed in toto by the trial Court.

2. The material facts briefly are as follows:--

The parties to the suit belong to two well-known business families of Kanpur. They may be described as Singhania and Guptas respectively. Admittedly, the Singhania and Guptas for a number of years jointly carried on several business enterprises. One of such business enterprises was carried on under the name and style of M/s. India Supplies--a registered firm of which admittedly the two

plaintiffs and the two defendants were partners. Certain disputes having arisen between the Singhania and the Guptas, they agreed to have their disputes, not only in regard to the affairs of M/s. India Supplies but in regard to many enterprises as well, settled by arbitration. Accordingly, they entered into an arbitration agreement referring all the disputes to the sole arbitration of Sri Kanhaiya Singh. Besides the parties to the suit No. 203 of 1952, a number of other persons belonging to the families of Singhania and Guptas, were also parties to the arbitration agreement. Admittedly, the above named arbitrator gave an award dated 18th January, 1944. This was a composite award by which the disputes regarding each business or enterprises were separately dealt with. It appears that an application u/s 17 of the Arbitration Act was filed for making the award the rule of the Court, It further appears that certain objections were filed against the award. The application u/s 17 of the Arbitration Act appears to have been registered as Original Suit No. 31 of 1954 in the Court of Civil & Sessions Judge, Kanpur. This application was filed on 5th May, 1944, It was prayed therein that a decree be passed in terms of the award. In the proceedings initiated by the application u/s 17 of the Arbitration Act, the parties appear to have entered into a compromise, and, as a result of this compromise, the Court ultimately passed a consent decree. Although the decree has been termed as a consent decree, in pith and substance, however, it is a decree based on the award dated 18-1-1944. We are, however, concerned only with that part of the decree which incorporated the award given by the arbitrator in respect of M/s. India Supplies. The substantial question for decision in this appeal, apart from legal questions, is the construction of the award.

3. On the pleadings of the parties, the trial court framed a number of issues. Out of them, the following only need mention:--

1. Whether award between parties dissolved "India Supplies" or directed plaintiffs to retire on payment of Rs. 50,000/- and other sums? If so, its effect?

2. Whether plaintiffs are entitled to claims mentioned in Schedule "A" given at the foot of the plaint in the light of award? If so, effect and amount?

3. Whether suit is barred by limitation?

4. On Issue No. 1, the trial court recorded a finding that the firm M/s. India Supplies had not been dissolved but by the award the plaintiffs were deemed to have retired from the partnership. The court below, however, further held that the effect of retirement of the plaintiffs was that the firm in question was to be deemed to have been dissolved with effect from 18-1-1944. On Issue No. 2, the Court below held that the plaintiffs were not entitled to the amount claimed as per Schedule "A". This finding was based on the interpretation of the relevant part of the award. On the third issue, the court below held that the suit was barred by limitation. It was of the opinion that the firm M/s. India Supplies stood dissolved on 17th January, 1944 and the suit, having been filed beyond the period of three years from the date, was barred by Article 106 of the Limitation

Act. 1908. The correctness of the findings of the court below has been questioned by the learned counsel for the appellants, except that part of the finding by which it was held that under the award, the plaintiffs must be deemed to have retired from the firm.

5. On behalf of the respondents, two new question were raised one was that the suit itself was barred by Section 47 of the CPC and therefore, was not maintainable, and the second question was that the suit was barred by Section 32 of the Arbitration Act. We propose to deal with these questions first because if any of the two objections is upheld, the appeal must be dismissed.

6. On behalf of the appellants, however, it was urged that the respondents who had every right and opportunity to defend the suit and to raise by way of defence all possible pleas legally open to them had not pleaded that the suit was barred by Section 47 of the CPC or by Section 32 of the Arbitration Act. Therefore, it was contended that the respondents should not be permitted at the stage of the appeal to raise new pleas of defence. Upon a scrutiny of the written statement and the order sheet, we find that neither of the two abovementioned pleas was taken by the defendants in the trial court. There is thus some force in the objection of the learned counsel for the appellants that the respondents should not be permitted to raise new pleas at the appellate stage. It may, however, be mentioned that the aforesaid pleas do not actually involve any investigation on new questions of fact. The parties admittedly were partners of M/s. India Supplies. There is no dispute between them that the shares of the plaintiffs was half and those of defendants was half in the firm. There is no dispute either that the parties had appointed Sri Kanhaiya Singh as the sole arbitrator to settle the entire dispute between them in regard to the affairs of M/s. India Supplies. It is also not disputed that the said arbitrator gave an award dated 18-1-1944 and further that on the basis of that award the court ultimately passed a decree which, though termed as a consent decree, incorporated the relevant award. In fact, the plaintiffs themselves in their plaint stated that the arbitrator gave an award dated 18-1-1944 which became the rule of the court on 2-1-1945. Under these circumstances, we do not see any valid reason not to entertain the above mentioned objections raised by the learned counsel for the respondents.

7. We will first take up the question whether the suit Instituted by the plaintiffs Was barred by Section 32 of the Arbitration Act. The answer of the learned counsel for the plaintiff appellants to the objection raised on behalf of the respondents is that Section 32 of the Arbitration Act in terms does not apply to the case. Section 32 reads:--

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

It was urged that the instant suit was not one for the decision upon the existence, effect or validity of the arbitration agreement or the award made by the arbitrator. The submission was that Section 32 applies only to arbitration agreements or awards. It does not apply to any decree passed in terms of the award u/s 17 of the Arbitration Act, fearless to a consent decree, passed even though, in proceedings u/s 17 of the Arbitration Act. It was further submitted that the suit really did not call for any decision as to the existence, effect or validity of an award. The existence of the award was admitted as between the parties. The validity of the award was not questioned by any party. It is true that each party was putting its own interpretation on a certain provision made in the award, but the suit did not, in reality, according to the learned counsel for the appellants, call for a decision upon the effect of the award. On the question as to whether the divergent interpretations put upon the award by the parties necessarily call for a decision upon the effect of the award, we do not desire to express any final opinion. The question does not appear to be completely free from doubt, but the argument that Section 32 of the Arbitration Act does not apply to decrees passed u/s 17 of the Arbitration Act, and muchless to a consent decree passed in proceedings u/s 17, appears to us to be well-founded and also directly supported by a decision of the Punjab High Court. In Mool Chand Wasakhi Ram and Another Vs. Tola Ram Suba Ram and Another, , the Court had to consider objections to the maintainability of the suit both u/s 47 of the CPC and Section 32 of the Arbitration Act as well. The learned Judge in dealing with the objection based on Section 38 of the Arbitration Act observed as follows:--

"The contention of the learned counsel for the respondent, however, was that the suit to recover the amount in question is virtually a suit to enforce the award and, therefore, such a suit is barred u/s 32 of the Indian Arbitration Act. T am unable to agree with this contention. The award merged into the decree and it was the decree which had to be executed and the decree as already shown, in the very nature of things, being declaratory, could not be executed. It cannot be held in the circumstances that the award dealt with the matter covered by the suit. Moreover, it could not deal with that matter inasmuch as the liability was contingent and may never have arisen. In this view of the matter, the contention based on Section 32 of the Arbitration Act must be repelled."

The above observations aptly apply to the instant case. As will be later shown, the award and the decree based on the award were both essentially declaratory in nature. Besides, in the instant case also, the rights and liabilities of the parties under the award and the decree both were only contingent. That is to say, nobody could claim ex facie on the basis of either of them that any amount was due to or by any party. It could only be determined or found out when certain acts were performed and certain events took place. Sri Jagdish Swarup, learned counsel for the appellants, in support of his contention that Section 32 of the Arbitration Act was not applicable to the case also relied on the decision of the Supreme Court in Kashinathsa Yamosa Kabadi, etc. Vs. Narsingsa Bhaskarsa Kabadi, etc., . On the basis of this decision, it was urged that the suit essentially

was based on events which had taken place subsequent to the award in question and that, therefore, Section 32 would not be applicable. In the Supreme Court case, the question was whether a certain plea taken by the defendant was barred by Section 32 and dealing with this question it was observed that where an award made in arbitration out of the court is accepted by the parties and is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent follow up acts of the parties are binding. It was further observed that by setting up a defence in the case that there has been a division of the property and the parties have entered into possession of the properties allotted, the defendant No. 1 was not seeking to obtain a decision upon the existence, effect or validity of an award. He is merely seeking to set up a plea that the property was divided by the consent of parties. Such a plea is not precluded by anything contained in the Arbitration Act.

8. The learned counsel submitted that having regard to the facts and circumstances of the instant case, the observations made by the Supreme Court with reference to the plea of defendant No. 1 would be squarely applicable. The submission, in our opinion, supports the contention that the instant suit was not barred by Section 32 of the Arbitration Act. We have, therefore, no hesitation in repelling the contention of the learned counsel for the respondents that the suit was barred by Section 32 of the Arbitration Act.

9. Coming now to Section 47 of the Code of Civil Procedure, the argument of the learned counsel for the respondents may briefly be stated thus:

"The reliefs claimed in the suit essentially related to matters of execution of the decree dated 2-1-1945 and, therefore, it was barred by Sub-section (1) of Section 47 of the Code of Civil Procedure. Further the suit which was so barred should not be permitted to be converted into or be treated as an execution application. It was urged that in considering whether a suit should be permitted to be converted into an execution application in pursuance of the provisions of Sub-section (1) of Section 47 of the Code of Civil Procedure, the court must necessarily have regard to two conditions--one condition is whether the suit on the date of its institution, if treated as an execution application would be within the period of limitation for filing an application for the execution of the decree In question, and the second condition is that the court must consider where (whether?) it had jurisdiction to entertain any such execution application, that is to say whether, in respect of the decree in question, the court would be the executing court."

In support of these contentions the learned counsel placed reliance on *Sasi Sekhareawar Roy v. Lalit Mohan Mitra and Awadh Bihari Tewari and Another Vs. Sudarsan Rai and Others*, . The learned counsel further relied on *Jai Narain Ram Lundia v. Kedar Nath AIR 1955 SC 359* and *Murari Lal Vs. L. Debi Saran and*

Another, . We shall very briefly refer to the aforesaid rulings because, in our opinion, Section 47 itself is not attracted in cases of the declaratory decrees as has been contended by the learned counsel for the appellants.

10. In *Sasi Sekhareawar Roy v. Lalit Mohan Mitra* , the arbitrator had in his award allotted therein Villages to one party and certain other villages to the other party. The suit in question was filed by one of the parties for possession of some of the villages allotted to him under the award. It was held that the suit was not maintainable. Here, however, the decree as well as the award both were not executable as such. They were declaratory in nature and, the provisions, in respect of the rights and liabilities were merely contingent.

11. In *Awadh Bihari Tewari and Another Vs. Sudarsan Rai and Others*, , the question was whether the representative of a person, who was a party to a suit but died before the decree without being substituted by his legal representatives, is competent to raise questions about the execution, discharge and satisfaction of the decree u/s 47 of the Code of Civil Procedure. In paragraph 10 of the judgment, it was observed:--

"The Executing Court has been given exclusive jurisdiction u/s 47 as to all matters relating to the execution of a decree and as a general rule a separate suit has been barred."

It was further observed:--

"Where the interests of any person, who was not a party to the suit or his representative, got involved in the question that comes before a Court u/s 47, the proceedings can be converted into a suit as provided In Sub-section (2) and all relevant matters will be decided in the suit."

On the basis of the said observation and certain other observations, it was contended that once a decree has been passed a subsequent suit will be barred by Section 47 because all questions relating to execution, discharge and satisfaction of the decree must be agitated before and decided by the executing court. The argument however, assumes that there was an executable decree.

12. In *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others*, , the appeal which came up before the Supreme Court had arisen out of certain execution proceedings. The question was one of interpretation of a decree for specific performance which had been granted upon certain terms and conditions. It appears that in the executing court objections were raised to the effect that the execution proceedings were not maintainable because the controversy which had arisen did not relate to execution, discharge and satisfaction of the decree. The Supreme Court, however, held that:

"It is a matter distinctly relating to the execution, discharge and satisfaction of the decree and so, u/s 47, Civil Procedure Code, it can only be determined by the Court executing the decree." There is nothing in this case which directly or indirectly has any bearing on the question before us. In deciding whether remedy

can be had only by way of execution or whether a separate suit would lie, the court in such case, to our mind, has to decide these questions with reference to the facts and circumstances of that case and in the light of the particular decree. In *Murari Lal Vs. L. Debi Saran and Another*, also there is nothing in particular which can be considered to be relevant to the matter which we have been called upon to

13. To maintain a valid objection u/s 47, Civil Procedure Code, it must be shown that there is or was a decree capable of execution. If a decree is not capable of execution, no question of its execution can arise. Therefore, Section 47 of the CPC cannot bar a suit for the enforcement of certain claims which have accrued subsequent to the passing of the decree even though by virtue of rights declared by the decree. On behalf of the appellants, it was contended by the learned counsel that in the instant case, the decree dated 2-1-1945, based on the award dated 18-1-1944, declared the rights of the parties in regard to certain disputes but it did not by itself entitle any party to receive any amount from the other party. Essentially, therefore, according to the learned counsel, it was a declaratory decree. In support of this contention, the learned counsel relied upon the following, passage occurring in paragraph 1610 of "Halsbury's Laws of England" Third Edition, Volume 22 at pages 746 and 747:--

"Judgments and orders are usually determination of rights in the actual circumstances of which the court has cognizance, and give some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any references to their enforcement."

According to the learned counsel, the instant case comes within the ambit of the commentary noted above. The learned counsel in this connection also relied upon the following observations of the Judicial Committee in *Gopinarain Khanna v. Babu Bansidhar* (1905) 32 I A 123 (PC):--

"Even if that were not so, their Lordships fail to see how the respective rights of Gaya Prasad, as owner of the first mortgage and half owner of the second mortgage, and the respondent as owner of the oilier moiety of the second mortgage, could have been worked out without additions to the decree which the court in executing the decree had no power to make. They are, therefore, of opinion that a new decree was required for the purpose, and Section 244 of the CPC was not a bar to the present suit."

Section 244 of the old Code corresponds to Section 47 of the Code of 1908. It was urged that a new decree was necessary because the decree dated 2-1-1945 did not remain intact nor was it capable of being enforced as such. It was further urged that the decree neither was nor legally could be treated as a preliminary decree as was contended by the learned counsel for the respondents. The learned counsel further relied upon the decision of a Division Bench of the Madras High Court in *Brahmandam Venkata Lakshmi Narayana Row v. A.*

Venkayya AIR 1919 Mad 63. In this case, the learned Judges observed:--

"For that section to apply, the question raised in the second suit should relate to the execution, discharge or satisfaction of the previous decree and that the relief claimed must be such as could be obtained by execution proceedings. That depends on the terms of the decree."

The learned Judges then observed:--

"The question is really concluded by the ruling of the Privy Council in (1905) 32 I A 123 (PC)."

We also agree with the observations made by learned Judges of the Madras High Court. The question whether the bar of Section 47 of the CPC would apply or not, has ultimately to be decided with reference to the terms of the decree and upon the finding on the question whether the decree could be enforced in execution proceedings.

14. Let us now examine the relevant terms of the decree. The relevant part of the decree incorporating the award runs thus:--

"I hold and award that from this date the partnership of the First Party therein that is of Lala Kailashpat and Sm. Pushpawati Devi who are partners to the extent of four annas each in the rupee in the said firm shall cease and determine and they shall be deemed to have retired and withdrawn therefrom. The remaining partners Lala Ramgopal Gupta and Shrimati Ram Janki Devi shall be entitled to carry on and continue the said business in the same name or in partnership with any other person or persons as they may think fit. A balance-sheet, and profit and loss account and an account showing the amount payable by or to the retiring partners on the footing of such accounts as of this date, namely, the 18th January, 1944 (excluding pending contracts and goodwill for which a provision is made hereafter) shall be prepared with all possible despatch and audited by Mr. G.P. Kapadia Auditor of Bombay and the accounts when so audited shall be deemed to be final and the amount payable after settlement of E. P. T. and I. T. Liability as settled by the I. T. O. in the first instance and payment thereof shall be paid by the partners liable according to such accounts."

Admittedly, the parties to the suit were partners of the firm M/s. India Supplies. Admittedly also disputes had arisen between them. It is, however, not known what the disputes actually were. The arbitration agreement, however, was comprehensive enough to include dispute of each and every kind which had actually arisen or which were apprehended to arise in connection with the business and the affairs of the firm. The arbitrator declared that the two plaintiffs must be deemed to have retired and withdrawn from the partnership. He further declared that the other two partners shall be entitled to carry on and continue the business of the firm in the same name. Therefore, there was no dissolution of the firm and the plaintiffs were not entitled to any relief or remedy as members of a dissolved firm. They were partners who had retired, and in that capacity

they might have been entitled to certain rights and might equally have been subject to certain liabilities under the provisions of the partnership Act. By the award, however, the parties concerned were not relegated to their rights and liabilities under the partnership Act. The arbitrator directed balance-sheet and profit and loss account to be prepared as on 18th Jan., 1944, showing the amount payable by or to the retiring partners. The award did not mention as to who was to prepare the accounts or the balance-sheet and profit and loss account. The award, however, contained a clear provision that the balance-sheet and profit and loss account prepared in accordance with the directions given in the award shall be audited by Mr. G.P. Kapadia, Auditor of Bombay. No alternative was provided in regard to the auditing of the accounts. It is not known whether Mr. Kapadia was nominated by all the parties or it was the arbitrator who had selected and nominated by name Mr. G.P. Kapadia. Having regard to these terms in the award, it was contended that the award which was incorporated in the decree could not possibly be treated to be a preliminary decree. It was further contended that assuming that any party concerned could approach the court to have the necessary balance-sheet and profit and loss account prepared either by appointment of a commissioner or otherwise, the court could not possibly have any power or jurisdiction to alter the award and the decree by getting the balance sheet and profit and loss account so prepared, audited by any auditor other than Mr. Kapadia. It was also contended that the court could have no power to compel Mr. Kapadia to audit the balance-sheet and profit and loss account either prepared by the parties or any party or prepared under the orders of the Court. If the court were to get it audited by some auditor, the court would be modifying the decree and the award itself. In the circumstances, the contention of the learned counsel was that the decree could only be treated to be a declaratory decree. Therefore, Section 47 of the CPC would not apply.

15. It was further contended that in cases of arbitration without intervention of the court, the jurisdiction of the court to pass a decree arises only u/s 17 of the Arbitration Act. Independently, of that section the court has no jurisdiction to pass a decree incorporating therein the award. Therefore, u/s 17 of the Arbitration Act, the court has no jurisdiction of right to pass any decree so as to modify the terms of the award. If the court is incompetent to do so, it certainly cannot have any larger power when executing the decree. These contentions go a long way to support the submission that Section 47 of the CPC could not be a bar to the institution of the suit or its hearing by the court below.

16. There is another reason why, to our mind, the objections based on u/s 47 of the CPC and Section 32 of the Arbitration Act cannot be upheld. As would be presently shown, the parties themselves had made certain departures from the terms and conditions of the award. Ex. 16 is a notice dated 15th September, 1950 sent on behalf of the defendants by Sri Devendra Swarup, Advocate. In this notice, it was stated that the firm M/s. India Supplies was dissolved with effect from 18th January, 1944 by an award which, after some amendment was made a rule of the court on 2nd January, 1945 and that the award provided that amount

due from one partner to another shall be paid after settlement of the E. P. T. liabilities as settled by the Income Tax Officer. It was further mentioned that the tax liabilities for the period in question were settled on 29-1-1949 and that after settlement of the tax liabilities a sum of Rs. 2,36,438-9-0 besides interest was due from the plaintiffs in respect of the partnership account as per statement enclosed with the notice and that the plaintiffs were liable to pay the same. The statement of accounts enclosed with the said notice was not the statement of accounts, prepared as directed by the arbitrator in the award. Admittedly, the statement of accounts enclosed with Ex. 16, or other accounts which are on the record, had not been at any time audited by Mr. Kapadia. This fact assumes importance because although reference was made in the notice, Ex. 16, to the decree passed on the basis of the award, yet it was nowhere stated therein that the balance-sheet and profit and loss account had been prepared and got audited by Mr. Kapadia as directed by the arbitrator. It is therefore, clear that although the defendants were making a demand for payment of a definite amount from the plaintiffs on the basis of certain terms of the award yet they could not claim the amount in strict conformity with the terms of the award itself. If this was the attitude and position adopted by the defendants, the attitude and position taken by the plaintiffs were not different. This will be clear from the reply given by the plaintiffs to the notice Ex. 16. The reply individually given by the plaintiffs are Exs. 19 and 20, both dated 31st October, 1950. In these replies, it was stated that it was not possible to verify the claims made by the defendants until and unless the plaintiffs received from the defendants the balance-sheet and profit and loss accounts of the firm for the periods ended 30th June, 1941, 30th June, 1942, 30th June, 1943 and 17th January, 1944 and copies of the income tax assessments for certain years and copies of E. P. T. assessments for certain periods. In these replies, no reference was made to the award on the decree nor was it stated or asserted that until and unless the balance-sheet and profit and loss account were prepared and got audited by Mr. Kapadia as provided in the award, the defendants had no right to claim anything from the plaintiffs. It thus appears to us that the parties themselves were willing and had in fact made certain departures from the terms and conditions of the award and the decree which incorporated the award. It appears that the notice Ex. 16 demanding payment of Rs. 2,36,438-9-0 was made on the basis of certain pre-existing statements of accounts, after making adjustments on the basis of the assessment order dated 29th January, 1949 under the Excess Profits Tax Act. The relevant assessment order is on the record and is Ex. 42. There is no dispute that an appeal was preferred against this assessment and that the appellate Tribunal by their order dated 12th November, 1952 (vide Ex. 52) very substantially allowed the appeal, with the result that the tax liability of the firm was reduced to an insignificant amount. After the allowing of the appeal by the appellate Tribunal, the plaintiffs in their turn, sent notices to the defendants demanding payment of certain, sums from them. These notices are Exts. 27 and 28. They are dated 6th June, 1953. In these documents some reference was made to the award dated 18-1-1944. It was then stated that on the basis of the

balance-sheet sent by the defendants through their counsel, a sum of Rs. 1,28,420/- was due to the plaintiffs from the defendants. There is no controversy that this sum of Rs. 1,28,420/- was claimed on the basis of the order of the appellate Tribunal dated 12th November, 1952 (Ext. 52). Exts. 27 and 28, therefore, clearly show that on their part, the plaintiffs themselves were also not insisting upon strict compliance of the terms of the award in the matter of preparation of balance-sheet and profit and loss account as on 18-1-1944 and auditing of the same by Mr. Kapadia of Bombay. The notices exchanged by the parties also show that there was no controversy in regard to the accuracy or correctness of the statements of accounts, the details of which are to be found in Exts. A-13 to A-15. In these circumstances, "it is not possible to hold that the plaintiffs were seeking to recover the amount claimed solely on the basis of the award and the decree dated 2-1-1945. They certainly founded their claim on the declaration of rights contained in the award and the decree. They also founded their claim on the basis of certain directions contained in the award, but, essentially, in respect of certain matters, a departure was made by the parties themselves. It is, therefore, not possible to hold that the plaintiffs could realise the amount claimed by them by executing the decree dated 2-1-1945 and that that was their only remedy. We are, therefore, clearly of the opinion that the suit was not barred by Section 47 of the Code of Civil Procedure.

17. The only important legal question now left is whether the suit was barred by limitation as held by the Court below. We have already mentioned that the Court below at one place held that the firm had not dissolved but the plaintiffs had retired therefrom. At another place, however, the Court below held that the suit was barred by limitation treating the suit to be a suit for accounts and recovery of certain amounts by the plaintiffs against the partners of the dissolved firm. It seems to us that neither the arbitrator nor the parties themselves nor even their counsel had any clear conception in regard to dissolution of firm as provided by the Partnership Act. We have carefully perused the award and our conclusion upon a reading of the same is that the firm had not been dissolved but the plaintiffs had only retired therefrom. We have also carefully scrutinised the plaint itself but are unable to hold that the suit was a suit by partners of the dissolved firm. The Court below, was, therefore, in error in holding that the suit was barred by Article 106 of the Limitation Act, 1908. Since no other Article would specifically apply to the suit, the suit would be covered by Article 120. The cause of action for the suit could not possibly be the date of the award because under the award nothing as such was payable by any party to another party. The award was a contingent one in certain respects. Therefore, until the contingency occurred, no one could say that any amount was due from one party to another party. Evidently, therefore, no party could seek recovery of any amount nor claim any relief against any party until the events contemplated in the award occurred. There is no controversy between the parties that one of the essential requisites to the determination of the rights and liabilities of the parties inter se was the assessment under the Income Tax Act and the Excess Profits Tax Act. There is no

controversy either that the first assessment was made on 29th January, 1949. So even if this date were to be treated as the starting point for computation of limitation, the suit instituted on 25th August, 1953 was well within limitation. Even if the suit were to be treated as a simple suit for recovery of specific sum of money and three years" period of limitation applicable to such suits were to be held to be applicable to the suit, on a correct interpretation of the award, the relevant date would be 12-11-1952 when the Appellate Tribunal decided the appeal whereby the tax liability was reduced very substantially and that the plaintiffs for the first time were in a position to find out whether and how much amount was due to them from the defendants. On this basis also, the suit was well within limitation.

18. The only other question which now remains for determination is as to the interpretation of the following part of the award:--

"A balance-sheet and profit and loss account and an account showing the amount payable by or to the retiring partners on the footing of such accounts as of this date, namely, the 18th January, 1944..... shall be prepared ..... and the payable after settlement of E. P. T. and I. T. Liability as settled by the I. T. O. in the first instance and payment thereof shall be paid by the partners liable according to such accounts."

According to the defendants, the question whether any party was liable to pay to any other party any amount and if so what amount had to be determined only on the basis of adjustments made in pursuance of the assessment orders passed by the Income Tax Officer for the first time. That was the only event, according to the learned counsel, contemplated and provided for by the arbitrator and that subsequent events, if any were wholly irrelevant and could not be legally taken into consideration. This contention is based upon a literal and strict construction of the underlined portion of the award noted above. On the other hand, according to the appellants, the words "in the first instance" occurring after the letters "I. T. O." did not carry any special significance and that the real intention of the arbitrator could only have been and was that the rights and liabilities of the parties inter se shall be determined after the assessment proceedings finally terminated. The learned counsel also suggested that if the words "in the first instance" were to be transposed and placed immediately after the word "and" and before the words "amount payable", the intention of the arbitrator would be quite clear. It was further urged that there did not exist any cogent or valid reason why the arbitrator should have decided that for the fixation of the rights and liabilities of the parties, the relevant order would be the assessment order passed by the Income Tax Officer only. It was submitted that the liability would be that of the firm and thus the burden of the same had to be shared by all the partners and not by any individual partner or particular partners. If that were the position, there could not have been any reason why the arbitrator should have directed rights and liabilities of the parties to be determined with reference to the order of the Income Tax Officer only. It was further urged that if the

interpretation suggested by the defendants were to be accepted, it would result in unjust enrichment of the defendants at the expense of the plaintiffs. It was also contended that if the relevant portion of the award was capable of two interpretations, then that interpretation which advances the cause of justice should be accepted and the interpretation which would entail injustice should be rejected. We must confess that the language used by the arbitrator is far from happy and that construing the relevant part of the award is not an easy task nor can the matter be treated to be absolutely free from doubt. We have, however, given our anxious consideration to the matter as a whole and find ourselves in agreement with the interpretation suggested by the learned counsel for the appellants. We, therefore, hold that the plaintiffs, as claimed by them, were entitled to have adjustments made on the basis of the order of the Appellate Tribunal dated 12-11-1952 and that the contention of the respondents that the relevant order for purposes of adjustment was the order of the Income Tax Officer is not tenable. We have already mentioned that there is no controversy in regard to the correctness of the statement of accounts nor was it urged before us that on the basis of the said accounts, the plaintiffs would not be entitled to receive from the defendants the sum of Rs. 1,48,582/-, after making adjustments on the basis of the order of the Appellate Tribunal dated 12-11-1952. A feeble attempt however was made on behalf of the respondents to canvass that the account did not disclose the true state of affairs and that the entries in regard to depreciation were paper entries only. There is, however, no factual basis nor cogent foundation for such contention. The accounts were prepared as admitted by defendants" witness Sri S.N. Kapoor, under the supervision of respondent No. 1 himself. They were signed by him as "Managing Partner". On the basis of the same accounts, the defendants themselves had given a notice to the plaintiffs (vide Ex. 16) demanding payment of Rupees 2,36,438-9-0. Besides, the defendants did not adduce necessary and adequate evidence to prove any such plea. The plaintiffs, therefore, must be held to be entitled to a decree for this sum.

19. In regard to the second relief, we are not satisfied at all that the suit was maintainable for that relief or that the plaintiffs were entitled to get that relief. From a perusal of the award and the decree dated 2-1-1945, it will be clear that the entire claim of the plaintiffs in the assets of the firm had been finally decided by the arbitrator himself and in lieu of such claim, the defendants, as directed by the arbitrator, had actually paid a sum of Rs. 50,000/-. This amount, in fact, was paid before the making of the award itself. The plaintiffs" suit for the second relief, therefore, was liable to be and was rightly dismissed.

20. For the reasons stated above, the appeal is partly allowed and the decree of the court below is modified. The plaintiffs" suit for recovery of Rs. 1,48,582/- is decreed with pendente lite and future interest at the rate of 3 per cent, per annum. Having regard to the circumstances of the case, we direct the parties to bear their own costs throughout.