

**(1955) 01 AHC CK 0007**

**Allahabad High Court**

**Case No:** F.A.F.O. No. 205 of 1946 and F.A.F.O. No. 27 of 1947, Ex. Second Appeal No. 1114 of 1947 and Second Appeal No. 947 of 1947

Moradhwaj

APPELLANT

Vs

Bhudar Das

RESPONDENT

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**Date of Decision:** Jan. 4, 1955

**Acts Referred:**

- Arbitration Act, 1940 - Section 2, 21, 37, 41, 47
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 2, Order 23 Rule 3, 107, 141
- General Clauses Act, 1897 - Section 8

**Citation:** AIR 1955 All 353

**Hon'ble Judges:** M.L. Chaturvedi, J; Brij Mohan Lall, J; Agarwala, J

**Bench:** Full Bench

**Advocate:** Shambhu Prasad, for the Appellant; K.C. Saxena and J. Swarup, for the Respondent

**Final Decision:** Disposed Of

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### **Judgement**

Agarwala, J.

These are four connected appeals and arise in the following circumstances. The parties are closely related to each other. They were originally members of a joint Hindu family. Then there was a partition between them. They now own contiguous houses. Disputes, about easementary rights regarding doors "janalas parnalas" and walls cropped up and in connection with them there was some "marpit" between them. Several litigations were pending in the civil and criminal courts in connection with these disputes, when on 11-12-1944 an agreement of reference was entered into between them by which they referred all these litigations as well as other disputes to arbitrators. The litigations then pending were four in number. One was an appeal No. 218 of 1944 arising out of suit No. 575 of 1943 (L. Moor Dhuj V. L. Bhumandal Dass), the second was Execution Appeal No. 111 of 1944, arising out of

execution proceedings in connection with the decree in suit No. 196 of 1934, filed by Moradhwaj against Lala Bhumandal Das, the third was suit No. 12 of 1944 for recovery of Rs. 2100/- as damages for assault, Moradhwaj, plaintiff v. Bhumandal Das and Bhudar Das, and the fourth was an execution application No. 698 of 1940 in connection with suit No. 184 of 1934, Moradhwaj v. Bhumandal Das.

All these cases were pending in the court of the Civil Judge of Etah. There was a fifth matter in dispute. A criminal complaint was filed by Ajit Prasad, son of Moradhwaj against Bhumandal Das and eight other persons under Sections 147 452 and 323, I. P. C. The accused were convicted by the first Court but were acquitted in appeal. Ajit Prasad intended to file a revision application in the High Court but had not actually filed it. All these matters were referred to arbitration by an agreement of reference dated 11-12-1944. Applications were then made in all the four cases, on 12-12-1944, that these cases be referred to the arbitrators mentioned in the agreement of reference. In execution case No. 698 of 1940, the application was rejected on the ground that an execution case could not be referred to arbitration. In execution appeal No. 111 of 1944, suit No. 12 of 1944 and civil appeal No. 218 of 1944, the Court, however, referred the cases to the arbitrators by an order dated 11-1-1945. The award was ultimately made on 14-3-1945.

In the award, the arbitrators stated that the parties had mentioned to them that so far as the criminal case was concerned, there was no dispute pending between them, and that for that reason they were not giving any award on that dispute. In other cases they gave their award decreeing some and dismissing the others. An application was made u/s 14, Arbitration Act by Lala Bhumandal Das and Lala Bhudar Das "which was registered as suit No. 14 of 1945 for directing the arbitrators to file the award in Court and to pass a decree in terms thereof. Moradhwaj and Ajit Prasad objected that the award was invalid for various reasons and no decree could be passed in terms thereof.

Their main objection was that it was incompetent either for the execution Court or the appellate Court to refer the matters pending before them to arbitration. under the Arbitration Act, But their objections were dismissed and decrees were passed in terms of the award, both in the application u/s 14 (suit No. 14 of 1945) as well as in the other three pending cases, namely, in execution appeal No. 111 of 1944, suit No. 12 of 1944 and Civil Appeal No. 218 of 1944, in accordance with the terms of the award. Against these four decrees Lala Moradhwaj and Ajit Prasad have come up in appeal to this Court.

2. First Appeal from Order No. 205 of IS46 arises out of the application made u/s 14, Arbitration Act (suit No. 14 of 1945), Execution Second Appeal No. 1114 of 1947 arises out of Execution Appeal No. 111 of 1944, Second Appeal No. 947 of 1947 arises out of Appeal No. 218 of 1944 and First Appeal from Order No. 27 of 1947 arises out of suit No. 12 of 1944. It only remains to mention that the decree under execution in execution case No. 898 of 1940 in which the application for reference to

arbitration was rejected, is stated to have been satisfied and is no longer pending execution.

3. The appeals came up for hearing before a Bench of this Court which referred the case to a larger Bench on account of a conflict between certain decisions of this Court, viz., -- "Shukrullah v. Mt. Rahmat Bibi AIR 1947 All 304 (A) where a Bench of two learned Judges of this Court held that an appellate court has no jurisdiction under the Arbitration Act to refer an appeal to arbitration, and -- " [Munni Lal Vs. Kishun Prasad and Another](#), where another Bench of two learned Judges held that both an appellate Court as well as an execution Court could refer the dispute between the parties to arbitration under the Arbitration Act. In the latter case, it was observed that even if the dispute could not be referred to arbitration by an appellate or execution Court, the award of the arbitrators could be given effect to as an adjustment. The learned Judges in making the reference to a larger Bench, after observing that

"it seems to us, therefore, very desirable that this important question of law on which there was a difference of opinion between the two Benches of this Court should be considered and decided by a Full Bench."

directed that, "the papers be laid before the Hon"ble the Chief Justice for constitution of a larger Bench to decide these appeals."

4. I may be permitted to point out that, although it is always competent for a Bench of this Court to refer an entire case to a Full Bench of the Court, yet it is always desirable, whenever possible, to refer to a larger Bench only those points on which the decision of a larger Bench is considered to be necessary. Questions of fact or law on which there is no necessity of inviting the opinion of a larger Bench should not, in our opinion, be referred to the larger Bench, as firstly, it involves unnecessary waste of time of the larger Bench and secondly, it might also happen that the opinion of the larger Bench on questions of law of a controversial nature may be rendered obiter by reason of the ultimate decision of the case. Both the parties before us have urged that this Bench may only decide the questions of law on which there seems to be a difference of opinion in the cases of this Court already referred to.

5. We therefore propose to answer the following questions only in this reference;

1. Can an execution Court or an appellate Court refer a case pending before it to arbitrators for decision?

2. Can an award made out of Court, be given effect to as an adjustment of a pending case when one of the parties objects to this being done?

6. The first question has to be answered mainly upon the interpretation of two words, "suit" and "Court", which appear in Section 21, Arbitration Act. The section is as follows:

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply in writing to the Court for an order of reference."

The word "Court" is defined in Section 2(c) of the Act as follows :

" "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings u/s 21, include a Small Cause Court."

7. It is contended on behalf of the respondents that the word "suit" includes execution proceedings as well as appeals, and the word "Court" includes Courts of not only original jurisdiction but also execution and appellate Courts. Alternatively, it is contended by them that so far as the power of an appellate Court to refer appeals to arbitration is concerned, an appellate Court has the same jurisdiction u/s 107, Civil P. C. as a Court of original jurisdiction has, and reading Section 107 along with Section 8, General Clauses Act, an appellate Court can exercise the power conferred upon a Court of original jurisdiction by Section 21, Arbitration Act; and that in so far as an execution Court is concerned, Section 141, Civil P. C. read with Section 8, General Clauses Act will enable an execution Court to refer disputes to arbitration u/s 21, Arbitration Act.

On behalf of the appellants it is contended that the word "suit" does not include an execution proceeding or an appeal and that Sections 107 and 141, Civil P. C. or Section 8, General Clauses Act do not apply to the provisions of the Arbitration Act. In support of their respective arguments parties have referred to the previous history of the law of arbitration and the entire scheme of the Arbitration Act.

8. Under a regulation dated 17-6-1787, the Court was authorised to refer any dispute to an arbitrator of its own accord, even against the wishes of the parties. The Bengal Regulation (16 of 1793) amended the law and authorised Courts to refer "suits" to arbitrations, It made no provision for reference to arbitration of disputes outside Courts. The CPC of 1859 contained provisions regarding reference to arbitration in Ch. VI, Sections 312 to 327. u/s 312, any matter in difference between the parties in a "suit" could be referred to arbitration. Section 325 provided for a judgment to be passed "according to the award" and "upon the judgment which shall be so given, a decree" shall follow." Then there was a provision that "it shall be carried into execution in the same manner as other decrees of the Court." u/s 326 an agreement of reference could be filed in Court and the application filing the agreement of reference was to be treated and registered as a suit, and the same procedure as provided for reference in pending suits was to be followed. u/s 327 an award obtained outside the Court without the intervention of the Court could be filed in Court within six months of the date of the award by means of an application

which was to be registered as a "suit" and "if no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the, provisions of this chapter."

There was no specific provision for reference to arbitration of disputes arising in execution proceedings. From the terms of the sections quoted above, it was clear that it was not intended that there should be any arbitration in execution proceedings. In regard to appeals, S. 358 provided that "the appellate Court shall have all the like powers in regard to the granting of time, adjourning the hearing of the suit, examining the parties or their pleaders, and awarding costs, or otherwise as are hereinbefore contained in regard to Courts of original jurisdiction." This section was repealed by Section 1 of Act 23 of 1861, but Section 37 of that Act provided that:

"Unless when otherwise provided, the appellate Court shall have the same powers in cases of appeals which are vested in the Courts of original jurisdiction in respect to original suits."

A question arose as to whether, under the provisions of the above section, an appellate Court could refer an appeal to arbitration. In -- "Juggeshur Dey v. Kritartha Moyee Dossee 21 Suth WR 210 (FB) (C) it was held that the appellate court could not refer the matters in difference in a suit to arbitration. This ruling was dissented from by the North Western Provinces High Court in a Full Bench case reported in --"Chiranji Lal v. Jamna Das 7 NWP HCR 243 (FB) (D). It was observed-

"It has for many years been the practice of this Court and of the courts subordinate to it, on the application of the parties to an appeal, to refer to arbitrators the matter in difference between the parties, and to deal" with the award under the provision of Chapter VI of the Code of Civil Procedure; nor, so far as we are aware, has the legality of the practice been questioned or doubted in these provinces."

It was further observed that-

"Although the term "suit" may apply to a suit in any stage of its progress, whether in a court of first instance or in a court of appeal, and had Section 312 stood alone, we might have considered its use in that section embraced proceedings in appeal, yet, looking to the terms of Sections 326 and 327, we accept the view that the whole Chapter in which these sections find a place was intended to apply to courts of first instance. But were it not for the ruling to which we have alluded, we should have considered it free from doubt that the provisions of Section 37, Act XXIII of 1861, clothed appellate courts with the like authority as is given to courts of first instance by Sections 312 and 325 of the Code."

9. The CPC of 1859 was repealed by Act 10 of 1877, but similar provisions were made with regard to arbitration in the later Code as well, vide Sections 506 to 526. The provisions of Section 37 of Act 23 of 1861 were incorporated in Section 582. The

following clause was also added:

"The provisions hereinbefore contained shall apply to appeals under this Chapter so far as such provisions are applicable."

"The provisions hereinbefore contained" included the provisions for reference to arbitration in suits. Under the Act of 1877, therefore, it was clear that the appellate Courts could refer matters in dispute in a suit to arbitration, by virtue of the provisions of section 582.

10. Act 10 of 1877 was repealed by Act 14 of 1882. The provisions relating to arbitration were similar to those made in the previous Act, vide Sections 506 to 526. The provisions of Section 582 of Act 10 of 1877 were incorporated in Section 582 of the Code of 1882. By this time it was well settled that an appellate Court with the consent of parties could refer a case to arbitration. See -- "In re Sangaralingam Pillai", 3 Mad 78 (E).

11. In the CPC of 1908, important sections of the old Civil P. C. were enacted as sections, while sections of lesser importance relating to procedure were incorporated in Schedules. The sections relating to arbitration were incorporated in Schedule 2. Section 107 of the Code of 1908, corresponding to Section 582 of the Code of 1882 provides:

"(1) Subject to such conditions and limitations as may be prescribed an appellate Court shall have power-

(a) to determine a case finally,

(b) to remand a case,

(c) to frame issues and refer them for trial,

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein."

12. There can be no doubt that as under the previous Codes, so also under the Code of 1908, so long as Schedule 2 was not repealed the appellate Court could refer a matter in dispute in a suit to arbitration by virtue of the provisions of Section 107, because the appellate Court has the same powers and performs the same duties, as nearly as may be, as are exercised by the courts of original jurisdiction.

13. The power which is possessed by a Court of original jurisdiction in respect of suits and may be exercised by an appellate Court is, however, not possessed by execution Courts and- a special procedure for execution has been provided for in the Code. Section 141, corresponding to old Section 467, does not apply to execution proceedings. The Allahabad High Court applied the procedure applicable

to suits to execution applications by virtue of Section 467, vide -- "Sarju Prasad v. Sita Ram 10 All 71 (F) and -- "Fakirullah v. Thakur Prasad 12 All 179 (G). A contrary view was taken by the Calcutta High Court in --"Bunko Behary v. Nil Madhav 18 Cal 635 (H). An appeal was taken to the Privy Council from the Allahabad decision in "Fakirullah"s case (G)", While the appeal was pending in the Privy, Council, the Legislature amended Section 647 by adding an Explanation thereto in the following terms :

"This section does not apply to applications for the execution of decrees which are proceedings in suits."

The Privy Council, in the appeal pending before it, held that both before and after the Explanation, the procedure for suits did not apply to the execution proceedings, vide -- "Thakur Prasad v. Fakirullah 17 All 106 (PC) (I). The law having been thus enunciated by the Privy Council, the Legislature, in the CPC of 1908, while enacting the main provisions of Section 647 of the Act of 1882 in the new Section 141, did not consider it necessary to retain the Explanation which had been added to the old Section 647.

14. It was urged that an execution proceeding is a proceeding in a suit. But the proceeding in a suit is not the same thing as the suit itself. An execution proceeding is a proceeding which follows a decree passed in a suit. The procedure up to the stage of passing of a decree is quite different from the procedure followed in the execution of the decree. Schedule 2, Civil P. C. applied to a stage before the passing of the decree. Before the enactment of the Arbitration Act of 1940, it has always been held under the CPC that the proceedings in execution cannot be referred to arbitration; see -- " [\(Firm\) Sarju Lal-Behari Lal Vs. Sukhdeo Prasad and Others, T. Wang Vs. Sona Wangdi, Bachan Lal Vs. Amar Singh and Others,](#) " AIR 1939 186 (Nagpur) . In -- " [Zumaklal Motiram Vs. Fulchand Tarachand,](#) the same view was taken, but it was held that an award could be regarded as an adjustment under Order 21, Rule 2, C. P. C. With this aspect of the case we shall deal later.

15. Thus, the position before the enactment of the Arbitration Act, 1940 was that reference to arbitration could be made in appeals from decrees passed in suits, while it could not be made in execution proceeding"s.

16. When the Arbitration Act of 1940 was enacted, the law relating to arbitration was to be found mainly in the Second Schedule of the CPC and in the Indian Arbitration Act of 1899. These provisions were repealed and a consolidated Act was passed to deal with the entire law relating to arbitration. The preamble to the Act shows that it is a consolidating and amending Act. The scheme of the Act is this: Chapter II deals with arbitration without intervention of the Court. This Chapter contains Sections 3 to 19. It is clear that this Chapter deals with a case in which there is no suit pending and parties have agreed to refer their differences to arbitration and an award is also made without the intervention of a Court. Chapter III deals with arbitration with the

intervention of the Court where no suit is pending. In other words, where there is an arbitration agreement, but where no award has been made, the agreement may be filed in Court by means of an application. Such application will be registered as a suit and then the matter will be referred to arbitrators. Chapter IV, which consists of Sections 21 to 25, deals with arbitration in pending suits. Parties may apply to the Court to have the suit or any issue therein referred to arbitration and thereafter the other provisions relating to arbitration shall be followed. Then there are general provisions which apply to all the three kinds of arbitration proceedings mentioned in Chapters II, III and IV.

17. Under Chapter II, when an award has been made, it has to be filed in "Court" and the Court ultimately passes a decree in terms of the award. Under Chap III, an agreement of reference is filed in "Court" by means of an application, and then the application is registered as a suit and the matter is referred to arbitration and after the award has been made, a decree is passed in terms of the award in the same manner as in Chapter II.

18. Which is the "Court" in which the award under Chap. II and an application under Chap. III shall be filed? According to the definition of the word "Court" as given in Section 2(c), it is "the civil Court having jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit." There can be no doubt that in Chaps. II and III, it must be a Court of original Jurisdiction and the word "suit" in the definition of "Court" and in Section 20 of Chap. III must mean an originating proceeding and cannot include an appeal or execution proceeding.

19. Does the word "suit" not carry the same meaning in Section 21? Sometimes a "suit" is said to include an "appeal", because it is a continuation of a suit in a suspensor Court. But that is not the sense in which the word is used in the procedural codes of India unless it is specifically provided to the contrary. In the CPC in the Limitation Act (vide Section 2(10)) in the U. P. Tenancy Act, 1939 (vide -- "[B. Bindraban Katiar Vs. Ganga Ram](#)"), the word "suit" is used as not including an appeal. The Arbitration Act incorporates the provisions of Schedule II of the Civil P. C. & is in "pari materia" with that Code. The Limitation Act and the Civil P. C. apply to arbitrations under the Arbitration Act (vide Sections 37 and 41 respectively) words used in Acts "pari materia" are to be interpreted in one and the same sense, unless the contrary appears.

In Craies on Statute Law, Fifth Edition, page 125, it is stated: "Where Acts of Parliament are in "pari materia" that is to say, are so far related as to form a system or code of legislation, the rule as laid down by the twelve Judges in Palmer's case (R. V. Palmer (1785) 1 Leach 352 at p. 355 (P)) is that such Acts "are to be taken together as forming one system, and as interpreting and enforcing each other"." In "Rex v. Loxdale (1758) 1 Burr 445 at p. 447 (Q) Lord Mansfield laid down the rule thus:



"Where there are different statutes in "pari materia", though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as, explanatory of each other."

In -- "Perth Local Board v. Maley (1904) 1 CLR 702 at 715 (R) Griffith C. J. said:

"It is usual to credit the Legislature with a knowledge of the existing law on the subject dealt with; and when we find that such a meaning has been constantly attributed to the word "necessary" in other Acts dealing with similar matters, they may have reasonably expected that the word would in this Act be construed as having the same meaning."

20. The provisions of the Arbitration Act in regard to arbitration in pending suits are practically the same as they were in Schedule II, which were interpreted in the Pull Bench of the N. W. p. High Court in the case of 7 NWP HCR 243 (D) already cited as not by themselves applying to appeals and in the other cases already cited as not applying to execution proceedings. In Chapters II and III the word "suit" means the original proceeding in the court of first instance. There is therefore no reason to think that the word "suit" in Section 21 and in the definition of the word "Court" in Section 2(c) as applicable to that section has been used in any other sense. The word "suit", therefore, does not include appeals or execution proceedings and the word "Court" in Section 2(c) refers to a court of original jurisdiction.

21. In the case of appeals, however, Section 107, Civil P. C. read with Section 8, General Clauses Act, 1897 empowers an appellate Court to refer an appeal from a decree in a suit to arbitration. Section 8. General Clauses Act provides:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

22. The Arbitration Act repeals and re-enacts the provisions of Schedule II of the Civil P. C. Section 107, Civil P. C. conferred upon the appellate Court the same powers and the same duties as nearly as may be conferred and imposed by the Code on the Courts of original jurisdiction in respect of suits instituted therein. The word "Code" included Schedule II also and therefore, it was held that under Schedule II an appellate Court has, in exercise of the powers conferred upon it u/s 107 the power to refer matters to arbitration. The words "any other enactment" in Section 8 must, in our opinion, include" the non-repealed part of the former enactment. The word "Code" in Section 107 would therefore include a reference to the Arbitration Act which has incorporated the provisions of Schedule II of the Civil P. C. This would become apparent if the word "Code" in Section 107 was amplified and in its place the following words were written:

"the Sections and Schedules of the Code."

The repeal of Schedule 2, and its re-enactment in the Arbitration Act, therefore, does not make any difference so far as the powers of the appellate Court u/s 107 are concerned, because those powers will still refer to the provisions of the Arbitration Act which have taken the place of the Second Schedule.

23. As Section 141, Civil P. C. does not apply to execution proceedings, Section 8, General Clauses Act can be of no help in the matter of arbitration in execution proceedings. Further, from the fact that the Arbitration Act provides for the passing of decrees in terms of the award after an award is filed in court and objections thereto have been rejected, and such decree is intended to be executed, an execution proceeding does not appear to be a fit subject of arbitration because to apply the provisions, of the Act will be contrary to the provisions of the Civil P. C. For instance, orders on objections or claims under Order 21, Rule 58 and Order 21, Rule 95 or 97 are not decrees under the Civil P. C., and can be challenged by means of a suit. This cannot be done in the case of an award. Even in the case of objections u/s 47, Civil P. C., where the order deciding the objection is a decree, the decree is not intended to be "executed" -- what is executed is the decree in the suit and the decision on the objection u/s 47 merely deals with a hurdle in the path of the execution of the decree.

24. I may now deal with the cases decided by the various High Courts in India upon the interpretation of Section 21 read with Section 2(c), Arbitration Act.

25. In AIR 1947 All 304 (A) a Bench of this Court held that the word "Court" as defined in Section 2, Arbitration Act was applicable only to Courts of original jurisdiction. The Bench further held that an appellate court could not refer an appeal to arbitration. Section 8, General Clauses Act was, however, not brought to the notice of the Court. To the same effect is the decision of the Calcutta High Court in -- [Abani Bhusan Chakravarty and Others Vs. Hem Chandra Chakravarty and Others](#), . The Patna High Court in -- "[Thakur Prasad Vs. Baleshwar Ahir and Others](#)", construed the definition of "court" in Section 2, Arbitration Act differently, as including an appellate Court as well. In my opinion the interpretation put upon the definition of the word "Court" in "Shukrullah"s case (A)" is the correct one.

In [Munni Lal Vs. Kishun Prasad and Another](#), a Bench of this Court held that Section 8, General Clauses Act read with Section 107, Civil P. C. empowered an appellate Court to refer a dispute to arbitration. With this opinion I am in respectful agreement. But the Bench went on further to hold that the word "suit" in Section 21, Arbitration Act included an execution proceeding.

In support of this view, the Bench referred to a decision of a single Judge of the Oudh Chief Court in -- AIR 1943 304 (Oudh) In the Oudh case an execution proceeding for the delivery of possession over certain property was referred to arbitration on 16-7-1940, that is, after the commencement of the Arbitration Act.

Two questions were raised in the case: (1) Whether execution proceedings could be referred to arbitration, and (2) whether a revision lay against the decree passed in terms of an award, on the ground of invalidity of the reference to arbitration. The learned Judge held that an execution proceeding could be referred to arbitration. He based his opinion not upon any authority but purely upon the view that

"there is no reason to restrict the meaning of the word "suit" in Section 21 in such a way as to exclude execution proceedings which are only a continuation of the suit" and that

"generally speaking a suit may fairly be interpreted to include the proceedings taken to execute the decree unless there is anything to suggest to the contrary."

This single Judge decision of the Oudh Chief Court could hardly lend support to the view expressed by the learned Judges in "Munni Lal's case (B)". They relied on three other cases, namely, -- [Banwari Lal Vs. Municipal Board of Cawnpore](#) . and their own earlier decision in -- [Banwari Lal Vs. Municipal Board of Cawnpore](#) , it was held by a Bench of this Court that u/s 24, Civil P. C., an execution proceeding could be transferred. This was so held because the word "suit" as used in Section 24 was held to include execution proceedings. Section 24 clearly empowered a Court to transfer execution proceedings because the words are "transfer any suit, appeal or "other proceedings" pending before it." "Other proceedings" would clearly include an execution proceeding and it was not necessary to hold that the word "suit" included an execution proceeding.

In [Zumaklal Motiram Vs. Fulchand Tarachand](#), it was clearly held that Schedule 2, Civil P. C., dealing with arbitrations, did not apply to execution proceedings, but it was observed that an award obtained in execution proceedings operated as an adjustment of the decree and might be recorded under Order 21, Rule 2, Civil P. C. With this aspect of the matter I. shall deal later on. In AIR 1949 All 100 (W) an application for the redemption of a mortgage under S 12, U. P. Agriculturists' Relief Act (Act 27 of 1934) was referred to arbitration. It was held that these proceedings could be referred to arbitration. If I may say so, with respect, this is a perfectly correct decision. But this was not a decision on the point we are considering in this case and could hardly be relied upon by the Bench for their view that execution proceedings could be referred to arbitration.

26. In -- [Lakshmi Narain Vs. Ram Babu and Another](#), it was held that an appellate court has jurisdiction to refer a matter to arbitration. In my opinion, therefore, an appellate court can refer to arbitration the dispute in an appeal from a decree in a suit, while an execution court cannot refer a dispute in execution proceedings to arbitration. A "fortiori" appellate court hearing an appeal from an order made in execution proceedings cannot refer the dispute between the parties to arbitration.

27. This brings us to the second question in the case, whether an award obtained on a reference outside court while a suit or other proceeding is pending, can be treated as an adjustment under Order 23, Rule 3, or under Order 21, Rule 2, Civil P. C.

Section 89, Civil P. C. provided that

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule."

Thus, the provisions of Schedule II were to be exhaustive of the mode in which an award could be enforced except in so far as it was "otherwise provided by any other law."

Leaving aside cases which fell under the Arbitration Act of 1899, some Judges held that the provisions of Order 23, Rule 3 and of Order 21, Rule 2, Civil P. C. which spoke of adjustment or compromise were that "other law" mentioned in Section 89 and in award, not obtained in the manner provided for in Schedule II could yet be treated as an adjustment or compromise on the ground that the agreement of reference itself was such an adjustment or compromise, and there was a promise contained in that agreement that the "award" given by virtue of the agreement would be binding on the parties, even though a party to the reference may have objections to the award. See -- "[Penmetcha Subbaraju Vs. Penmetcha Venkatramaraju](#), [Zumaklal Motiram Vs. Fulchand Tarachand](#), and -- [Gajendra Singh Vs. Durga Kumari](#) per Walsh and Kanhaiya Lal JJ. Mukerji J. dissenting. On the other hand, in -- "Maung Hlay v. U Ge AIR 1939 Rang 300 (FB) (Z1) it was held that there could be no adjustment of a decree by means of an award under Order 21, Rule 2, Civil P. C., if it is objected to by any of the parties.

28. In this state of affairs, opportunity was taken to clarify matters when the law of arbitration was codified by the Arbitration Act of 1940. Section 47, Arbitration Act is similar in language to Section 89, Civil P. C., but a proviso has been added to the following effect:

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

The words "with the consent of all the Parties interested" are intended to resolve the conflict that prevailed before the Act came into force. These words obviously have reference to the award. All the parties interested must consent to the "award" being given effect to. Where they do not so consent, the award cannot be taken into consideration as a compromise or adjustment. The consent of the parties to the reference merely and not to the award can by no stretch, of imagination be deemed to be a consent to the award itself as actually made. Accordingly, the proviso to

Section 47 has been interpreted by almost all the courts in India as meaning that an arbitration award can be taken into consideration as a compromise or adjustment of a suit or execution proceeding only if it has been consented to by all parties concerned "after" the award was made.

In -- [Indramoni Mohapatra Vs. Nilamoni Moharana](#), Ray, C. J., and Das J. observed:

"But the proviso also requires in terms, the -consent of all the parties interested as a condition precedent for the exercise of the power to take the matter into consideration. It is to be noticed that the award cannot be taken into consideration on the application of one only of the parties, nor by Court itself suo motu. The context indicates that the "consent" specified in the "proviso is a "consent" given at the time when the matter is to be taken into consideration."

The same view was taken in -- "[Behari Rai Vs. The State](#)", "Nazir Mohammad v. Kasturchand Gomaji Co. AIR 1951 Mys 57 (Z4); -- "[Jugaldas Damodar Modi and Co. Vs. Pursottam Umedbhai and Co.](#)", and lastly -- "[Abdul Rahman Sahib Vs. Muhammad Siddiq and Another](#)", overruling the earlier decision of the same Court in -- [V.S.A. Arumuga Mudaliar Vs. V.S.P. Balasubramania Mudaliar and Others](#), in which it was held that there was nothing in the proviso to Section 47 which precluded the antecedent consent of the parties to the award as given in the agreement of reference.

The only case of this Court in which a reference to Section 47, Arbitration Act was made is the Full Bench case in -- "Dular Koeri v. Payag Koeri AIR 1942 All 145 (Z8). That was a case in which the arbitration was made before the commencement of the Arbitration Act of 1940 and therefore the case fell to be decided under the old law. In view of the earlier decisions of this Court, their Lordships held that an award obtained outside the Court when the suit was pending could be regarded as a compromise under Order 23, Rule 3. But they went on to observe that the question had become immaterial in view of the provisions of Section 47, Arbitration Act which enabled this to be done. This observation was obiter and the wordings of the proviso to Section 47 were not specifically considered. To give effect to an award or an adjustment in spite of the objections of one of the parties to it without examining those objections and allowing the party an opportunity to prove them would be, to my mind, most inequitable. If the arbitration had been done under the provisions of the Arbitration Act, every party to the reference could have an opportunity to show that the award was vitiated on account of the misconduct of the arbitrators, or was otherwise unenforceable.

The grounds on which an award can be set aside or remitted to an arbitrator or modified by the court are based on equity, justice and good conscience. But simply because the award has been made without following the procedure prescribed in the Arbitration Act, the award cannot acquire such a sanctity that it cannot be challenged even on those equitable grounds which have been given statutory

recognition in the Arbitration Act.

29. I am, therefore, of opinion that an award obtained without the intervention of Court in respect of matters which are the subject-matter of a proceeding pending in a court of law can only be given effect to as an adjustment under Order 23, Rule 2, or under Order 23, Rule 3, Civil P. C. if all the parties interested give their consent to this being done and not otherwise.

30. The other points arising in the case will now be decided by a Bench. Let the papers of the case be laid before the Hon"ble the Chief Justice for the constitution of a Bench for deciding the appeals in the light of the opinion of this Full Bench.

Brij Mohan Lall, J.

31. I agree.

M. L. Chaturvedi, J.

32. I agree.