**ALLAHABAD HIGH COURT**

Mariam

Vs

Amina

(Sulaiman, J.)

21.09.1936

**JUDGMENT**

**Sulaiman, C.J.**

1. This is an application in revision by Mt. Mariam and her. minor brother Latif Ahmad arising out of a suit in which there was a reference to arbitration and a decree in terms of the award. The suit had been brought by the applicants' step-mother Mt. Amina, who was a lunatic, through a next friend. The claim was for recovery of the dower debt due against her deceased husband Habib Ahmad, the father of the present applicants. She had impleaded Sagir Ahmad, her eldest step-son, also as a defendant and had impleaded Latif Ahmad, minor, under the guardianship of his elder brother. It has been assumed that the Court had duly appointed Sagir Ahmad as the guardian-ad-litem of the minor Latif Ahmad. On 22nd August 1934, an application for reference to arbitration was filed which was signed by Sagir Ahmad for himself and as pairokar of the defendants other than Sharif Ahmad, the son of Mt. Amina, who signed the application himself. It was also signed by the advocates for all the parties and also by the next friend of the plaintiff. The attention of the learned Munsif does not appear to have been drawn to the fact that one of the defendants was a minor and that it was necessary for the Court to consider whether leave should or should not be granted to the guardian-ad-litem to enter into the agreement for reference to arbitration as required by Rule 32, Rule 7. The Court merely passed an order that, as the parties had agreed, the matter should be referred to arbitration. The sole arbitrator promptly delivered his award on 26th August 1934. Certain formal objections were taken to the award by Sagir Ahmad for himself and for Latif Ahmad, but these did not include the point that the reference was invalid inasmuch a the leave of the Court had not been expressly recorded in the proceedings. These objections were dismissed and a decree was passed in terms of the award.

2. The present application was accordingly filed challenging the validity of the proceedings on the ground that there had been a non-compliance with the requirements of Order 32, Rule 7. The Bench before whom the civil revision came up for disposal have referred the following questions to this Full Bench for answers :

1. Whether para. 1, Schedule 2, Civil P.C., is subject to the provisions of Order 32, Rule 7? 2. If the answer to the above question is in the affirmative, should the leave of the Court for the agreement to refer the suit to arbitration be obtained before an application for an order of reference is made, or, leave can be granted by the Court even after the award has been delivered? 3. (a) Does the omission of a next friend or a guardian-ad-litem of a minor party to a suit to obtain leave of the Court render the order of reference and the award void or only voidable at the option of the minor? (b) Can such an order of reference and the award be assailed by the minor in the suit itself or his proper remedy is to file a separate suit? 4. Whether an objection to the validity of reference to arbitration comes within the purview of para. 15, Schedule 2, Civil P.C.? 5. Whether the decision of the Court that made the reference to arbitration overruling an objection, relating to the invalidity of the order ol reference and passing a decree in accordance with the award can be challenged by an appeal or by an application in revision?Before 1908, Section 506, Act 14 of 1882, which corresponded to Schedule 2, Para. 1, Civil P.C., contained the word "desire" instead of the word agree" which now occurs in the rule. Section 462 of the Code did not contain the words "expressly recorded in the proceedings" which now find a place in Order 32, Rule 7. These variations are of significance.

3. Under the old Code it was held by a Bench of this Court in Hardeo Sahai v. Shankar (1905) 28 All. 35, that if the guardian of a minor consents to refer the matters in dispute to arbitration and if there is no fraud or gross negligence, then even though the Court has not under the provisions of Section 462 sanctioned the agreement to refer to arbitration the minor is bound, by the reference and the award. Apparently the view taken at that time following some earlier cases was that the provisions of Section 506 were really not controlled by those of Section 462. The case in Manohar Lal v. Jadunath Singh (1905) 28 All. 585 went up before their Lordships of the Privy Council for decision. That was a case where a compromise had been entered into on behalf of the minor by his guardian without the special leave of the Court and a decree1 was passed in terms of such a compromise. Their Lordships after quoting the provisions of Section 462 laid down that the mere fact that the minor was represented by a guardian was not sufficient but that there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained. The rule laid down by their Lordships applies with greater force to cases under the new Code where Order 32, Rule 7 has the additional words "expressly recorded in the proceedings." It is therefore obvious that in the case of a compromise entered into by a next friend or guardian ad litem of a minor party, it is absolutely essential that the attention of the Court should be drawn to the fact that there is a minor concerned and the Court should apply its mind to the consideration of the question whether the compromise is for the benefit and in the interest of the minor or not, and that it must record the grant of leave expressly in the proceedings. In view of their Lordships' pronouncement in the aforementioned case, a compromise entered into on behalf of a minor by his guardian without such leave would certainly not be binding on the minor.

4. The question of the binding character of a reference to arbitration and an award against a minor came up for consideration before a Full Bench of this Court in *Lutawan v. Lachya*[1]. In that case there had been no application made to the Court for leave to refer the matter on behalf of the minors but the guardian had consented. When the award was delivered objections were taken on behalf of the defendants including the minors, but they were overruled. The defendants including the minors then went up in appeal before the District Judge who entertained the appeal, allowed it and set aside the decree of the Court below which had incorporated the award. The matter came up as a first appeal from order before the High Court which was referred to the Full Bench for decision. It was held that no appeal lay from the decree of the first Court to the District Judge and accordingly the order of the District Judge was set aside and that of the Court of first instance restored. On the facts of that case no question really arose as to whether a revision would not lie from the original order passed by the trial Court referring the matter in dispute to arbitration. So far as Banerji, J. was concerned he definitely held that it was not necessary to express any opinion on the question whether an agreement entered into by the guardian of a minor for making an application for an order of reference to arbitration comes within the purview of Order 32, Rule 7, Civil P.C. But Richards, C.J., and Ryves, J., made observations which suggested that the substitution of the word "agree" in place of the word "desire" did not introduce any material alteration in the rule. Relying on the case in *Ghulam Khan v. Md. Hassan*[2] which however was a case of a compromise, the learned Judges held that the order of the trial Court was final and could not be questioned in appeal. They pointed out that Schedule 2, para. 15, has been amended and the words "or otherwise invalid" have been introduced which widened the scope of that paragraph, and made it possible to take all objections against the award including the objection that the reference itself was invalid. No exception can be taken to this view and we must accept the ruling of the Full Bench as laying down that even where an objection is taken to the validity of the award on the ground that the original reference itself was invalid, and such an objection is decided against the objector and a decree is passed in terms of the award, the decree is final and is not appealable. It cannot be challenged by way of appeal on any of the grounds on which an appeal can ordinarily be impugned. But that case is no authority for the proposition that no revision would lie to the High Court from the original order if it came within the purview of Section 115, Civil P.C., because this point does not appear to have been argued or considered and it is certainly not referred to in the judgment.

5. It seems to me that there is a clear distinction between the proceedings before an arbitrator and the proceedings in the Court itself, whether before the reference is made to the arbitrator or after the receipt of his award. So far as the proceedings before the arbitrator are concerned they can be taken exception to by way of objection to the award when it is delivered and the trial Court has exclusive authority to consider such objections and to dispose of them finally. Whether it decides them in favour of the objector or against him the matter cannot be reopened in the appellate or revisional Court because at the very most the trial Court has erred on a point of law in deciding the objection in the way it has done. But so far as the proceedings before the Court itself are

concerned that Court cannot be made the sole judge of the propriety of its own proceedings. It should not have the final word on the question whether it has acted without jurisdiction or with illegality or material irregularity in the exercise of such jurisdiction.

6. In such a case, therefore, even if the proceedings have terminated in a decree in terms of an award and even though no appeal lies from such a decree, it is open to the High Court to interfere in revision and set aside the orders which have been passed by the Court itself, provided they are vitiated either by want of jurisdiction or illegality or irregularity in the exercise of jurisdiction. In holding that a revision lies one would not be going against the pronouncement of their Lordships of the Privy Council in Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(Supra), nor really against the view expressed by the Full Bench in *Lutawan v. Lachya*[3] because this point did not arise for consideration in those cases. What their Lordships meant by remarking that in the case of an award revision would be more objectionable than an appeal obviously was that where the decree in terms of the award cannot be challenged in appeal because it is believed to be final the same decree should not on its merits be challenged on revision.

7. Their Lordships did not lay down that the provisions of Section 115 are wholly inapplicable to a case which ultimately results in an award. On p. 186 their Lordships were careful to remark that the Subordinate Judge in that case did not appear to have exercised a jurisdiction not vestal in him by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of his jurisdiction illegally or with material irregularity. Indeed, he had in that case followed the course prescribed by the Code strictly. It has been urged before a& that in that case one of the points urged before the Punjab Court and urged before their Lordships at the bar was that the award was bad with reference to Section 462, Civil P.C., inasmuch as the minor's guardian had agreed, without the leave of the Court to refer the case to arbitration. Their Lordships remarked that inasmuch as they held that the application in revision was incompetent it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court, but that in their Lordships' opinion there was no substance in any one of the objections. In that case the guardian had actually agreed to the reference. He had therefore desired that the matter be referred to arbitration within the meaning of Section 506, Civil P.C. The only defect was that the leave of the Court had not been expressly given.

8. In the view which then prevailed, Section 462 did not govern the provisions of Section 506 and therefore there was really no substance in the objection taken. That is accordingly no authority for the proposition that under the new Code also the provisions of Order 32, Rule 7 can be ignored by the guardian ad litem of a minor. In several cases this Court has interfered in revision although the suit had resulted in a decree in terms of an award. In *Durga Baksh Singh v. Fateh Bahadur Singh*[5], the High Court interfered in revision and allowed the application because there had been an irregularity appearing on the face of the proceedings as there had been a failure to hear and determine an application for adjournment. In *Govind Singh v. Baij Nath*[6] it was pointed out that if the Court below commits a material irregularity, or refuses to exercise

jurisdiction, for instance, refuses to hear a valid objection properly raised before it or entertains matters which are outside its jurisdiction, then the High Court can interfere under Section 115, Civil P.C., not with the arbitrator or with the award, but with the exercise of the jurisdiction of the Court below in dealing with the application. In *Gopal Das v. Baij Nath*[7] an application in revision was allowed on the ground that a reference to arbitration had been made without authority and was not binding on the partner who had not agreed to the reference and that it was open to him to challenge the reference in revision although there was a decree passed in terms of the award, on the ground that the reference was illegal in its inception. In *Tej Singh v. Ghasi Ram*[8] a reference to arbitration made by a Court upon an application in which all the parties to the suit had not joined was held to be a reference made without jurisdiction and was liable to be set aside in the exercise of the High Court's revisional jurisdiction.

9. The Bench accordingly, although dismissing the appeal, interfered in revision. In *Mahadeo Prasad v. Badri Das Ram Sarup*[9] an application for revision on the ground of the initial invalidity of the reference was entertained. The other observations made in that case will be considered presently. If it were to be held that no matter whatsoever irregularity or illegality might have been committed by the Court itself in the suit or in referring the matter to arbitration, the decree when passed in accordance with the award is absolutely final and no party has any remedy to get such illegality or irregularity cured, there might be great hardship. For instance, the Court may refer a matter to arbitration in spite of the opposition of some of the parties to the suit or it may after the award is received immediately pass a decree in terms of the award without giving any opportunity to any party to produce evidence or to object otherwise. In such cases if there is to be a finality attaching to the decree a grave injustice would ensue. There seems to be no good ground for holding that the High Court as the superior revisional Court cannot intervene to rectify such illegalities or irregularities committed in the exercise of jurisdiction merely because the suit has terminated not in a" decree in the ordinary course but in a decree based on the award. When the reference itself is challenged on the ground of its initial invalidity the attack is directed not against the award itself but against the procedure adopted by the Court in its exercise of jurisdiction. There is ample authority in this Court in support of the view that the revisional powers exist.1. I would answer the first question in the affirmative and say that para. 1 of Schedule 2 and Order 32, Rule 7 should be read together and each governs the other. There is, however, this distinction. Where the guardian of a minor has agreed to join in the reference to arbitration, the requirements of para. 1 of Schedule 2 are complied with, but unless and until the leave of the Court has been obtained and expressly recorded in the proceedings the requirements of Order 32, Rule 7 are not fulfilled.

2. In view of the imperative provisions of Order 32, Rule 7 as interpreted by their Lordships of the Privy Council, the answer to the second question should be that the leave of the Court must be obtained before the reference is made so that the attention of the Court should be directed to the matter that there is a minor concerned and the Court should be asked to consider whether the reference is in the interest of the minor and for his benefit and if so it should expressly record the

granting of the leave in the proceedings.

3. (a) The omission of the next friend or the guardian ad litem of a minor party to obtain such leave would render the order of reference and the award and the decree based upon it voidable at the option of the minor as against all the parties, but not voidable at the option of the other parties thereto, as against the minor. The adult members are bound by it despite the fact that the leave of the Court had not been obtained, if the award is in favour of the minor or is not challenged on his behalf. But if the minor's guardian or next friend repudiates the award or the minor on attaining majority does not accept it, the reference can be avoided and therefore the award and the decree would fall to the ground so far as the minor is concerned, (b) It is open to the minor to bring the matter up in revision to the High Court or to get a declaration in a separate suit that for want of leave the reference, the award and the decree1 are not binding upon him, or to take such a plea in any suit in which he may be impleaded as a defendant.

4. An objection to the validity of the reference to arbitration on the ground that the reference was illegal because of the absence of leave does, in view of the pronouncement of the Pull Bench, come within the purview of para. 15, Schedule 2, Civil P.C., and so if the objection is decided adversely and a decree is passed in terms of the award, the decree is final and no appeal lies therefrom. This however does not mean that the order of reference to arbitration cannot be challenged by way of revision on that ground.

5. The decision of the Court that made the reference to arbitration overruling the objection and passing a decree in accordance with the award, cannot be challenged by an appeal or by an application in revision, for at most that amounts to an error of law. But the order made by the Court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision, though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award.

**Iqbal Ahmad, J.**

10. The answer to the first question, referred to the Full Bench depends on the interpretation of the word "agree" in para. 1, Schedule 2, to the Civil P.C. The provisions of Order 32, Rule 7 of the Code, are mandatory and expressly prohibit a next friend or guardian for the suit from entering into any agreement or compromise on behalf of a minor with reference to the suit, without the leave of the Court expressly recorded in the proceedings, and the omission to obtain such leave renders the agreement or compromise "voidable against all parties other than the minor." If the word "agree" in para. 1, Schedule 2, is used in the sense in which the word agreement" has been used in Order 32, Rule 7, there is no escape from the conclusion that para. 1 is subject to the provisions of Rule 7. The provisions of Rule 7 are general and of universal application and embrace agreements and compromise of every description. If an "agreement" between all the parties to the suit to refer the matter in dispute, between them to arbitration is a

condition precedent to an application to the Court for an order of reference, it follows that such an agreement in the ease of a minor can only be entered into with the leave of the Court expressly recorded in the proceedings and, if such leave is not obtained, the agreement is voidable at the option of the minor. But there are certain observations in the judgments of two of the learned Judges constituting the Full Bench that decided the case in Lutawan v. Lachya A.I.R. 1914 All. 446(Supra) which run counter to the view expressed above and this necessitates an examination of the ease law on the subject. Order 32, Rule 7 of the present Code corresponds to Section 462 of the Code of 1882 with this difference : that in the present Code the words expressly recorded in the proceedings" have been added in the provisions of Section 462 of the Code of 1882. Section 506 of the former Code prescribed the procedure for an application for an order of reference and provided that: If all the parties to a suit desire that any matter in difference between them...be referred to arbitration, they may apply...to the Court for an order of reference.

11. Paragraph 1, Schedule 2, to the present Code is identical with Section 506 of the former Code except in one material respect, viz. that the word desire" in Section 506 has been replaced by the word "agree" in para. 1, Schedule 2. The question whether the provisions of Section 506 of the former Code were subject to the provisions of Section 462 of that Code, i.e. whether it was necessary for the next friend or a guardian ad litem of a minor, who was a party to the suit, to obtain the leave of the Court before joining in an application for an order of reference to arbitration was considered by this Court in *Hardeo Sahai v. Shankar*[11] and was answered in the negative. It was held in that case that the provisions of Section 462 have no application to arbitration proceedings, "which are special proceedings" and a minor is therefore bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence on the part of the guardian, although the Court has not granted leave to the guardian to consent to an order of reference. It was pointed out by the learned Judges that all that was necessary to secure an order of reference from the Court was that all the parties to the suit should "desire" that such an order be made and that the expression of such desire stood "on a very different footing from the agreement or compromise contemplated by Section 462."

12. The same question arose in *Ghulam Khan v. Md. Hassan*[11] and, though the question was not expressly decided by the Privy Council, there is a passage in the judgment of their Lordships that suggests that the view taken in the Allahabad ease referred to above had the approval of their Lordships. In Ghulam Khan's case Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(Supra) there was a reference to arbitration in a pending suit through the intervention of the Court. The guardian ad litem of some of the minors, who were parties to the suit, did not obtain the leave of the Court for referring the suit to arbitration. On the submission of award by the arbitrators, one of the objections taken to the award was that, as leave of the Court had not been obtained by the guardian ad litem the award was invalid. The learned Subordinate Judge overruled all the objections to the award and passed a decree in accordance with the award. The matter was taken in appeal by the defendants to the Chief Court of the Punjab and that Court held that the decree passed by the Subordinate Judge was not appealable. It however treated the appeal as an

application in revision. One of the questions argued in the Chief Court was that the award was bad with reference to Section 462, Civil P.C., inasmuch as the minor defendants' guardian had agreed, without the leave of the Court, to refer the case to arbitration.

13. The learned Judges, while pointing out that the view of the Subordinate Judge on the question was opposed to a previous Full Bench decision of the Chief Court, declined to give effect to the contention in revision on the ground that the mere fact that the Subordinate Judge had acted in an erroneous view of law could not justify interference in revision. In the result the revision application was dismissed by the Chief Court and the defendants filed an appeal to His Majesty in Council. The main question considered by their Lordships on appeal was whether or not the revision application in the Punjab Chief Court was competent and their Lordships held that it was not. This was enough for the disposal of the appeal, but their Lordships also made the following observations in the course of their judgment:Inasmuch as their Lordships hold that the application in revision was incompetent it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court. It is enough to say that, in their Lordships' opinion, there does not appear to have been any substance in any one of them.

14. As one of the objections raised in the Chief Court was about the invalidity of the award based on the non-compliance with the provisions of Section 462, it must be field that their Lordships considered the objection without force. That being so the consideration of the first question referred to the Pull Bench must be approached on the assumption that under the Code of 1882, it was open to a next friend or a guardian ad litem of a minor party to the suit to join the other parties to the suit in an application for an order of reference to arbitration without the leave of the Court. The question however remains whether any change, in the law has been introduced by the Code of 1908, and this question was considered and answered in the negative by two out of three learned Judges constituting the Pull Bench in Lutawan v. Lachya A.I.R. 1914 All. 446(Supra). They held that the substitution of the word "agree" in para. 1, Schedule 2 of the present Code for the word "desire" in Section 506 of the former Code did not in any way shake, the authority of the decision in Hardeo Sahai v. Shankar (1905) 28 All. 35(Supra). Richards, C.J., was of the opinion that there was a mere "slight change in the wording of para. 1, Schedule 2" and that much weight" cannot be given "to this verbal alteration." Ryves, J. also held that by the substitution of the word "agree" for the word "desire" the legislature did not intend that the proceedings under para. 1 should be controlled by Order 32, Rule 7. Banerji, J. did not express, any opinion on the point.

15. As the decision in Lutawan's case Lutawan v. Lachya A.I.R. 1914 All. 446 (Supra) turned on another point, the observations of two of the learned Judges quoted above, though entitled to great weight were mere obiter dicta, but the view taken by them is not shared by any of the High Courts in India. In *Vijaya Ramayya v. Venkatasubba Rao*[12] *Chajju Mal v. Tarloki Nath*[13] *Sadashivapp Gangappa v. Sangappaa Chanvirappa*[14] and *Golenur Bibi v. Abdul Samad*[15] the contrary view was taken and it was held that leave of the Court under Order 32, Rule 7 must be

obtained by a guardian ad litem of a minor for agreeing on his behalf to refer through Court the subject-matter of a suit to arbitration. It is therefore manifest that the weight of authority is decidedly against the view expressed by the two learned Judges in Lutawan's case.3 Apart from this I, with all respect, am unable to agree with the learned Judges in holding that the replacement of the word "desire" with the word "agree" was a mere slight verbal change and that weight could not be given to this alteration in the new Code. The word "agree" is a technical term and must be interpreted in its technical sense. When the parties to a suit consent to refer the matter in dispute to arbitration the consent amounts to an agreement as defined by the Indian Contract Act and in the absence of anything to the contrary, it must be assumed that the word "agree" was used by the legislature in that sense. It may well be that as the word "desire" in the old Code was otherwise interpreted in the case Hardeo Sahai v. Shankar (1905) 28 All. 35(Supra), the legislature intentionally substituted that word by the word "agree." At any rate the alteration in the new Code must have been intentional and with a purpose, the purpose presumably being to make it clear that the consent expressed by the parties to a suit to refer the matter in dispute to arbitration amounts to an agreement. For the reasons given above I would answer the first question referred to the Full Bench in the affirmative.

16. This brings me to the consideration of questions 2, 3(a) and 3(b) referred to the Full Bench. In my judgment the leave required by Rule 7, Order 32 must be obtained before the next friend or guardian for the suit enters into an agreement to refer the matter in difference to arbitration. Rule 7 enjoins the next friend or guardian not to "enter" into any agreement without the leave of the Court, and further the leave of the Court must be "expressly recorded in the proceedings." The obvious object underlying the provisions of Rule 7 is to prevent any agreement or compromise in a pending suit on behalf of a minor till the same has the approval of the Court, so that the interest of the minor may not suffer. A reference to arbitration has far reaching consequences. It substitutes a tribunal selected by the parties for the tribunal constituted by law. The arbitrator is not bound by rules of procedure. Further the reference to arbitration deprives the parties of the valuable right of appeal in the event of a decree being passed in accordance with the award.

17. The exigencies of the provisions of Rule 7 can therefore be complied with only if the Court has considered the question whether or not, having regard to all the circumstances of the case, it is for the benefit of the minor that the matter in difference be left to the decision of an arbitrator. The proper stage for the Court to consider this question is before reference is made to arbitration. The contrary view may lead at times to anomalous results. It would obviously be inconvenient to wait till the award has been delivered, and then to consider the question whether or not the next friend or guardian for the suit should have been allowed to agree to an order of reference. In the event of the award being adverse to the minor the other parties to the suit would have the legitimate grievance of being put to unnecessary expense, if the requisite leave is withheld by the Court. I therefore hold that the provisions of Rule 7, Order 32 are complied with only if, before entering into the agreement for reference to arbitration, leave of the Court is obtained. If such

leave is not obtained the agreement for reference, is, in view of the provisions of Clause (2), Rule 7, "voidable against all parties other than the minor." In other words such an agreement is voidable at the option of the minor and is not void.

18. The next question that arises is, what remedy or remedies are open to the minor for avoiding an agreement for reference to arbitration made by his next friend or guardian for the suit without the leave of, the Court. It is open to a party to avoid an agreement that is voidable at his, option by means of a suit, and there appears to be no apparent reason why a similar remedy should not be available to a minor for avoiding an agreement of the description mentioned above. The right of a, minor to avoid a decree passed on as award by means of a separate suit, when the objection to the validity of the award is based on the ground that leave of the-Court for submission to arbitration was not obtained on behalf of minors, was recognized in Vijaya Ramayya v. Venkatasubba Rao A.I.R. 1917 Mad. 672(Supra) and Sadashivapp Gangappa v. Sangappaa Chanvirappa A.I.R. 1931 Bom. 500.(Supra) Further in numerous cases suits by minors in order to avoid decrees based on compromise entered into by their next friend or guardian for the suit in an earlier litigation have been en, tertained. I may refer in this connexion to the decision of their Lordships of the Privy Council in Manohar Lal v. Jadunath Singh (1905) 28 All. 585. It is therefore clear that a separate suit by a minor to avoid a decree passed on an award is maintainable when the reference to arbitration was without the leave of the Court.

19. This however does not negative the right of the minor to avoid such an agreement for reference to arbitration in the suit itself. If, as I hold, the agreement is voidable at the option of the minor, it is open to the minor to exercise his option of avoiding the agreement before decree, in terms of the award is passed. The arbitrators derive their jurisdiction to deliver an award from the order of reference and, if that order is itself based on, an agreement that is not binding on the minor, there is no reason why the minor should not be allowed to bring the invalidity of the order of reference to the notice of the Court and avoid the same. If he does so, the Court is, bound to hold that the agreement for reference to arbitration was not binding on the minor, and, as such, the minor is not bound either by the order of reference or by the award. This was the view taken in Chajju Mal v. Tarloki Nath A.I.R. 1926 Lah 665(Supra). It remains to consider the last two questions referred to the Full Bench for decision, viz. whether an objection to the validity of an order of reference itself comes within the purview of para. 15 of Schedule 2 to the Code, and if it does, whether the decision of the Court, that made the order of reference, overruling such an objection and passing a decree in accordance with the award can be challenged either by appeal or by an application in revision.

20. There is considerable conflict of judicial opinion on these points and the conflict is mainly due to the divergent interpretations put by the Courts on the decision of their Lordships in Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(Supra). It has already been stated that in that case the guardian ad litem of the minors, who were parties to the suit, joined in an application for an order of reference without the leave of the Court, and after the delivery of the award, an

objection to the validity of the award based on the invalidity of the order of reference was overruled by the trial Court, and the Chief Court of the Punjab dismissed an application in revision against the decree passed in accordance with the award. On an appeal by the defendants, their Lordships held that no appeal lay from the decree passed in accordance with the award and that the application in revision against the decree was also incompetent. In this connection their Lordships observed that:
In case of an award a revision would be more objectionable than an appeal.... If an application in revision were admissible in a case like the present the finality of any award would be open to question.... In the next case, even if the application had been in time, it could not in their Lordships' opinion be brought under Section 622.

21. The decision in Ghulam Khan's case Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167 (Supra)was treated by the Pull Bench that decided the ease in Lutawan v. Lachya A.I.R. 1914 All. 446(Supra), as an authority for the proposition that a decree passed in accordance with an award is not appealable. To this extent the Full Bench decision is not, if I may say so with respect, open to any exception, and is in consonance with the provisions of Clause (2) of para. 16, Schedule 2. But there are observations contained in the judgment of the Full Bench which lend countenance to the contention that even an application in revision against such a decree can in no circumstances be entertained and with this expression of opinion I, with all respect, am unable to agree. It would be noted that this question did not arise for consideration and was not decided by the Pull Bench. Section 521 of the old Code specified the grounds for setting aside an award. Section 521 of the former Code corresponds to para. 15 of Schedule 2 of the present Code with this difference : that the words "being otherwise invalid" have been added by the legislature in the new enactment in Clause (c) of Sub-clause (1), para. 15. In the Pull Bench case Richards, C.J. considered, that by this amendment of the Code the legislature intended that "objections to the award on the ground of invalidity from any cause whatever should be decided" by the Court that made the order of reference and by no other Court. Banerji, J. observed that in consequence of the decision, in Ghulam Khan's case Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(Supra), the legislature apparently added the words " or being otherwise invalid "in Clause (c) of para. 15, Schedule 2. Under the old Code an objection could not be taken before, the Court which referred the case to arbitration on the ground that the award was invalid for any reasons other than the reasons mentioned in Section 521 of that Code.... It is thus clear that the intention of the legislature was that only one Court, namely the Court which referred the case to arbitration should try the question whether the award is invalid for any reason other than the reasons specifically mentioned in para. 15.

22. It would appear from the above quotations from the judgment in Lutawan's case Lutawan v. Lachya A.I.R. 1914 All. 446(Supra) that the Pull Bench considered that it was ruled by their Lordships in Ghulam Khan's case Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(Supra) that an application in revision does in no case lie under Section 115, Civil P.C., against a decree passed in accordance with an award. I regret that I am unable to so interpret the decision of their

Lordships. That decision was under the Code or 1882 and, in accordance with the provisions of that Code, it was not necessary for the next friend or the guardian ad litem of a minor party to a suit to obtain the leave of the Court before filing, an application for an order of reference. The objection to the award in Ghulam Khan's case Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(supra) taken in the trial Court on the ground that the omission of the guardian ad litem to obtain the leave of the Court rendered the order of reference invalid was, therefore, without substance. It follows that the order of the trial Court dismissing the objections to the award was-valid and the decree passed in accordance with the award was not open to any objection. That decree could not, therefore, be challenged either by appeal or by revision. Their Lordships, therefore, held that the decree was not appealable and the revision application in that case could not be brought within the purview of Section 622 of the old Code that corresponds to Section 115 of the present Code. These observations of their Lordships must be taken to be confined to the facts of the case before their Lordships, and not as laying down the law that in no case is an application in revision against a decree passed in accordance with an award a competent application. That their Lordships did not intend to lay down any such general proposition is apparent from the fact that their Lordships pointed out that in the case before them the Subordinate Judge did not appear to have exercised a jurisdiction not vested in him by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of his jurisdiction illegally or with material irregularity. He appears to have followed strictly the course prescribed by the Code.

23. I cannot assent to the proposition that the words "or being otherwise invalid" in Clause (c) of para. 15, Schedule 2, do not refer to the invalidity of the kind referred to in the preceding sentences of the said clause and embrace an objection which challenges the validity of the order of reference itself. If the legislature has, by the addition of these words, intended to let in objections to the invalidity of the order of reference itself or to some irregularity of the procedure of the Court antecedent to the order of reference or subsequent to the delivery of the award, nothing would have been easier for the legislature than to say so in clear and unambiguous language. At any rate I would have, in that event, expected the legislature to enact such a rule in a separate clause. The context in which those words occur leave an impression on the mind that these words have been used ejusdem generis with the preceding sentences in Clause (c). In any case it appears fairly clear to me that those words have reference to the invalidity of the award itself as distinct from some invalidity attaching to the procedure of the Court. Clauses (a), (b) and (c) of para. 15 are preceded by the words that "no award shall be set aside except on one of the following grounds." These words coupled with the contents of Clause (a), (b) and (c) lead to the conclusion that the grounds set forth in that paragraph have reference to proceedings before the arbitrator alone and not to the proceedings of the Court. The words "being otherwise invalid" must, therefore, refer only to the invalidity of the award based on any ground unconnected with the proceedings of the Court. This was the view taken in Vijaya Ramayya v. Venkatasubba Rao A.I.R. 1917 Mad. 672(Supra), and Golenur Bibi v. Abdul Samad A.I.R. 1931 Cal. 211(Supra).

24. The question then arises as to how is a party to the suit to challenge the validity of the award

on any ground unconnected with the proceedings before the arbitrator, i.e., on the ground of the invalidity of the order of reference itself. According to the view that I take, an objection impugning the validity of the order of reference does not come within the purview of para. 15, but it does not follow from this that objections to the validity of an award not contemplated by that paragraph can, in no circumstances, be entertained by the Court. Para. 15 is exhaustive only so far as objections to the validity of the award based on the irregularity or illegality of the proceedings before the arbitrator are concerned, but it does not in any way affect the inherent jurisdiction of the Court to recall and cancel its invalid order, if it is brought to its notice before the litigation has terminated by the passing of a decree. It is in the exercise of this inherent jurisdiction that the Court has to entertain an objection to the invalidity of the order of reference and to give effect to the same if it is well founded. If the next friend or a guardian ad litem of the minor party to a suit has joined in an application for an order of reference without the leave of the Court the provisions of Clause (2), Rule 7, Order 32, entitled the minor to exercise his option of avoiding the agreement entered into by his next friend or guardian ad litem. The jurisdiction of a Court to make an order of reference comes into play only when all the parties interested agree that the matter in difference between them be referred to arbitration. If the Court, has without the agreement of all the parties, made an order of reference, the order is without jurisdiction, and it is open to a party to impugn the validity of the award, on the ground that the award is invalid as it is consequent on an invalid order of reference. An objection of this description though outside the scope of para. 15 is an objection relating to the procedure adopted by the Court, and, as such, entertainable by the Court.

25. It appears to me that the divergence of judicial opinion on the question, as to whether a decree passed in accordance with an award can be challenged by an application in revision, has been mainly due to the omission to differentiate between objections challenging the validity of the award on the ground of the invalidity of the proceedings before the arbitrator and objections attacking the validity of ith0 award on the ground, of the invalidity of the order of reference itself. In the former case the Court which made the order of reference is the final arbiter and its decision relating to matters specified in Clauses (a), (b) and (c), para. 15, is final and cannot be assailed by an application in revision. This is so because that Court is vested by the legislature with the jurisdiction to decide the objections to the award formulated in para. 15. If the Court in deciding the objections contemplated by para. 15 follows the procedure prescribed by law, and does not act in the exercise of its jurisdiction illegally or with material irregularity, its decision, even if erroneous, cannot be assailed by, an application in revision. In this class of cases an application in revision can be entertained only if the Court has exercised its jurisdiction illegally or with material irregularity, e.g., if the Court has proceeded to pass a decree on accordance with the award without giving the parties time allowed by law to file an application to set aside the award, or if the Court has wrongly refused to hear evidence that a party to the suit proposed, to adduce to substantiate the objections to, if the validity of the award.

26. But in the other class of eases, viz., I those in which the award is attacked on the ground of

the invalidity of the order of reference, the decision of the Court overruling such an objection and passing a decree in accordance with the award can fee challenged by an application in revision, as the question raised in such cases is as to the jurisdiction of the Court to make the order of reference. For obvious reasons it would be inexpedient to attach finality in this class of cases to the order of the Court overruling an objection to the validity of the order of reference. The question whether the provisions of para. 1, Schedule 2 were complied with so as to give jurisdiction to the Court to make the order of reference is a question that relates to the jurisdiction of the Court or to the legal and regular exercise of that jurisdiction and therefore comes within the purview of Clauses (a) and (c) of Section 115, Civil P.C. The High Court is therefore competent to entertain an application in revision which attacks the validity of the decree passed in accordance with the award on any such ground. But it is argued that, as an appeal against such a decree is prohibited by para. 16(2), Schedule 2, an application in revision cannot also be entertained. In this connexion reference is made to the observations of their Lordships in Ghulam Khan's case Ghulam Khan v. Md. Hassan (1902) 29 Cal. 167(Supra) that:In case of an award a revision would be more objectionable than an appeal.

27. In my judgment there is no substance in this contention. These observations of their Lordships had reference to a case in which the decree passed in accordance with the award was valid and was not open to any objection whatsoever. The mere fact that a decree in accordance with an award is not appealable is no ground for holding that it cannot be assailed in a proper case even by an application in revision. The scope of an application in revision is much more restricted than of an appeal. In appeals the decision of the Court below on questions of fact or on questions of law is open to correction but not in revisions, unless the Court below has in the exercise of its jurisdiction acted illegally or with material irregularity Instances, in which a decree of a subordinate Court, though not appealable, is capable of correction by the High Court in the exercise of its revisional jurisdiction, are furnished by the decrees passed by the Courts of Small Causes and the decrees passed in suits of the description contemplated by Section 102, Civil P.C. It follows that the mere fact that a decree is unappealable is no ground for holding that it cannot be challenged by an application in revision though the case comes under one of the clauses of Section 115, Civil P.C.

28. The view that I take is in consonance with the decisions in Govind Singh v. Baij Nath A.I.R. 1926 All. 238(Supra), Gopal Das v. Baij Nath A.I.R. 1926 All. 238(Supra) and Mahadeo Prasad v. Badri Das Ram Sarup A.I.R. 1928 All. 740(Supra). For the reasons given above my answers to the questions referred to the Full Bench are as follows : (1) The provisions of para. 1, Schedule 2 are subject to the provisions of Order 32, Rule 7. (2) The leave of the Court contemplated by Order 32, Rule 7 for an agreement to refer the suit to arbitration must be obtained before an application for an order of reference is made. (3a) The omission of a next friend or a guardian ad litem of a minor party to a suit to obtain leave of the Court renders the order of reference voidable at the option of the minor. (3b) Such an order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. (4) Objections to the validity of the

order of reference do not fall within the purview of para. 15, Schedule 2. (5) The decision of the Court overruling an objection relating to the invalidity of the order of reference and passing a decree in accordance with award can be challenged by an application in revision but not by an appeal.

**Harries, J.**

29. I agree with the judgment delivered by His Lordship the Chief Justice and have nothing further to add.

30. (1) The answer to the first question is in the affirmative. (2) The answer to the first part is in the affirmative, and that to the second part in the negative. (3a) The answer to the first part is in the negative, and that to the second part in the affirmative. (3b) Both remedies are open to the minor. (4) The answer is in the affirmative. (5) The decision of the Court that made the reference to arbitration overruling the objection and passing a decree in accordance with the award cannot be challenged by an appeal or by an application in revision for at most that amounts to an error of law. But the order made by the Court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision, though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award.

Cases Referred.

1A.I.R. 1914 All. 446
2(1902) 29 Cal. 167
3A.I.R. 1914 All. 446
4A.I.R. 1916 All. 65
5A.I.R. 1926 All. 238
7A.I.R. 1926 All. 238
8A.I.R. 1927 All. 563
9A.I.R. 1928 All. 740
10(1905) 28 All. 35
11(1902) 29 Cal. 167
12A.I.R. 1917 Mad. 672
13A.I.R. 1926 Lah 665,
14A.I.R. 1931 Bom. 500
15A.I.R. 1931 Cal. 211