CALCUTTA HIGH COURT

Saha and Co

Vs.

Ishar Singh Kripal Singh and Co

Full Bench Ref. No. 1 of 1954

(Chakravartti, C.J., Lahiri, S.R. Das Gupta, P.B. Mukherji and Bachawat, JJ.)

08.09.1955

JUDGMENT

Chakravartti, C.J.

1. The facts out of which this Reference to a Full Bench has arisen, have been set out in full in the Order of Reference. Briefly stated, they are that after the notice of the filing of an award made against the Appellants had been served on them, they made an application to the Court which contained three prayers. Their case being that the alleged award had been made by a Body other than the body named in the arbitration agreement, they prayed that the existence, validity and the effect of the alleged agreement upon which the award had been made, might be determined by the Court, that it might be declared that there was no valid, binding, effective or subsisting agreement between the parties and that the purported award might be set aside. The learned trial Judge treated the application, so far as it asked For the first two reliefs, as an application under Section 33, Arbitration Act and held it to be barred by limitation; but he allowed the appellants to withdraw the application, so far as it was an application under Section 33, without however, granting them leave to make a fresh application under the section. As to its third prayer, the application was treated as an application under Section 30 of the Act and the appellants were allowed to proceed with it. In support of it, they wanted to urge the same ground that they had previously advanced in support of the other two prayers, viz., that there had been no agreement between the respondents and themselves to refer their disputes to the arbitration of the body which was said to have made the award. As put in terms of Section 30, the contention was that since the award had been procured from a body not named in the arbitration agreement it had been 'improperly procured' and since it was an award made by a body which had no jurisdiction to make it, it was 'otherwise invalid'. The learned Judge held that the real ground of the appellants was that the award was a nullity, inasmuch as there was no agreement for a reference to the arbitrators who had made the award and that such a ground was proper only to an application under Section 33 and could not be relied on for supporting an application under Section 30. In that view, he dismissed the application, so far as it was an application under Section 30 and asked For the relief of setting aside the award.

2. Thereafter, the appellants preferred an appeal from the order of the learned Judge which came

up for hearing before Lahiri, J. and myself. The view taken by the learned Judge was in fact in accordance with the view taken in several decisions of this Court, some of them, decisions of Division Benches sitting as the Court of Appeal. It had been held in those decisions that an application which challenged an award as a nullity could not be made under Section 30 of the Act which only contemplated applications which did not impugn the award as a nullity, but treated it as an award which, though liable to be set aside on account of same legal defect; would remain effective if it was not set aside. An award which was a nullity was not required to be and could not be set aside and therefore an application which challenged an award as a nullity was not within the purview of Section 30. Such an application, it had been held further, properly belonged to Section 33 which provided for application challenging the existence or validity of an arbitration agreement or award or to have the effect of either determined and the proper relief to be asked for by it would be an ad judgment of the award as void. An application which challenged an award as passed without jurisdiction on the ground that there had been no agreement or valid agreement to refer, impugned it as a nullity and therefore such an application, it had been held, could be made only under Section 33.

3. The substance of the view taken in the decisions of this Court therefore was that of applications by which the applicant impugned an award and sought to be relieved of it the Act contemplated two different and mutually exclusive classes, viz. applications under Section 30 for setting aside an award which was vitiated by some illegality or irregularity but was otherwise valid and applications under Section 33 for an ad judgment and declaration that an award was nullity or did not exist. We found ourselves unable to accept that view. We thought chat Section 30 had no concern with applications but only with the power of the Court to grant relief in the form of setting aside an award and the grounds On which such relief could be given. It appeared to us that, under the Act, all applications, challenging an award and seeking to avoid it as bad, were to be made under Section 33, irrespective of the ground of the challenge and that applications directed against invalid but not void awards were to be made under the section as much as applications directed against awards, impugned as void. The Act, it appeared to us further, also intended that the Court should relieve the applicant against a bad award by setting it aside under Rule 30, not only when it was merely illegal but also when it was a nullity. As a contrary view had been taken by certain Division Benches, we referred to the decision of a Full Bench the following questions : I Does the Indian Arbitration Act, 1940, distinguish between an application for setting aside an award and an application For the ad judgment of an award to be a nullity and contemplate that an application of the former kind should be made under Section 30 of the Act and an application of the latter kind under Section 33 ? 2. If the answer to the above question be in the negative, does the Act contemplate that all applications, challenging an award must be made under Section 33, irrespective of the ground of the challenge, and that they must be applications for setting aside the award ? 3. Can the non-existence or invalidity of the reference be a ground of an application for setting aside an award, particularly in the case of an award in an arbitration without the intervention of the Court ?

4. Were the cases of '*Haji Ebrahim Kassim Cochinwalla v. Pannalal Johurmull*[1]*,* and '*Bajranglal Ladhuram v. Ganesh Commercial Co. Ltd*[2]*.,* rightly decided, in so far as it was held or assumed in them that the Arbitration Act contemplated different classes of

[1] ILR (1949) 1 Cal 245

[2] AIR 1951 Cal 78

applications under Sections 30 and 33 for (impugning) an award and that nullity of the award was a proper ground of an application under Section 33 and could not be a ground or an

application under Section 30 ?

4. The Reference was argued at great length on both sides and the argument ranged over practically the whole of the Arbitration Act. That was perhaps inevitable, but I consider it essential to keep close to the questions, actually asked. As to those questions, upon giving my best consideration to the submissions of learned counsel, I find no reason to alter the opinion I expressed in the Order of Reference, except that I have come to think that it will be more accurate to state one of the propositions in a slightly narrower form.

5. Of the questions referred, the main question is the first one, the rest being consequential. It will be seen from them that the controversy is purely over a matter of procedure. No one will say that under the Arbitration Act, a person cannot impugn an award as a nullity, either because there was no agreement or valid agreement to refer or for some other reason. Nor can any one say that under the Act, a person cannot impugn an award as bad in law, though not void, and say that it ought not to be allowed to stand.
Either form of challenge is obviously open to a person complaining of an award, if the facts justify it, and the object of the challenge in either case is to obtain relief against the operation and effect of the award. In those circumstances, whether the application in the former case would have to be made under one section of the Act and that in the latter case under another, might seem to be a matter of no practical consequence, nor whether the Court gave relief in one case by adjudging award to be void and in the other case by setting it aside. But the provisions contained in the Act as to limitation and appeals vest the distinction with an importance of a vital character. The only provision in the Limitation Act, as amended by the Arbitration Act, which prescribes a specific period of limitation for an application directed against an award is Article 158 which speaks of an application to set aside an award; and the only order relating to an award from which an appeal is provided for in Section 39 of the Act is an order setting aside or refusing to set aside an award. It follows that if an application challenging art award as a nullity is not, in the contemplation of the Act, an application for setting aside an award but belongs to a different category and if the relief which can be asked for or granted on such an application is only an ad judgment of the award as null and void, then, on the one hand, no specific period of limitation had been prescribed for such an application and, on the other hand, the order passed on such an application is not appealable. An enquiry as to whether the Act really contemplates two types of applications, to be made respectively under Sections 30 and 33, according as the award is admitted to have been passed with jurisdiction but is sought to be set aside on the ground of some legal defect or it is impugned as passed without jurisdiction or as being otherwise void, is the extremely pertinent. The first of the questions referred to a Full Bench formulates that enquiry in a direct form.

6. In my view; there are several indications in the Act that of applications challenging an award, two distinct types, to be made under two different sections and with incidents markedly different, are not contemplated. I shall presently give my reasons, but before I do so, I should like to point out that in construing the provisions of the Act, it is essential to bear two important considerations in mind; first, that it consolidates the law of arbitration and brings the whole law within the confines of a single statute; and, secondly, that by barring suits, it limits real or purported parties to an arbitration agreement, seeking any relief with respect to the agreement or an award, to the remedies provided for in its own provisions. This last circumstance has an important bearing on the question as to whether the reliefs which could formerly be obtained by

means of a suit when the award was challenged on the ground of want of jurisdiction in the arbitrators or fraud, can now be obtained or has to be obtained toy mean of a, procedure prescribed by the Arbitration Act itself, that is, an application under Section 33 which is said to be quite independent of the procedure of and application for setting aside an award.

7. To take up the first question now, no one will contend that Sections 30 and 33 are co-extensive. Section 33 deals with both agreements and awards, while Section 30 deals with awards only. Again Section 33 covers questions as to the existence or the validity or the effect of awards, but with questions of existence or effect, Section 30 has no concern, I do not think 'existence' in Section 33 comprises legal existence as well, because if it does, it is not easy to see how in that aspect it differs from Validity. Applications of various kinds are thus conceivable as applications under Section 33, which may concern the existence or effect of awards and which cannot possibly be applications under Section 30. The ambit of Section 33 is thus undoubtedly wider and the real question is whether applications For the relief provided for in Section 30 are included within the applications contemplated by Section 33.

8. As to the question, it is to be noticed that Section 30 does not provide For the making of an application at all, at least not in express terms. It is said that no express provision is necessary and the example of applications made under para 15 of the now-repealed Sell. II, Civil Procedure Code was cited. It is certainly true that if a section of an Act empowers the Court to grant some relief, a person desiring to have that relief may apply for it, although an application may not be provided for. But in such a case the application is really not made under the section, but it is made for relief there under, the method of an application being a procedural adjunct added to the law out of the necessity for giving effect to it. There can be no good reason for attaching such an addition to the written law of a section when an application is clearly provided for elsewhere in the Act. In the present case, Section 33 provides in the most general of terms that any party to an arbitration agreement Or any person claiming under him, desiring to challenge the existence or validity of an award, shall apply to the Court and the Court shall decide the question. It is to be noticed that the section does not speak of any particular kind of application, nor does it specify the form of the relief that may be prayed for, but it merely gives a general direction to all persons who are parties to arbitration agreements or alleged to be parties and who may desire to challenge the existence or the validity of an award, to proceed by way of an application. Leaving aside the question of existence, the validity of an award may be challenged under Section 15 of the Act which provides for its correction or modification by the Court or it may be challenged under Section 16 which provides for its remission for reconsideration or it may be challenged under Section 30 which provides for setting it aside. But none of these sections provides For the making of an application. It is perfectly clear that the authority for making an application in each one of these cases is derived ultimately from the general provisions contained in Section 33.
Taking particularly the case of Section 30, a person desiring to have the relief mentioned in that section and therefore desiring to have an award set aside, undoubtedly desires to challenge the validity of the award. If so it is clearly Section 33 which directs him to make an application and when he makes an application, he does so under that section.
Assuming that a person impugning an award a void cannot appropriately apply for setting it aside but can only apply for an ad judgment of the award to be a nullity, such an application must be made under Section 33 even according to those who favor the theory of two types of applications. A person impugning an award as a nullity undoubtedly desires to challenge its validity and if he desires to carry his challenge to the Court and if such a form of challenge is not

within the ambit of Section 30, he must, in the first place, make an application, since an application is enjoined by Section 33 and he must make it sunder Section 33 itself, since there is no other section in the Act under which it can be made. The conclusion is thus clear that there is no such thing as an application under Section 30; there is only an application under Section 33 For the relief provided for in Section 30, that is, the relief of the award being set aside. Secondly, if where the award is challenged as a nullity, the relief of setting aside the award is not appropriate but 'the application must be for an ad judgment of the award as null and void, then too, it must be an application under Section 33. As regards the section under which an application challenging the validity of an award must be made, the Arbitration. Act thus does not distinguish between an application for setting aside an award and an application For the ad judgment of an award as a nullity and does not contemplate that an application of the former kind should be made under Section 30 and an application of the latter kind under Section 33. Section 30 only sets out the ground on which, an application being made under Section 33, an award may be set aside.

9. But it is said that this reasoning rests on the assumption that the invalidity of an award contemplated by Section 33 is of the same kind as the invalidity contemplated by Section 30, whereas in fact they are different. The invalidity contemplated by Section 33, it is said, is invalidity going to the root of the award, such as non-existence of an agreement to refer and consequent non-existence of jurisdiction in the arbitrators, whereas the invalidity contemplated by Section 30 is of a lesser degree, affecting not the legal existence of the award, but only its propriety or full conformity with law. I can see no warrant for this distinction either in the language of the Act, or in reason. Indeed, the Act seems to contain a clear refutation of it. In the first place, Section 33 provides that a party to an arbitration agreement, desiring to challenge the validity of the award, shall apply to the Court. Section 30 provides that the Court may set aside an award as invalid. When the Court, acting under Section 30, holds an award to be invalid, it does so, because someone comes up before it and challenges its validity. I can discern no intention in the language of Sections 30 and 33 to lay down that the invalidities contemplated by the two sections are mutually exclusive and that the invalidity for which a party may challenge an award under Section 33 cannot be the invalidity for which he can apply to the Court for setting aside the award under Section 30. But the matter does not rest on the use of the words 'validity' and 'invalid' in the two sections alone. A stronger reason is furnished by the scope and effect of Sections 31, 32 and 33 which are mutually inter-linked. Among those sections, logically Section 32 comes first. It 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 this Act." Taking the case of an award alone, it will be noticed that what the section bars is a suit for a decision upon "the existence, effect or validity of an award" and while laying down that an award can be interfered with only in the manner provided for in the Act and specifying the forms of interference, it describes the only form of interference which will amount to an extinction of the award by the words 'set aside'. The clear implication is that whatever the nature of the invalidity pf an award, if it is to be declared to be inoperative on that account or removed, it will have to be 'set aside'. Next, the general statement as to the jurisdiction of the Court under the Act to which Section 32 refers persons desiring to raise a question as to an award, is contained in Sub-Sections (2) and (3) of Section 31. Sub-Section (2), to quote only the material portion, provides that 'all questions regarding the validity, effect or existence of an award ** shall be decided by 'the Court in which the award under the agreement has been or may

be, filed and by no other Court'. It will be noticed that this section also uses the same expression "validity, effect or existence of an award", and that expression obviously sums up the whole jurisdiction of the Court regarding questions, relating to awards. The jurisdiction to set aside an award, which undoubtedly exists under the Act, must therefore be contained in the jurisdiction to decide "questions regarding the validity, effect or existence of an award" for which the section provides. "Set aside", it will be recalled, is the language of Section 30 and that section provides For the setting aside of awards. It will thus be clear that setting aside of awards is not something outside the jurisdiction to decide all questions regarding the validity of an award as contemplated by Section 31(2). I am not referring to 'effect' because a person desiring to have the effect of an award determined does not challenge it or seek to have it set aside and I am also leaving out 'existence', because For the reasons I have already given, the existence contemplated appears to me to be only existence in fact and not legal existence. A person who alleges that no such, award as is sought to be set up against him exists in fact at all, cannot appropriately ask at the same time that the award be set aside. But even assuming that 'existence' comprises legal existence as well, the jurisdiction to set aside an award under Section 30 must flow from the jurisdiction to decide "all questions regarding the validity * * * or existence of an award", provided for in Section 31(2), for there is no other jurisdiction. The same expression "the existence or validity of xx x x an award" occurs in Section 33 and the right given by it is obviously a right to challenge such existence or validity as Sections 31 and 32 contemplate. I am therefore entirely unable to see how it can be said that the invalidity contemplated by Section 33 is something different from the invalidity contemplated by Section 30 and that it is a form of invalidity for which an award can only be adjudged to be a nullity but cannot be set aside. The whole jurisdiction given to the Court as an arbitration Court by Section 31 (2) being a jurisdiction to decide questions relating to the existence, validity or effect of awards, the jurisdiction to set aside awards under Section 30 must be included within that jurisdiction and since Section 33 also speaks of applications by persons desiring to challenge the existence or validity of an award or to have its effect determined, such applications, when they challenge an award, must include applications for setting aside an award under the powers conferred by Section 30, Sections 31(2) and 33 being inter-connected by the expression 'existence validity or effect'. It cannot be said that Section 33 is limited to awards which are void and that such intention of the section appears from the word 'existence' which means existence in law, because on such construction, the use of the word Validity' as a separate matter for challenge cannot be explained. There is thus no impossibility in an application for setting aside an award being an application challenging the validity of an award within the contemplation of Section 33, apart, however, from what relief can be given under Section 30, which is a separate question.

10. Proceeding now to the second question, the first part of it has been answered by what I have already said. The second part asks whether even granting that all applications challenging an award must be made under Section 33, they must necessarily be applications for setting aside the award. This part of the second question is really connected with the third and is the most controversial question in the Reference. It has been said that although, the section under which such applications can be made must always be Section 33, it does not follow that the form in which relief can be given may or must always be by way of setting aside the award. Where the award is impugned as passed without jurisdiction, if cannot be, it is said set aside, but can only be adjudged null and void. If so, the application, though an application under Section 33, will not be an application for setting aside the award and accordingly Article 158, Limitation Act will not apply; and the order passed on such application being not an order setting aside the award or refusing to set it aside, it will not be appealable.

11. It must undoubtedly be conceded that according to established notions under the ordinary law, something which is a nullity cannot be and is not required to be set aside and, conversely, an order or decision which can appropriately be set aside is an order or decision which, if not set aside, would subsist as good and effective. It, however, appears to me that the Arbitration Act has not proceeded on that established concept but has made interference in that form of setting aside applicable to all awards, whether they be void or merely illegal. Such intention of the Act appears clearly enough from the terms of Section 30 itself, as I pointed out in the Order of Reference. Clause (b) of that section refers to awards which are clear nullities and yet the section provides that they may be set aside.
I do not think that clause (b) of Section 30 can be answered by saying that the Legislature chose to treat the two kinds of awards mentioned in if as not nullities, though in fact they were so, and that such treatment of those two kinds of awards must not be extended to other awards which are also nullities. Nor is the sub-section answered by saying that the specific inclusion of two kinds of void awards has really the effect of excluding from the ambit of the section other awards which are void for other reasons. As I have already pointed out, the intention that the expression 'set aside', as used in the Act covers all forms of interference with the awards which amount to their extinction appears also from Section 32. That section, though expressed in a negative form enumerates the various forms in which an award can be interfered with under the Act and while speaking of an award being not merely amended or modified or affected otherwise, speaks of its being set aside and not also of its being adjudged null and void. In my view, the Arbitration Act uses the expression 'set aside' in a wide sense and requires that whenever an award is found fit to be removed it must be set aside.

12. In view, however, of the fact that the first part of the second question speaks of applications 'challenging an award', it seems to me that the answer to the second part cannot be an unqualified affirmative. This is the point on which I find it necessary to restate the proposition suggested in the Order of Reference in a somewhat narrower form.
An application challenging an award may challenge either its existence or its validity. I have already said that a question of legal existence will be a question of validity, but when the factual existence is challenged and the challenge succeeds, there cannot obviously be an order setting aside the award. The proper answer to the second part of the question therefore seems to me to be that all applications challenging the award must be applications for setting it aside, except when the award is challenged as not existing in fact.

13. If applications challenging an award are to be applications for setting it aside, save in the case I have just excepted, it must of course be established that even the nullity of an award can be a ground for setting it aside. I have already pointed out that the expression 'set aside' has not been used in the Act in its ordinary acceptation, but has been used in the wider sense. To say that is to state the point in terms of the form in which the Act intends relief against bad awards to be given. But it is said that no reference as to such width of the meaning of 'set aside' can be drawn from the inclusion of two kinds of void awards in Sub-Section (6) of Section 30. I have already pointed out that Section 32 points to the same width of meaning, but whether Section 30 has any room For the nullity of an award among the grounds of interference stated in the section may be examined. This, I may point out, leads us to the third question, although, that question deals with only a particular ground which would make an award a nullity.

14. It is true that Section 30 does not say in terms that an award may be set aside on the ground that there was no agreement to refer to the arbitrators to make an award or that some other ground, making the award void in law, exists. The section, however, in setting out the grounds on which an award may be set aside, includes a residuary ground of a general character and speaks of award's which are 'otherwise invalid'. I think the controversy which had raged at one time as to whether the expression "otherwise invalid' was to be read ejusdem generis with the statement of invalidity immediately preceding need not trouble us any longer. The expression which occurred formerly in Clause (c) of para 15(1) of Schedule II, Civil Procedure Code in juxta position with what is now clause (b) of Section 30, has now been relegated to clause (c) of that section where only a single type of invalidity is mentioned before it. I pointed out in the Order of Reference that where only one species was mentioned, there was no basis for formulating a genus and therefore there was no room For the application of the principle of 'ejusdem generis' in such a case. I need not cite again the authorities which I then cited. It appears to me, however, that apart from whether a genus can be formulated or not, if is wholly impossible to apply the principle of 'ejusdem generis' to the expression 'otherwise invalid', as it now occurs in Section 30(c) of the Act. The whole of clause (c) is 'that an award has been improperly procured or is otherwise invalid'. A genus can be formulated only when some objective standard or specimen has been, mentioned and the principle of 'ejusdem generis', when applied to such a case, will on the one hand draw in other species of the same genus and, on the other hand, limit the additions to the genus formulated. The words preceding the expression is otherwise invalid' in clause (c) of Section 30 are 'that an award has been improperly procured'. If the genus is 'awards improperly procured', other awards, properly belonging to the same genus, must also be awards improperly procured and if they are so, the description already appearing in the preceding words will completely cover them and therefore the expression 'is otherwise invalid' would really add nothing. In my view, the words 'is otherwise invalid' are perfectly general and intended to be so. They cover, all forms of invalidity, including invalidities which amount to nullities. Such construction of the expression appears to me to be legitimate and indeed necessary, not only because it is wholly unqualified by any restrictive words of any kind but also because nullities, and illegalities less than nullities, bath occur in other clauses of the section.

15. I need not refer again to the decision of the Privy Council in - '*Chhabba Lal v. Kallu Lal*[3]', which I discussed at length in the Order of Reference. Nothing which I heard from the Bar would induce me to alter the view which I then expressed of that decision. It related to an arbitration in a suit and the contrast which their Lordships draw between the language of paras 15 and 21 of Schedule 2, Civil Procedure Code explains conclusively the reason why they said that the invalidity of a reference could not be a ground for setting aside an award under para 15. Long ago, it had been said by the Privy Council in the case of - '***Ghulam Jilani v. Muhammed Hassan,' 29 Ind App 51 (PC)***, that in the case of an arbitration in a suit, the actual reference was an order of the Court upon an agreement by all the parties, 'so that no question can arise as to the regularity of the proceedings up to that point' see p. 58 of the Report. The distinction which I ventured to point out in the Order of Reference has thus the support of the Privy Council. It is true that the words "where the Court is satisfied that the matter has been referred to arbitration" which occurred in para 21(1) do not appear in Section 30 of the present Act, but the reason For the omission clearly is that Section 30 is applicable to all arbitrations including arbitrations in suits and also that the words special to para 21(1) did not contain a ground for setting aside the award. They were words containing grounds on which the Court might refuse to direct an award to be filed and if they were to be inserted in the present Act, their proper place would be not Section 30, but Section 17. Speaking for myself, I should think that the words "where the Court

is satisfied that the matter has been referred "to arbitration" must mean referred in fact or validly referred and their omission, from para 16 was not very appropriate, because it is not inconceivable that even where a matter is referred to arbitration by an order made by the Court in a suit, the reference may be invalid. In fact, it was invalid in the "case of Chhabba Lal, itself. I do not think that the non-inclusion of those words in Section 30 can properly lead to an inference that the non-existence or invalidity of an arbitration agreement or the non-existence of a valid reference is not a matter which can be considered under Section 30 as a ground for setting aside an award. The correct view appears to me to be that the Legislature, in enacting a general provision which would cover all arbitrations and enacting it in an Act which was requiring all forms of challenge to an award to be made by means of an application there under and not otherwise, intended to place the ground of the non-existence or invalidity of an agreement or a reference under the residuary words 'otherwise invalid'. As appearing in para 21(1) the words "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" only enabled a party to contend that an award should not be ordered to be filed, because there had been no reference or valid reference to arbitration, but they did not purport to contain a further ground on which the award could be asked to be set aside. They contained only a defence and not a ground of attack. The present Act has, more logically, omitted them from Section 17 which really corresponds to paras 16 and 21 of the Code and included the objection among the grounds of setting aside a decree under the words 'otherwise invalid' in Section 30.

16. I would supplement the view I expressed of 'Chhabba Lal's case, in the Order of Reference in one regard. It was held in that case that the invalidity of the reference could be a ground for an appeal from the decree. The basis of that decision was that an objection to the validity of a reference to arbitration did not come under the expression 'otherwise invalid' in para 15 and if it did not, para 16(2) would not apply so as to bar an

[3] AIR 1946 PC 72

appeal from the decree on such a ground. In expressing their decision, their Lordships said that if there was no valid reference, the purported award was a nullity and could be challenged in any appropriate proceeding. By 'appropriate proceeding' they were thinking not so much of an independent suit as an appeal from the decree made on the award which, had been challenged before them. It has been said in many cases on the strength of the decision of their Lordships that if an appeal lay from the decree on the ground of the invalidity of the reference, such a ground could not be a ground for setting aside the decree, for if it was, it would be concluded by the decision of the trial Court given on the application for setting aside the award or by the omission of the party, seeking to rake that ground, to make such an application and therefore no appeal on such a ground would lie.

That, it appears to me, is looking at the decision from the wrong end. The whole basis of the decision was that the invalidity of the reference could not be a ground for setting aside an award and what their Lordships said about the appeal from the decree was only consequential. If non-existence or invalidity of an agreement or reference can be established to be included in the grounds for setting aside an award, as contemplated by the present Act, the whole basis of the decision in 'Chhabba Lal's case, would disappear and if will not be correct to argue backwards from what their Lordships said about an appeal from the decree and say that because an appeal would lie from the decree in such a ground, therefore it cannot be a ground for setting aside the award. I need not repeat 'the reasons I gave in the Order of Reference for holding that the decision in - 'Chhabba Lal's case, cannot apply to a construction of Section 30, particularly as

applied to arbitrations without the intervention of the Court, As I pointed out in the Order of Reference, earlier, even the Privy Council had held in - '*Ram Pratap Chamria v. Durga Prosad Chamria*[4]', that an award in excess of the reference made in a suit and therefore made without a reference and without jurisdiction, could be set aside under para 15 of Schedule 2 to the Code as "otherwise invalid".

17. A passing reference is required to another decision of the Privy Council given in the case of - '*E.D. Sassoon and Co v. Ramdutt Ramkissendas*[5]',. That was a case under the Indian Arbitration Act, 1899 and a suit for a declaration that the award was void on the ground that the arbitrators had acted wholly without jurisdiction was held to be maintainable even after the award had been enforced by execution. That decision, it was suggested indicated that the nullity of an award was not a matter set at rest by an award not being set aside and by being even executed and it was argued that it could survive as a ground for an attack on the award, as it was held in that case to have survived, only it could not be a ground for setting aside the award. The argument, to my mind, is misconceived. Under Section 14 of the Act of 1899, an award could be set aside only if the arbitrator or umpire had misconducted himself or an arbitration or award had been improperly procured. Quite clearly the ground of a total want of jurisdiction of the arbitrators or the non-existence of a valid reference was not included. Rut even so, the argument that the plaintiffs could have moved to set aside the award under Section 15 was not repelled by their Lordships, when it was advanced. All that they said was that when the ground of the attack was a total want of jurisdiction in the arbitrators, the award could be questioned in a suit brought For the purpose. It should be remembered that there was no section in the Act of 1899 barring suits, like Section 32 of the present Act and the jurisdiction under the former Act being limited to certain matters', it came to be held that

[4] AIR 1925 PC 293
[5] AIR 1922 PC 374

other matters could be agitated by the ordinary procedure of a suit.

18. It might seem strange at first sight that a suit should have been held to be maintainable even after the award had been executed. The reason is explained by their Lordships themselves and will appear from the following passage :

> "Nor is the fact that the award has been enforced by execution under Section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree".

19. Under the Act of 1899, the award itself was enforceable and no decree on the award was passed, and since the award was not to be deemed to be decree of the Court, it could not obviously constitute a bar to a subsequent suit in relation to matters not covered by Section 14. The position under the present Act when a decree is passed upon an award is entirely different. I do not think it can now be correct to say, on the analogy of old decisions by which a suit on a ground going to the root of the award was held to be maintainable even after an award had been filed and enforced by execution, that even after a decree has been passed on an award, the award can be directly challenged by an independent application on the ground that it is void or indirectly by an application directed against the agreement.

20. Some reference was made in the course of the argument at the Bar to the general concept of the Court's jurisdiction to set aside an award and the case of - '*Oil Products Trading Co. Ltd. v. Societe Anonyme Scciente de Gestion D' Entreprises Coloniales*[6]', was cited. There, the case of the applicants who wanted the award to be set aside was that the whole arbitration was a nullity since there had been no valid submission. The Court held that the point taken by the applicants being that there was no submission, it followed that, in their view, there was no award and if there was no award, as the applicants themselves contended, the jurisdiction of the Arbitration Court could not be invoked. That decision was relied upon in support of the argument that a ground that there was no valid reference could not be urged in support of a prayer for setting aside an award and that the Court also could not set aside an award on such a ground. To my mind, the principle of that decision would not apply in India under the scheme of the present Arbitration Act. The decision was given under the English Arbitration Act of 1889, but the jurisdiction of the English Courts in regard is matters of arbitration under that Act, as also the supplementary Act of 1934, is extremely limited, as was the jurisdiction of Indian Courts under the Act of 1899. The jurisdiction of the English Courts can operate only in the restricted sphere of the special limits set by the Arbitration Act, questions outside the Act being left to be agitated in actions or suits. On the same principle, it was held in India in certain cases with respect to the Indian Arbitration Act of 1899, under which the grounds of enquiry as to the validity of an award were limited, and with respect to Section 521 of the Code of 1882 as also its successor, para 15 of Schedule 2 to the Code of 1908, which were limited to arbitration in suits, that the respective provisions presupposed a valid reference and that if the existence or validity of the reference itself was questioned, the remedy of the party questioning it lay in a suit and he could not urge the objection as a ground for setting aside the award.

[6](1934) 150 LT 475

The position under the present Arbitration Act of India is, however, entirety different and the whole jurisdiction of the Court in regard to matters of arbitration and the jurisdiction to give all forms of relief on all grounds have been brought under the Act and conferred by it on the Court as a jurisdiction to be exercised thereunder. It is no longer proper to hold that certain forms of relief against awards On certain grounds cannot be given under the Arbitration Act or that where the whole basis of the arbitration is challenged, there is nothing upon which the jurisdiction of the Court as a Court dealing with matters of arbitration under the Arbitration Act can operate. Among the matters which must be agitated under the Act and cannot be agitated in any suit is included even the existence of awards. I am, therefore, of opinion that it is no longer feasible to hold that the Court can exercise its jurisdiction of setting aside an award only if it exists in law and cannot set it aside on the ground of its nullity or that the non-existence of a valid agreement to refer cannot be a ground for setting aside an award, particularly when the expression 'set aside' has obviously been used in the wider sense and the ground of nullity, in at least two of its illustrations, has been included among the grounds for setting aside an award.

21. The contrary view is that while it is true that an objection to an award on the ground of its nullity is no longer required to be taken by means of a suit and indeed cannot be so taken, still, it cannot be urged, even under the present Arbitration Act, as a ground for setting aside an award and the Court also cannot set aside an award on such a ground.

According to the protagonists of that view in its extreme form, a person not questioning an award as made without jurisdiction or otherwise a nullity but desiring to have it, set aside on the ground of some legal defect, will apply under Section 30 of the Act and the Court also, if it finds the

applicant's case established, will give relief under that section by setting aside the award. But a person challenging an award as a nullity, will apply under Section 33 and the Court, if it finds the applicant's case established, will adjudge the award under that section to be null and void and not set it aside, A modified form of the view is that all applications challenging an award must be made under Section 33, irrespective or the ground of the challenge, but the relief given must be in accordance with the infirmity alleged and established and cannot always be the setting aside of the award. The award will be set aside only when one or more of the grounds specified in Section 30 are made out, but where the award is alleged and found to be a nullity, it cannot be set aside but will be adjudged void, except in the two cases expressly mentioned in clause (b) of this section.

22. I am unable to accept the above view in either of its two forms. It rests ultimately on the basis that Section 33 of the present Arbitration Act has merely substituted an application under the Act for a suit under the general law, but otherwise the distinction between an award which is impugned as illegal and an award which is impugned as a nullity remains and that although relief against an award, of the latter kind can no longer be asked for or given in a suit, it must nevertheless be challenged by and dealt with on an application of a different character from an application to set aside an award. In other words, for an application under the arbitration law to set aside an award when the award is impugned only as vitiated by some illegality and a suit under the general law For the ad judgment of an award as a nullity when it is impugned as altogether void, the present Act has prescribed an application under the Act for both cases, but they are applications of different kinds with incidents peculiar to each.
I do not consider ft correct to construe the Act as having abolished suite outside the Act and at the same time maintained, within the Act, the old duality of procedure according as an award was impugned as bad but not void or as altogether a nullity. The Act bars suits, repeals the Arbitration Act of 1899, repeals the Second Schedule to the Code of Civil Procedure as also Sections 89 and, 104 thereof and then consolidates and amends the law which was previously lying scattered over general principles and two statutes1 and brings it within the ambit of a single special enactment. In doing so, it appears to me to assimilate the divergent procedure for seeking relief against art award, previously obtaining, into a single procedure resulting, if successful in the same form of relief and to adjust both limitation and the right of appeal accordingly. Reasons in support of this view, drawn from the language of the Act, have already been given. Further light, in my view, is thrown on the matter by the history of the relevant legislation and of the case-law.
In the year 1893, when the Code of 1882 was in force and that Code contained in Section 526 a provision corresponding to para 21(1) of Schedule 2 to the-Code of 1908, but without the words "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made-thereon", it was held by a Full Bench of this Court in the case of - *'Mahomed Wahiuddin v. Hakiman[7]',* that, nevertheless, an objection that there had been no reference to arbitration or no agreement to refer subsisted, could be taken by a party and entertained by the Court when the award was sought to be filed. That was a case of an arbitration without the intervention of the Court. In 1901, the P.C. observed in the case of '29 Ind App 51 (PC), that there was a difference between a reference to arbitration in a suit and such reference either with the intervention of the court when no suit was pending or without the intervention of the Court, which had not always been kept in view in the Courts of India. The difference was that in the case of arbitration in suits, the actual reference was an order of the Court, made on an agreement to refer and on an application founded thereon by all the parties, so that no question as to the regularity of the proceedings up to that point could arise whereas, in the other two cases,

proceedings had to be taken to bring the agreement to refer or the award, as the case might be, under the cognizance of the Court and those proceedings would or might be litigious proceedings, resulting in an order which would seem to be a decree. The decision of the Privy Council related to an arbitration in a suit. When the Code was amended in 1905, effect appears to have been given to the views of both the Full Bench and the Privy Council. The words "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" were inserted in para 21(1) which related to arbitration without the intervention of the Court and they were not inserted in para 16(1) which related to arbitration in suits. The words inserted in para 21(1), however, were not inserted as introducing a further ground for setting aside the award but only as a matter which the Court had to consider before ordering the award to be filed and a ground on which such an order could be resisted. The grounds for setting aside an award were set out in para 15 and they were the grounds for setting aside awards made in all kinds of arbitrations. Virtually para 15 was a reproduction of Section 521 of the Code of 1882, but as it had been held in several cases that an award could be set aside only on one or other of the particular grounds specified in Section 521 the words "or being otherwise invalid" were added, in para 15, thereby introducing grounds of invalidity not specifically mentioned. Apart from whether the phrase "otherwise invalid" was to be construed 'cjusdern generis' or not, it was undoubtedly held in - '*Dooly Chand v. Mamuji Musaji*[8]' and other cases that para 15 contemplated a

[7]25 Cal 757 (FB) [8] AIR 1917 Cal 481

valid reference to arbitration, but that was said not For the purpose of holding that an award could not be set aside on the ground that there had been no valid reference to arbitration, but For the purpose of repelling a contention to that very effect. Taking 'Dooly Chand's case',, a case of an arbitration in a suit, the Court repelled the argument that the award could not be set aside except On one or more of the grounds mentioned in para 15 and held that para 15 contemplated only cases Where there was a valid reference and where improprieties or illegalities such as mentioned in the paragraph had occurred, but where there was no valid" reference, para 15 was not relevant and the Court could and would set aside the award on the ground that it had been made without jurisdiction. It is important to notice that although there had been no valid reference to arbitration, the award was not adjudged void, nor directed to be taken off the file, as was suggested by the party who had brought it up, but an application to set aside the award was allowed and it was set aside. It may be recalled that when in ' AIR 1922 PC 374, a case under the Arbitration Act, 1899, it was contended that the award which was being challenged as made without jurisdiction and void could have been sought to be set aside on that ground under Section 14 of the Act, the Privy Council did not repel that argument, but only held that a suit was maintainable.

23. To turn to the previous state of the law in another of its aspects, a great deal of controversy raged under the Code of 1882 as to whether an appeal lay from a decree passed on an award on any ground other than the ground mentioned in Section 522, viz., that the decree was in excess of or not in accordance with the award. The Privy Council said in the case of '29 Ind. App 51 (PC), that no such appeal lay from a decree made on an award in an arbitration, in a suit, but as their Lordships said that the cases of arbitration, with the intervention, of the Court were different inasmuch as the order passed in those Gases on the application to file the agreement or the award would seem to be a decree,, a large body of case-law arose in which various views-were taken. In some of them it was Held that the limitation contained in Section 522 applied to appeals arising out of all kinds of arbitration, while in other cases it was held that even in the case of arbitrations

in suits, an appeal might lie from the decree,, when the award was challenged by denying its genuineness or denying the reference to arbitration. See, for example, - '*Chinta Money Aditya v. Haladhar Maiti*[9]*',* Those decisions may be passed over, but I may point out that in holding that when the award was alleged to be a nullity, it could be challenged even in a case of an arbitration in a suit in an appeal from the decree, 'Chhabba Lal's case, did not take into account Ghulam Jilani's case, although I must add that in the earlier case of - '*Har Narain Singh v. Bhagwant Kuar*[10]*',* the Privy Council appears to have held that an objection to an award on the ground that, having been made after the expiry of the time fixed by the Court, it was a nullity, could betaken in an appeal from the decree. To revert to the decisions of our Court, it was held by a Full Bench in the case of - '*Janokey Nath Guha v. Brojo Lal Guha*[11]*',* that an appeal lay from an order passed under Section 526 of the Code, merely directing the filing of an award made in an arbitration without the intervention of the Court. The Code of 1908', gave effect to that view and by clause (f) of Section 104 (i), provided for an appeal from "an order filing or refusing to file an award in an arbitration without the intervention of the Court." There was no appeal from an order setting aside or refusing to set aside an award.

[9]10 Cal WN 601 [11]10 Cal WN 609
[10]18 Ind App-55 (PC)

24. It was in the above state of the law that the Arbitration Act of 1940 was passed. It bars suits, formerly permitted when the foundation of the award was challenged and takes the place of the general law as also the statutory provisions which it repeals. It does not use the opening words of para 21(i) of Schedule 2 to the Code of 1908 in Section 17 which applies to the pronouncement of a Judgment on awards made in all kinds of arbitration.

It retains the words "otherwise invalid" in Section 30 which is the general provision for setting aside awards and provides for all kinds of invalidity. It directs all challenges to an award to be made by an application. In providing for appeals by Section 39, it retains all the relevant clauses of Section 104(1) of the Code except clause (f) and it replaces the old provision in that clause by the following provision "setting, aside or refusing to set aside an award". It thus reduces the question of the extent of the appeal from the decree to one of no importance. The Act, to my mind, makes a clean sweep of all the old diversity and confusion. It lays down a single procedure for questioning all kinds of awards, provides For the setting aside of not only illegal but also void awards, which was held possible then under the old law, prescribes the same period of limitation for applications to get rid of an award which is sought to be filed, whatever the nature of the award may be and provides For the same right of appeal from the order passed on such applications.

25. In the Order of Reference I pointed out, by reference to Section 17 of the Act, the anomalies which would result if the view that an award could not be set aside on the ground of non-existence or invalidity of an agreement or reference was accepted. It is said that the anomaly cannot be avoided by simply including all grounds of attack against an award among the grounds for setting an award aside, because the right to challenge an arbitration agreement is an independent right under Section 33 and therefore even if a decree may be passed on an award, the right to challenge the arbitration agreement would remain unaffected. I do not consider that view to be sound. It is true that Section 33 provides for a separate and independent challenge to an arbitration agreement. If no arbitration proceedings have yet been had and no award has been made, a party may undoubtedly challenge an arbitration agreement by means of an application made to the Court. But I am of opinion that after an award has been made, a party, if lie desires

to challenge the validity of an arbitration agreement, can make his challenge only by way of advancing it as a reason for impugning the award as invalid. No independent application against the agreement would at that stage be maintainable. It follows that if a party desiring to challenge an arbitration agreement has not done so by way of asking the award to be set aside on that ground and has allowed a decree to be passed on the award, cannot thereafter launch an attack against the agreement. The true view to take appears to me to be that after an award has been made, all grounds of objection to the award, including grounds of the non-existence or invalidity of the agreement or reference, and all other grounds of nullity must be taken in an application for setting aside the award and that no ground, not so taken, can be available after the time for making such an application has expired. All grounds not so taken must be deemed to have been waived. I do not consider it right to say that the invalidity or non-existence of an agreement is not a proper ground to urge for setting aside an award and that a party desiring to plead such invalidity or non-existence will not be concluded by not urging it by means of an application for setting aside the award, but that he must nevertheless urge such ground before the decree is passed and will be concluded by the decree if he does not urge them even at a later stage.
In my view, as I have already explained at some length the non-existence or invalidity of an agreement is also a ground for setting aside an award and therefore must be urged by means of an application under Section 30 and if it is not urged by such an application within the time limited by law, the consequence laid down in the last part of Section 17 of the Act will follow.

26. Certain contingencies such as the filing of a valuation award or an award palpably bad or outside the contemplation of the Act were mentioned and it was asked how such awards could foe dealt with under Section 17, if all forms of challenge from award had to be by applications for setting the award aside and if setting aside was the only form of interference open to the Court. I do no think it need be insisted that Section 17 in exhaustive. Certain situations may certainly arise which are obviously outside the contemplation of a normal proceeding under the Arbitration Act and they will have to be dealt with not under the Act, but in exercise of the Court's general powers. The Act, it may be usefully recalled, applies only to arbitration agreements as defined in the Act and to awards which are arbitration awards. Pretended awards or pretended agreements are certainly not excluded, but awards which are no awards at all or agreements which are not known to the Act must be dealt with as such. It should not be overlooked that Section 17 occurs in the Chapter dealing with arbitration without the intervention of Courts and it purports to do no more than to provide what would normally happen in a proceeding under the Arbitration Act at the stage to which the section relates. Many matters not specifically covered by Section 17 have to be considered when an award is sought to be filed.

27. The only question which remains is the last. It concerns the correctness of two of the decisions of this Court, but the answer has already been furnished by what I have stated with regard to the other three questions. I do not think it is necessary to make any separate observations with regard to arbitrations in suits and arbitrations with the intervention of the Court where no suit is pending. In both, there is an agreement between the parties, although the reference is made by an order of the Court and the general provisions of the Act which are made applicable by Sections 26 and 47 require only immaterial adaptations to be applied to them.

28. For the reasons given above, the answers to the questions formulated in this Reference should in my opinion, be as follows :

Question 1 : No.
Question 2 : First part - Yes.

Second part - Yes, except in cases where the existence of an award in fact is challenged.

Question 3 : Yes.
Question 4 : No.

Lahiri, J.

29. I agree with the answer given by my Lord the Chief justice on all the questions and I also agree with the reasons given by him and I have nothing further to add.

S. R. Das Gupta, J.
30. There are two main questions involved In this reference, namely, (a) does the Arbitration Act contemplate that an application to set aside an award should be made under Section 30 while an application to have an award adjudged null and void should be made under Section 33 of the said Act; (b) can non-existence or invalidity of reference be a ground for setting aside an award.

31. On the first question mentioned above, Mr. Kar contended before us that Section 33 is the only section under which an application to set aside an award can be made. In order to determine this question it would be necessary to refer to several sections of the Indian Arbitration Act, namely Sections 31, 32, 33 and Section 30 of the said Act. Sub-S. (2) of Section 31, Arbitration Act, provides that all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award has been or may be filed. Section 32 of the said Act lays down 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 or modified or in any way affected otherwise than as provided in the Act. Then comes Section 33, Arbitration Act, material portion of which reads as follows :

> "Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court.

The combined effects of these sections are (a) that question regarding Validity, effect' or 'existence' of an award or an arbitration agreement shall be decided by the Court in which the award is or may be filed, (b) no suit will he for decision on these questions i.e., validity, effect or existence of an award or arbitration agreement, and (c) any party to the arbitration agreement or his representative desiring to have any one of those questions decided must make an application to the Court. Thus it appears that while Section 31 gives jurisdiction to the Court in which the award is or may be filed to decide these questions, namely, validity, effect or existence of an award or arbitration agreement, Sections 32 and 33 indicate the procedure which has to be followed to have these questions determined. Section 32 bars institution of a suit for decision of these questions while Section 33 indicates that an application has to be made in order to have

these questions determined by Court. Thus there can be no doubt, and in this respect I agree with Mr. Kar's contention, that Section 33 lays down the procedure which has to be followed to have a decision on the questions mentioned, namely, the existence, or validity or effect of an award or arbitration agreement.
32. But the question which still remains to be decided is what is meant by the words "invalidity of an award" referred to in Sections 31, 32 and 33 of the Indian Arbitration Act. Does it include all kinds of invalidity including invalidity due to irregularities in the proceedings or does not mean a particular type of invalidity e. g. invalidity on the ground of non-existence or invalidity of an arbitration agreement.

33. Mr. Meyer contended before us that invalidity as mentioned in Section 33 is different from invalidity referred to in Section 30 of the said Act. In other words, his contention, as I have understood him, is that while Section 30 contemplates invalidity or irregularity in the proceedings, Section 33 contemplates all other kinds of invalidity other than those mentioned in S 30. Mr. Meyer argued before us that invalidity of an award in Section 31 is really non-existence of an award due either to non-existence or invalidity of arbitration agreement or want of jurisdiction in the arbitration. In that view of the matter Mr. Meyer contended before us that Section 33 does not contemplate that kind of invalidity on which an application to set aside an award can be made and for which specific provision has been made in Section 30, Arbitration Act.

34. I have carefully considered Mr. Meyer's contention but I am unable to accept the same. I see no reason to hold that "invalidity" referred to in Section 33 is a particular class or type of invalidity. I also do not see how it can be said that invalidity of an award as contemplated in Section 31 is really non-existence of an award due either to non-existence or invalidity of reference or to want of jurisdiction in the arbitrator. The language of Section 33 does not warrant such a construction. What Section 33 says is "desiring to challenge the.....validity of an award" without limiting such, challenge to a particular type or class of invalidity. Besides Section 33 has to be read along with Section 31 and Section 32 of the Act. As I have already pointed out Section 31 gives jurisdiction to the Court where the award is or may be filed to decide all questions regarding the validity, effect or existence of an award or an arbitration agreement. Section 32 bars institution of a suit while Section 33 lays down the procedure to be followed for having a decision on those questions. But the subject matter of the said three sections of the Arbitration Act is the same, namely, decision on the questions regarding validity, effect or existence of an award or arbitration agreement. In other words, the same subject matters are mentioned in all these sections though for different purposes. In Section 31 of the Act we find amongst others "all questions" regarding validity of an award have to be determined by the Court mentioned in that section. Section 32 provides that no suit will lie on "any ground" whatsoever for a decision 'inter alia' upon the validity of an award which to my mind means that challenge to the validity of an award, on whatever ground it may be, cannot be made in a suit. It is reasonable therefore to hold that Section 33 which is really a counterpart of Section 32 allows such, challenge - challenge on any ground whatsoever to the validity of an award - to be made by means of an application.

35. Mr. Meyer in support of his aforesaid contention then contended before us that an application for leave to revoke the authority of an arbitrator under Section 5 does not come under Section 33. Obviously it would not, because, an application for leave to revoke the authority of an arbitrator

made under Section 5 of the Act is not an application challenging the validity of an award, as at that stage the award had not yet been made.

36. In my opinion the correct view to take on this question would be to hold that Section 33 merely lays down the procedure which has to be followed if a person desires inter alia to challenge on whatever ground it may be - the validity of an award. Section 33 does not go further than, that. It, therefore, follows from what I have Just now said that if a person desires to have an award set aside he must, in view of the provisions of Section 33, make an application for 'that purpose, because application is the only procedure available to him. But there Section 33 does not say on what grounds an award can be set aside. Such a provision, namely, the grounds on which an award can be set aside, is to be found in Section 30, Arbitration Act.
It should, however, be noted, and I shall deal with that question more fully hereafter, that it is not any and every kind of invalidity on which an award can be set aside under that section. In other words, Section 30, Arbitration Act, contemplates a particular kind of invalidity i.e., invalidity in the course of actual proceedings before the arbitrator.

37. This leads me to consideration of the next important question involved in this reference, namely, whether non-existence or invalidity of an arbitration agreement can be a ground for setting aside an award under Section 30, Arbitration Act.

38. Mr. Kar based his said contention on the two grounds, (a) whenever an award is challenged the reliefs to be claimed must be for setting aside the award. In other words, ail applications challenging the validity of the award, even if it be on the ground of non-existence or invalidity of reference must also be for setting aside the award, (h) non-existence or invalidity of reference can be taken as a ground for setting aside an award, because such non-existence or invalidity comes within the expression "is otherwise invalid" used in Section 30, Arbitration Act.

39. In the first place I cannot accept Mr. Kar's contention that all applications challenging the validity of an award - even if it be an application to have the award adjudged void on the ground of non-existence or invalidity of the arbitration agreement - must be an application for setting aside the award as well, i.e., the applicant must also ask for setting aside, the award. I see no force in this contention. An award which is void need not be set aside. It would be enough to have it declared or adjudged void. It is only voidable awards, i.e., awards, which would be binding unless set aside by an order of the Court, which have to be set aside. The obvious answer to Mr. Kar's contention, namely, that all applications under Section 33 relating to an award must be an application to set aside the award is that a party who challenges the very existence of an award cannot ask to have the award set aside. Such a prayer would be wholly inappropriate to such an application.

40. In my opinion a challenge to the award on the ground of non-existence or invalidity of an arbitration agreement is in effect a challenge to the existence of an award. Because, such an award, to use the words of their Lordships of the Privy Council, is a nullity.
An award which is a nullity does not exist in the eye of law. Therefore a challenge to an award on the ground of non-existence or invalidity of a reference is a challenge to the very existence of the award. Therefore in such a case there is no scope, far less an obligation, for making a prayer for setting aside an award.

41. Mr. Kar relied very strongly on the recent decision of the Bombay High Court in the case of - *'A.R. Savkur v. Aimrital Kalidas*[12]*',* and on the views expressed by Chagla, C.J. therein. In that case it was contended before their Lordships that if the arbitration agreement is invalid then the award is a nullity and it is not necessary to set aside the award. In dealing with that contention, Chagla, C.J., observed, as follows :

> "If that contention were to be accepted then it would not even be necessary for a party to apply under Section 33 for a declaration that an award is a nullity. It is well-settled that a decree which is a nullity may be ignored and it is not necessary to have such a decree set aside.

[12] AIR 1954 Bom 293

But what the Arbitration Act contemplates is that if an award is on the file of the Court unless steps are taken to have that award set aside, a certain definite result must follow and that definite result is the result indicated by the legislature in Section 17 : Therefore it is not open to a party to assume that an award which has been filed and in respect of winch a notice has been served on him is a nullity. He must go to Court and get it set aside, and the legislature in Section 30 has stated the grounds on which the party can succeed in setting aside the award". With all respect to the learned Judge, I cannot understand wherefrom his Lordship gets that a party contending that the award is a nullity must go to Court and get it set aside ? I am assuming For the moment that in view of the provisions of Section 33, Arbitration Act, a party desiring to challenge the validity of an award, on whatever ground it may be, has to make an application to the Court for that purpose hut why must he apply to have the award set aside. Why cannot an application be made to have the award adjudged void ? In my opinion all applications under Section 33 in respect of an award need not be applications to set aside the award. It should be remembered that Section 33 only lays down the procedure. In other words, the only effect of Section 33 is that what could previously be done by means of an application i.e., the reliefs which could previously be obtained by means of a suit have to be obtained now by way of an application.

42. Chagla C.J., seems also to have been troubled by the fact that unless he conies to the aforesaid conclusion there would be two periods of limitations, one for setting aside the award which is 30 days and the other for a declaration that the award is invalid under Section 33 which would be three years and this he holds, would lead to curious result.
The curious result, he was thinking of, would be that although under Section 17 it would be incumbent upon the Court to proceed to pass a judgment upon the award after the expiry of 30 days which is the period of limitation under Article 158 for setting aside an award it would still be open to the party to make an application under Section 33 and the period of limitation for such application would be 3 years under Article 18. In the first place, I should say that if there is an anomaly in the Act it would be For the legislature to remove it. But we cannot read into the Act what is not there. I find no section in the Arbitration Act which says that an application to have an award adjudged void must also be application for setting aside the award, i.e., in all applications to have the award adjudged a nullity there must also be a prayer for setting aside the award. In the second place, it is possible, in my opinion, to hold that an application to have an award adjudged void has to be made before the Court passes a decree and if that view is accepted then the curious result referred to by Chagla C.J., would be avoided. In my opinion it is possible to hold that an application to have an award adjudged void has to be made before the Court passes judgment or the award. As, however, in this reference we are not called upon to answer

this question, namely, what would be the period of limitation for an application to have an award adjudged a nullity. I am not expressing any final opinion on this question.

43. In my opinion the difficulties to which Chagla, C.J., refers, namely, the two periods of limitation would still remain even if it be held that is party challenging the validity of an award on the ground of nullity must go to Court and get it set aside. If, for example, after a judgment on award has been passed a party makes an application only challenging the existence of an arbitration agreement can such an application be prevented ? If not, the period of limitation for such an application cannot be limited to the period of 30 days which is the period for an application to set aside an award.
In the premises, I cannot agree with the view taken by Chagla, C.J., in the said case. His Lordship also seems to be troubled by the fact that otherwise there would be no right of appeal against an order made under Section 33 while an appeal would lie under Section 30. Chagla, C.J., tries to resolve all these anomalies by holding that all applications under Section 33 must be applications to set aside an award. With all respect to the learned Chief Justice it seems to me that his Lordship in corning to the aforesaid conclusion was guided more by 'necessity to construe' than 'true construction' of the different section of the Arbitration Act. As I said before if or true construction of the said sections there still remain anomalies in the Arbitration Act it would be For the Legislature to remove the same. I am unable to agree with High. Lordship's view on this point.

44. The real and substantial contention of Mr. Kar is that non-existence or invalidity of reference is a ground for setting aside an award, because it comes within the words "otherwise invalid" in clause (c) of Section 30. This leads me to the consideration of the question, and that is the most important question in this reference as to what is meant by the expression "otherwise invalid" appearing in clause (c) of Section 30, Arbitration Act.
Before dealing with that question, I should mention that, if it is held that the invalidity of an award on the ground of non-existence or invalidity of an arbitration agreement is not covered by the said words "otherwise invalid", then the first contention of Mr. Kar, namely, that all applications challenging the validity of an award - whatever may be the grounds on which the award is challenged - must also be applications to set aside the award must fail. Because Section 30 says that an award cannot be net aside except on one or more of the grounds mentioned therein and if non-existence or invalidity of reference do not come within the grounds mentioned in Section 30 then it would follow that an application to have the award adjudged void on the grounds of such non-existence or invalidity cannot be an application to set aside the award.

45. Mr. Kar contended before us that the expression "otherwise invalid" must include all kinds of invalidity including invalidity on the ground of non-existence or invalidity of reference. I am unable to accept this contention. In the first place, a void award need not be set aside and an award made on a non-existent or invalid agreement is a void award. Therefore a ground, which would make an award void, would not be mentioned as ground for setting aside the award. It should also be noted that Section 30 deals with an award and not an arbitration agreement. It sets out the grounds on which an award and not an arbitration agreement should be set aside. It would, therefore, in my opinion, be right to hold that Section 30 proceeds on the assumption that there is a valid arbitration agreement. In other words "setting aside an award" presupposes existence of an award. An award made on an invalid or non-existent submission is void and does not in the eye of law exist. This seems to be the view held so long by this Court.

46. In the case of - '*Durga Charan Debnath v. Ganga Dhar Deb*[13]', Mitter, J., who delivered judgment in that case, observed as follows :

> "We do not agree with this argument, for Section 15 obviously assumes a valid reference to arbitration and only contemplates cases where the propriety of an award on the basis of such a reference is in question.
>
> An examination of clause (c) of Sub-Section (1) of Section 15 will show that the

[13]1931 Cal" 109 (AIR V. 18)

> words "or being otherwise invalid" must refer to the invalidity of the kind referred to in the preceding sentence of the said clause as for instance the award having been made after the issue of an order by the Court superseding the arbitration and proceeding in the suit or after the expiration of the period allowed by the Court".

In coming to the aforesaid conclusion his Lordship relied on the observations of Sir Lancelot Sanderson in a previous decision of this Court ' AIR 1917 Calcutta 481, to the effect that all grounds for setting aside the award mentioned in Section 15 show that the Act contemplated in the first instance a valid reference. It is true that in the above-mentioned cases their Lordships were dealing with para 15 of Schedule II of the Code of Civil Procedure but that fact would not, in my opinion, affect the present question. Section 30 is substantially in the same terms as clause (1) of para 15 of the Second Schedule; the only difference being that sub-clause (c) of clause (1) of para 15 with some alterations had been made clause (6) in Sea 30 of the Act. Sub-clause (6) of clause (1) of para 15 has been shortened and put in a general form and has been made clause (c) of Section 30 and the words "otherwise invalid" have been added at the end of that clause. The important portion of the observations of their Lordships important for our present purpose - is that Section 15 assumes a valid reference to arbitration. In the case of - 'AIR 1946 PC 72, the position, in my opinion, has been made clear and their Lordships of the Judicial Committee expressed themselves quite clearly that an objection to the validity of a reference to arbitration did not come under the expression "otherwise invalid" in para 15. I do not think that the fact that the reference in that case was made under the second schedule to the Code made any difference, nor do I think that their Lordships of the Privy Council in holding that validity of reference to arbitration did not come under the expression "otherwise invalid" proceeded on that basis. It seems to me that the real basis of their Lordships' decision was to use their Lordships' own expression, that "if there is no valid reference the purported award is a nullity and can be challenged in an appropriate proceeding". These observations, to my mind, apply equally to an arbitration without the intervention of the Court. In the latter case also if there is no valid submission the purported award would be a nullity. I cannot also agree that the fact that their Lordships referred to the opening words of para 21 by way of contrast to show that although in para 21 it is laid down that the Court must be satisfied that the matter has been referred to arbitration but no such words appear in para 15 suggest that their Lordships of the Judicial Committee took the view that because the reference was made by the Court it would not be appropriate to ask the very Court which made the reference to hold that the reference was invalid and on that view hold that the objection as to the validity of reference does not come under the expression otherwise invalid in para 15.

47. At this stage I should mention that the fact that although in para 21 of the Schedule which

deals with arbitration without intervention of Court the words "where court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" appeared but the said words are not retained in Section 30 to my mind supports Mr. Meyer's contention namely these questions are not to be gone into by the Court in setting aside an award under Section 30. It, therefore, follows that the Court in dealing with an application for setting aside an award under Section 30, Arbitration Act, be it an arbitration without the intervention of the Court, will assume that there has been a valid reference or agreement and art award made thereon.
In other words, the position of the Court in dealing with an application to set aside an award, even in an arbitration without the intervention of Court, is the same as it was in an application under para 15 of Schedule II of the Code. In my opinion, therefore, 'Chhabbalal's case',, cannot be distinguished on the ground that their Lordships in that case were dealing with para 15 of Schedule II to the Code.

48. In my opinion the view taken by Iqbal Ahmed, J., in 'Chhabbalal's case',, before it went on appeal to the Privy Council, is the correct view to take on this question. In fact the view taken by His Lordship in that case was accepted by the judicial Committee.
Iqbal Ahmed, J. held, that clauses (a), (b) and (c) of para 15 are preceded by the words "No award shall be set aside except on one of the following grounds" and that those words coupled with the contents of clauses (a), (b), and (c) lead to the conclusion that these words have reference to the proceedings before the arbitrator alone. In my opinion also the invalidity contemplated by the use of the words "otherwise invalid" in clause (c) of Section 30 means invalidity in the proceedings before the arbitrators. Contents of the clauses of Section 30 and particularly clauses (a) and (c) and the context in which the words "otherwise invalid" appear also suggest it. In this connection it should also be noted that what the section says is that "an award" shall not be set aside, "except on one or more of the grounds" mentioned in the said section. If the words "otherwise invalid" be held to be so wide as to include all kinds of invalidity, i.e., invalidity of any ground whatsoever then there was no point in using the words, "except on one or more of the grounds" in the said section, because in that case an award can be set aside on any ground. Again the result of holding that non-existence or invalidity of an arbitration agreement can be a ground for setting aside an award would be to enlarge the scope of the section and bring within its compass not only an enquiry as to the validity of an award, but also an enquiry (a) as to the existence of an arbitration agreement (b) validity of an arbitration agreement and consequently (c) existence of an award. This, in my opinion, cannot be the scope of Section 30. Following the observation of Iqbal Ahmed, J., in the case referred to I hold that if the Legislature had by the addition of these words intended to let in objection as to the invalidity of the arbitration agreement itself nothing would have been easier than to say so in clear and unambiguous term and at any rate one would have "expected the legislature to enact such a rule in a separate clause". Instead of that the Legislature in Section 33 specifically mentions questions relating to the existence, validity or effect of an arbitration agreement as separate from the existence, validity or effect of an award but limits Section 30 only to "an award" and sets out the grounds on which it can be set aside.

49. In the course of argument before us our attention was drawn to sub-clause (b) of Section 30 and it was contended that the provision of the said sub-clause shows that awards made without jurisdiction can be on that ground set aside and therefore non-existence or invalidity would also be a ground for setting aside an award. With all respect to the learned counsel who put forth that contention this argument defeats its own purpose. To my mind incorporation of clause (b) in

Section 30 instead of supporting the contention that non-existence or invalidity of reference can form the ground for an application to set aside an award negatives it. In the first place, if by the use of the words "otherwise invalid" all kinds of invalidity were contemplated then I see no reason why this particular kind of invalidity mentioned in sub-clause (2), should at all be inserted in clause 30.
In the second place, incorporation of clause (b) in the said section suggests that all other grounds based on want of jurisdiction in 'the arbitrator to proceed with the reference are excluded from the Operation of Section 30. Lastly the invalidity on the grounds mentioned in the said sub-clause, i.e., proceeding with an arbitration after notice of institution of legal proceedings has been served under .S 35 mentioned in clause (b) does not relate' to nonexistence or invalidity of an arbitration agreement. This contention, therefore, in my opinion, must fail.

50. It was also contended before us that an award made, although there was no arbitration, agreement, is an award "improperly procured" and therefore comes within clause (c) of Section 30. I am wholly unable to accept this contention as well. The expression "improperly procured" must, in my opinion, relate to something which had happened in. the conduct of the arbitration proceedings. In the corresponding clause i.e., clause (b) of para 15 of the Schedule although the said expression "improperly procured" was not used but what was done was to mention the circumstances which would make an award, obtained thereunder, liable to be set aside. They are circumstances which would make an award, obtained thereunder, improperly procured. All such circumstances mentioned in clause (b) of para 15 relate to the conduct of the arbitration proceedings. In the corresponding clause (c) of Section 30 only the expression "an award has been improperly procured" used without mentioning the circumstances which would make it so. In my opinion it is quite clear that an award made, although there is no arbitration agreement cannot be said to be an award improperly procured. In support of his contention Mr. Kar relied on the case of AIR 1925 PC 293, decided by their Lordships of the Judicial Committee and on the case of - '*Gobardnan Das v. Lachmiram*[14]*',* In none of those cases there was any invalidity of reference and the question which we are now considering did not arise for consideration of their Lordships in the said cases. It is true that in the case of '*Chamaria v. Chamaria*', their Lordships of the Judicial Committee observed that an award made otherwise than in accordance with the authority by the order conferred is 'otherwise invalid' but the real basis of their Lordships' decision seems to me to be that the arbitrator who decided matters referred to by Court and also matters outside such reference but agreed to by the parties to be so referred, did not discriminate between the two and this would appear from the following observations of their Lordships :

> "While it would not be easy to segregate the findings with reference to the matters in question - in the suit from those not so in question - the findings in which Annardeyi was interested from those in which she was not it is, their Lordships think, impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference".

On the question of jurisdiction i.e. whether the same arbitrator can be held in respect of matters within jurisdiction and outside jurisdiction of Court their Lordships reserved their opinion.

51. Before concluding my judgment, I would refer to the case of, '(1934) 150 LT 475', decided

by Lord Hansworth M. R. and Romer, L.J., la that case an application was made to set aside an award on the ground that there was no submission to arbitration at all. Lord
[14] AIR 1954 SC 689
Hansworth, M.R., in his Lordship's judgment held that

> "this application is founded upon and based upon this being an award, and there can only be an award if there is a submission and the present applicant's whole ground of refusing to accept and obey the award is that there was never any submission".

His Lordship further observed that the applicants took no point as to the procedure upon the award if there was submission. On this view of the matter their Lordships did not grant the application but stayed it till the decision of the suit to be brought by the applicants. Some attempt was made in the course of argument before us to distinguish this case on the ground that in English Law a submission can be challenged only in a suit whereas under the Arbitration Act an application has to be made for that purpose. This difference should not, in my opinion, make any difference in the result. It should be remembered that the only effect of Section 33 is to substitute the procedure for an application for that of a suit. In my opinion this decision supports Mr. Meyer's contention.

52. Haying carefully considered the matter, I hold that the contention of Mr. Meyer On the second question indicated by me in this judgment should prevail.

53. I shall now formally answer the questions referred to this Full Bench :

> Q. 1 - No. All applications under the Arbitration Act challenging an award have to be made under Section 33 although an application for setting aside an award must be made on one or other of the grounds mentioned in Section 30.
> Q. 2- My answer to the question as to whether all applications challenging an award must be made under Section 33 is "Yes". My answer to the question as to whether all such applications must be for setting aside the award, is "No".Q. 3 No.
> Q. 4 The said decisions so far as they held that Arbitration Act contemplated different classes of applications under Sections 30 and 33 were wrong. The said decisions so far as they held that nullity of the award could not be ground of an application under Section 30 were correct.

P. B. Mukherji, J.

54. This Pull Bench reference raises far-reaching controversies under the Arbitration Act, 1940. The central question for decision is whether an application lies to set aside an award of an arbitrator on the ground that there was no valid reference to the Arbitrator who gave the Award. The occasion which raises the question is that the award under dispute instead of being made by the named Arbitrator in the clause for arbitration in the contract between the parties, happened to be made by a different body. Under the Arbitration clause the named arbitrator is Calcutta Kirana Association. The award, however, was made by the Calcutta Kirana Merchants Association in spite of protests.

55. The referring judgment raises 4 questions before the Full Bench :

> 1. Does the Indian Arbitration Act, 1940 distinguish between an application for setting aside an award and an application For the ad judgment of an award to be a nullity and contemplate that an application of the former kind should be made under Section 30 of the Act and an application of the latter kind under Section 33 ?
> 2. If the answer to the above question be in the negative, does the Act contemplate that all applications challenging an award must be made under Section 33 irrespective of the ground of the challenge, and that they must be applications for setting aside the award ?
> 3. Can the non-existence or invalidity of the reference be a ground of an application for setting aside an award, particularly in the case of an award in an arbitration without the intervention of a Court ?
> 4. Were the cases of - 'ILR (1949) 1 Cal 245' and '1951 Cal 78 (AIR V38) (B)' rightly decided, in so far as it was held or assumed in them that the Arbitration Act contemplated different, clauses of applications under Sections 30 and 33 for impugning an award and that nullity of the award way a proper ground of an application, under Section 33 and could not be a ground for an application under Section 30 ?

56. The answer to these questions depends on the proper interpretation and construction of Sections 30 and 33. Arbitration Act. To arrive at the correct interpretation of these two sections, the whole view of the entire Arbitration Act is essential. The controversy is primarily and preeminently one of interpretation of the Arbitration Act. The primary approach should therefore be through the construction and interpretation of the Arbitration Act. Appeal to the legislative history on this branch of jurisprudence, the past decisions on the repealed Law and the decisions on the new Arbitration Act, 1940 is of secondary importance, although unavoidable having regard to the arguments advanced. I shall take up, first, the construction, and interpretation of the Indian Arbitration Act.

57. Section 33, Arbitration Act, 1940, requires an application to the Court to challenge the existence or validity of an arbitration agreement or an award, or to have the effect of either determined. Its mandate is that the Court should decide such questions on affidavits unless the Court, deems it just, and expedient that the application should be heard on evidence in which event the Court can order discovery and particulars, in the same way as it does in the case of a suit. Taking Section 33 of the Act as a whole. I am of the opinion that its emphasis is, first, on the application; secondly, its emphasis is on the ambit of that application by limiting it to questions of existence, validity or effect of either an award or an arbitration agreement; its third emphasis is, how the application should be tried, prescribing it to be tried by the affidavits alone or on evidence, as is a suit; fourthly, it limits such application to a person who is a party to an arbitration, agreement or claiming under him.

58. Section 30 of the Act, however, only seta out the grounds for setting aside an award and does not prescribe a procedure. It provides that an award shall not be set aside except on one or more of the grounds stated there. It says nothing about the procedure, how the award shall be set aside on those stated grounds. Its main and only purpose is to circumscribe the grounds on which the

award can be set aside.

59. An apparent scope for conflict between Section 30 and Section 33 of the Act is at once revealed. Section 33 speakes of challenging awards on the grounds of its existence, validity or effect. But Section 30 limits the grounds on which an award can be set aside. It is therefore possible to argue a conflict by suggesting that while an award can be challenged on the ground of its existence, validity or effect under Section 33 not all such grounds are available to set aside the award, unless they also come under the specified grounds under Section 30 of the Act. If that is so then the question is, what is the reason for giving an unrestricted and unqualified, right to challenge the existence, validity or effect of an award under Section 33 of the Act which does not open with the words "Subject to the provisions contained in Section 30 of the Act", if the only grounds on which award, can be set aside are those in Section 30. These two sections are so nearly juxtaposed in the context of the Act that a construction which leads to such obvious conflict should be rejected and a more harmonious construction sought. I achieve such harmony of construction between Section 30 and Section 33 of the Act by (1) first interpreting Section 30 and specially the words "otherwise invalid" therein so as to include all grounds of existence validity or effect of award mentioned expressly in Section 33 of the Act, and (2) secondly by interpreting Section 30 as providing the only grounds so interpreted and no others on which awards can be set aside. The structural composition of Section 30 supports that view when, it uses the expression "shall not be set aside except on one or more" of the grounds mentioned there. It, therefore, excludes other ground's for setting aside the award. No other section in the Act deals with setting aside an award. The conclusion, therefore, is twofold on Section 30 of the Act; first an award can only be set aside on the grounds mentioned under Section 30. Secondly, it cannot be set aside on any other ground. Section 30, therefore, is both inclusive and exclusive. But it remains confined to setting aside of awards. It speaks nothing of arbitration agreement.

60. There is no specific section in the Arbitration Act to set aside an Arbitration agreement. At the same time the expression "to set aside an arbitration agreement" is not a stranger to the Act. That expression is used in Section 32 of the Act. It provides

> "nor shall any arbitration agreement * * be set aside, amended or modified or in any way affected otherwise than as provided in this Act".
>
> Now there is no express provision in any other section in the Act itself for setting aside, amending or modifying or affecting an arbitration agreement. At the same time Section 32 uses the words "otherwise than as provided in this Act", in respect of setting aside an arbitration agreement. Therefore provision has to be sought and found in the Act For the remedy of setting aside an arbitration agreement.
>
> The only section in which, an arbitration agreement can be set aside is under Section 33 of the Act, because no other section appears to bear on that subject. The word used in Section 33 of the Act is not "set aside" but "challenge".

The word "challenge" is neither an apt nor a happy legislative expression to be used in a Statute but its meaning in this context is not in doubt. After such challenge the section enjoins that the "Court shall decide question"; what are the questions that the Court shall decide under Section 33 of the Act ? As I have indicated this Section 33 of the Act limits the questions to (1) existence.

(2) validity and (3) effect of an arbitration agreement or an award. For the purpose of jurisdiction these three categories appear to me to include any conceivable question that may arise in respect of arbitration agreement. Any conceivable dispute in respect of an arbitration agreement can in my view be brought under any of these categories either of existence or of validity or of effect.
In my view it is unnecessary sophistication to interpret the plain word "existence" as including, "legal" existence For the simple reason that all questions of legal existence once under the other word "validity" or "effect" and it is entirely unnecessary to make the word "existence" do the work of the other two expressions. Existence should mean what it says and should be understood in its plain meaning as existence in fact and not existence in law. The Court deciding such a question of existence or validity or effect of an arbitration agreement under Section 33 of the Act has necessarily to come to a conclusion whether the agreement exists or is valid or what its effect is. In case the Court decides that the arbitration, agreement is invalid or has no effect it does in effect set aside the agreement. Therefore, the word "challenge" read with the word "decide" in. in Section 33, Indian Arbitration Act must include Court's power to decide and. set aside an arbitration agreement. That is how the expression setting aside an arbitration agreement "as provided in the Act" in Section 32 can be reconciled with Section 33 of the Act.

61. Arbitration represents the whole process from submission to award. Submission, may be challenged before an award as well as after an award. The eventuality of the award cannot deprive the right to challenge the submission itself unless the Statute prevents it or the parties by their act and conduct waive it. An invalid reference or a non-existent reference or a reference of no legal effect cannot become valid by reason alone of the fact that an award has been pronounced upon it, unless as I have said either the Statute says so or the parties accept it. Therefore if setting aside an agreement mean setting aside, an award then the limitations on the setting aside of an award cannot in my judgment be imported on the otherwise unrestricted right to set aside the arbitration agreement. Even were it so then the enquiry is, does the ground "otherwise invalid" in Section 30 (c), Arbitration Act leave it open to the aggrieved party to challenge the arbitration agreement even after the award. This leads me to a consideration of the construction and scope of Section 30, Arbitration Act in this respect.

62. Section 30 (c) permits an award to be set aside on the ground that the award is "otherwise invalid". Many legal battles have been fought over the meaning of the word "otherwise". One kind of dispute is whether the expression "otherwise" is to be construed ejusdem generis. My own view is that the word "otherwise" in Section 30 (c), Arbitration Act should not and cannot be construed ejusdem generis. The first reason for so holding is that what precedes Sub-Section (c) itself as well as Sub-Section (a) and (b) of Section 30 does not form any dependable genus in support of that conclusion. The observations of Viscount Maugham and - *'Lord Wright in Alexander v. Tredegar Iron and Coal Co. Ltd*[15]. at pages 293 and 298 and of Viscount Simon L. C. in - '*National Association of Local Govt. Officers v. Bolton Corporation*[16]', at pp. 176 and 177 illustrate this point. Sir N. N. Sarkar in his Tagore lectures of the law of Arbitration expresses the same view at page 231 where the learned author says.

> "It is submitted that there is no jurisdiction for this ejusdem generis construction and awards have been set aside as being otherwise invalid on grounds which are not ejusdem generis".

63. It was suggested in argument at the Bar that apart from the principle of ejusdem

[15]1945 AC 286

[16]1943 A. C. 166

generis the word "otherwise" in Section 30(c) of the Act should receive a construction with reference to the context of that section. In other words what was argued was that the expression "otherwise invalid" should some kind and type dealt with in other part of that section. It is really an attempt to introduce the principle of ejusdem generis by the back door which is found to be difficult to attract otherwise because of the high authorities quoted above. Shortly put the argument is that the expression "otherwise invalid" in Section 30(c), Arbitration Act means some invalidity attached to the proceeding before the Arbitrators. In aid of this argument it is submitted that Sub-Section (a) refers to misconduct of the Arbitrator or the Umpire which obviously has reference only to proceedings before the Arbitrator or Umpire, Similarly Sub-Section (b) of Section 30 renders an award invalid where the award is made after the Court has issued an order superseding the arbitration proceedings. Then it is said that in Sub-Section (c) the first part refers to improper procurement of award which it is contended also has reference to proceeding before the arbitrator or umpire. Therefore the conclusion is sought to be drawn that the penultimate expression, "otherwise invalid" in Section 30(c) of the Act must necessarily mean an award that is invalid with reference to proceedings before the Arbitrator. Hence it is contended that if the submission or the reference itself is bad then that contention goes to the very root of the matter and concerns a stage prior to the commencement of the proceedings before the Arbitrators and therefore should not be included as a ground within the meaning of "otherwise invalid". This argument is ingenious but essentially unsound first because I see no logical ground for making a distinction between procedural grounds before the arbitrators and other grounds, which is the very basis of this argument, and secondly, even accepting that artificial distinction sought to be made by this argument, I can find no reason why, even then, it cannot be said to be procedurally invalid where some persons not named as arbitrators choose to act as such and carry on a pretended reference and produce an award. Such a course is as much procedurally defective as on any other ground.

64. On a point of construction, therefore, I am satisfied that the words "otherwise invalid" in Section 30(c), Arbitration Act include the case of setting aside an award when such award is based on a wholly invalid reference to arbitration. It is enough to stats this conclusion.

65. It is not necessary to proceed further to say what other grounds are included in the words "otherwise invalid". It has however been contended in argument at the Bar that if too liberal an interpretation is put on the words "otherwise invalid", then it will enlarge unjustifiably the content of Section 30, Arbitration Act, which it is said was not the intention of the framers of the section, having regard to the language of restriction with which they begin the opening words of that section. In other words, it is said that if a section like Section 30, Arbitration Act was intended to limit the grounds on which awards could be set aside by using the expression "An award shall not be set aside except on one or more of the following grounds" then to introduce all grounds by an interpretation of the words "otherwise invalid" appearing at the end of that section in its sub-clause (c) would be really going against the spirit of restriction dominant in that section. I am unable, generally, to agree with that proposition because Courts are guided primarily by the amplitude of the expression used. The words "otherwise invalid" are, in my opinion designedly vague, because it was intended that an invalid award, whatever the grounds on which it may be invalid for, should not be allowed to remain but should be set aside. There is,

in my view, no meritorious justification for holding that awards invalid on some grounds should be set aside, while awards equally invalid on other grounds or perhaps more invalid, should remain inviolate. To my mind, the scheme of Section 30, Arbitration Act is clear. It is a comprehensive section which sets out all the grounds on which an award could be set aside. By its first sub-clause (a) it includes any misconduct, either personally or of the proceedings, so far as the arbitrators or umpires are concerned. But by its second clause (b), it renders invalid awards made after the Court's order superseding the arbitration. Pausing here, For the time being, it is clear why an award is set aside on this ground. The reason is that there is no valid reference on which the award could stand.; that is why it is rendered invalid. If, therefore, the context of these different sub-clauses is an indication, then where the reference is invalid otherwise than by an order of Court, it should also be included as a ground for setting aside the award. That is precisely what is done and was intended to be done by the use of the expression "otherwise invalid" in Sub-Section (c) of Section 30, Arbitration Act. This Sub-Section (c) of Section 30, Arbitration Act is widest in its tone when compared with the preceding Sub-Sections (a) and (b). Mark the first expression improperly procured'. Wherever an award is improperly procured it is liable to be set aside. The cases on this expression "improperly procured" are mostly older cases dealing with, such instance as where the arbitrator or the umpire was bribed. Such decisions as have come to my knowledge are mostly of the 17th or 18th century. If an award is made by arbitrators who are said to be pretended arbitrators and not arbitrators of the choice of the parties, then the award resulting from such a proceeding is, in my judgment, also an award which is "improperly procured" within, the meaning of this sub-section. The other expression, "otherwise invalid", is also designedly ample in its significance.

66. On the interpretation, therefore, of Section 30, read with S. S3, Arbitration Act, I have come to the conclusion that an application lies to decide the effect and validity of an arbitration agreement on the ground that it is not a valid reference at all, and to set aside an award on the ground that it has proceeded on an entirely invalid reference.

67. A rapid review of the entire Arbitration Act may not be out of place but rather necessary on the question of interpretation and construction. Section 31, Arbitration Act fixes the Court which has jurisdiction to deal with reference to arbitration. It is marginally described as the jurisdiction clause. Its opening words in Sub-Section (1) direct the filing of the award only in a Court which has jurisdiction in the matter to which the reference relates. In Sub-Section (2) it prescribes the same Court in which the award has been filed or may be filed as the Court which alone can decide the validity, effect or existence of an arbitration argued was that the expression "otherwise invalid" should mean some kind of invalidity of the kind and type dealt with in other part of that section agreement or award. The familiarizing of the expression "validity, effect or existence" has obvious reference to the same expression used in Section 33 of the Act and the words "may be filed" appear to suggest that the filing of the award is no longer a condition precedent For the court to take action. By Sub-Section (3) it prescribes that all applications regarding the conduct of arbitration proceedings shall be made similarly to the very same Court where the Award has been filed or may be filed. By its last sub-clause (4) it prescribes that where an application has been made under the Act to such a competent Court, then that Court alone shall have jurisdiction over the arbitration proceedings.
It is noteworthy that in sub-clauses (2), (3) and (4) of Section 31 of the Act the Court described is the Court of exclusive jurisdiction by reason of the expression "by no other Court" acting as a refrain to each one of these sub-sections. The net result of the interpretation of Section 31, so far

as the present Full Bench Reference is concerned, appears to me to be that by its Sub-Section (2) the Court in which the award has been or may be filed is designated as the only Court where questions regarding the validity, effect or existence of the arbitration agreement can be decided. This is consistent with the view that I have already taken, that an application to set aside an arbitration agreement under Section 33 has been properly made in the present case to the proper Court as described in Section 31(2), Arbitration Act.

68. The Arbitration Act has various sections indicating various kinds of applications that are contemplated by the Act. For instance, Section 5 contemplates leave of the Court to revoke the award of an appointed arbitrator or umpire. No specific provision is made how such leave is to be applied for or obtained, and therefore the general rule will apply, that when a statute provides a relief the Court will invent the procedure to grant it, if the statute has not expressed it. Then Section 7(2) of the Act indicates an application in Court in the case of the insolvency of the party to an arbitration agreement. Section 8(2) of the Act provides applications to the Court to appoint an Arbitrator in the contingencies mentioned in that section. The proviso to Section 9 similarly permits the Court to set aside the appointment of a sole Arbitrator and that implies an application. Section 11 of the Act speaks of application of any party to a reference to remove an arbitrator or an Umpire in certain circumstances including among them when the Arbitrator or umpire misconducts himself or the proceedings, a ground on which even the award may be set aside under Section 30(a) of the Act. Section 13(b) of the Act provides for a special case being stated For the opinion of the Court. Section 15 of the Act gives the Court power by order to modify or correct an award. No special provision is made in the Arbitration Act as to how applications under Section 15 are to be made. The general principle therefore operates that the Court will entertain such an application as a method of granting the relief contemplated by the Act.

69. Before leaving the discussion on Section 15 it is necessary to observe that by Sub-section (a) thereof the Court can modify or correct an award where part of it is upon a matter not referred to arbitration and such part can be separated from the other part, and does not affect the decision on the matter referred. It would be odd indeed then to come to the conclusion under the Arbitration Act by a process of interpretation of Sections 30 and 33 that a whole award based on a matter not referred to arbitration could not be set aside although when it impartially bad on that account the Court can correct and modify it.

70. Proceeding with the analysis of the Statute, we come next to Section 16. That is a section which gives power to the Court to remit an award or any matter referred to arbitration for reconsideration in cases specified therein. It is again worth observing; on this section that amongst such cases is the one where the award determines any matter not referred to arbitration, and such matter cannot be separated without affecting the determination of the matters referred. No specific provision, again, is made in the Act providing the procedure to be followed by the Court in order to act under Section 16 of the Act, with the result that the general principle will operate and the Court will invent a procedure to grant the relief contemplated under Section 16 of the Act. Presumably that procedure is an application to the Court.

71. Then follows Section 17 of the Act. This section is marginally described as empowering the Court to pass "judgment in terms of the award". The Court pronounces judgment according to the award under this section, and thereupon a decree follows. No appeal is allowed from such decree except on the two limited grounds where it is in excess of or not otherwise in accordance with the award. The obligation that is cast upon the Court to pass judgment operates at a point of

time which it is necessary to analyze. The time is fixed with reference to three different stages, first, when the Court sees no cause to remit the award or any matters referred to arbitration for reconsideration, or, secondly, where the Court sees no cause to set aside the award, and, thirdly, when the time for making an application to set aside the award has expired, or when such application having been made has been refused. The structure and the intent of Section 17 of the Act indicated the procedural consummation by the Court pronouncing judgment according to the award.

72. On the basis of Section 17 of the Act it has been argued that as it does not provide the instance of setting aside an invalid arbitration agreement, it by implication follows that once the specified time and specified occasion have expired, namely, the three events where the Court sees no cause to remit the award or set aside the award or where the application to set aside the award having been made was refused or the time for moving the application has expired, the Court is bound to pronounce a judgment on the award, and a decree must follow. To allow the Court's power to pronounce a judgment and a decree on the award to be encroached upon by the further consideration of an application to set aside an award on the ground of an invalid reference to arbitration is to interpolate another case which the Legislature has not recognized in Section 17.

73. In aid of this argument it is said that after a decree follows on the award under Section 17 of the Act, the decree is not appealable except on the ground of being in excess of or not in accordance with the award. These two grounds being th3 limited grounds it is argued that there is again by implication exclusion of the ground of invalid reference to arbitration as a reason for refusing to pass Judgment en the award or to set aside the decree on appeal there from. To permit such a course will be, in effect, to render such decrees liable to be collaterally attacked. It may however be emphasized here that even on such a similar provision under the old law an appeal was permitted from the decree on the ground that the award proceeded on an invalid reference to arbitration, as in the case of - '*Golnur Bibi v. Abdus Samad*[17]',

74. This argument, to my mind, makes an entirely wrong approach to Section 17 of the Act. Section 17 of the Act is an imitation of paragraph 16 of the repealed Schedule 2, Civil Procedure Code , which contained no provision like Sections 31, 32 and 33 of the present Indian Arbitration Act of 1940. These new sections in the new Act made a departure which was radical in its express provisions and in its unexpressed implications.
While, therefore, Section 17 in the new Act of 1940 appears as a relic of the past paragraph 16 of Schedule 2 of the Code, today its effect has to be judged in the light of the new sections introduced by the Act, especially Sections 32 and 33, Arbitration Act,
[17] AIR 1931 Cal 211

1940.

75. With this reminder of the past, I shall proceed now to analyse this argument that Section 17, in effect excludes the ground of challenging an arbitration agreement. Section 17 of the Act does not pretend to mention all the cases where the Court should not pronounce a decree on an award. All that it says is where the Court shall proceed to pronounce judgment on Award. I shall endeavour to show how it leaves out many cases where the Court cannot pronounce judgment even if the specific conditions of this Section 17 are present. For instance when a Court has

revoked the authority of an arbitrator under Section 5 of the Act, the arbitrator notwithstanding such a revocation, will be producing an award, if he proceeds on the revoked authority. Can it then be said that because these three conditions in Section 17 are present, namely, (1) No remission of the Award, (2) No setting aside of the award and (3) Expiry of the time For the application to set aside an award or refusal of such, application, the Court cannot refuse to pass a decree upon such an award ? If the arguments that I have noticed on Sections 17. 30 and 33 and overruled, were to prevail, then this situation could not be cured, and the Court must remain a mere spectator and compelled to pass a decree on the award. Then, again, where the Court under Section 11 of the Act has removed an Arbitrator and notwithstanding such removal the arbitrator proceeds with the reference and produces an award, a similar situation will arise, because, there again, if this construction of Section 17 of the Act were to hold good, the Court will have to pronounce a decree upon such an award, because the three conditions specified in Section 17 are satisfied. These, therefore, are only illustrative examples to show the inherent unsoundness of the arguments advanced that the Court under Section 17 of the Act has to function as a mechanical rubber stamp by passing a decree on the award so long as the three specified conditions in that section are satisfied. I am unable to accept that the Court in the scheme of the Arbitration Act of 1940 is so helpless as that, or that the statute was intended to produce such an insensible result. I shall add now my further reasons why I am of the opinion that Section 17 is not exhaustive on this point.

76. The Arbitration Act is divided into seven main chapters. The first chapter is introductory with two sections, of which the main one is Section 2 containing the definitions. The second chapter deals with "arbitration without the intervention of the Court" and consists of Section 3 to Section 19. It is in this chapter that Section 17 is placed. Primarily, Section 17, therefore, was intended to apply to "Arbitrations without the intervention of Court". Section 17 represents the culmination of such an arbitration without the intervention of the Court, leading to not merely the award but finally the Court's seal upon the award by pronouncing judgment upon it and followed by a decree. The third chapter is a chapter of only one section and deals with "arbitration with, the intervention of a Court" where there is no suit pending. The fourth chapter has five sections, from Section 21 to Section 25, and deals with "Arbitration in suits". Neither in chapter three, dealing with "arbitration with the intervention of a Court where there is no suit pending", nor in chapter four, dealing with "arbitration in suits", any specific section like Section 17 is introduced.

77. Then follows Chapter V of the Act which is described as the "General". This chapter begins with Section 26 and ends with Section 38. The very first section in this chapter, namely, Section 26 of the Act provides "Save as otherwise provided in this Act, the provisions of this chapter shall apply in all arbitrations". This must mean that whether an arbitration is without the intervention of the Court or with the intervention of the Court, without suit or in suit, Section 30 and Section 33 of the Act shall apply to all arbitrations unless they are excluded by other provisions in the Act itself. The words "save as otherwise provided in this Act" in Section 26 of the Act therefore make it necessary to consider the question whether Section 17 of the Act is in conflict with Sections 30 and 33 of this Act so as to bear the meaning "as/ otherwise provided in this Act". To my mind it is not. Section 17 covers a field entirely different from the fields covered by Sections 30 and 33 of the Act. Section 17 is confined to Court's powers of pronouncing judgment on the award and thereafter making a decree upon it. On the other hand Section 30 only provides the grounds for setting aside an award and in so far as it does so provide this will form the subject matter of the application to set aside the award mentioned in

Section 17 of the Act. But Section 17 of the Act makes no provision whatever to say what is going to happen when the reference itself on which the arbitration has proceeded and the award has been made is invalid. Therefore on this point it is silent and cannot come within the meaning of the words "save as otherwise provided in this Act" in Section 26. Hence applications under Section 33 of the Act to set aside an arbitration agreement and the decisions of the Court there under on the existence, validity or effect of an arbitration agreement cannot come within the operation of Section 17 of the Act or within any implied exclusion engrafted upon Section 17 by a process of construction. To do so would be to violate the other express provision of Section 26 of the Act, "the provisions of this Chapter shall apply to all arbitrations". In other words Section 33 of the Act in so far as it involves an application to decide on the existence, validity or effect of an arbitration agreement must apply to all arbitrations inducting an arbitration without the intervention of a Court, which is the case here, unless something can be shown as "otherwise provided in this Act". In fact the scheme of Chapter V shows that all the sections in that, chapter are to apply universally to all kinds of arbitration unless "otherwise provided in the Act" as for instance in Sections 15 and 16 of the Act dealing with Court's "powers to modify or remit awards. The subject matter of Sections 15 and 16 left to itself might easily have come within Section 33 of the Act dealing inter alia with validity effect or existence of award, but For the special provisions made in Sections 15 and 16. In other words Sections 15 and 16 of the Act are to be read as exceptions to the general provisions contained in Section 33 of the Act and as coming within the expression "as otherwise provided in this Act", appearing in Section 26 of the Act. It follows therefore, that the power to pronounce a judgment on award under Section 17 of the Act appearing in Chapter II of the Statute dealing with arbitration without the intervention of the Court cannot be read as. divesting the Court of the express power given to set aside an arbitration agreement under Sections 32 and 33 of the Act. I shall even go further to say that the words "save as otherwise provided in this Act" in Section 26 of the Statute exclude the possibility of controlling the express provisions of Sections 32 .and 33 of the Act providing for application to set aside an arbitration agreement by a mere inference drawn from Section 17 of the Act. Even the slippery doctrine of necessary implication, the last armory in judicial legislation, does not avail against clear and express statutory provisions of Sections 32 and 33 of the Act. The scheme of the Statute therefore shows that the Indian Arbitration Act provides for various kinds of applications mentioned therein and not all applications are treated by the Statute on the same footing.

78. To make a review of the Act complete, reference may be made to Section 18 which gives the Court power to pass interim orders notwithstanding anything contained in Section 17 of the. Act after the filing of the award and before the decree and Section 19 of the Act which gives power to the Court to supersede arbitration presumably on application made to it. Then begins the short Chapter III of Section 20 which contemplates application to file arbitration agreements which are registered as suits. Then Chapter IV of the Act provides for applications to Court when the arbitration is in suit For the purpose of making an order of reference under Section 23 of the Act.

I have already dealt with Chapter V which contains the general provisions and which includes Sections 30, 31, 32 and 33 of the Act, and also includes applications for stay of legal proceedings under Section 34 and applications for Arbitrator's remuneration under Section 38. Thereafter Chapter VI deals with appeals under Section 39 which does not provide appeals from a decision under Section 33 of the Act. Then follows the last Chapter VII of the Act containing miscellaneous provisions of which Section 41 may be noticed as providing that the Code of Civil Procedure shall apply to all proceedings before the Court and to all appeals under the Statute.

79. This completes the review of the Act to show that application to set aside an award is not the only kind of application that the Act contemplates and to show that its mention in Section 17 of the Act therefore does not necessarily exclude applications for challenging the existence, validity or effect of an arbitration agreement and the decisions of the Court thereupon, expressly provided under Sections 32 and 33 of the Act. If in this review of the, Arbitration Act I have dealt with Section 17 of the Act at length that is because consciously or unconsciously that section appears to be put forward as the final stage where the curtain drops with the Court making a decree in terms of an award.

80. My own view is that the answers to the questions raised by this Full Bench reference must be given on the basis of interpretation and construction of the relevant provisions and sections of the Arbitration Act, 1940. On my interpretation and construction of the Act therefore answer the questions before the Full Bench as follows :

> 1. I answer the first question in the negative. I hold that the Arbitration Act, 1940 does not distinguish between an application for setting aside an award and an application For the ad judgment of an award to be nullity. I hold further, that the Statute does not contemplate that an application of the former kind should be made under Section 30 of the Act, and that an application of the latter kind should be made under Section 331 of the Act.
> I am of the opinion that Section 30 of the. Act does not contemplate any application at all, that it sets out only the grounds on which an award can be set aside and that the only application that can be made even for setting aside an award is under Section 33 of the Act, but then it must only be on the grounds stated in Section 30 of the Act duly interpreted.
> 2. My answer to the second question is in the affirmative. I hold that the Arbitration Act, 1940 contemplates that all applications challenging an award must be made under Section 33, irrespective of the ground of the challenge provided that such, grounds are those specified in Section 30 of the Act in all applications for setting aside the award. I need only add that I agree with the exception made by my Lord the Chief Justice in answer to the Second part of this question.
> 3. My answer to the third question is in the affirmative. I hold that the non-existence or invalidity of the reference can be a ground of an application for setting aside an award based on such invalid or non-existent reference including the case of an award in an arbitration without the intervention of a Court.
> 4. My answer to the fourth question is in the negative. I hold that in so far as the case in 'ILR (1949) 1 Cal 245' and the case in '1951 Cal 78 (AIR V38) (B)' hold or assume that the Arbitration Act contemplated different classes of applications under Sections 30 and 33 for impugning an award and that the nullity of the award was a proper ground of an application under Section 33 but could not be a ground for an application under Section 30 of the Act, were wrongly decided.

81. Speeding for myself, these answers on the basis of the interpretation of the relative sections of the Arbitration Act should be enough. But it seems to me some reference to Legislative history

and to past decisions is unavoidable. The judicial mind is net infrequently haunted by the ghosts and apparitions from the past. The next part of the enquiry will therefore have to pursue some of these ghosts, and, if possible, to lay them to rest. The law of arbitration is the law of private courts. It was born with high hope for simplicity but exists today in despair in a miscellaneous patchwork of complex decisions which no private arbitrator can be expected to master to avoid their mischiefs or obey their salutary commands. It suffers today under a fourfold curse. So far as, the arbitrators are concerned, the situation is one of helplessness verging on resignation. So far as the Courts are concerned, arbitration appears as a prolific source of litigation where commonsense always fights a losing battle with an increasingly technical jurisprudence. As For the disputants themselves before the arbitrators, the attitude is one of heads I win and tails you lose, and if the head does not go the way a party wants, he immediately takes resort to the public courts of the land to upset the apple cart. As for legislation, the statutes of arbitration are Jerry-built structures suffering- from divided loyalties precariously balanced between sympathy with private courts of litigant's choice and a nostalgia for public courts which are expected to exercise a kind of paternal control over them. Like all hybrids, this cross-breeding has produced one of the most defective and unreliable species of legal creatures. This fourfold curse has effectively laid it stronghold to make the law of arbitration a cripple which walks permanently on the crutches of legal precedents. It is no exaggeration, to say that almost every controversial arbitration of any importance always waits for a second bout of legal fight in the public courts proving the truth of the old cynical statement that only fools go to arbitration because they pay two sets of costs, one before the arbitrators and the other before the courts where they come home to roost. I shall now take up the twin afflictions of the Judicial mind from, the ghosts of the past statutes and the ghosts of the past decisions.

82. The Arbitration Act 1940 begins with, the words "An Act to consolidate and amend the law relating to Arbitration". Statutory history, therefore in the light of the present Act, can be and in fact has been entirely misleading unless both the objects of consolidation and amendments are constantly borne in mind. The Arbitration Act 1940 does not merely consolidate the past law or past statutory provisions. It also amends past law and the past statutes.
The complete code, therefore, is not in the Act of 1940. Section 32 of the Act 1940 excludes suits to contest the existence, validity or effect of an arbitration agreement or an award. No suit, therefore, is possible any longer under the present Act on this ground. This much is certain. That is the negative part of Section 321 of the Act. Its positive part is that it provides that an arbitration agreement or an award can be set aside, amended or modified only according to the provisions of the Act and not "otherwise". That is the effect of Section 32 of the Act as I read it. No provision of this nature appears in any past statute dealing with1 arbitration in India.

83. A novel measure such as this has naturally caused much nodding of heads. Attempts continue to find an area where suits are still said to be competant. I consider it unnecessary to explore and examine such attempts in this Full Bench reference. A reference to such attempts can however be illustrated by the decision of Das, J. in - '*Munshilal and Sons v. Modi Brothers*[18]' in the year 1947. It seems to suggest that the suit lies to enforce an award on the looting of an agreement, and that Section 32 only bars special suits but not all suits. The other decision of Harries, C.J. and Mukherjee, J., in - '*Johurmull Parasram v. Louis Dreyfus and Co. Ltd.*[19]', in the year 1947, holds that a suit which was filed only to avoid the consequences of alleging the true nature of the claim with a view to avoid the arbitration could not be stayed under Section 34 of the Act.
84. Section 33 of the Act is another innovation. Nothing like it occurred in the past statutes

relating to arbitration in India. This innovation also has provoked a lot of free thinking by Judges. At one stage in the year 1947 Das, J. thought in - '*Manicklal v. Shiva Jute Bailing Co. Ltd*[20].', that a party to an arbitration, agreement; or person claiming under him was alone competent under Sections 32 and 33 of the Act to make the application and for them alone the suit was barred, but for others who claimed not to be bound by the agreement, the suit was not barred, on the ground that in that event they would be without remedy. It was also held in that case that the word 'existence' meant in that section factual and not legal existence, such as is affected fraud, mistake or illegality in Sections 19 and 30 Contract Act. This decision came up for criticism, in subsequent decisions and ultimately in 1948 Sinha, J., in - '*Chaturbhuj Mohanlal v. Bhicam Chand Chororia*[21]', dissented from the view of Das, J. and held that any alleged party could come under Sections 32 and 33 of the Arbitration Act. The better view today seems, that even a party disputing that he is a party to an arbitration agreement comes within the meaning of Section 33 of the Arbitration Act, 1940 and can make an application, thereunder. It is again unnecessary for me to consider these decisions on this Full Bench Reference, and they are only referred to show first that these are statutory innovations and how such innovations have stimulated Judges.

85. Section 30, Arbitration Act, 1940 is an old relic of Section 14 of the repealed Indian Arbitration Act of 1899 and paragraph 15 of the repealed second Schedule to the Civil Procedure Code. Sub-clauses (a) and (c) of Section 30 of the present Act of 1940 have been bodily taken from Section 14, Arbitration Act 1899. The words "or the proceedings" in sub-clause (a) of the present Section 30 are added alter the words "has misconducted himself" to make it clear that an arbitrator may be removed not only for personal misconduct but also for misconducting proceedings.

[18]51 Cal WN 563 [20]52 Cal WN 389 (0)
[19]1949 Cal 179 (AIR V36) [21]53 Cal WN 410

But today the effect of Section 30 is not guided solely by the older decision under Section 14 of the repealed Indian Arbitration Act of 1899 and the repealed paragraph 15 of the Second Schedule of the Civil Procedure Code, because those repealed legislations did not contain the new provisions of the two Sections 32 and 33 of the present Act of 1840.

86. Section 17, Arbitration Act 1940 copies with minor alterations, paragraph 16 of the repealed Second Schedule of the Civil Procedure Code, with the result that it makes available all the awards on which the Court can found its judgment and on which a decree can be passed. It removes the difference that existed on this point between arbitration under the Second Schedule of the Civil Procedure Code and arbitration under the old Arbitration Act 1899. The older decisions on paragraph 16 of the Second Schedule of the Civil Procedure Code have now to be judged not merely by themselves but in the light of the new provisions contained in Sections 32 and 33, Arbitration Act, 1940, which, found no place in the older statutes. According to Section 39 of the present Act an appeal lied from an order refusing to set aside an award. According to Section 17, however, no appeal lies from the decree and judgment so long as the decree is in accordance with the award. The consequence is that an appeal lies from an order refusing to set aside an award but no appeal lies from the decree that follows the judgment passed in terms of the award after such refusal. This is what happens when a consolidated and amending Act is built up by the framers of the Act by the method of scissors and paste. The result is that a total view produces results which perhaps were not intended by the individual instances of emendations by the scissors and additions of the paste. It means both conflict and confusion.

87. It will be appropriate at this stage to notice three decisions of the Privy Council.

88. One is the case in - '1946 PC 72 (AIR V33) (C)'. The decision in that case was given by the Privy Council in the year 1946. That case relates to a reference to arbitration in a suit under Schedule 2, Civil Procedure Code now repealed. Sir John Beaumont, delivering the judgment of the Privy Council, said at page 75 of that Report :

> "A further question referred to the Full Bench was whether an objection to the validity of a reference to arbitration comes within the provisions of Section 15 of the Second Schedule of the Code of Civil Procedure. Harries, C.J. considered that it did relying on the words 'being otherwise invalid' in Section 15; Iqbal Ahmed, J. considered that it did not.
>
> On this question their Lordships agree with the view of Sir Iqbal Ahmed. In their opinion, all the powers conferred on the Court in relation to the award on a reference made in a suit presupposed a valid reference on which the award has been made, which may be open to question. If there is no valid reference, the purported award is a nullity and can be challenged in any appropriate proceeding.
>
> By way of contrast, the language of Section 21 of the Second Schedule may be noted. The section empowers the Court to pronounce judgment according to an award made on a reference out of Court, and the opening words require the Court to be satisfied that the matter has been referred to arbitration. There are no such words in Section 16".

89. This is a decision which is often quoted as an authority For the proposition that under no circumstances where a decree has followed an award can a party challenge the award on the ground that the reference itself to arbitration was invalid.

90. On a close examination of this decision, its effect and its ratio decidendi, I am satisfied that it lays down no such wide proposition whatever. This decision has raised a false siren and at its call have trooped out many judicial decisions which did not, in my view, sufficiently consider its implications. Among them, I include the unreported decision of the Court of Appeal in - '*Bajranglal Shroff v. Ram Chandra Hanuman Das*[22]*',* The limits of Chabbalal's case must be emphasised. Its first limit is that this was a reference to arbitration in such a pending suit. When the Court makes an order of reference to arbitration in such a pending suit, it "presupposes a valid reference", as pointed out by Sir John Beaumont, because the whole reference originates by Court's order a feature entirely absent in the case of an arbitration without the intervention of the Court and not in a pending suit and where the arbitration agreement is not filed and registered in Court. Its second limit is that in cases of "a reference out of Court", as pointed out by Sir John Beaumont, the Court has always to be satisfied that there is a valid reference. That provision was contained in paragraph 21 of the Second Schedule of the Civil Procedure Code. The words in that paragraph were the significant words "where the Court is satisfied that the matter is referred to arbitration". Why is this provision made in the case of a reference out of Court ? It is because the Court does not have any chance or opportunity to enquire about the validity of the reference itself before the award is brought to it. These significant words of paragraph 15 of the repealed Second Schedule of the Civil Procedure Code are absent from Section 17; Arbitration Act of 1940. Why are they absent ? That is because there is today a new section, namely. Section 33 in the Arbitration Act of 1940, which read with; Section 32 of that Act, expressly provides for

setting aside or deciding on the question of existence, validity or effect of an arbitration agreement itself, as distinguished from the award. This is another example of the confusion created when consolidation and amendment of a statute are made by Scissor and paste method. In fact, the present Section 17, Arbitration Act of 1940 is comparable to the old paragraph 16 of the repealed Second Schedule of the Civil Procedure Code.
But the present Section 17 is put under "Arbitration without the intervention of the Court", while the old paragraph 16 of the Second Schedule was under "Arbitration in suit". That is a bad copy, and the user of the scissor and paste method forgot the difference between these two kinds of arbitrations. The third limit is provided by Sir John Beaumont in that decision by stating expressly that the validity of the reference itself would be challenged "in any appropriate proceeding". To use Sir John Beaumont's words he says "if there is no valid reference, the purported Award is a nullity and can be challenged in any appropriate proceeding". Incidentally it sets the nail on the coffin of that effete doctrine that a null award can only be ignored but nothing can be done about it, by saying that it can be challenged in any appropriate proceeding. Now, that "appropriate proceeding", which was then available, is no longer available, except under the new Section 33 of the Act. That makes the difference so long as these three limits are remembered and these differences are applied between the Second Schedule and the present Act, Chabbalal's decision (C) cannot be held to be an authority For the proposition that in all cases and under all circumstances an award can never be set aside
[22] Appeal No. 106 of 1951, D/d. 4-7-1952 (Cal)
on the ground that the reference itself to arbitration was invalid. So, these material feature can, in my opinion, sufficiently distinguish that case from the present one and from the problem that is before the Full Bench reference today.

91. Strangely enough, this decision, of the Privy Council failed to notice its own prior decision in the year 1925 in the case of AIR 1925 PC 293, on the same paragraph 15 of the Second Schedule of the Civil Procedure Code. There in that case also there was a reference to arbitration in a pending suit. What happened there was that the award included not only matters in suit but also outside the suit, although the Court's order of reference on interpretation was found to include only matters in suit between the parties.
In fact the award there covered some of the differences which were not only outside the suit but also even a member of the family who was interested in some of the differences but was not even a party to the suit. Lord Blanesburgh who delivered judgment confirming the judgment under appeal set. aside, the award under paragraph 15 of the Second Schedule of the Civil Procedure Code as coming within the words "otherwise invalid". The ratio of this decisions is clearly that an .award can be set aside as "otherwise invalid" even on the ground that there was no proper or adequate or valid reference to arbitration. If 'AIR 1946 PC 72, was to be read as laying down the proposition that an award cannot be set aside on the ground of invalid reference, then that decision would be contrary to the decision in 'AIR 1925 PC 293' where it was held it could be and in fact the award was set aside on that ground. But as I have said 'Chabbalal's decision (C)' has been misread and misapplied in many subsequent reported and unreported decisions.

92. The third decision of the Privy Council which I want to examine here is one under the repealed Indian Arbitration Act, 1899. This is the case of AIR 1922 PC 374. There a suit was filed' asking for a declaration that the appointment of a particular person to act as the sole Arbitrator was illegal and that the award was void and inoperative. Viscount Cave who delivered the judgment of the Privy Council overruled a preliminary point taken there that the suit did not

lie and the only remedy open to the plaintiffs in that case was to move to set aside the awards under Section 14, Arbitration. Act of 1399 and that this could not foe done after the awards had been enforced by execution. Viscount Cave overruled that point by observing at page 377 :

> "In their Lordships' opinion there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the Arbitrator ought no doubt to toe taken by motion to set aside award; but where (as here) it is alleged that an Arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose.
> Nor is the fact that the award has been enforced by execution under Section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 a bar not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it, is to be enforceable as if it were a decree".

93. Now these words are significant if one recalls the language of Section 15, Arbitration Act, 1899, which was in these terms :

> "15 (1), An award on a submission on being filed in the Court in accordance with the foregoing provisions shall (unless the Court remits it to the consideration of the Arbitrators or Umpire or sets it aside) be enforceable as if that were a decree of the Court."

94. Now there again it could easily have been said that, as this section mentioned only the case of remission or the case of setting aside of the award, the Court was bound to enforce the award as if it were a decree in the absence of remission or setting aside of the award, and the award could not be challenged on the ground of invalidity of the reference itself. That indeed was done before the Privy Council and it was exactly this same argument which was overruled by Viscount Cave in the passage that I have quoted. Today no longer a suit is competent because of the specific bar provided in Sections 32 and 33 of the new Arbitration Act, 1940. What these sections do is to bar a suit among others to challenge the existence, validity or effect of an arbitration agreement. But while the suit is barred the procedure today is by way of a more expeditious process of an application on affidavits which also can be disposed of on evidence if the Court so desires. Then what could be done by a suit before, can be done now by an application under Section 33 of the present Act of 1940. In other words, the relief which Viscount Cave gave in the suit under the old Indian Arbitration Act of 1899 permitting the validity of the reference itself to be challenged even when awards had been enforced by execution (the awards then were executable as such as a decree although no decree could be pronounced upon them) can now be given in or by way of an application under Section 33 of the Act of 1940. On a parity of reasoning therefore which found favour with Viscount Cave, namely, notwithstanding the provisions in Section 15, Arbitration Act of 1899 providing expressly that an award shall be enforceable as if a decree of the Court unless the Court remitted it for reconsideration or set its aside, a suit to declare the appointment of an Arbitrator invalid and for declaring the award to be void was competent, it must be held and I hold that in spite of Section 17 of the present Arbitration Act, 1940, specifying the three events which when present compel the Court to pass a decree on the award, an application is nevertheless competent under the express provisions of Section 33 of the Act, 1940 to challenge

the validity of the arbitration agreement itself even after decree has been passed under Section 17 of the Act and even at the stage of its execution provided of course such an applicant has not prior thereto disabled himself by estoppel or waiver or by conduct showing that he had opportunity to contest the award on the ground of invalid reference but did not avail of it. It is all the more so because under the old Arbitration Act of 1899 there was no such express, clear and positive provision enabling a party to set aside an arbitration agreement which today is contained in Section 32, Arbitration Act of 1940.

95. This analysis disposes of mainly the old law and the other decisions which continue to haunt the present precincts of the new Arbitration Act of 1940. As the analysis shows, they haunt not because of the strength of their inner vitality but on the invitation of the mental propensities of Judicial nature imprisoned in old equipment.

96. Before I conclude, reference to a few more cases is necessary to make the analysis of precedents complete For the Full Bench reference. In - '*Bengal Jute Mills v. Jewraj Heeralal*[23]*',* Gentle, J. decided in 1942 that when an arbitrator gave an award in which he included matters not submitted to him such an award was void in toto. The learned Judge also held that an application to set aside the award on that ground was competent. That is in favor of the view that I have taken.

[23] AIR 1943 Cal 13

Later in the year 1944 in '*Nanibala Saha v. Ramgopal Saha*[24]*',* a Division Bench of this Court consisting of Mitter and McSharpe, JJ., held that an award requiring registration under the Indian Arbitration Act, but not registered thereunder could not be used in evidence in an application for filing it in Court with a view to get a decree therein. It was held there that the Court should dismiss such an application on the ground that there was no "legal evidence" to show what the award was, such an award being unregistered. But the Court proceeded to say in that case that the award could not be set aside nor the arbitration superseded nor could the award be remitted under Section 16, Arbitration Act, 1940 because non-registration was a defect de hors the award and such objection to the legality of the award on the ground of its non-registration was one not appearing upon "the face of the award". No question of registration of an award arises here on this Full Bench reference before us, and therefore I do not wish to say what the effect of an unregistered award is and I do not make any observation on the point whether an unregistered award could not be set aside. That doctrine may later have to be more critically examined in the light of many other considerations under the Arbitration Act, 1940, where the validity of an award can be challenged and the distinction between internal and external defect may not be as safe and dependable a test as suggested in the decision. I have already drawn attention to the observation of Sir John Beaumont in 'Chabhalal's case, decided by the Privy Council that an award which was a nullity could be set aside by "appropriate proceeding". In the same year 1944 the Privy Council gave another decision in - '*Shree Meenakshi Mills v. Patel Brothers*[25]*',* There Lord Justice Du Parcq, discussing Section 16, Arbitration Act, 1940 came to the conclusion that there was no power in the Court to remit an award under Section 16 except in the three cases specified there and that the Court had no power under that section to remit the award when the award was nullity. The learned Ford Justice held there that there was no need for such power since there was nothing to remit but was careful to observe :

> "since it necessarily follows from the fact that the decision is annulled that the parties are entitled to a new and effective hearing and determination."

This observation appears at page 78 of that report. While no doubt the Court's power to remit is wholly confined to Section 16, Arbitration Act, 1940, it is expressly made clear by the judgment of Du Parcq, L.J. that the decision is annulled and the parties are entitled to new and effective hearing and determination. Such new and effective determination can only be had now under Section 33, Arbitration Act, 1940.

97. In the pursuit of precedents what remains now to notice is a recent decision of the Appeal Bench of the Bombay High Court in - AIR 1954 Bombay 293. Chagla, C.J. was there considering an application to set aside an award on the ground that it was a nullity and not valid and binding on the applicant. Chagla, C.J. observed at pp. 294-295 :

> "In our opinion it is clear that whereas S. SO deals with the grounds on which an award can be set aside, Section 30 is the procedural section which lays down the procedure to be followed in making an application either For the purpose of setting aside, an award, or For the purpose of setting aside an arbitration agreement".

[24] AIR 1945 Cal 19

[25] AIR 1944 PC 76

With that part of the observation of the learned' Chief Justice of the Bombay High Court I respectfully agree with this reservation that where Section 33 speaks of "existence, validity or effect" it covers substance as much as procedure. The learned Chief Justice of the Bombay High Court also distinguished the Privy Council decision, in the case of - '*Chhabbalal v. Kalilal*, and I respectfully agree with his Lordship that the Privy Council decision can be so distinguished. I, shall now state the point on which I find myself unable to agree with the views of the learned; Chief Justice of the Bombay High Court. At page 296, the learned Chief Justice of the Bombay High Court observes :

> "In our opinion, For the reasons already stated, the only application contemplated by the Arbitration Act is an application under Section 33 and whether the award is challenged on the grounds mentioned in Section 30 or on the grounds mentioned in Section 33, the application has got to be made under Section 33 it has to be decided under Section 33 and the award has got to be set aside, never mind how the challenge is made to the award, and once the application has been made to set aside an award under Section 33, Section 17 comes into operation and the Court is bound to pass a judgment in terms of the award if that application to set aside the award is refused or if "that application to set aside the award is not made within the time mentioned in Article 158, Limitation Act."

The learned Chief Justice thereupon proceeded to dissent from the view expressed by Sinha, J. in ILR (1949) 1 Cal 245, on the point that, the decision holds that even if the application to set aside the award was barred by limitation having been made beyond 30 days, the application in so far as it asks for a declaration that the award, was invalid as there was no valid reference, was within time.

98. My own view is that an application to set aside an award and an application to set aside an arbitration agreement are both made under Section 33,, Arbitration Act but because Section 30

limits the grounds of attack on award and because Article 158, Limitation Act limits the time for appeal to set aside an award, it does not follow that all the conditions in Section 30, Arbitration Act and Article 158, Limitation Act are' thereby attracted to an application to set aside an arbitration agreement on the ground that to set aside such agreement will involve setting aside the award which have become unassailable under Section 30, Arbitration Act and Article 158. Limitation Act unless as I have said before such an applicant has disabled himself by waiver or estoppel or conduct showing that he allowed his objection to be concluded.

I have already given my reasons why I do not consider that on an interpretation of Section 17, Arbitration Act of 1940 that section cannot be held to encroach upon, the express right conferred by Section 33 read with Section 32, Arbitration Act, 1940 to set aside an arbitration agreement, although it may mean setting aside an award based thereupon.
I do not wish to repeat any more the reasons given elsewhere in this judgment. I need only add here that the learned Chief Justice of the Bombay High Court did not consider the effect of the Privy Council decision in - '*Chamaria v. Chamaria*, on the lines that I have discussed, and where a suit to set aside the award was held to be competent even after the award had been executed as a decree.

99. In this connection notice may be taken also of the decision of Blagden, J. in the case of '*Uma Dutt Memani v. Chandrao G. Kadam*[26]*',* where the learned Judge came to the conclusion that "to hold that though a party may have debarred himself from applying to set a purported award aside, he can come to the Court and as it were point out to the Court the grounds on which the Court should set aside the award itself under the powers conferred in the earlier part of Section 17, would mean for all practical purposes repealing Article 158, Limitation Act as now amended." If, by those observations the learned Judge meant that the party "debarred" himself by waiver, estoppel or conduct as I have indicated then I agree with these observations. But if by these observations the learned Judge meant that the right to make an application to set aside an arbitration agreement on the ground that it was not a valid agreement under Section 33, Arbitration Act 1940, is lost by reason alone of the fact that the award has followed upon such invalid reference and the time to set aside the award has also expired, then I must enter my respectful dissent from that view.

100. To my mind it is unwise and unsound to construe Section 33, Arbitration Act, 1940 by construing the Limitation Act and its amended Article 158. It is obvious that the Arbitration Act provides for its own appeals, and in doing so, while it mentions setting aside of an award, it does not mention any appeal from the decision of a Court setting aside an arbitration agreement under Sections 32 and 33, Arbitration Act. It only means that the Act did not choose to give an appeal from such a decision however unreasonable it might be in the context. Equally again if the Limitation Act never thought of providing a limitation for bringing on an application for setting aside an arbitration agreement under Section 33 of the Act, that is not For the Court but For the Legislature. To torture an Independent right to set aside an arbitration agreement under Sections 32 and 33, Arbitration Act, 1940, to make it suffer a limitation provided for setting aside an award because it is assumed that no limitation is provided by the Limitation Act for an application to set aside an arbitration agreement, is to indulge in legislation by the Court.
If there is no limitation provided for such an express and independent right as the one conferred by Sections 32 and 33 to set aside an arbitration agreement, it cannot be axed out by importing the limitation for setting aside an award because an award has otherwise intervened and because

the consequence of setting aside an arbitration agreement would make the otherwise invulnerable award vulnerable.

101. I wish to guard myself being understood as deciding in the Full Bench that there is no limitation for an application to set aside an arbitration agreement. To my mind there is a clear limitation for such an application. All that I say is this that even if the result of this interpretation is that there is no such limitation that is not the ground for this Court coming to a different conclusion but for Parliament to provide for such limitation. The reason why it is unnecessary to pursue this point further, is first, it is not one of the question before this Full Bench, and secondly, Section 37, Arbitration Act, 1940 makes all provision of the Limitation Act applicable to arbitration, proceedings and therefore an application to decide the validity, effect or existence of an arbitration, agreement, should For the purpose of limitation, be now governed by the residuary Article 181, Limitation Act providing for a period of three years. The former restriction of Article 181 Limitation. Act only to applications under the Civil Procedure Code doss not any longer operate by reason of the amendment of Article 158 introducing the Arbitration, Act in the Third

[26] AIR 1947 Bom 94

Division dealing with applications under the First Schedule to the Limitation Act.

The third reason is for all practical purposes the question of limitation for application to set aside an arbitration agreement is academic. The question can only arise when any decree upon such award is executed although for all practical purposes such question would be concluded long before. The result, therefore, is that the period of setting aside an arbitration agreement can at the most be the same as the period of limitation for executing the decree on the award because at the stage of execution the objection of an invalid reference must have to be taken. This period may also be shortened and that will happen in most cases, by reason of some other event as would give such an applicant opportunity to resist the passing of the decree on the award but which he fails to take.

For in that event even on the assumption that there is no period of limitation for making an application for setting aside an arbitration agreement, the moment he makes it, he will be met with plea that he could have raised the objection of invalidity of the arbitration agreement at an earlier stage but not having done so, has waived the objection and the application would, be barred by waiver or res-judicata and principles analogous thereto.

The fear therefore of such a right to set aside an arbitration agreement being at large for an indefinite length of time is more imaginary that real, and is only academic and that might perhaps be the reason why the legislature did not think it necessary to expressly provide for a specific limitation for this right but left it to the residuary Article 181, Limitation Act.

102. For the reasons stated above, my answer to the questions raised by this Full Bench reference remain in those stated hereinbefore both on the ground of interpretation of the relevant sections of the Arbitration Act, 1940 as well as on my reading of the past decisions and the legislative history relating to the law of arbitration in India.

103. With these observations, I agree with, the answers given by My Lord the Chief Justice.

Bachawat, J.

104. This reference raises important questions with regard to the scope and interpretation of Sections 30 to 33 and 14 to 17 of the Arbitration Act, 1940.

105. The Arbitration Act, 1940, contemplates classes of arbitration viz. (1) arbitration in suits, (2) arbitration with the intervention of the Court where there is no suit pending, (3) arbitration without the intervention of Court.

106. I shall in the first instance deal with the 3rd class of arbitration viz. arbitration without the intervention of Court and shall consider what machinery is provided for by the Act For the enforcement and challenge of an arbitration agreement and award without the intervention of Court

107. It is contended by Mr. Kar who appears in support of the view expressed in the letter of reference that (1) Section 30 does not provide for any application at all and that it only indicates certain grounds of invalidity of an award for which the award may be set aside, (2) Section 33 is the only section in the Act which authorises the making of an application challenging the validity of an award, (3) all applications challenging the validity of the award must be applications to set aside the award and all such applications must be made under Section 33, (4) non-existence or invalidity of arbitration agreement are grounds for setting aside the award and are covered by the expression "otherwise invalid" in Section 30(5) an application challenging the award on the ground that the arbitration agreement does not exist or is invalid and for adjudication that the award is a nullity on the ground is an application to set aside the award, (6) such construction avoids anomalies regarding limitation and appeal, (7) Section 17 does not recognize an application for a decision that the award is nullity and the Court is bound to pass judgment according to award even if such application is pending. I am unable to accept these contentions.

108. An award may be set aside by the Court on one or more of the grounds specified in Section 30 and on no other grounds. The power of the Court to set aside an award is implicit in Section 30 and is not conferred by any other section. This special jurisdiction implies a corresponding right to make an application to set aside the award. Such application is made under Section 30 just as such application could be made under the corresponding paragraph 15 of Schedule II, Civil Procedure Code (1908).

109. An application challenging the validity of the award is not necessarily to set aside the award nor is such application necessarily made under Section 33.

110. Sections 15, 16 and 30 and each of them provide for applications challenging the validity of the award. Thus if a part of the award determines matters not referred to arbitration and is therefore invalid an application may be made to set aside or to remit or to modify the award. If such part is not separable from the remainder of the award the whole award is invalid and the Court may either remit the award for reconsideration under Section 16 or set it aside under Section 30. if the invalid part is separable from the rest of the award the Court may modify the award by striking out the invalid part under Section 15.

111. While Section 33 also empowers the Court to decide questions of validity of the award all reliefs which may be granted by the Court under Sections 15, 16 and 30 by way of setting aside, remitting and modifying the award on account of its invalidity may and must be obtained under

those sections and not under Section 33.

112. The conditions For the exercise of the powers under Sections 15, 16 and 30 are very different from those For the exercise of the powers under Section 33. To give one example the power under Section 16 can be exercised only oil the footing that there is an arbitration agreement by which the parties are bound : - *'Louis Dreyfus and Co. v. Arunachala*[27]*',* Relief under Section 33 may however be given when there is no valid arbitration agreement by which the parties are bound.

113. Sections 31, 32 and 33 of the Arbitration Act 1940 are new provisions having no counterpart in the previous legislation Section 32 bars a suit for a decision upon the existence, validity or effect of the arbitration agreement award, Section 31 determines the forum For the decision of such, questions and Section 33 provides that in lieu of suit an application shall be made by the party desiring to challenge the existence, or validity of

[27] AIR 1931 PC 289 (22)

the arbitration agreement or award or to have the effect of either determined and that the court shall decide the questions on such application. Section 33 also prescribes the procedure for such application.

114. Section 33 empowers the Court to decide all questions raised on an application challenging the existence or validity of an arbitration agreement or award and to exercise all residuary powers of relief to which the party making such challenge is entitled and which cannot be granted under Sections 15, 16 and 30. Section 32 bars a suit with regard to such questions and all reliefs which could formerly be obtained by the party in a suit and which cannot be granted under Sections 15, 16 and 30 may and must be obtained under Section 33.

115. Certain differences in the scope of Sections 30 and 33 and in the conditions of relief under the two sections may now be noted.

116. Section 30 confers on the Court power to set aside an award. No such power is conferred on the Court by Section 33.

117. The Court cannot set aside an award under Section 30 unless the award is filed in Court but the Court may decide under Section 33 that no award exists where a document which in fact is not an award is set up as award though the document has not been filed in Court. - '*Kuppuswami Chetty v. Anantharamier*[28]*',*

118. Section 33 provides for a decision as to the existence and validity of an arbitration agreement as to the existence of the award and as to the effect of either of them. Section 30 contains no such provision. A non-existent award, e.g., an award which should be but is net registered under the Indian Registration Act cannot be set aside under Section 30, 1945 Cal 19 (AIR V32) at page 22 (Y). The challenge on the existence of the award may however be determined under Section 30.

119. An award which has become void under Sub-Section (3) of Section 16 does not legally exist and the Court may so decide under Section 33 but such award cannot and need not be set aside under Section 30.

120. The Arbitration Act, 1940, recognizes a distinction between awards which are void and a nullity and consequently do not legally exist and awards which are voidable and therefore invalid are liable to be set aside.

121. Where the arbitration agreement is void 'ab initio' it may be treated as non-existent and the court may so decide and adjudicate under Section 33. - '*Ruby General Insurance Co. Ltd. v. Pearey Lal Kumar*[29]*',* at p. 122 .

122. An award on the supposition of an arbitration agreement which does not exist or is invalid, is void 'ab initio' and may similarly be treated as non-existent and the Court may so decide and adjudicate under Section 33. An application asking for such decision is not an application to set aside the award.

[28] AIR 1948 Mad 40

[29] AIR 1952 SC 119

123. An attack on the arbitration agreement is distinct from an attack on the award and is so treated by the Act. Sections 30 and 33 read together show that an attack on the arbitration agreement is made under Section 33 and not under Section 30. The Court may decide under Section 30 that the award is invalid but the Court cannot under that section decide that the arbitration agreement does not exist or is invalid. Under Section 30 the Court can set aside an award but cannot set aside an arbitration agreement.

124. The existence and validity of the arbitration agreement may be challenged by an application under Section 33 even though an award on the basis of the supposed arbitration agreement has been made and even though the application under Section 33 is made after the expiry of the time prescribed by Article 158 of the Indian Limitation Act. I observe that Section 32 provides that such application may be made in the Court where the award has been or may be filed. If the Court decides that the arbitration agreement does not exist or is invalid such decision cuts at the root of the supposed award and the Court may then declare that the award does not legally exist. Where there has been such decision the supposed award cannot be enforced although no application to set aside the award has been made.

125. By Section 2(b) an award means an arbitration award. Section 30 specifies certain grounds of the invalidity of an arbitration award. It presupposes a valid arbitration agreement and contemplates cases where, there having been such agreement the propriety of the award is open to question and the award is said to be invalid on one ground or another. In the absence of such agreement the purported award is not an arbitration award and does not exist as such. The Court may decide under Section 33 that the supposed award does not exist but the Court cannot set it aside under Section 30. Thus if an appraisement or valuation award under an agreement to refer the question of valuation is set up as an arbitration award the Court cannot set it aside under Section 30 but the Court may decide under Section 33 that no arbitration award exists. The expression "otherwise invalid" in Section 30 empowers the Court to set aside an invalid arbitration award. It does not empower the Court to decide that there is no valid arbitration agreement and that consequently no arbitration award legally exists. Non-existence or invalidity of arbitration agreement are not grounds for setting aside the award under Section 30.

126. If there is no valid arbitration agreement the conditions of Section 14 cannot be complied

with and the award cannot be filed. If the award has been improperly filed the proper course is to direct that the award be taken off the file. If the award is taken off the file it cannot be set aside.

127. A party who challenges the existence or validity of the arbitration agreement can neither request the alleged arbitrator nor compel him by an application under Sections 14 and 38 to file his award in Court. Such a party cannot move to set aside the award under Section 30 but he can obtain a decision under Section 33 that there is no valid arbitration agreement and consequently there is no valid arbitration award though the supposed award has not been filed in Court. I reject the contention that such party must move to set aside the award and must wait until the award is filed in Court at the instance of the opposite party. An invalid award made under an arbitration agreement may however be filed in Court and set aside at the instance of a party to the agreement.

128. It is clear, however, that there is no genus in Section 30(c) and there is no scope For the ejusdem generis construction of the expression "otherwise invalid". Where there is a valid arbitration agreement an arbitration award may be set aside on any ground which renders the award invalid, e.g., because the award is wholly in excess of jurisdiction or is made out of time or is made after the issue of an order superseding the arbitration, See - '1925 PC 293 (AIR V12) (E)'. The party who challenges the award on any such ground must move to set aside or remit the award within the time prescribed. If he omits to take that course he must be taken to have waived the objection. The award was liable to be set aside or remitted on that ground but it was not a nullity. Such award could be treated as a nullity under a system of law which did not provide For the setting aside and remission of the award on such grounds within a limited time but it can no longer be so treated, see - '*Shib Kristo Dawn and Co. v. Satish Chandra Dutt*[30]',

129. It is contended that where the award is in excess of jurisdiction either wholly or in part there is no arbitration agreement qua the excess and that if such award can be set aside under Section 30 there is no reason why an award on the supposition of a non-existent or invalid arbitration agreement cannot be set aside under that section. The plain answer to the contention is that Section 30 does not provide For the setting aside of an, award made on the supposition of a non-existent or invalid arbitration agreement. A more sophisticated answer is that there is a gulf of difference between pretended arbitration and award and an award wholly in excess of the jurisdiction of the arbitrators, it is interesting to note that though writs of prohibition and certiorari may issue to a Court to correct excess or absence of jurisdiction they may not issue to a pretended court. Halsbury 2nd Edition Vol. IX, Pp. 820, 830, 879.

130. It is then contended that this conclusion leads to the anomaly that while the Legislature specially provides for a period of limitation, for an application under Section 30 and for appeal from an order made on such application, the Legislature has not at the same time provided for a period of limitation for an application under Section 33 nor for an appeal from an order made on such application. The legislative Act cannot however be questioned on the ground that it leads to anomaly. The anomaly if any is not prevented by treating an application for adjudication that the award is a nullity and does not legally exist as an application to set aside the award. It is clear that an application under Section 33 for a decision that the arbitration agreement does not exist or is invalid is not governed by Article 158 of the Limitation Act even if such application is moved after the award has been made and that no appeal lies under Section 39 of the Arbitration Act 1940 from an order made on such application. No appeal also lies under Section 39 from an order on an application under Section 16 to remit the award for reconsideration. A decision that

the arbitration agreement does not exist or is invalid and a decision that the award is so invalid that it should be remitted to the arbitration for reconsideration are no less important than a decision that the award is a nullity and does not exist. I am wholly unable to appreciate how the legislative anomaly, if any, is prevented by the suggested construction.

131. While Section 32 bars a suit for a decision upon the existence, effect or validity of an arbitration agreement or award on any ground whatsoever, Section 33 does not give a corresponding right or making an application to the party who seeks to establish the

[30]39 Cal 822

existence or validity of the arbitration agreement or award. It was not necessary to confer such right by Section 33. Other sections of the Act such as Sections 20 and 34 permit proceedings by the party who seeks to establish the existence and validity of arbitration agreement. Similarly Sections 14 and 17 enable proceedings at the instance of a party who seeks to establish the existence and validity of the award. A plea in defense by the respondent to these proceedings challenging the existence or validity of the arbitration agreement or award is, not barred by Section 33. That section enables a substantive application for obtaining a decision. It does not bar a defence '*Bhagwandas v. Atmasing', AIR 1945 Bombay 494* ; - '*Panchanan Pal v. Nani Gopal Niyogi*[31]*',*

132. Sections 14 and 17 provide for summary proceedings For the enforcement of an award. It has been held in - '*Kumbha Mawji v. Dominion of India*[32]*',* that proceedings For the filing of an award under Section 14 is an application in the reference within the meaning of Section 31(4). The issue of a notice by the Court under Section 14 starts a list For the summary enforcement of an award under Section 17 in lieu of a suit. In a suit on an award the award holder is bound to allege and prove both an arbitration agreement and an award. (See form No. 10 Appendix A. Code of Civil Procedure 1908). - '*Ferrer v. Oven*[33]*',* - '*Bremer Qeltransport GMBH v. Drewry*[34]*',* Just as in a suit so also in the summary proceedings for enforcement of the award, the party who seeks to enforce the award in substance alleges that there is an arbitration agreement and an award. Having regard to Article 158 of the Indian Limitation Act in the absence of an application to set aside or remit the award for reconsideration within the time prescribed the other party will be deemed to have waived all objections to the award on any ground of invalidity for which the award would either be set aside or remitted and will not be permitted to set up those grounds of invalidity In defense to the summary proceedings. Article 158 however does not apply to an application under Section 33 for determination of the existence and validity of the arbitration agreement and the existence of the award and such application may be made even after the time prescribed by that article. Article 158 does not also bar a defense to the summary proceedings on the ground that there is no existing or valid arbitration agreement or on the ground that the award does not legally exist, e.g., because (a) there is no existing or valid arbitration agreement or (b) the award should have been but is not registered or (c) the award has become void under Sub-Section (3) of Section 16. Clearly, therefore, the respondent to the summary proceedings may resist the passing of a judgment on the award on the ground that there is no existing or valid arbitration agreement or that no award exists although he has not moved to set aside or remit the award within the time prescribed by Article 158; these objections may be taken by way of defense in the summary proceedings and if taken must be decided by the Court before passing judgment. A substantive application raising these objections need not be made but if made must be decided before the Court can pass judgment on the, award. If it is established to the satisfaction of the Court that there is no valid or existing arbitration agreement the Court cannot

pass judgment on award. No Court will pass judgment on an award on the supposition of an arbitration agreement which has been declared to be nonexistent or invalid on an application under Section 33 whether such declaration is obtained before or after the making of the award.

133. An award can be filed in Court under Section 14(a) by an arbitrator (b) at the request

[31] ILR (1951) 1 Cal 438
[32] AIR 1953 SC 313
[33](1827) 7 B and C 427
[34](1933) 1 KBJ 753

of a party to an arbitration agreement or if directed by the Court on the application of such party (c) in a Court having a jurisdiction in the matter to which the reference relates having regard to Section 31 read with Section 2(c). ' AIR 1953 SC 313 '. These conditions cannot be complied with if there is no valid arbitration agreement. Where the conditions of Section 14 have not been complied with the award cannot be filed nor can a judgment be passed on it and if it has been improperly filed it must be taken of the file.

134. The contention that under Section 17 the Court is bound to pass judgment according tot award after the time for making an application, to set aside the award has expired or such application having been made after refusing it without disposing of any other pending application and without considering any objections filed by the respondent is based upon a total misconception of that section and the other relevant provisions of the Act. The opening words of Section 17 indicate that the Court has to consider and dispose of an application under Section 16 to remit the award or any matter referred to arbitration for reconsideration. Even in the absence of an, application to set aside or remit the award within the time prescribed the Court must in the summary proceedings For the enforcement of the award consider and dispose of all objections to the award which cannot be taken to have been waived by the omission to make such application. Section 33 read with Section 26 applies to all arbitrations and the right to challenge the arbitration agreement under Section 33 before the passing of a judgment op. the award is not taken away by Section 17. Before passing judgment under Section 17 the Court must consider and decide a pending application under Section 33 raising objections regarding the existence and validity of the arbitration agreement and the existence of the award. The Court must consider and decide a pending application under Section 15 to modify the award. Before passing judgment, the court has also to consider and dispose of numerous objections even though such objections are not raised by separate applications. The court must be satisfied that the conditions of Sections 14 and 17 have been complied with and that it is competent to pass the judgment. The court can pass judgment only on an award made on a reference to arbitration to which; the Act applies. Thus the court cannot pass judgment on a valuation award. - '*McNaughten v. Rameshwar Singh*[35]', or on a submission wholly governed by a foreign law - *John Batt and Co. (London) Ltd. v. Kanoolal and Co*[36].', Equally the court cannot pass judgment on an award on a supposed arbitration without the intervention of court which is not founded on an arbitration agreement recognized by the Act. Such award is obtained otherwise than in accordance with the Act and cannot be the basis of a judgment under Section 17. If the Court illegally passes judgment and decree according to such award an appeal will lie from the decree.

135. I am therefore of the opinion that under the Arbitration Act, 1940, (a) an award on an arbitration without the intervention of Court presupposes an arbitration agreement; (b) There can be no arbitration award without the intervention of Court if the alleged arbitration agreement does not exist or is invalid, (c) Non-existence or invalidity of the alleged arbitration agreement is not a ground for setting aside an award without the intervention of court under Section 30(d). An

application may be made under Section 33 asking for a decision that the arbitration agreement does not exist or is invalid and that consequently the award is a nullity and does not exist; (e) Proceedings for summary enforcement of an award without the intervention of Court may be defended on the

[35]30 Cal 831

[36]1926 Cal 938 (AIR V13)

ground that the arbitration agreement does not exist or is invalid and that consequently the award does not legally exist even though no substantive application challenging the award has been made.

136. I find that similar conclusions were reached in numerous decisions of this Court and(in particular in - 'ILR (1945) 1 Cal 245', Order of Reference to Full Bench in - '*Dwarkadas and Co. v. Daluram Goganmull*[37]', - '*Panchanan Pal v. Nani Gopal Niyogi*[38]', These decisions largely base their conclusions upon the authority of ' AIR 1946 PC 72 '. I prefer to rest my conclusions on an examination of the different sections of the Indian Arbitration Act, 1940. I respectfully record my dissent from the contrary conclusion reached in '1954 Bom 293 (AIR V41) (M)' and other similar decisions.

137. It is interesting to observe as a matter of historical interest that non-existence or invalidity of the alleged arbitration agreement was not a ground for setting aside an award without the Intervention of Court either under paragraphs 20 and 21 of Schedule n, Civil Procedure Code 1908 or under the Indian Arbitration Act 1899. - '*Matulal Dalmia v. Ramkissendas Madan Gopa*[39],; - '*Radhakissen v. Lukhmichand*[40]', or under the English Arbitration Act, 1889. '(1934) 150 LT 495'. Formerly such award could be challenged in a suit on this ground but such suit is now barred by Section 32 of the Indian Arbitration Act, 1940.

138. I have so far dealt with arbitration and award without the intervention of Court. I will now deal with arbitration and award (a) in suits and (b) with the intervention of Court where there is no suit pending.

139. While an arbitration award without the intervention of Court presupposes an arbitration agreement, an arbitration and award in suit presupposes an order of reference to arbitration by Court under the provisions of Chapter IV of the Arbitration Act 1940 and an arbitration and award with the intervention of Court where there is no suit pending presupposes an order of reference to arbitration by court under the provisions of Chapter III of the Act.

140. It is to be noticed that Sections 14, 31, 32 and 33 of the Arbitration Act 1940 use the expression "arbitration agreement" and do not mention order of reference to arbitration. In view of Sections 20, 25 and 26 clearly Sections 14, 31, 32 and 33 apply to arbitration in suits and to arbitration with the intervention of Court where no suit is pending, and to awards in such arbitrations. If therefore the expression "arbitration agreement" in Sections 14, 31, 32 and 33 is read as "order of reference to arbitration" in connection with these two classes of arbitrations and awards our conclusions on the points under discussion with regard to these two classes of arbitrations and awards are identical with those regarding arbitration and award without the intervention of Court and For the same reasons.

141. If on the other hand the expression "arbitration agreement" in these sections cannot be so

read the only difference in our conclusion is that Section 33 does not empower the Court to decide an objection as to the existence or validity of an order of reference to

[37]1951 Cal 10 (AIR V38) [39]1920 Cal 820 (1) (AIR V7)
[38] ILR (1951) 1 Cal 438 [40] AIR 1920 Cal 150

arbitration.

In either view of the matter our conclusions must be that (a) There can be no award in these two classes of arbitration in the absence of a valid order of reference to arbitration (b) Non-existence or invalidity of an order of reference to) arbitration is not a ground for setting aside the award under Section 30. (c) If there is no valid order of reference to arbitration the purported award is a nullity and may be challenged in appropriate proceedings; e. g. by an application under Section 33 and by way of defense to the summary proceedings For the enforcement of the award under Section 17(d). An appeal lies on this ground from a judgment and decree passed under Section 17. In the case of - '1946 PC 72 (AIR V33) (C) their Lordships of the Judicial Committee came to similar conclusions with regard to arbitration and award in suit under Schedule II, Civil Procedure Code 1908.

142. I answer the questions raised as follows :

> Question 1 "The Arbitration Act, 1940, distinguishes between an application for setting aside an award and an application for a decision that the award is a nullity and consequently does not legally exist and contemplates that an application of the former kind may be made under Section 30 and an application of the latter kind under Section 33.
> Question 2 Does not arise.
> Question 3 Non-existence and invalidity of arbitration agreement and of an order of reference to arbitration are not grounds for setting aside the award under Section 30.
> Question 4- The case of ILR (1949) 1 Cal 245' was correctly decided in so far as it held or assumed that the Arbitration Act 1940 contemplates that an application under Section 33 for a decision that an award is a nullity and does not legally exist because the arbitration agreement does not exist or is invalid is distinct from an application under Section 30 to set aside the award and that nullity of an award was a proper ground for an application under Section 33 and not for an application under Section 30.

The assumption if any to the same effect in '1951 Cal 78 (AIR V38) (B)' is correct. The assumption, if any, in '1951 Cal 73 (AIR V38) (B)' that absence of jurisdiction of the arbitrator acting under a valid arbitration agreement makes the award a| nullity and is not a ground for setting it aside is not correct.

143. The Court : The answers of the Full Bench according to the view of the majority are as follows :

> Question 1 : "No".
> Question 2 : First Fart - "Yes" Second part - "Yes", except in cases where the existence of an award in fact is challenged.

Question 3 : "Yes".
Question 4 : "No".

144. The costs of the Full Bench Reference will be costs in the appeal.
Answers accordingly.