
(1973) 07 CAL CK 0014
In the Calcutta High Court

Venkatarama Krishna Kurti

APPELLANT

Vs

C. V. Rama Aiyer and Another

RESPONDENT

Date of Decision : 14-07-1973

Acts Referred:

Arbitration Act, 1940 — Section 15, 16, 2, 30, 33

Citation : 78 CWN 1

Hon'ble Judges : S.P. Mitra, C.J.;Janah, J

Bench : Division Bench

Advocate : B.C. Banerjee and A.K. Dhar, for the Appellant;Parimal Das for the Respondent No. 1 (in F.M.A. 266/68) Respondent No. 2 (in F.M.A. 267/68), R.C. Deb, S.K. Lahiri and R.P. Sanyal for the Respondent No. 2 (in F.M.A. 266/68) for Respondent No. 1 (in F.M.A. 267/68), for the Respondent

Final Decision : Dismissed

Judgement

1. These two appeals are by the plaintiff and are against one and same judgment dated 30th September, 1967 passed by the learned Subordinate Judge, 3rd Court, Alipore in Misc. Case Nos.93 and 95 of 1964.

2. The facts giving rise to the present appeals are, briefly, as follows:

On the 20th June, 1959 the plaintiff V. K. Murti obtained an Import Licence from the Joint Chief Controller of Imports and Exports for the import of machinery from the United States of America for the manufacture of Salted Peanuts. The plaintiff did not have the necessary finance with him and he was looking for a financier. The defendant No.1 C. V. Rama Ayar, agreed to finance the plaintiff and an agreement was entered into between the plaintiff and the defendant No.1 on the 29th March, 1960 by which it was agreed, inter alia that a private limited company would be incorporated with the object of establishing a factory for the manufacture of Salted Peanuts by the said machinery to be imported under the plaintiff's import licence. In pursuance of the agreement a private Limited company was incorporated under the name and style of "Bharat Kennels Private Limited" (hereinafter referred to as the "company") on the 11th May, 1960.

Disputes arose between the plaintiff and the defendant No.1 in January, 1961 and various correspondence went on between the parties for some time and ultimately the plaintiff instituted a suit, being Title Suit No.78 of 1962, in the 3rd Court of the Subordinate Judge, Alipore against defendant No.1 and several other persons, of whom the company was the defendant No.6, and the plaintiff's wife was the defendant No.12. In the said suit the plaintiff, inter alia, prayed for:

(a) A decree declaring that the plaintiff is the owner and he has title over the machinery described in Schedule A to the plaint and for recovery of possession thereof,

(b) In the alternative if the said machinery were not available then a decree for Rs.3,29,364.00 with interest at 6 percent per annum.

3. After the said suit was instituted by the plaintiff, a petition was filed by the defendant No.1 u/s 34 of the Arbitration Act praying for a stay of the suit pending reference to arbitration under the Arbitration Clause contained in the Deed of Agreement dated 29th March, 1960 between the plaintiff and the defendant No.1. A similar application was also filed on behalf of the defendant No.6, the company, which had been incorporated in the mean time. The said prayer of the defendants for stay was opposed by the plaintiff but the learned Subordinate Judge by his order dated 7th March, 1963, stayed the hearing of the suit u/s 34 of the Arbitration Act. Thereafter arbitration proceedings went on before the Bengal Chamber of Commerce and Industry in terms of the Arbitration Clause contained in the Deed of Agreement dated 29th March, 1960. On the 9th October, 1964 the Bengal Chamber of Commerce and Industry made an award in favour of the plaintiff. On the 15th December, 1964 and 16th December, 1964, two petitions were filed by the defendant. Nos.1 and 6 respectively for setting aside the award u/s 33 read with sections 30, 15 and 16 of the Arbitration Act. The said two applications were registered as Miscellaneous Cases Nos.93 of 1964 and 95 of 1964 respectively. By an order dated 30th September, 1967, the learned Subordinate Judge upheld the defendants' objection and allowed the two Miscellaneous cases. The plaintiff has preferred the present appeals against the order allowing the two Miscellaneous Cases.

4. Mr. Banerjee appearing on behalf of the plaintiff has argued in the first place, that the learned Subordinate Judge was wrong inasmuch as the import licence is not per se non-transferable but it is transferable with the consent of the Licensing Authority. Mr. Banerjee has referred to Clause 90(2) at page 61 of the Handbook of Rules and Procedures on Import Trade Control (1967 Edition), (hereinafter referred to as 1967 Handbook). But Clause 90(2) has no application in the present case because that clause is headed "change in the name, constitution. Or ownership of actual user's licence". In the present case there is no question of change in the name, constitution or ownership of the actual user's licence, Mr. Banerjee has also referred to paragraph 5(3)(i) of the Government of India, Ministry of Commerce and Industry, order No.17/55 dated 7th December, 1955, issued under the Imports and Exports Control Order, 1967

Handbook). The said paragraph runs as follows:

No person shall transfer and no person shall acquire by transfer any licence issued by the Licencing Authority except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority".

5. Mr. Banerjee argues that the agreement dated 29th March, 1960 is not illegal because there is no transfer of the licence under this agreement. The learned Subordinate Judge, according to Mr. Banerjee was greatly influenced by the judgment of the Criminal Case convicting the plaintiff for violation of section 5 of the Import and Export Control Act of 1947. But that judgment was set aside by this Court in Criminal Revision Case No.1016 of 1966 on the 19th September, 1969. Mr. Banerjee has drawn our attention to the judgment passed in the aforesaid Criminal Revision Case printed at page 38 of the appendix to volume 2 of the Paper book. It has been further argued by Mr. Banerjee that the defendant No.1 and the defendant No.6 admitted before the Arbitrator that there had been no transfer of the licence as would appear from the written statement filed by the defendant No.1 before the Arbitrator (vide paragraph 2 page 363 of volume 1 of the paper book) and also the written statement filed by the defendant No.6 before the Arbitrator (vide paragraph 2 page 532 of volume 2 of the paper book). Mr. Banerjee, therefore, argues that the basis of the learned Subordinate Judge's finding that the plaintiff transferred the licence is wrong. Mr. Banerjee next contends that assuming that clause 1 of the agreement is illegal that entire agreement cannot be invalid. According to him clause 1 of the agreement is severable from the rest of the clauses and therefore the entire agreement cannot be illegal.

6. Mr. Deb, learned Counsel for the defendant No.6, has argued that the entire agreement between the plaintiff and the defendant No.1 dated 29th March, 1960 is illegal as the very object with which the said agreement was entered into is unlawful. He has argued that each of the covenants contained in the said agreement is a consideration for the other and therefore if one goes the entire agreement falls. In order to appreciate the argument advanced by Mr. Deb it would be convenient to set out in some details the relevant portion of the said agreement which is as follows:

This agreement Between Mr. Venkatarama Krishna Murti . . . (hereinafter called "the licencees") of the one part and Chittur Vaidyalinga Rama Aiyer (hereinafter called "the promoter" . . .) of the other part.

Whereas,

(1) The licensee holds import licence No.992543/CC dated twentieth June, one thousand nine hundred and fifty nine to the value of rupees one lakh forty five thousand eight hundred and twenty permitting him to import from the United States of America certain plant necessary for the purpose of manufacturing Salted Peanuts (hereinafter called "the plant").

(2) The promoter intends to incorporate at the earliest opportunity in India a private limited company . . . The main object of the said company being to establish a factory in India for the purpose of utilizing the said plant and carrying on the manufacture and selling of Salted Peanuts and like products (hereinafter called "the project").

Now this agreement witnessed and it is hereby agreed and declared in consideration of the covenants herein contained by and between the parties hereto as follows:

1. The licensee if required by the Promoter shall transfer the said Import Licence into the name of the proposed company as soon as may be practicable and all machinery imported under the said licence shall be deemed to be the property of the proposed company.

2. The licensee shall assist the Promoter and the proposed company in effecting the import of machinery under the said licence to the best of his ability.

3.

4. The Licensee confirms that there is no fetter on his right to dispose of the said licence or the machinery to be imported under the said licence and that he has not entered into any obligations with regard to the said licence or the said machinery with any other party prior to the date of this agreement. The Licensee undertakes to indemnify the Promoter and the proposed company against the costs and consequences of any such claim hereafter made by any third party in respect of the said licence and the said machinery and any liability so arising shall be the sole responsibility of the Licensee to the exclusion of the Promoter and the proposed company.

5. The Promoter immediately on the signing of this agreement will open a Letter of Credit to the value of rupees one lakh forty five thousand eight hundred and twenty against the said Import Licence and in favour of the manufacturer of the said machinery.

6.

7.

8. The office from the date of this agreement will be located at 73, Rashbehari Avenue, Calcutta, and the Promoter will have custody of all papers including the Licensee's import licence from that date.

9. In the event of the company for any reason whatsoever ceasing to carry on the business of the project or otherwise ceasing to utilize the plant in its business or in the event of the company going into liquidation . . . then and in that case the company shall give sixty days notice in writing to the Licensee and the Licensee shall have the first option of purchasing at any time during the said period of sixty days notice.

10. In the event of the Licencee wishing to exercising his option to purchase the plant shall be valued and sold to the Licencee at valuation and sold to the Licencee at valuation provided only that if valuation figure exceeds rupees one lakh forty five thousand eight hundred and twenty the purchase price shall nevertheless exceed rupees one lakh forty five thousand eight hundred and twenty.

11. All matters, questions, disputes and differences which may at any time arise between the parties hereto attaching to arising out of or in respect of this agreement, whether as to the construction or otherwise and whether during the continuance of or after the determination of this agreement, shall be referred to the Bengal Chamber of Commerce and Industry for arbitration unless the parties hereto otherwise mutually agree

7. The import licence in question was granted to the plaintiff under the Government of India Ministry of Commerce and Industry, Order No.17/55 dated 7th December, 1955, issued under the Imports and Exports (Control) Act, 1947 (18 of 1947). The said order is called the Imports (Control) Order 1955, The relevant paragraphs of the said Order are as follows: -

3. Restriction of Import of certain Goods -

(1) Save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II.

.....

5. Conditions of licence -

(1) The Licencing Authority issuing a licence under this order may issue the same subject to one or more of the conditions stated below: -

(i) that the goods covered by the licence shall not be disposed of, except in the manner prescribed by the Licencing authority, or otherwise dealt with, without the written permission of the licencing authority or any person duly authorized by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any directions attached to the licence;

(3) It shall be deemed to be a condition of every such licence that: -

(i) No person shall transfer and no person acquire by transfer any licence issued by the licencing authority except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority

(ii) That the goods for the import of which a licence is granted shall be the

property of the licensee at the time of import and thereafter upon the time of clearance through Customs.

.....

(4) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause.

8. Mr. Deb argues that the plaintiff's import licence was an "actual user's licence", that is to say, the machinery to be imported against the said import licence was to be used, in fact, by the plaintiff and by no one else. Referring to clause 2 of the aforesaid agreement Mr. Deb submits that the object of the agreement was to allow the proposed company to use the machinery to be imported, for the purpose of its business of manufacturing and selling salted peanuts. This, according to Mr. Deb, is an illegal object, contrary to, and in violation of, the conditions of the licence. Not only was the object illegal but the said illegal object has been carried out by the agreement in question.

9. Let us, therefore, see whether the said agreement is a lawful agreement or not. Clause 1 of the agreement provides that the Licensee shall transfer the import licence "into the name of the proposed company as soon as may be practicable and all machinery imported under the said licence shall be deemed to be the property of the proposed company". Mr. Banerjee has argued that the clause "as soon as may be practicable" suggests that the intention of the parties was that the import licence shall be transferred after obtaining necessary permission from the authority concerned. In fact however, no such permission was obtained nor was any application filed for such permission. It is clear, therefore, that the parties agreed to effect a transfer of the import licence and further agreed that the machinery to be imported would become the property of the proposed company. It has been pointed out by Mr. Deb that a transfer of the machinery imported under an "actual user's licence" is illegal. Reliance has been placed upon the decision in (1) State of West Bengal Vs. Motilal Kanoria, . It was held in that case that a sale by the Licensee of the machinery imported under a licence with the express condition of the use of the machinery by the Licensee only, amounted to a violation of the conditions of the licence. It was further held that a transfer machinery was tantamount to transfer of licence. Clause 2 of the agreement provides that the "Licensee shall assist the Promoter and the proposed company in effecting the import of machinery under the said licence". Therefore, it is argued that the goods would be the property of the proposed company and the Licensee would assist the Promoter and the proposed company. Then, clause 4 of the agreement shows that the parties are clearly making a distinction between the licence and the goods to be imported thereunder. This clause constitutes an agreement to transfer the machinery to the proposed company when formed and it does not require that any permission should be taken from anybody. Under this clause the entire interest is immediately passing to the Promoter and the agreement is not subject to any sanction from the appropriate authority. Further, the indemnity clause shows that there has been a

transfer of the property otherwise there was a necessity to incorporate the indemnity clause. In the next place, under clause 5 of the agreement the Letter of Credit is to be opened by the Promoter, that is to say, the price is to be paid by the Promoter. Then clause 8 provides that "the Promoter will have custody of all papers including the Licencee's import licence". There could not have been such a clause if the machinery to be imported were to remain the property of the licencee. Clause 9 of the agreement provides that in the event of the company ceasing to carry on the business or ceasing to utilize the plant in its business or in the event of the company being wound up the Licencee shall have the first option of purchasing the plant from the company. Then clause 10 speaks of the price which the Licencee will have to pay in case he chooses to exercise the option given to him under clause 9. Considering all these clauses in the agreement together, it is quite clear that as between the contracting parties the transfer of the property is complete and nothing else remains to be done except the act of physical handing over of the machinery when imported. Such an agreement, in our opinion, is an unlawful agreement its object being to do something which is forbidden by law, namely, a transfer of the licence and the goods to be imported thereunder, in violation of the conditions of the licence. The Arbitration Clause, namely, clause 11 of the said agreement being a part of the agreement cannot be a valid arbitration agreement between the parties when the agreement as a whole is found to be unlawful.

10. In the next place, the learned Advocate for the appellant has contended that the defendants themselves having filed the petition u/s 34 of the Arbitration Act, they cannot now take up the plea that the agreement being void the Arbitration Clause contained therein is also void. It is argued that even assuming that an admission as to the existence of a valid Arbitration Agreement was made by the defendant's under an erroneous decision, but such a decision is binding between the parties and would operate as constructive *res judicata*. It is, therefore, argued that such a decision would be binding between the parties unless it is set aside in an appropriate proceeding. Reliance has been placed in this connection upon the decisions in (2) *Tarini Charan Bhattacharya v. Kedarnath Halder* (1928) I.L.R. 56 Cal 723 and (3) *Angur Bala Dassi v. Arati Rani Dassi* 80 C.W.N. 618 and certain other decisions, to which we need not refer. It is no doubt true that an erroneous decision will operate as *res judicata*, but the question here is, whether there was any decision as to the existence of a valid arbitration agreement between the parties. It is contended on behalf of the appellant that the defendant having themselves filed an application for stay and having got an order of stay u/s 34 of the Arbitration Act, which could have been passed only if there was a valid arbitration agreement, cannot challenge the validity of the award on the ground that there was no valid arbitration agreement. It has been contended that one of the essential conditions that must exist before an order for stay of proceedings u/s 34 of the Arbitration Act can be passed is that there must be a subsisting and binding agreement capable of being enforced between the parties, Mr. Banerjee has further argued on behalf of the appellant that a person

who accepts the benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must confirm to all its provisions and renounce all rights that are inconsistent with it, that is to say, a person cannot approbate and reprobate in the same transaction. In support of this contention reliance has been placed upon the decisions in (4) C. Beepathumma and Others Vs. V.S. Kadambolihaya and Others, and (5) Dwijendra Narayan Roy v. Joges Chandra Roy 39 C.L.J. 40).

11. Mr. Deb, learned Counsel for the defendant No.6 company, has argued that his client was not a party to the agreement dated 29th March, 1960. He pointed out that in the first extra ordinary general meeting of the company held on the 12th May, 1960, it was resolved that a formal agreement as per draft placed before the meeting be executed by the company and V. K. Murti and C. V. Rama Ayar but this agreement was never executed. He has further pointed out that the plaintiff's own case in paragraph 9 of the plaint was that "this formal agreement" has not yet been executed by the defendant No.1". In these premises, argues Mr. Deb, the defendant No.6 is not bound by the agreement between the plaintiff and the defendant No.1. In support of his argument Mr. Deb has relied upon the decision in (6) Natal Land and Colonization Company Limited v. Pauline Colliery and Development Syndicate Limited, 1904 A.C. 120. In that case it was held that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. In order to do so a new contract must be made with it after its incorporation on the terms of the old one. It is true that the defendant No.6 filed an application u/s 34 of the Arbitration Act for stay of the suit but that does not make it a party to the arbitration agreement because a valid and legally enforceable arbitration agreement must precede the application. In the said application filed by the defendant No.6 on the 11th August, 1962, the defendant No.6 nowhere stated that it was a party to the agreement. The stay order passed in the suit u/s 34 of the Arbitration Act could not, in our opinion, have the effect of making defendant No.6 a party to the agreement. Moreover the plaintiff knew that the defendant No.6 was not a party to the agreement. That being the position the statements made in the affidavit-in-reply on behalf of the defendant No.6 filed in the trial court (vide paragraphs 4, 7, 9 and 12 at pages 286 and 287 of Volume 1 of the paper book) cannot constitute an estoppel against the defendant No.6. The plaintiff did not act to his detriment on account of any representation made by the defendant No.6. It appears further that the defendant No.6 repeatedly took this objection before the Tribunal of Arbitration (vide petitions dated 16th November, 1963, 4th January, 1964, 24th January, 1964 and 8th April, 1964 printed at pages 333, 337 and 387 of Volume 1 of the paper book and page 461 of volume 2 of the paper book). It has therefore been argued on behalf of the Respondent No.6 that this is not a case where the Arbitrator has jurisdiction but he has wrongly decided, but it is a case where there is initial lack of jurisdiction of the Arbitrator. That objection was specifically taken by the defendant No.6 and in spite of such objection the Arbitrator passed

an award. Therefore, this Court is entitled to see if the Arbitrator had jurisdiction. In (7) Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd., the Supreme Court while considering a question similar to the one involved in the present case, observed in paragraph 4 of the judgment, as follows: -

It can not be disputed that the expression "arising out of" or "concerning" or "in connection with" or "in consequence of" or "relating to this contract" occurring in clause 14 are of sufficient amplitude to take in a dispute as to the validity of the agreement dated September 7, 1955 But the question is not whether clause 14 is all comprehensive but whether it could be enforced when the agreement of which it forms an integral part is held to be legal. Logically speaking, it is difficult to conceive how when an agreement is found to be bad, any portion of it can be held to be good. When the whole perishes its part also must perish. Ex nihilo nil fit. On principle, therefore, it must be held that when an agreement is invalid every part of it including the clause as to arbitration contained therein must also be invalid.

12. Again, in paragraph 11 of the judgment the Supreme Court observed:

If there had been another arbitration agreement apart from and independent of clause 14 of the contract dated September, 7, 1955 it might have been possible to sustain the proceedings before the arbitrators as referable to that agreement. But none such has been set up or proved in the present case. All that is alleged is that the respondents acquiesced in the proceedings. But what confers jurisdiction on the Arbitrators to hear and decide a dispute is an arbitration agreement as defined in S.2(a) of the Arbitration Act, where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence.

13. It was further held in that case that where it is alleged that the agreement containing arbitration clause is itself illegal and void, it is a matter for decision by the Court and not by arbitrators. The same view has been expressed by the Supreme Court in (8) Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., in which their Lordships have, at paragraph 21 of the judgment observed as follows: -

Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they entered on their duties the proceedings, must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction. But in such a case there is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrator and in that event the proceedings there after before them might be upheld and referable to that agreement and the award will not be open to attack as without jurisdiction. But it will make all the difference in the result whether the parties have entered into an

arbitration agreement as defined in S. 2(a) of the Arbitration Act or have merely taken steps in the conduct of proceedings assumed or believed to be valid. In the former case the award will be valid; the latter a nullity.

14. In our view, therefore, the proceedings before the Tribunal of Arbitration was without jurisdiction, inasmuch as, there was no valid arbitration agreement within the meaning of section 2(a) of the Arbitration Act. The principle that a party cannot approbate and reprobate in the same proceeding or transaction is also not applicable to the facts of the present case. The defendant No.6 in the present case never took up the position that there was a valid arbitration agreement between the plaintiff and itself, on the contrary, the defendant No.6 protested all along before the Tribunal of Arbitration. Relying on the case of (9) Dinajpur Samabaya Bank, Ltd. Vs. Benoy Bhusan Mukherji , Mr. Banerjee has argued on behalf of the appellant that if a person who is not a party to an arbitration agreement submits to arbitration he cannot say that the award is not binding upon him. But that case, in our view, is clearly distinguishable on fact. In that, case there was an independent agreement for arbitration. And there was no protest by the person concerned before the arbitrator. So it was not a case of initial lack of jurisdiction on the part of the arbitrator. But in our case, as we have already seen, there was an initial lack of jurisdiction on the part of the Tribunal Arbitration. Relying upon the decision in the (10) The Chartered Bank Vs. The Commissioner for the Port of Calcutta, , Mr. Banerjee has argued that a party cannot repudiate the contract and at the same time take advantage of the arbitration clause contained in the same agreement. He has drawn our attention to the statements made in paragraph 2(c) of the petition filed in the trial court u/s 34 of the Arbitration Act. This petition u/s 34 of the Arbitration Act was filed by the defendant No.1 and not by the defendant No.6 (vide page 86 of volume 1 of the paper book). The present appeal contested before us on behalf of the defendant No.1 is therefore not of any assistance to the applicant in so far as the defendant No.6 is concerned.

15. In the next lace, it has been argued on behalf of the appellant that assuming though not admitting that in a proceeding u/s 34 of Arbitration Act there was no decision, either express or implied, as to the validity of the entire agreement, but as the ambit of the arbitration clause, namely, clause 11 of the agreement dated 29th March, 1960 was wide enough to include a dispute as to the validity of the entire agreement, the Tribunal of Arbitration had jurisdiction to adjudicate upon it, and its decision, right or wrong, was final. It has, accordingly, been argued that the Court had no right to go into the said question. But as has been noticed above, where the legality of the agreement as a whole is disputed, it is a matter for decision by the Court and not by the arbitrators. Therefore, even if the question as to the validity or legality of the agreement as a whole was raised before the Tribunal or Arbitration and decided by it, it is competent for the Court to go into that question and come to its own conclusion. Mr. Banerjee has, further, argued on the authority of the decision in (11) Union of India (UOI) Vs. Salween Timber Construction (India) and Others, that if it is necessary to refer to

the terms of the contract for the purpose of ascertaining whether or not the dispute is in respect of or in relation to the contract then it is within the authority of the arbitrator to decide the said question. But this decision is of no help to Mr. Banerjee as we have already held that the agreement dated 29th March, 1960 was itself unlawful, and as such there was no valid arbitration agreement which could give jurisdiction to the Tribunal of Arbitration to decide any dispute. That being so, the entire proceeding before the Tribunal of Arbitration is void as there was an initial lack of jurisdiction on the part of the Tribunal of Arbitration. There could not also be any question of estoppel as the proceeding before the Tribunal of Arbitration was subject to strenuous objection on behalf of the defendant No.6. Moreover an arbitration agreement between two parties cannot be set up by estoppel.

16. In the next place, it has been argued on behalf of the appellant that the learned Judge's finding to the effect that as the defendant No.1 advanced rupees two lakhs for purchase of machinery and as in the award there is no reference to that point the award cannot be accepted because the award is vitiated by an error apparent on the face of the record, is not correct in view of the language used in clause (c) of sub-section (1) of section 16 of the Arbitration Act. Section 16 of the Arbitration Act empowers the Court to remit the award or any matter referred to arbitration to the arbitrators in certain cases. One of such cases mentioned in clause (c) of sub-section (1) of that section is "where an objection to the legality of the award is apparent upon the face of it". It has been contended by Mr. Banerjee that the learned Judge cannot look into anything beyond the award although it may be on the record. He has referred to the decisions in (12) Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, , (13) Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., ; and (14) Jivaraj Balloo Spinning and Weaving Company Ltd. 15 Indian Appeals 324 and has submitted that the award is final on both fact and law and there is no appeal from the Arbitrator's verdict. The Court cannot review this award and correct any mistake in his adjudication. There can be an error on the face of the award only when in the award or in any document incorporated with it there is found some legal proposition which is the basis of the award and it is erroneous the decision in (15) Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, and has submitted that unless the document is appended to or incorporated in the award as to form part of it, it cannot be looked into. Mr. Banerjee submits that whether the defendant No.1 who advanced the money for purchase of the machinery has got back his money or not and whether he can still have any claim for the aid money and all claims and counter-claims by the parties must be taken to have been considered by the Tribunal of Arbitration, and the learned Judge was not justified in looking into any other document in deciding the validity of the award. Mr. Banerjee has drawn our attention to certain statements made by the defendant No.1 in his letter dated 6th January, 1964 to the Registrar, Tribunal of Arbitration (at page 343 of volume 1 of the paper book) and the written statements filed by the defendant No.1 before the

Tribunal of Arbitration on 6th January, 1964 (at page 357 of volume 1 of the paper book) wherein the defendant No.1 has stated that he has resigned from directorship of the defendant No.6, company, and he has got back all his money from the defendant No.6, and has submitted that the award should not be set aside at the instance of a person who is not in any way prejudiced by the award. We have already held above that the whole proceeding before the Tribunal of Arbitration was without jurisdiction and so the award is void, and it is therefore not necessary for us to go into the question whether the award should be set aside when the defendant No.1 will not be prejudiced in any way by the award in view of the fact that he has already got back his money. Moreover, the present appeal before us has been contested not by the defendant No.1 but by the defendant No.6.

17. The point urged by Mr. Banerjee on behalf of the appellant is that though originally the defendant No.6 was not a party to the Deed of Agreement dated 29th March, 1960, subsequently when the defendant No.6, company, was incorporated in accordance with the provisions in the said Deed of Agreement the defendant No.6 company, adopted the said Deed of Agreement by clause 10 of the Articles of Association, subject to ratification by the company in a general meeting. Such ratification, it has been submitted, was also made at the first extra ordinary general meeting on the 12th May, 1960, and the defendant No.6 having applied for stay of the suit and having got an order of stay, it cannot now be heard to say that it was not a party to the arbitration agreement and as such it is not bound by the award. This contention of the appellant cannot be given effect to because rightly or wrongly the court had passed an order for stay u/s 34 of the Arbitration Act without holding that there was an arbitration agreement between the plaintiff and the defendant No.6. In the application filed by the defendant No.6 it was not alleged that there was an arbitration agreement and there was no such issue as to the existence of any arbitration agreement between the plaintiff and the defendant No.6. The order for stay of the suit, as far as the defendant No.6 is concerned, was not on the basis that there was an arbitration agreement. Mr. Banerjee has relied upon several decisions, to which we need not refer, in support of his contention that even an erroneous decision will operate as res judicata. In the case of (16) Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, the Supreme Court had to consider the application of the doctrine of res judicata. In that case an earlier application filed by the appellant for determination of standard rent, was rejected on the ground that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 did not apply to open land let out for constructing buildings, etc. In view of another decision of the Bombay High Court the appellant filed a fresh petition for the determination of standard rent as the area in which the land was situated was included within the limits of Greater Bombay. This application was rejected on the ground that the question whether the Act applied to the case was res judicata. In dealing with this question their Lordships, at paragraph 5 of the judgment, observed as follows: -

A decision on an issue of law will be as *res judicata* in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.:

18. In the present case the cause of action for the application for stay u/s 34 of the Arbitration Act and the cause of action for the application out of which the instant appeals arise are different. The application for stay was on the basis that there was an arbitration clause in the agreement between the plaintiff and the defendant No.1, and the second application was on the basis that the arbitration clause contained in the agreement was void and illegal. Therefore, even assuming that there was a subsisting arbitration agreement between the plaintiff and the defendant No.6, the defendant No.6 is still entitled to challenge the award because the cause of action is different. Further, in view of the decision of the Supreme Court referred to above the stay order u/s 34 of the Arbitration Act was without jurisdiction as the agreement was illegal. In our view, therefore, the decision on the application for stay u/s 34 of the Arbitration Act cannot operate *res judicata*.

19. The other branch of the appellant's argument in this behalf has been that the defendant No.6 is estopped from saying that it was not a party to the agreement dated 29th March, 1960 and that it is not bound by the award. It is argued that the defendant No.6 having agreed to the arbitration, having appeared before the Tribunal of Arbitration, having filed a written statement before the Tribunal, it is not open to it now to say, when the award has gone against it, that it was not a party to the agreement and the award is not binding on it. We are unable to accept this argument advanced by the learned counsel on behalf of the appellant, first, because the stay order u/s 34 of the Arbitration Act was not passed on the basis that there was an arbitration agreement between the plaintiff and the defendant No.6, secondly, because the defendant No.6 did not make any representation on the basis of which the plaintiff has acted to his detriment, and lastly because there cannot be any estoppel against a statute. In the case reported in (17) In Re : A Bankruptcy Notice L.R. (1924) 2 Ch. 76) a similar argument was advanced namely, that a creditor by his letter of assent to an unregistered Deed of Composition, which was required to be registered under the Deeds of Arrangement Act, 1914, was estopped from alleging the invalidity of the promise. In repelling this argument Atkin, L.J. (at page 95) observed: -

It is said that the creditor by assenting to the deed and by then allowing more than twelve months to elapse, and by standing by and allowing the other creditors to alter their position, as some of them did, by withdrawing bankruptcy proceedings, and by allowing the debtor to act under the deed, and by paying over to the trustees that which, under the deed, he had promised to pay over to

the trustee, is estopped from now alleging the invalidity of the promise. In order to come to a proper conclusion in respect of that matter, I think it is to be remembered that the Deeds of Arrangement Act is an Act which was passed in the public interest, and it avoids deeds of arrangement which are not registered and are not in accordance with the provisions of the Act, not in the interests of a particular debtor, or in the interests of all his creditors, but in the interest of the public generally

What then is the estoppel that is here alleged" It appears to me plainly that it cannot be the ordinary estoppel in pais, the estoppel by words or conduct as to a representation of fact. There is no fact alleged here by the creditor. The only allegation of fact which can be made is the allegation that he has assented to the deed, which does not take one any further, because the deed is still void, or the representation that the deed is valid. As to that representation, first of all the representation would not be a representation of fact but of law, and, secondly, if it were a representation of fact, it is not a representation which would be believed by any one to whom it was made, for everyone knew that the deed was invalid, because on the face of it, it states that it is not to be registered, and every one to whom it was addressed knew that it was not to be registered, and every one who had assented to it by this letter had in fact in the letter stated that he understood it was not to be registered. But to my mind, there are none of the essentials of the ordinary estoppel in pais.

From what we have stated above it follows that the plaintiff is not entitled to succeed in these appeals. The appeals are, therefore, dismissed, but in the circumstances of the case there will be no order as to costs.

Sankar Prasad Mitra, J.

20. I agree.