(1965) 07 KL CK 0029

High Court Of Kerala

Case No: C.R.P. 899 of 1963

Mammoo Alias Kunhammed Keyi	APPELLANT
Vs	
Cheria Kaderkutty Keyi	RESPONDENT

Date of Decision: July 29, 1965

Acts Referred:

- Arbitration Act, 1940 - Section 14, 15, 16, 17, 2(c)

Citation: (1965) KLJ 821

Hon'ble Judges: K.K. Mathew, J; C.A. Vaidialingam, J

Bench: Division Bench

Advocate: V. Rama Shenoi and R. Raya Shenoi, for the Appellant; V.R. Krishna Iyer, K. Raghavan Nair and T.V. Ramakrishnan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Vaidialingam, J.
In this revision petition, on behalf of the defendant petitioner, Mr. V. Rama Shenoi, learned counsel, challenges the decree of the learned Subordinate Judge of Tellicherry. accepting the claim of the plaintiff-respondent on the basis of an award, passed by an arbitrator on a reference by agreement of parties, on 3--2--1961. The main contention taken by the learned counsel for the petitioner before the court below, as well as before this Court, is that the suit for enforcing a claim arising out of an award passed by an arbitrator--no doubt appointed outside court--under the provisions of the Arbitration Act, 1940 (Central Act 10 of 1940)--is not maintainable and that such a suit is barred by section 32 of the said Act. In order to appreciate the contentions that have been taken by Mr. Rama Shenoi learned counsel for the petitioner, as well as by Mr. V. R. Krishna Iyer learned counsel for the respondent, it is necessary to set out the circumstances under which the claim in the suit came to be made by the respondent-plaintiff.

2. The plaintiff, the defendant and their sister Beebi, were heirs to the estate left by their deceased father A. P. Kunhi Pakky. There is no controversy that these three parties referred to above, entrered into an agreement on 11--5--1960, to refer their diputes regarding the shares to be allotted to them in the estate of their father, to an Advocate viz., Shri P. M. Abubacker. There is also no controversy that an award was made under Ext. A1, by the said arbitrator on 3--2--1961. We, are not concerned in these proceedings with the various other matters dealt with in the award, excepting the item of claim which is the subject of the present suit. In paragraph 9(a) of the agreement to refer the disputes to arbitration, it is stated that the parties have agreed to allow the defendant to be in possession of the properties make the collections, and deposit the collections every month before the arbitrator who is to make tentative disbursements pending Final adjudication by him regarding the actual rights of the parties in respect of the total collections that may be made by the defendant. The provision was to the effect that the defendant was to be in such possession and make necessary collections and deposit the income from the date of the agreement to the date of the award.

3. It will be seen that the defendant was making the collections and depositing the amounts before the arbitrator, who was also disbursing the same tentatively in proportion to the shares that the parties may be ultimately found entitled to. The defendant ultimately made only a total return, in respect of the collections for the said period, in the sum of Rs.3,447.89P. Objection appears to have been raised to the quantum of the collections shown by the defendant. After considering the objections, as well as the claim made by the defendant, the arbitrator ultimately fixed that the defendant must have made a total collection during the said period, in the sum of Rs. 4,955.27P. And, on that basis, after taking into account the disbursements made by him to the parties from time to time, the arbitrator ultimately, directed in paragraph 8 of the award, Ext. A1, that the defendant, apart from his being liable to make the payment representing, the balance share to his sister, should pay an additional sum of Rs. 602.95P. to the plaintiff. That is the only aspect that has to be adverted to in respect of the matters covered by the award Ext. A1.

4. The grievance of the plaintiff is, that notwithstanding the fact that the notice Ext. A2, was sent to the defendant, calling upon him to pay the amount mentioned in paragraph 8 of the award, the defendant has defaulted in complying with the said demand, and therefore he has instituted the present suit, for recovery of the said amount.

5. Inasmuch as the defence to the action is based upon the provisions of the Arbitration Act, 1940 (Central Act 10 of 1940)--hereinafter to be referred to as the Act--it is also necessary to advert to the exact nature of the claim made by the plaintiff in his plaint. After referring to the fact that the disputes regarding the shares to be allotted to them in the estate of their father were referred for

arbitration, the plaintiff states that the arbitrator finally made an award on 3-2-1961. The agreement to refer the disputes to arbitration is itself stated to be dated 11-5-1960. Then in paragraph 3 of the plaint, there is reference to paragraph 9 (a) of the arbitration agreement, wherein, according to the plaintiff, the defendant was allowed to be in possession of the properties, collect the income, and deposit the same with the arbitrator from the date of the arbitration agreement, to the date of the award to be rendered by the arbitrator, and that the final disbursements were to be made by the arbitrator at the time of passing the award. After referring to all these aspects it is mentioned by the plaintiff in the same paragraph that the arbitrator, overruling the objections of the defendant and accepting the claim made by the plaintiff, held that the total amount that must have been collected by the defendant when he was in possession of the properties, should be fixed in the sum of Rs. 4,955.27P. On this basis, it is further averred by the plaintiff, that the arbitrator awarded that the defendant was liable to pay the plaintiff a sum of Rs. 602.95P. on account of the mesne profits for the period mentioned in paragraph 8 of the award, which was the subject of reference in paragraph 9 (a) of the arbitration agreement. The plaintiff also refers to the fact that the defendant has not chosen to pay the amount, notwithstanding the fact that demand was made in that regard. Ultimately the plaintiff prayed for a decree being granted in his favour for the said amount as against the defendant and his properties. There is one other aspect that has to be noted in the plaint, namely the averment regarding the date, when the cause of action for the suit arose. That is contained in paragraph 5 of the plaint. In that paragraph, it is stated that the cause of action for the suit arose on and after 3-2-1961 when the award was made, and 4-5-1961 when the registered lawyer notice demanding payment was issued to the defendant. Therefore going by the averments contained in the plaint, prima facie, it will be seen that the plaintiff has based his claim for recovery of the amount in question, mainly on the basis of the directions given by the arbitrator in the award Ext. A 1, and the cause of action for the suit is also stated to have arisen from the date of the award.

6. The defendant, no doubt, accepted in his written statement, that there was an arbitration award as alleged by the plaintiff. But he took up the position that in respect of the suit claim the award is not just or final or conclusive. He also raised a more essential contention to the effect that the claim of the plaintiff, being the subject-matter of the award, cannot be enforced by a suit, but only by filing the award in court and obtaining an executable decree. He has also stated that it is only such a decree that could be executed; and this aspect of his plea is wound up by the statement to the effect that the suit is not maintainable and is liable to be dismissed in limine. These allegations are to be seen in paragraphs 2 and 2 (a) of the written statement. In the subsequent paragraphs of the written statement, the defendant has raised various grounds of attack as against the procedure adopted by the arbitrator when he came to the conclusion that the defendant is liable in the sum of Rs. 602.95 P. in favour of the plaintiff. It is not necessary for our present purpose to

go into all those aspects, excepting to note that the defendant has also raised various grounds of attack against the legality and validity, as well as the effect of the arbitration proceedings.

7. The suit appears to have been originally instituted in the Munsiff''s Court, Tellicherry, and later on transferred to the file of the Subordinate Judge''s Court Tellicherry. The claim itself is one made in a small cause court. The learned Subordinate Judge raised two issues for trial, namely (1) Whether the suit for recovery of the amount awarded by the arbitrator is maintainable, and (2) Whether any charge is created by the award for the amount due to the plaintiff. So far as the second issue is concerned, the learned Subordinate Judge is of the view that going by the recitals contained in the award it cannot certainly be stated that any charge has been created in favour of the plaintiff. Therefore, so far as that claim is concerned it was negatived. Regarding the substantial question that arose for consideration in the suit, the view of the learned Subordinate Judge is that the contention of the defendant that, in as much as the award has not been made a decree of court and inasmuch as the procedure indicated in the Act has not been followed the claim of the plaintiff cannot be recognised, should not be accepted. The learned Judge is of the view that if the award itself is to be attacked, it has got to be filed in court; and that when it is not disputed that the parties have taken possession of the properties set apart by the arbitrator under the award, there is an implied agreement that the amount awarded by the arbitrator in his award would also be paid. The further view of the learned Subordinate Judge is that having enjoyed the benefits of the award, the defendant cannot say that he is not liable to pay the; amount awarded by the arbitrator. Ultimately the learned judge expresses the view that a party cannot partly accept the award and partly reject it; and finally holds that there is no legal bar in enforcing the claim in the suit. Therefore, on this basis, the learned Subordinate Judge came to the conclusion that the suit is maintainable; and ultimately granted a decree as prayed for in favour of the plaintiff.

8. Mr. Rama Shenoi, learned counsel for the defendant, revision petitioner, attacks rather strenuously the reasoning of the trial court holding that the suit, as framed, is maintainable, notwithstanding the fact that the plaintiff has not adopted the procedure indicated in the Act. No doubt a slight controversy arose between the learned counsel appearing in this court for both parties regarding the correctness of the statement contained in the judgment of the lower court, wherein it is stated that it was not disputed that the parties have taken possession of the properties set apart by the arbitrator under the award. But, for the purpose of deciding the question of law, that arises for consideration at the hands of this Court, in this revision petition, we do not think it is necessary to go into that controversy. We will therefore proceed on the basis that what the learned Subordinate Judge had in mind is that the parties have taken possession of the properties, that were allotted to them, under the award. But nevertheless the question does arise as to whether the claim of the plaintiff, can form the subject of an independent suit, without the

party seeking to enforce it after having got a decree of court, as is provided, under the provisions of the statute itself.

9. Mr. Rama Shenoi referred as to the relevant provisions of the Act, as well as the decisions of the various High Courts bearing on the point, wherein according to the learned counsel, the view has been unanimously expressed that, in such circumstances, and having due regard to the provisions of the Act itself, it is not open to a party, who seeks relief on the basis of an award, to institute a separate suit for that purpose, without complying with the provisions of the Act itself by obtaining an executable decree in his favour. Before we refer to the decisions relied on by the learned counsel for the petitioner, and by Mr. V. R. Krishna Iyer learned counsel for the respondent, it is necessary to advert to some of the provisions of the statute, which have been referred to, rather, exhaustively in the decisions, to which we are going to refer immediately.

10. Section 2(c) of the Act defines the expression "court". Chapter TI deals with Arbitration without the intervention of a Court. It is necessary to refer to some of the provisions contained in this Chapter. Section 14 therein more or less consists of two parts, namely sub-section (1) providing for the arbitrators or umpire making their award, signing it, giving notice in writing to the parties of the making of the award, and signing, and also the amount of fees and charges payable in respect of the arbitration and award. Sub-section (2) provides for the arbitrators or umpire filing the award in court under two circumstances, namely (a) at the request of any party to the arbitration agreement or any person claiming under such party, and (b) if so directed by the Court. Section 15 deals with the power of court to modify the award under the circumstances mentioned therein. Section 16 again gives power to the court to remit an award under the circumstances stated therein. Section 17 provides for judgment being rendered in terms of the award. The substance of this Section is to the effect that where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award and if the time for making application to set aside the award has expired, or when such application has been filed and dismissed, the court is to proceed to pronounce judgment according to the award. It is also provided in the Section, that upon the judgment so pronounced, a decree shall follow. No doubt, to a limited extent, there is a right of appeal provided in the last part of Section 17. Pausing here for a minute, it may be stated that Article 158 of the Limitation Act, 1908, specifies the period within which an application is to be filed to set aside an award or to get an award remitted for reconsideration under the Arbitration Act, 1940. Similarity, it may also be stated that so far as the filing of an award in court under sub-section (2) of Section 14 of the Act is concerned, the period of limitation is provided in Article 178 of the Limitation Act.

11. It is not necessary for us to note Chapters IH and IV of the Act, the former dealing with arbitration with intervention of a court where there is no suit pending,

and the latter dealing with arbitration in suits. Chapter V is General; and it is necessary to refer to some of the Sections contained in this Chapter, which have got a bearing on the controversy that arises for consideration in the present case. Section 30 provides for the circumstances under which a court can set aside an award; and Section 31 relates to the jurisdiction of the court. It will be seen that under sub-section (2) of Section 31, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement mentioned therein, shall be decided by the court in which the award under the agreement has been, or may be filed, and by no other court. Similarly, Section 32, which bars suits contesting arbitration agreement or award, is as follows:

32. Bar to suits contesting arbitration agreement or award. 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 anyway affected otherwise than as provided in this Act.

It will be seen that the provisions contained in this Section is absolute, namely that notwithstanding any law for the time being in force, no suit shall lie on any ground, whatsoever, regarding the decision upon the existence, effect or validity of an arbitration agreement or award. Section 33 enables a party, who seeks a decision regarding the existence or validity of an arbitration agreement or an award, to approach the Court concerned by filing an application.

12. The bar to the maintainability of the present suit is mainly rested upon the provisions contained in Section 32 of the Act extracted above. The contention taken on behalf of the revision petitioner by his learned counsel is that in this case, insumuch as Section 17 of the Act specifically provides that after going through the earlier stages when the award is filed before court, the court is to ultimately pronounce judgment according to the award and on the judgment so pronounced a decree is to follow, it is only when those formalities have been gone through and a decree passed on the basis of the award by the court, that it becomes an executable decree which can be enforced by the party claiming the benefits under the same. Naturally the learned counsel placed considerable reliance upon the provisions contained in Section 32 of the Act. According to the learned counsel there can be no controversy, that the plaintiff has based his claim, to recover the amount, exclusively or solely upon the directions contained in the award Ext. A1; and therefore, before the court can recognise the claim of the plaintiff and give a decree in his favour, notwithstanding any plea that may be raised by the defendant, the court has necessarily to adjudicate upon the existence of the award. And more than that, in the present case, the learned counsel pointed out that, the various other grounds of attack taken by his client in the written statement will show that he is also challenging the validity of the award Ext. A 1. Therefore according to the learned

counsel, the suit as instituted by the plaintiff, though it may appear to be a very simple suit, does invite the court to decide upon the existence, effect or validity of the award Ext. A 1, and therefore Section 32 operates as a bar to the entertaining of the suit.

13. No doubt the stand taken by Mr. Rama Shenoi, though supported by the various decisions to which we will refer immediately, is controverted by Mr. V.R. Krishna Iyer, learned counsel for the respondent plaintiff. The learned counsel urged that in this case though there is a direction contained in paragraph 8 of the award to the effect that the defendant is to pay an amount,--which claim is the subject of the present suit--it is not by virtue of any direction contained in the award itself, but is really by virtue of the agreement of parties that the defendant was put in possession of the properties during the stage when the arbitration proceedings are going on; and therefore the claim now made in the suit, must be considered to be one arising independently of the award itself and so, no question of the existence, effect or validity of the award comes into the picture at all. The learned counsel also referred us to a decision of the Nagpur High Court, as well as the observations contained in an early decision of the Calcutta High Court by a learned Single Judge, wherein both the High Courts have held that if an application to set aside an award or to enforce the rights under the award can be filed they see no reason why an independent suit could not be instituted. The learned counsel also urged that the recent decision of the Supreme Court, as interpreted by a Full Bench of the Madras High Court in Mohammed Yusuf v Mohammed Hussain (A. I. R. 1964 Madras 1) will clearly show that when once the parties have taken steps to implement an award, that itself will give rise to a fresh cause of action. In this case the learned counsel points out that inasmuch as the parties have taken advantage of the benefits arising out of the various directions given by the arbitrator under the award Ext. AI by taking possession of the properties, it is no longer open to the defendant to resile from that arrangement, and resist the claim of the respondent plaintiff in these proceedings.

14. In our opinion, after having due regard to the provisions of the statute, as well as to the decisions bearing on the point, the contentions of the learned counsel for the petitioner regarding non-maintainability of the suit will have to be accepted. The earliest decision bearing on the point, is the one rendered by Chagla J. (as he then was) reported in Ratanji Virpal & Co. v Dhirajlal Manilal (A.I.R. 1942 Bombay 101). In that decision it will be seen that after an award was made, no proceedings appear to have been taken for having the award filed before court. Nevertheless, one of the parties to the award, against whom certain directions had been given in the award, filed an application to have the award itself set aside. The learned Judge considers the question as to whether it is open to a party to file an application, to have the award set aside before the award itself has been filed before Court as required by Section 14 of the Act. In this connection the learned Judge, at page 101 of the report observes:

Section 32 specifically provides that 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 the said Act, and u/s 17 of the Act the court has to pronounce judgment according to the award and a decree follows. It is only this decree that can be executed.

From the above extract, it will be seen that after referring to Sections 17 and 32 of the Act, the learned Judge is of the view that the only decree that can be executed, on the basis of the award, is the decree that is passed in pursuance of the judgment rendered u/s 17, and it is only that decree that can be executed. Ultimately the learned Judge came to the conclusion that the application filed by the party therein to set aside the award, even before the award was filed before court, was not maintainable. The aspect that has to be noted is, that according to the learned Judge, a party can claim relief, only on the basis of the decree, to be passed- u/s 17, in pursuance of the award, that is filed before court, u/s 14 of the Act.

15. That decision of Chagla, J., has been quoted with approval by the Madras High Court in a decision of a learned Single Judge reported in Rashid Jamshed Sons v Moolchand Jothajee (A, I. R. 1945 Madras 371) as well as in the decision of a Division Bench reported in Moolchand v Rashid Jamshed Sons & Co. (A.I.R.I 946 Madras 346). In fact, the decision in Rashid Jamshed Sons v Moolchand Jothajee (A.J. R. 1945 Madras 371) was that of a single Judge, viz. Somayya, J., which went up on appeal before the learned Chief Justice and Lakshmana Rao, J., in the decision reported in Moolchand v Rashid Jamshed Sons & Co. (A.I. R. 1946 Madras 346.) The question that specifically arose in those decisions was regarding the maintainability of a suit, to enforce a claim, arising under an award. The matter as we mentioned already, came up before a Single Judge, Somayya J., in the first instance. The learned Judge, in the decision reported in Rashid Jashed Sons v Moolchand Jothajee (A.T.R. 1945 Madras 371), refers to the various provisions contained in the Act and ultimately at page 372 of the report observes:

Where a successful party files a suit to obtain the relief that is granted to rim by the award, it cannot be gainsaid that the plaintiff must prove the fact of the award, i.e., its existence, before he can get relief. When the other side questions the existence or validity or effect of the award, a question regarding the existence, validity or effect of the award is directly raised. If an award is alleged by the plaintiff, obviously the defendant must be allowed to raise the question of the existence of the award. But u/s 31, cl. (2)even the existence of the award shall not be determined by any court except the court in which the award may be filed. This provision indicates that even a sucessful party to whom a relief is given under the award must seek to enforce it in the court in which the award may be filed, that is, by proceeding u/s 14 of the Act.

The above extract will also show that it is the view of the Madras High Court, that when a party, who has been granted certain reliefs under the Act, seeks to enforce them in a separate suit, that party as plaintiff will have to prove the fact of the award, namely its existence before he can get the reliefs. The learned Judge after referring to the provisions continued in clause (2) of Section 31 of the Act, expresses the view that even a successful party to whom relief is given under the award must seek to enforce it in the court in which the award may be filed, and that is by taking proceedings u/s 14 of the Act read with Section 17. Ultimately the learned Judge came to the conclusion that if a party to whom some reliefs are given by the award, seeks to enforce them as a plaintiff, and the defendant says that the award does not exist or that it is not valid for the grounds mentioned by him, then the question that will have to be considered will be as to the existence, effect or validity of the award, which is barred by Section 32 of the Act. The decision of Pollock J., reported in Vanhelal Anandilal v Singhai Gulabchand (A.I.R. 1944 Nagpur 24) wherein the learned Judge has taken the veiw, that under such circumstances a suit is maintainable was quoted before Somayya J., but the learned Judge was not inclined to follow that decision.

16. As already stated, the decision of Somayya J., in Rashid Jamshed Sons v Moolchand Jothajee (A. I. R. 1945 Madras 371) was taken up in Letters Patent Appeal before Leach C. J., and Laskhmana Rao J., whose decision is reported in Mookhand v Rashid Jamshed Sons & Co. (A. I. R. 1946 Madras 346). There again, the learned Judges, refer to the decision of the Nagpur High Court in Nanhelal Anandilal v Singhai Gulabchand (A. I. R. 1944 Nagpur 24); but they are not inclined to adopt the view expressed by the Nagpur High Court. On the other hand, the learned Judges refer to the decision of Chalga J., in Ratanji Virpal & Co. v Dhirajlal Manilal (A. I. R. 1942 Bombay 101) and express the view that those observations have to be adopted by the Madras High Court also. Regarding the view expressed by Somayya J., which was the subject of the appeal before their Lordships, the learned Judges, refer to the provisions contained in the Act, and ultimately express the opinion at page 347 of the report:

By reason of Section 31, no Court other than that in which the award has been, or may be, filed has jurisdiction to decide any question relating to the validity, effect or existence of the award. Section 32 emphasises this by stating that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of the award. The act of 1940 was intended to consolidate and amend the law of India relating to arbitration matters. The scheme of the Act is to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act. The suit which the appellants filed clearly raised the question with regard to the existence and validity of the award, and such a suit is expressly barred b; Section 32.

Here again, it will be seen that the learned Judges, having due regard to the provisions of the Act, are of the view that the suit, which the appellants before them filed, clearly raised the question with regard to the existence, effect or validity of the award, and that such a suit is expressly barred by Section 32 of the Act. No doubt it will also be seen that before the learned Judges some support was sought to be derived by the provisions of the Specific Relief Act; but the learned Judges were not prepared to look into any other enactment for the purpose of considering the question whether in such circumstances the suit was barred or not. Ultimately the learned Judges approved of the decision of Somayya J., regarding the interpretation to be placed on Section 32 of the Act and held that a suit to enforce rights arising under an Award is not maintainable. We have already indicated that the view of the Nagpur High Court in Nanhelal Anandilal v Singhai Gulabchand (A. I. R. 1944 Nagpur 24) was not adopted by the learned Judges, but the view of the Bombay High Court in Ratanji Virpal & Co. v Dhirajlal (1942 Bombay 101) was accepted.

17. Before we refer to a later Division Bench decision of the Bombay High Court, it is necessary to refer to two decisions--one of the Patna High Court, and the other of the Punjab High Court. In Ramachander v Munsiff (I. L. R. 1949) 28 Patna 569, Imam and Ramaswamy JJ. (as they then were) had to consider the question as to whether a suit was maintainable for enforcing a relief granted under an award. In that case it will be seen that the arbitrator had directed the defendant to pay the plaintiff, a sum of Rs. 280/-, together with interest; and for recovery of the said amount, the plaintiff instituted the suit, without adopting the remedy provided for in the Act itself. The learned Judges took the view, that because of Section 32 of the Act, the suit is not maintainable. They also quote with approval the Division Bench decision of the Madras High Court in Moolchand v Rashid Jamshed Sons & Co. (A. I. R. 1946 Madras 346) as well as the decision of Chagla J., in Ratnaji Virpal & Co. v Dhirajlal Manilal (A. I. R. 1942 Bombay 101) Ramaswami J., having due regard to the various provisions of the Act itself as well the decisions bearing on the point, ultimately expresses, the view at page 574 of the report:

The governing Section is Section 32, Arbitration Act. The Act of 1940 was intended to and did after the law, and one of the main objects of the Act was to provide that claims to set aside arbitration award or challenge arbitration agreement should be made by application to Court and decided on affidavits or on other evidence if deemed expedient by the Court and not by means of a suit. In the present suit the question at issue clearly relates to existence and validity of the award made by the arbitrators. In paragraphs 6 and 17 of the written statement the defendants specifically asserted that they had never referred the alleged matter in dispute to any arbitrators and that no award was made. The defendants maintained that even if the award was genuine, the plaintiff was not entitled to enforce the award since it was illegal, invalid and inoperative. Upon these pleadings it is manifested that the suit raised the question as to the existence and validity of the award and such a suit is expressly prohibited by Section 32 of the Arbitration Act.

Here again it will be seen that the Patna High Court is of the view that when relief was granted under an award, it is not open to a party to institute a separate suit, because such a suit is expressly barred by Section 32 of the Act. '' We have already referred to the fact that the decisions of the Madras High Court and the Bombay High Court have been approved by the Patna High Court also.

18. Kupur J., (as he then was) of the Punjab High Court in the decision reported in Radha Kishen v Ganga Ram (A. I. R. 1951 Punjab 121), had also, under similar circumstances, in a suit instituted for enforcing rights recognised by the award, taken the veiw that by virtue of Section 32 of the Act, the suit is not maintainable. The learned Judge, quotes with approval the Division Bench decision of the Madras High Court in Moolchand v Rashid Jamshed Sons & Co. (A. I. R. 1946 Madras 346) as well as the decision of Chagla J., reported in Ratanji Virpal & Co. v Dhirajlal Manilal (A. I. R. 1942 Bombay 101.) The learned Judge specifically dissents from the view expressed by Pollock, J., of the Nagpur High Court reported in Nanhelal Anandilal v Singhai Gulabchand (A. I. R. 1944 Nagpur 24).

19. The question as to whether a suit, in such circumstances to enforce rights under an award, is maintainable, again came up before a Division Bench of the Bombay High Court, consisting of Chagla C. J., and Dixit J., reported in Naramadabai v Natverlal (A. I. R. 1953 Bombay 386). In that decision the learned Judges have made certain observations to the effect that even if the parties agree that a civil court should entertain the suit to enforce the award, the parties could not by their consent confer jurisdiction, upon it, and section 32 of the Act operates as an absolute bar to such a suit. In fact, it will be seen that no objection appears to have been taken at the stage of the trial of the suit, to the maintainability of the suit; nor during the stage of the appeal. But nevertheless the learned judges have considered this aspect, on the ground that there is a preliminary and insuperable difficulty in the way of sustaining the action instituted by the plaintiff. The learned Chief Justice here again quotes with approval the Division bench decision of the Madras High Court in Moolchand v Rashid Jamshed Sons & Co. (A. I. R. 1946 Madras 346), as well as his own decision rendered as Single Judge and reported in Ratanji Virpal & Co. v Dhirajlal Manilal (A. I. R. 1942 Bombay 101). At page 390 of the report, the learned Chief Justice discusses the scope of Section 32 of the Act, and ultimately comes to the conclusion that Section 32 bars suits and a civil court would have no jurisdiction to entertain and determine a suit filed to enforce an award. In fact, as we mentioned before, the learned Chief Justice goes further and makes observations to the effect that even if the parties agree that a civil court should entertain the suit to enforce the award, the parties could not by their consent confer jurisdiction upon it. Ultimately the learned Judges hold that the suit as brought was not maintainable. The learned Judges have also quoted with approval the decisions of the Patna and Punjab High Courts.

20. There is one more decision which deals with the question of the maintainability of the suit, namely of the Nagpur High Court reported in Nathulal v Beharilal (A. I. R. 1952 Nagpur 65). In that decision, Hidayathullah J., (as he then was) and Kaushalendra Rao, J., have considered the scope of Section 32 of the Act, and ultimately, the learned Judges have held that Section 32 operates as a bar, and suits to enforce rights on the basis of an award are not maintainable.

21. From the various decisions, to which we have referred above, excepting the one reported in Ratanji Virpal & Co. v Dhirajlal Mnilal (A. I. R. 1942 Bombay 101), it will clearly be seen that the question as to whether a suit to enforce rights given under an award is maintainable, and as to whether the provisions of Section 32 of the Act operate as a bar to such a suit, has directly come up for consideration before the High Courts of Madras, Bombay, Patna, Pubjab, and Nagpur, and those High Courts have unanimously taken the view that such a suit is not maintainable in view of the clear prohibition contained in Section 32 of the Act. Pausing here for a minute, it may be stated that Mr. V. R. Krishna Iyer learned counsel for the respondent plaintiff, pressed for our acceptance, the view expressed by Pollock J., of the Nagpur High Court reported in Nanhelal Anandilal v Singhai Gulabchand (A. I. R. 1944 Nagpur 24). No doubt the learned Judge has taken the view, that if an application to enforce the claim under an award is maintainable, a suit also is maintainable. But it will be seen that the Division Bench of the same High Court reported in Nathulal v Beharilal (A. I. R. 1952 Nagpur 65) have differed from that view. No doubt Mr. Krishna Iyer is perfectly justified in his contention that the Division Bench of the Nagpur High Court, has not adverted to the decision of the Single Judge (Pollock, J. Nag.) in Nanhelal Anandilal v Singhai Gulabchand (A. I. R. 1944 Nagpur 24.) That may be so. But the position is that the Nagpur High Court itself on a later occasion--and that of a Division Bench--has taken a view that is opposed to the view taken by Pollock, J., on an earlier occasion. We have already pointed out that the Division Bench of the Nagpur High Court, has quoted with approval the decisions of the various other High Courts to which also we have adverted to earlier.

22. The question, as to how far it is open to the defendant, in an action to enforce rights under an award, to plead as a bar to the suit or resist the claim of the plaintiff on the basis of an unfiled award has no doubt been considered by a Full Bench of the Andhra Pradesh High Court reported in Pamandas v Manikyam Pillai (A. I. R. 1960 A. P. 59), as well as by a Full Bench of the Madras High Court, in the decision reported in Mohammed Yusuf v Mohammed Hussain (A. T. R. 1964 Madras 1). But we do not propose to go into the various matters discussed in those Full Bench decisions, excepting to this limited extent, namely that the learned Judges, after referring to the provisions contained in the Act, particularly Sections 31 to 33, have come to the conclusion that, normally a suit, to enforce rights, which have been given under an award is barred. In fact, the learned Judges of the Madras High Court, in the Full Bench decision referred to above, specifically approve of the views expressed by Chagla J., in Ratanji Virpal & Co. v Dhirajlal Manilal (A. I. R. 1942

Bombay 101), as well as the Devision Bench Judgment of the Madras High Court in Moolchand v Rashid Jamshed Sons & Co. (A. I. R. 1946 Madras 346). No doubt there is one aspect that has been dealt with in the Full Bench of the Madras High Court, namely that it has interpreted certain observations contained in the decisions of the Supreme Court, in Kashinathsa v Narsinghsa (A. I. R. 196] S. C. 1077), on which Mr. Krishna Iyer learned counsel for the respondent has placed considerable reliance in support of his contention that if it is seen that the parties have accepted the award and acted upon it, that itself will give a fresh cause of action. We do not propose to express any opinion in this judgment, on the observations of the Madras High Court in the Full Bench decision reported in Mohammed Yusuf v Mohammed Hussain (A.I.R. 1964 Madras 1), particularly those observations contained in paragraph 24 thereof; and we reserve liberty to consider those observations, as and when an appropriate occasion arises. But the point to be noted, in both the Full Bench decisions of the Madras and Andhra Pradesh High Courts, is that reference has been made with approval to previous decisions based on Sections 31 to 33 of the Act wherein Courts have held, that a suit to enforce a claim, arising out of an award, is not maintainable.

23. It now only remains to refer to certain observations contained in two Supreme Court decisions, namely those reported in Jawaharlal v Union of India (A. I. R. 1962 S. C. 378) and Jawahar Lal Burman Vs. Union of India (UOI), . In the former decision, it is only necessary to refer to the observations of the Supreme Court to the effect that the main object of introducing the provisions of Sections 31, 32 and 33 of the Act was to entrust the decision of the relevant disputes to the specified Court and to require the parties to bring the said disputes for the decision of the said Court in the form of petitions. The other observation that has to be noted is that remedy by way of a regular suit is intended to be excluded. In our opinion, these observations clearly are to the effect, having due regard to the provisions contained in Sections 31, 32 and 33 of the Act, that the matters covered by those in Sections could net form the subject of adjudication in a separate suit instituted for the purpose. The question that arose for consideration before the Supreme Court in the latter decision, namely Kashinathsa v Narsinghsa (A. 1. R. 1961 S. C. 1077), related to the effect of the various arrangements entered into by the parties, on the basis of directions given from time to time, by the arbitrators appointed for that purpose. In that particular suit, the defence was taken that the parties had acted in pursuance of the directions given by the arbitrators and entered upon possession of the properties, but it was urged by the plaintiff, that such a plea is not open to the defendants, in view of the provisions of Section 32 of the Act. The Supreme Court in that connection, dealing with this aspect, after adverting to the fact that on the basis of the directions given by the arbitrators, from time to time, the parties have, by mutual agreement, settled all their disputes and entered into possession of the various items of properties allotted as and for their share. Then the Supreme Court deals specifically with the question, as to what exactly is the effect of the plea raised

by the defendants on the ground that the parties have by mutual consent taken possession of the properties on the basis of the directions contained in the award, and consider the question as to whether such a plea is one coming u/s 32 of the Act. At page 1083, the Supreme Court observes:

It may be sufficient to observe that where an award made in arbitration out of court is accepted by the parties and it 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 actings of the parties are binding. By setting up a defence in the present case that there has been a division of the property and the parties have entered into possession of the properties allotted, defendant No. 1 is 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 consent of parties. Such a plea is in our Judgment not precluded by anything contained in the Arbitration Act.

The above extract, in our opinion, clearly implies that if in view of a particular defence, the question regarding the existence, effect or validity of an award arises for consideration, Section 32 of the Act comes into play. In our opinion, the same principles will have to be applied, even when the plaintiff institutes a particular action, and in such an action, those questions arise for consideration, the bar u/s 32 of the Act will stand attracted.

24. These are the various decisions bearing upon this aspect; and, in our opinion, notwithstanding the fact that there is an observation by Das J., of the Calcutta High Court in the decision reported in Issur Chandra Pal v Ramkristo Pal (51 Calcutta Weekly Notes 563) to the effect that a suit may be maintainable, and notwithstanding the direct decision of Pollock, J., of the Nagpur High Court in the decision reported in Nanhelal Anandilal v Singhai Gulabchand (A. I. R. 1944 Nagpur 24) which decision, as we have already pointed out, has been expressly dissented from by the various High Courts, and a contrary view has been taken by a Division Bench of the same High Court, in view of the averments made in the plaint, the position is that the plaintiff really asks for enforcing a claim recognised in his favour, under the award. And, as pointed out by Somayya, J., in Rashid Jamshed Sons v Moolchand Jothajee (A. I. R. 1945 Madras 371)--which decision has been affirmed by a Division Bench in Moolchand v Rashid Jamshed Sons & Co. (A. I. R. 1946 Madras 346) and quoted with approval by various other High Courts--it follows, that before relief can be granted to the plaintiff, the Court will have to adjudicate upon the existence of the award itself. Even apart from that, we have already adverted to the fact that the defendant has raised several other pleas regarding the award itself. Even if we eliminate them for the present purpose and hold that it may not be necessary for the court to adjudicate upon those aspects, still even going by the

allegations contained in the plaint itself, it is clear that unless the court adjudicates upon the existence of the award as recognising the right in favour of the plaintiff, it may not be possible for the court to grant any relief. If that is so, it is a matter which clearly comes within the prohibition contained in Section 32 of the Act, and the suit has to be held to be not maintainable.

25. We are not inclined to accept the contention of the learned counsel for the respondent that the rights of parties will really have to be related to the original agreement entered into by them, on the basis of which, the defendant was put in possession of the properties. No such case has been pleaded in the plaint. We have already indicated that the plaint itself is based upon the fact that relief has been granted under the award, namely paragraph 8 of the award Ext. A1. We have also indicated that the cause of action for the suit is stated to have arisen on and after 3-2-1961 when the award was rendered. And the claim of the plaintiff is only to enforce, what is directed in paragraph 9 of the award; and there can be no controversy that the matter was also subject of decision in the award by the arbitrators. Therefore we are not inclined to accept the contention of the learned counsel for the respondent that the causes of action for this claim, will have to be separated and the real cause of action should be considered to be the agreement entered into between the parties, especially in the absence of any such plea to that effect in the plaint itself. The question of approbate and reprobate, also, in our opinion, does not come into the picture in this case. Having gone through the award Ext. A1, we do not find any provision to the effect that the taking of possession of the properties by the various parties, is conditioned by payments of the amounts mentioned in paragraph 8 of the award. Each direction in the award stands by itself, and therefore the direction contained in paragraph 8 of the award which is the subject matter of the suit, has nothing to do with the other directions regarding the division and allotment of the properties.

26. Finally Mr. Krishna Iyer made a request before us to the effect that his client may be permitted to amend the plaint, by basing his claim on the original cause of action, namely of the defendant being put in possession of the properties of the family under an agreement, on which basis parties will be entitled to claim profits, which accrued due for the period in question. Normally we would certainly be inclined to consider this request very sympathetically. But unfortunately, the difficulty in this case is, that the suit having been instituted as a small cause suit, in the Subordinate Judge''s Court, even if converted into an. original suit, after, amendment, will not certainly be maintainable in that Court. Such an original suit for recovery of Rs. 602.95 Ps. has to be instituted in a Munsiffs Court. Therefore the amendment of the plaint, even if permitted, will at present serve no useful purpose. The result is that the finding of the lower court that the suit is maintainable, cannot be sustained. It, therefore, follows that however hard the result may be, the plaintiff''s suit will have to be dismissed. The revision petition is accordingly allowed, and the plaintiff''s suit will stand dismissed. The parties will bear their own costs

throughout. But we make it very clear that the dismissal of the present suit, for the reasons mentioned in this judgment, will not preclude the respondent plaintiff, if he is otherwise entitled to in law, to file a fresh suit, based upon the original cause of action, before the appropriate forum.