CALCUTTA HIGH COURT

Pratabmull Rameshwar

Vs.

K.C. Sethia

Appeal No. 200 of 1958

(P.B. Mukharji and N.K. Bose, JJ.)

24.12.1959

JUDGMENT

P.B. Mukharji, J.

1. This is an appeal from the judgment of G. K. Mitter, J. dismissing the plaintiffs suit for a declaration that certain jute contracts and the relative Arbitration agreements contained therein are void and unenforceable, that the awards made thereupon are void and unenforceable, that such awards be taken off the file and for perpetual injunction restraining the defendants, their servants and agents from enforcing the award or taking any steps thereunder.

2. The plaintiff appellant is the seller and the defendant respondent is the buyer of certain jutes. The plaintiff is a partnership and the defendant is a limited company. Under four different contracts, two dated 28-7-1947 and the other two dated 5-9-1947, the plaintiff agreed to sell certain bales of jute to the defendant at rates and prices mentioned in such contracts; the Port of delivery was Genoa, Italy and the stipulated time for shipment under the first two contracts was from September to November, 1947 and under the last two contracts was from December, 1947 to January, 1948. The contracts were made through the exchange of usual Bought Notes.

3. The plaintiff supplied certain bales but not all under these contracts. In fact, the plaintiffs case is that the plaintiff shipped 842 bales against the said four contracts; 742 bales were shipped in May, 1948 and 100 bales in July, 1948.

4. The plaintiffs reason for non-performance of these contracts with respect to the balance of the goods is that in spite of best efforts the balance could not be supplied because of the inability of the plaintiff to receive the quotas from the Government of India and Pakistan under which the export of jute was then regulated.

5. The defendant, however, demanded delivery and thereupon disputes arose between the parties. Under the Arbitration Clause contained in those contracts, the defendant referred the dispute to the Arbitration of London Jute Association. The defendants claim before the Arbitrators failed. But then the defendant appealed to the Committee of London Jute Association and on such

appeal the Special Committee made an award on 5-5-1949 in the form of a special case allowing damages against the plaintiff-appellant for the total sum of Rs. 1,93,693-1-6p equivalent to £14,501-15s.-2d. under four separate awards covering the said contracts.

6. The parties had a long run in the Arbitration forum. The dispute was first submitted to Arbitration under the Bye Laws of the London Jute Association who decided in favour of the appellant. An appeal was taken by the present respondents under the same Bye Laws to the Appeal Committee of that Body, who reversed the decision of the Arbitrators but stated a case for the opinion of the High Court in London. The appellant lost before Lord Goddard, Lord Chief Justice of England, then before the Court of Appeal consisting of Tucker, Singleton and Jenkins, L. JJ. and finally before the House of Lords. The Court and the Court of Appeal upheld the award of the Appeal Committee and the House of Lords also dismissed the appeal with costs.

7. Lord Porter who delivered the leading judgment of the House of Lords came to the following conclusions which will be material for the purpose of a decision on this appeal:

> '(1) In terms the contract contains no limitation on the sellers obligation to supply or ship the goods; it is for them if they seek to be excused to set up and prove facts which would exonerate them. Prima facie, therefore, they are liable and the onus is on them to establish circumstances which discharge that liability. In my opinion the facts as found, so far from constituting an excuse for non-performance, rather show that an absolute liability was intended or at any rate that the prima facie obligation is not abrogated'.
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> '(2) The actual system of controlling the working of the license or quota system is by no means clear from the award. The appellants may have been obliged to obtain first a quota and then a license to ship to a particular country or may have had only to obtain a quota for a particular country but whichever of these two courses the system adopted required, they alone had the means of ascertaining what they had obtained or were likely to obtain and knew that the goods could not be shipped under a C. I. F. contract until they had received permission to put them on board. On the other hand, for all the buyers knew, the sellers might have had a quota sufficient to fulfill the whole of their contracts; moreover the sellers knew, as the buyers did not, that the basic year which they had chosen was one in which they had no Italian contracts'.
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> '(3) The steps to be taken were for the sellers to determine and it is not clear that steps were taken or indeed how far they took all reasonable measures to fulfil their obligations. There is no finding as to the reason why no application to ship from Chittagong was made until so late a period and the onus being on the sellers to establish a defense, one is not entitled to infer that they had a valid excuse for their failure to obtain a license to ship'.
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> '(4) A further difficulty in finding or implying in a contract such as this a term 'that the seller should be excused if he did not obtain a sufficient quota is to know what is meant by the word sufficient. Not only must it depend upon the choice of the basic year and upon the exertions made to carry out the bargain but it must also depend upon what other contracts the sellers had to fulfil to Italian buyers and possibly to foreign buyers elsewhere. On these facts your Lordships are ignorant and it is for the sellers to establish.

> This only is known, that out of the quotas obtained in 1948 for shipment to Italy a considerable portion, though not quite a half, was shipped to other buyers. The quantity to be sold in any country was a matter which was under the sellers control and theirs only and I cannot think that the buyers rights were subject to diminution by reason of sales made by the sellers to other merchants'.
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> '(5) In the present instance no question of supervening illegality arises. Substantially the sellers position at the end of the extended time was the same as it was all along; from first to last he could not ship more than his quota permitted or without a licence; the case therefore differs from those in which some supervening illegality has come into existence as it did in *Ralli Brothers v. Compania Naviera Sota M Aznar*[1], and similar cases. Nor is there any question as to whose duty it was to obtain the licence. In a C. I. F. contract that duty devolves upon the seller. He must put the goods on board the ship and cannot do so without a licence'.
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> '(6) Some difficulty for the respondents, it is true, is to be found in Anglo-Russian Merchant Traders and Batt (John) and Co., (1917) 2 KB 679 but whatever view may be taken of that case it is, I think, distinguishable on the facts. No question of quota was involved; license alone came into consideration. . . . . The case therefore may, as I think, be distinguished, but in any case your Lordships are not bound by it, be it right or wrong'.

8. Lord Asquith who was another member of the House of Lords deciding this case, added one further ground and made the following observations:

> 'Clause 18 (the so-called Paramount Clause) provides that in certain specified events the contract shall be null and void and the parties shall be excused from further performance. The significance of the clause is, in my view, not that any of the excusing events have in fact occurred, but that the parties were clearly directing their minds to the question what events should excuse them, but did not include among those events inability to obtain an adequate quota or a license'. The reason for setting out these seven conclusions of the House of Lords is to show that they decide some of the very points urged before us in this appeal.

9. At the conclusion of all these proceedings when the respondent made an application in this Court under Section 5 of the Arbitration (Protocol and Convention) Act, 1937 to file the foreign award, the appellant instituted this suit on the Original Side of this Court on 28-11-1952 for the reliefs mentioned above. The plaint covers again many of the grounds decided by the English Courts.

10. Paragraph 4 of the plaint pleads an express oral agreement instead of an implied term, between the parties that (1) that the supply will be solely dependent on obtaining license or quota from the Government of India to export jute to Itlay; (2) that the aforesaid condition will be the condition precedent to the said contract; and (3) that the plaintiff would make the best effort to obtain the said license or quota for Itlay covering the full quantity of goods. The plaintiff has lost before the learned trial Judge here on the ground that there was no such agreement and there was

no such condition precedent.

11. The plaintiff-appellant claims the present right of suit against almost on the same
[1](1920) 2 KB 287
grounds pleading that this foreign award is not enforceable under Section 7 of the Arbitration (Protocol and Convention) Act, 1937 the only material difference being that what was previously said to be an implied term is now alleged to be an express oral agreement. This pleading on the point is set out in paragraph 17 of the plaint. The plaintiff states that the English awards are invalid, void and of no effect on the following five main grounds.

> (1) The awards have been made by a Tribunal, viz., the London Jute Association and/or its Committee, not provided for by the said agreements and are without jurisdiction.
> (2) The said awards failed to deal with all the questions referred and did not deal with the question of the said oral agreement which was a condition precedent to the said contracts.
> (3) The arbitrators in respect of the said awards were guilty of misconduct in that they failed to take any evidence regarding the existence of the said oral agreements which as a question was put in issue before them and which being a question of fact could not be decided without oral evidence, although one Mr. Amal Lall Bose who put through the said contracts on behalf of the plaintiff offered to give such evidence on behalf of the plaintiff.
> (4) The said awards incorporated decisions as to the existence of an implied term and as such deals with matters not referred to the said arbitrators and/ or not within the scope of the arbitration agreement.
> (5) The said awards are based on agreements which are illegal and/or contrary to public policy of India and the enforcement thereof would be a breach of such policy and/or the law of India.

12. Two main points arise in this appeal for determination. One relates to the ambit and construction of the contract between the parties including the question of absence or existence of an implied or oral term that these contracts were subject to and dependent on the appellant obtaining license or quota from the Governments of India and Pakistan. The other point relates to the plaintiffs right to maintain or institute a suit to set aside a foreign award governed by the Arbitration (Protocol and Convention) Act 1937.

13. I shall first deal with the question of contract because that is a question of merit. The contracts do not expressly appear to be subject to any condition that they are subject to the appellant obtaining license or quota from the Government. The contracts in this case had an express clause 'license' and it was not stated there that they were subject to any condition of the appellant obtaining license from the Government. All the other details in these contracts were duly filled up but so important a term which would go to excuse the appellant seller from performing the contract under the clause 'license' was not expressly included and the clause was left blank. This consideration taken along with the paramount clause in clause 18 of the contract which does not include failure to obtain license or quota as a specified ground of avoiding the contract goes against the whole case of the appellant that the contracts were subject to any condition about quota or license. Secondly, this very point was agitated by the appellant in all the

arbitration proceedings in England, first before the Arbitrators, second before the Appeal Committee, third before the Lord Chief Justice, fourth before the Court of Appeal and fifth before the House of Lords although not on the ground of an express oral condition but as an implied term. In all the three Courts in England, the appellant lost on these points and all the English courts on the facts and construction came to the unanimous conclusion that the contract between the parties was absolute in its terms.

14. In the present suit and in the appeal before us a great emphasis was laid on behalf of the appellant that there was an oral agreement by which this term was introduced. It is contended that the House of Lords did not consider the point of oral agreement and proceeded only on the point where such a condition could be implied in the contracts between the parties. The outstanding fact which goes to dispose of such oral agreement is that it was never pleaded in the numerous statements of case filed by the parties before the arbitration proceedings and Courts in England. The learned trial Judge has come to the finding that the Appellants whole case of oral agreement is 'a myth' and 'an obviouslie'. The new fact on which reliance is placed in these proceedings before us is that Amar Lal Bose affirmed an affidavit in February 1949 expressly stating that the contracts were subject to quota being available and that it was expressly understood between him and Mulchand Sethia of the respondent firm that the contract in the suit was subject to such quota. No proof was furnished whether such an affidavit was in fact placed before the Arbitrators who made their award on 28-2-1949. No reason thereafter appears why, if that was so, the appellants did not take this point of oral agreement in their statements of a case and in the further proceedings before the Courts in England. On this ground alone we have no hesitation in holding that there was no such oral agreement on the facts of this case.

15. To import a condition that these contracts were subject to license or quota either by implication or by an express oral agreement is, in our opinion, impossible in the facts and circumstances of this case. That will make these contracts completely meaningless, hazardous and wholly uncertain for the buyer. It is inconceivable from the point of view of business efficacy how such a problematical contract, whose fulfillment will be left to so uncertain an event, could be entered into by the parties.

16. Apart from the difficulty of construction on the way of the 'appellants on this point, there are other difficulties on the merits also. The finding of fact by the Courts of England is that the appellants did not even make the best efforts to obtain the quota and license. In fact, the appellants in their application for quota before the Government chose to give a basic year which was significant in the sense that in that basic year the appellants did not export any jute to Italy at all. It was, therefore, inconceivable how the appellants could expect to get a quota for export to Italy when they deliberately chose a basic year in their application to the Government showing no export to Italy at all. There is also a further finding of fact by the Courts of England including the House of Lords to the effect that no reason has been furnished by the appellants why no application for shipment from Chittagong was made until so late as February 1948. The learned trial Judge here in this suit comes to the same finding of fact that there was no difficulty in the way of the appellants to ship jute from Calcutta under other license or quota before the issue of Notification No. 56 dated 31-1-1948 and that so far as export from Chittagong was concerned, there seemed to have been no restriction within the period of contract and that the appellants did not make any effort in that behalf until September, 1948.

17. Nothing has been said in argument before us in this appeal to challenge these findings of facts. Mr. Roy has however made two submissions. One is that immediately on partition of India the laws operating in India and Pakistan were continued and therefore the legal situation for export from Chittagong in Pakistan was not different from that in India. His other submission follows from the first in saying that the prevailing customs Notification prevented any such export. To consider these submissions it is necessary to refer in the first place to two notifications of the Calcutta Customs House dated 10-7-1947 and one dated 3-2-1947. Mr. Roy for the Appellants has argued specially on the strength of the July notification that the conditions therein governing the grant of export license include (1) that the license is valid for export by the named consignor to the particular ultimate consignee and that the transfer of the license with or without consideration will render it null and void and (2) that the license is valid for export from the port mentioned therein. The condition of named consignor and consignee and the non-transferability of the license does not in our view vitiate the finding of the learned trial Judge that 'there was no difficulty in the way of the plaintiff shipping jute from Calcutta under other license or quota before the issue of the notification dated 30-1-1948'. The notification specifying the condition of non-transferability is a notification of July 1947 and is not of January 1948. Besides, the quota-holder with a license who has not used his quota or license could certainly agree to become the agent of the seller in this case to carry his goods under the quota-holders quota or licence. That would not be transfer of the license. There is no legal difficulty in such arrangement although such an arrangement may not always be commercially convenient. The notification of the 30th January 1948 also does not prevent such arrangement. Condition (4) of such notification lays down that all applications for export license must be accompanied by documentary evidence of *bona fide* firm contracts having been concluded with the overseas buyer for supply of raw jute and condition (5) lays down that the intending shippers of raw jute should register their requirements with full particulars of (a) date of sale, (b) shipment month and (c) buyers name. The arrangement that the learned trial Judge speaks of does not violate these conditions.

18. This disposes of the merits of the case.

19. It will be necessary now to deal with the procedural argument pleaded in paragraph 17 of the plaint. The first objection of the appellant is that the award has been made by a tribunal not provided by the agreement for arbitration. The contracts in suit contain the clause: 'Arbitration - London or Private. The document here on record shows first that the appellant plaintiff wanted to refer all their disputes to arbitration of the London Jute Association in preference to private arbitration tribunal and the defendant thereupon referred the matter to the London Jute Association for arbitration. Objection, therefore, is no longer open to the appellant that this tribunal had no jurisdiction. Secondly the appellant submitted to their jurisdiction. The statements and counter-statements of cases before them show such submission. They constitute a fresh arbitration agreement in any event. The appellants own statement in paragraph 2 of their 'case for the appellant' before the Court of Appeal in England made the following admission:

> 'Each of the contracts was made on the terms and conditions of the London Jute Association contracts, a copy of which will be found in the pocket'. We, therefore, overrule the objection taken in paragraph 17(i) of the plaint.

20. The second objection of the appellant is that the awards failed to deal with the questions referred and did not deal with the question of the said oral agreement which is a condition

precedent to the said contract. We fail to see the merits of this objection. The questions dealt with by the awards covered the whole dispute of the parties. They decided that there was no implied term or any condition precedent that the contracts were subject to export quota or license. The question of oral agreement was not pleaded before the arbitrators or before the Courts in England. Therefore, there was or could be no failure in the awards to deal with the questions referred. We, therefore, overrule the objection of the appellant in paragraph 17(ii) of the plaint.

21. The third objection of the appellant is that the arbitrators were guilty of misconduct because they failed to take evidence regarding the existence of the said oral agreement. The answer to this objection is two-fold. The first answer is that no case of oral agreement was ever made as a fact before the arbitrators. Therefore, there was no failure to take evidence on any question raised before the Arbitrators. The second answer is that the failure to take evidence, even if any, is at best legal misconduct and such legal misconduct of the arbitrators cannot be taken as a ground in a suit to challenge the award. In the case of *L. Oppenheim and Co. v. Mahomed Haneef*[2], the Judicial Committee of the Privy Council holds that in a suit in India upon an award made upon a submission to arbitration in England, irregularity or misconduct in arriving at the award is not a defence; the award can be set aside on those grounds only on motion under the (English) Arbitration Act. See the observation of Viscount Cave at pp. 178-179 of that report (Ind App). We therefore also overrule the third objection.

22. The fourth objection of the appellant is that the awards incorporated decisions as to the existence of an implied term and, therefore, deal with matters not referred to the arbitrators and/or not within the scope of the arbitration agreement. The appellant firm invited the arbitrators to decide on the implied term because it was their case at that stage that there was an implied term that the contracts were subject to the condition of quota or license and they are now contending that because the arbitrators decided against their implied term, therefore they had decided on something which was beyond the agreement. The appellant cannot blow hot and cold at the same time. The appellants own statement of case before the arbitrators and the respondents statements in any event constitute a clear submission on this point to the arbitrators and they themselves therefore constitute the arbitration agreement on this point. We, therefore, overrule this objection also.

23. The learned Standing Counsel, on behalf of the respondent, has argued that this main contention of the appellant that the agreement and the awards are against the public policy of India is misconceived. He submits that the words of Section 7(i) of the Arbitration (Protocol and Convention) Act, 1937, are against this contention. He argued that the expression, 'enforcement thereof', in that section means execution of these awards. It is said that the awards in this case only direct the appellant to pay a certain sum of money as damages. As such, on the face of it, it cannot be said that the awards are against any public policy. The difficulty of accepting this argument is the narrow meaning it attributes to the word, 'enforcement'. Enforcement is not merely the technical part of execution. Enforcement includes the whole process of getting an award as well as its execution. We are, therefore, not prepared to limit the word, 'enforcement', in Section 7(i) of the Act to

[2]49 Ind App 174

the mere technical part of its execution.

24. The last objection of the appellant on this ground is that the awards are based on an

agreement which is illegal and/or contrary to the public policy of India and the enforcement thereof would be a breach of such policy or the law of India. Mr. Roy on behalf of the appellant submits that the arbitration agreement and the awards based thereon are illegal and void on the ground of being against such policy of India, because to perform such agreement and awards would mean that the seller was liable to ship the goods without obtaining a quota or license and that would mean that the seller was required to violate the law of India. This argument begs the question. Neither the arbitration agreement in this case nor the awards based thereupon require either expressly or impliedly, that the seller must violate the law of India and ship the goods without quota or licence. The arbitration agreement only stipulates that the disputes regarding the contracts were to be decided by arbitration. Thereafter, the awards decided that the contracts in this suit were absolute in their terms and they did not contain any term that these contracts were subject to quota or license. It cannot be said, therefore, that the awards themselves require the seller to do anything which was against the law of India. If the seller had not protected himself by providing a suitable condition in the contract then the fault is entirely of the seller. They have only to thank themselves for the situation. Therefore, neither the agreement nor the awards as such are against the public policy of India. They would have been so if the contracts did contain a term, express or implied, for which the appellant had contended and lost and if the appellant had successfully proved that they did their best. Even on the facts which we have already analyzed, it has been found that in spite of restrictions the appellant could have arranged for shipment and, in fact, they were also guilty in their very application for quota and license for choosing a basic year for which they had exported no jute to Italy. We hold upon the facts and construction of the contracts in this suit and the awards that neither the contracts nor the awards are against any public policy or law of India.

25. On the merits of this question whether contracts of this description can import a term, there are a number of decisions on the subject. It would be unnecessary to refer to all these decisions. It will serve our purpose to refer to one or two of the most recent cases for illustration. In the case of *Peter Cassidy Seed Co. Ltd. v. Osuustukkuk-Auppa, reported in*[3] the condition of delivery was stated to be 'prompt, as soon as export license granted.' It was held there that on the construction of the contract, there was to be implied into the clause an absolute warranty by the sellers that they would obtain an export license and not merely a warranty of diligence to do so. The case held that as the sellers had failed to carry out that obligation, they were liable in damages to the buyers. This case is very much against the contention of the appellant. Although in that case there was an express clause relating to export license which is absent in the present appeal before us, even then it was held that the sellers had warranted that they would obtain an export license and would use all diligence to do so. Neither of these tests is satisfied in the appeal before us. Indeed, in that case, the sellers application for export license was made with reasonable diligence but was refused by the Finish authorities so that they were unable to ship and deliver the contracted goods. Here in the present appeal before us it has been found as a fact both by the English courts and the trial court here that the appellant did not exercise that diligence.

[3](1957) 1 WLR 273

26. Again, Denning L.J. in *Brauer and Co. (Great Britain) Ltd. v. James Clark Ltd*[4]*.,* said:

> 'The question for decision depends on the true construction of the words: This contract is subject to any Brazilian export license. These words serve a most useful purpose. The parties to the contract knew that the goods could not lawfully be exported from Brazil

without an export license. If this clause had not been inserted, the buyers might have contended that the sellers undertook absolutely to obtain a license and ship the goods and that it was no excuse for the sellers to say that they could not get a license.'

This case is also appropriate on the points before us and is against the entire contention of the appellants who are the sellers.

27. For these reasons, we hold that all the procedural objections of the appellant pleaded in paragraph 17 of the plaint are untenable and we overrule them.

28. The major argument on behalf of the respondent before us has been that the entire suit is misconceived. In fact, the learned standing counsel contends that no suit lies on a foreign award governed by the Arbitration (Protocol and Convention) Act. This argument is developed on a number of grounds.

29. It is first said that Section 9 of the Civil Procedure Code does not recognize such a suit. Section 9 is said to indicate that the courts shall have jurisdiction to try all suits of a civil nature. The question then is whether this is a suit of a civil nature. It is contended that unless the right of suit is there, Section 9 gives no new right but only indicates that the courts would have jurisdiction to try all suits of a civil nature. That appears to be arguing in a circle. No doubt Section 9 of the Civil Procedure Code says that courts shall have jurisdiction to try suits of a civil nature. But it is nowhere defined what are suits of a civil nature. This is a suit for a declaration of civil rights in respect of certain contracts, arbitration agreements and awards. Therefore, they are questions of a civil nature. But there is an exception in Section 9 of the Civil Procedure Code. That exception is contained in the expression: 'excepting suits whose cognizance is either expressly or impliedly barred'. The question then is whether suits of this nature are expressly or impliedly barred. No law expressly bars such suits. The point therefore boils down to the question whether such suits are impliedly barred.

30. At this stage our attention was drawn to the reliefs in the plaint which we have set out elsewhere in the judgment. The first relief claims for declarations that the contracts and the agreements are void and the subsequent reliefs claim for declarations that the award are void and should be delivered up for cancellation. Taxing the cue from the form of the prayers in the plaint the learned standing counsel rightly drew our attention to Sections 39 and 42 of the Specific Relief Act. His argument is that Section 39 of the Specific Relief Act deals with cancellation of a written instrument where a contract is void.

31. Rut an award or a judgment of court is not in this sense a written instrument within the meaning of Section 39. In the first paragraph of Section 39 of the Specific Relief Act, the words 'adjudged' and 'delivered up' appear to support this argument; in other words

[4](1952) 2 All. E. R. 497

the word 'adjudged' means that where a written instrument such as a written contract has already been 'adjudged' by a court or Tribunal, Section 39 cannot be applied. It is only when a written instrument has not been adjudged by a court or tribunal but remains an unadjudged written instrument that Section 39 can be invoked. Similarly, the 'delivery' of the written instrument cannot be made to include delivery of an award or judgment of court to be 'cancelled. There is no

question of delivery or cancellation in such a case, because the judgments or awards on which judgments are pronounced are public records and the parties can have them by making the proper application to court for their copies and which can be set aside according to the law or procedure applicable and not delivered for cancellation as contemplated in Section 39 of the Specific Relief Act. We are inclined to think that Section 39 of the Specific Relief Act cannot be applied to the cases of judgments of a court or an award of a Tribunal although they may come within the general expression 'written instrument'. We consider that the expression written instrument in Section 39 mentions an instrument which has not already been adjudged by any formal court or tribunal.

32. On Section 42 of the Specific Relief Act dealing with declaratory decrees in this country, the argument also deserves consideration. It is said that the right of suit is confined to a person who is entitled to a 'legal character' or 'any right as to property'. When therefore persons claiming title to any 'legal character' or 'right to property' have already sought the assistance of a court or a tribunal and obtained its judgment, then their legal character or right stands pronounced in such judgment which binds them and they cannot any longer be called thereafter persons, merely entitled or claiming title to any 'legal character or 'any right as to property'. It is said that when a Tribunal or a court by its award or judgment has already declared the rights of a party there can be no further question of a suit being filed by a person claiming a legal character or title within the meaning of Section 42 of the Specific Relief Act. Once an award or judgment is given, further question of title or character does not arise and what remains is only a matter of enforcement or execution of such legal character or right conferred by such award or judgment.

33. Reliance at this stage is placed upon the famous observations of Sir Lawrence Jenkins, C. J. in *Deokali Koer v. Kedar Nath*[5], at p. 709, where it was said:

> 'This section does not sanction every form of declaration, but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property; it is the disregard of this that accounts for the multiform and at times, eccentric declarations which find a place in Indian Plaints'.

34. In support of this proposition the decision of the Privy Council in *Sheoparsan Singh v. Ramnandan Prasacl Narayan Singh*[6], is cited. In that case it is held that after probate of a will has been granted, a suit for a declaration that the plaintiffs are the next reversioners to the estate of the testator and as such are entitled to apply to the court having probate jurisdiction for revocation is not within Section 42 of the Specific Relief Act and cannot be maintained. At p. 97 of the Privy Council Report, (Ind App) the same learned Judge, Sir Lawrence Jenkins, then of the Privy Council observed as follows in deciding that

[5] ILR 39 Cal 704
[6] 43 Ind App 91

case:

> 'A plaintiff coming under this Section 42 of the Specific Relief Act must therefore be entitled to a legal character or to right as to property. Can these plaintiffs predicate this of themselves? Clearly not... It is not suggested that in this litigation the testamentary jurisdiction is or can be invoked and yet there can be no doubt that this suit is an attempt

to evade or annul the adjudication in the testamentary suit and nothing more'.

'This use of a declaratory suit illustrates forcibly the warning in *Sree Narain Mitter v. Sm. Kishen Soondery Dassee*[7], at p. 162, where it was said: 'There is so much danger in India than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation '.

35. The Judicial Committee of the Privy Council in that case dismissed the suit on the ground that it was misconceived and incompetent.

36. The only difficulty in the way of the respondent on this branch of the argument is another decision of the Privy Council, in *E. D. Sassoon and Co. v. Ram Dutt Ramkisen Das*[8], This was a case of contract for sale of jute and the Privy Council came to the conclusion that a suit could be maintained on the ground that the award was objected to for want of jurisdiction and not for mere misconduct or irregularity. But this was not a case of a foreign award nor an award governed by the Arbitration (Protocol and Convention) Act 1937. Besides, such suit will no longer be maintainable under Section 32 of the new Arbitration Act 1940. The authority of that decision of the Privy Council therefore has disappeared except the observations of Viscount Cave in Sassoons case, 49 Ind App 366 that Section 42 of the Specific Relief Act applies. Mr. Roy for the appellant also relied on the Indian decision reported in *Firm Jai Narain Babu Lal v. Firm Narain Das Jaini Mal*[9], but that was also before the Arbitration Act, 1940 and also not concerned with foreign award or an award under the Arbitration (Protocol and Convention) Act, 1937. Viscount Cave gave no reasons but his conclusion that Section 42 of the Specific Relief Act applies and his observation can be supported by the reason that where the award is not conclusive on the 'right' or 'legal character' and is open to further challenge, a declaration for right or legal character is permissible notwithstanding the award.

37. Reverting therefore to the exception contained in Section 9 of the Civil Procedure Code, the ultimate question remains whether a suit of this description is 'expressly or impliedly barred by any law'. The new law on the subject is the elaborate provisions made in the Arbitration (Protocol and Convention) Act, 1937. If there be any implied bar against the present suit then it must be sought in that statute. It follows therefore that the provisions of the Arbitration (Protocol and Convention) Act 1937 must be investigated to determine this point.

38. An analysis of the Arbitration (Protocol and Convention) Act shows elaborate provisions in respect thereof. Section 4 of the Act provides for the effect of foreign award. Section 5 provides for the filing of the foreign award. Section 7 lays down the

[7](1873) IA Sup. Vol. 149 [9] ILR 3 Lah 296 at pp. 315-6: AIR 1922 Lah 369 at p. 378

[8]49 Ind App 366

condition for enforcement of foreign award. Section 8 deals with the evidence which the parties seeking to enforce the foreign award must produce. Section 9 of the Act deals with the savings.

39. Section 4 makes a foreign award subject to the provisions of the Act enforceable in India as if it was an award made on a matter referred to Arbitration in India. This equates and assimilates the procedure of the enforcement of a foreign award with that of an Indian award. Section 4 also makes the foreign award which is enforceable as binding for all purposes on the persons as

between whom it was made. Section 4(2) of the Act thereafter proceeds expressly to provide that a foreign award 'may accordingly be relied on by any of these persons by way of defense, set off or otherwise in any legal proceedings in India'.

40. A brief survey of the different provisions of the Arbitration (Protocol and Convention) Act 1937 leads to certain conclusions. First the Act states in the preamble that India is a State signatory to the Protocol on Arbitration Clauses set out in the First Schedule of the Act and to the Convention on the execution of Foreign Arbitral awards set out in the Second Schedule of the Act. From this it follows that under Article 1 of the Convention in the Second Schedule that such a foreign arbitral award in India 'shall be recognized as binding and shall be enforced in accordance with the Rules of the procedure of the territory where the award is relied upon'. The subsequent provisions in that convention set out more or less the provisions embodied in the Act. The second conclusion is again deducible from the preamble that these arbitrations relate to contracts which are considered as 'commercial' under the law in force in India. The third conclusion is Sections 4, 5, 6, 7 and 8 of the Act relates to the effect of a foreign award, the procedure for its filing, enforcement, condition of enforcement of a foreign award and the evidence necessary for the party seeking to enforce the foreign award.

41. These conclusions appear to indicate that the foreign award under the Arbitration Protocol and Convention Act can be used both as a weapon and as a shield. The party in whose favor the foreign award is made can take steps to enforce it or he can take it as a defense or set off. Section 4(2) expressly lays down that such a foreign award can be relied on as a defense or set off in any legal proceedings in India. From this it is not unreasonable to conclude that an action or a suit if brought by party to denounce a foreign award then the fact of the foreign award may be taken as a defense or a set off by the party relying on it.

42. The fourth conclusion follows from Section 9 of the Act which expressly provides first that 'nothing in this Act shall prejudice any rights which any person would have had of enforcing in India any award or of availing himself in India of any award if this Act had not been passed' and secondly, 'nothing in this Act shall apply to any award made on arbitration agreement governed by the law of India'. Consequently, Section 9 is a double-barreled saving. First it does not prejudice the rights which any person in India would have of enforcing 'any award' and secondly, it excludes the awards governed purely by the Indian Law.

43. On this aspect, an interesting argument has been raised to suggest that Section 32 of the Arbitration Act, 1940 bars the right of suit on the existence, effect or validity of an arbitration agreement or award. It is contended by the respondent in this case that this suit is barred by Section 32 of the Arbitration Act, 1940. The argument is that Section 32 of the Arbitration Act 1940 should be applied although this is an arbitration award governed by the Protocol Act. The logic of this argument is drawn from Section 9(a) of the Protocol Act which says that the Protocol shall not prejudice any right which a person has of 'enforcing any award'. The words 'any award' are said to include even an award under the Protocol Act. It is therefore argued that if a right of suit is granted to the appellant then it prejudices the right of the respondent to enforce the award because such a right will be delayed, embarrassed and affected if a suit is allowed to proceed. It is then said that it will mean endless litigation which will frustrate the very object of commercial arbitration whose purpose is speedy disposal of commercial differences between merchants. This argument is attractive and much as I would like to accept it, I am unable to do so

as I consider there are many legal difficulties on the way. I am inclined to think that the word 'award' in Section 32 of the Arbitration Act 1940 means an award made under that Act and not under the Arbitration Protocol and Convention Act and therefore I hold Section 32 of the Arbitration Act does not apply to awards made under the Arbitration Protocol and Convention Act 1937. All that Section 9(a) of the Protocol Act says is that that it will not 'prejudice' the award-holders right to enforce the award which under Section 4(1) of the Protocol Act shall be enforceable 'as if it were an award made on a matter referred to arbitration in India'. Therefore an award under the Protocol Act is not an award under the Arbitration Act 1940 but is for purposes of enforcement only deemed or treated as such award. That in my opinion does not attract Section 32 of the Arbitration Act which in that sense does not relate to 'enforcement' of an award. In this view of the construction of Section 9 of the Protocol Act and Section 32 of the Arbitration Act, there is no conflict and I do not consider the expression 'notwithstanding any law for the time being in force' in Section 32 of the Arbitration Act helps the Respondents contention.

44. The other argument against any right of suit to denounce the foreign award governed by the Protocol Act is based on the principle that where a remedy is provided by special statute that remedy must be followed and no other. *Esher M. R. in R. v. Essex County Court Judge*[10], at p. 707 and Wulles, J. in *Wolverhampton New Waterwords Co. v. Hawkesford*[11], at p. 356 have discussed and summarised the law on the subject which has become classic. The proposition of law as laid down by Willes J. is as follows:

> 'There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contained words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by statute which at the same time gives special and particular remedy for enforcing it. ..... The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class.

[10](1887) 18 QBD 704

[11](1859) 6 CBNS 336

45. The question then is to which class does a person claiming to maintain a suit to denounce a foreign arbitral award, governed by the Protocol and Convention, belong. By the analysis of the different provisions of the statute in the Arbitration (Protocol and Convention) Act 1937, I have endeavored to show that the right, procedure and manner of enforcing the award is provided in a number of sections stating expressly that a party wanting to enforce the award may do so by filing the award (Section 5) and thereafter the court pronouncing judgment on the award and then when such judgment is pronounced a decree shall follow and that is equating the procedure for enforcement of these awards with that of enforcing Indian Awards under Section 4(2) of the Protocol Act. But I have looked in vain for any express statutory provision in the Act to provide for the steps or the course which a party against whom the award is made can take to denounce

the award. All the relevant sections are concerned with prescribing procedure for enforcing the foreign award but there is no special remedy prescribed by this statute which expressly gives any right to a person aggrieved by such award. Therefore this case comes under the second class of Willes J.s threefold classification. It certainly may very well be argued that the party aggrieved by the award can contest and defend proceedings which the award holder will have to bring to enforce his award. Freedom or capacity to question the validity of such foreign award only as defense to proceedings brought for its enforcement cannot in my opinion be read as an implied ouster of his right to initiate and maintain an action to set aside such awards on the same grounds open to him in defense to proceedings brought against him. For one thing that will mean that the award will be at large and he will have to wait until the award holder chooses to bring proceedings to enforce it. I see no reason why he should not have a right to clear his title or right by challenging the award by bringing an independent action of course on the grounds only on which such awards are liable to be challenged under Section 7 of the Protocol Act and not on other grounds of challenge which were open to him under the law of arbitration of the country where the award was made under the Convention and Protocol of the Act. The common law recognizes a suit on foreign judgment and here in India Section 13 of the Civil Procedure Code provides for cases where a foreign judgment is not conclusive. Cheshires Private International Law, 4th Edition at page 589 states that 'a foreign arbitral award is on the same footing as a foreign judgment in the sense that an action to recover the sum awarded may be brought in England.' The express provision in Section 4(2) of the Protocol Act here permitting foreign award to be taken as a defence appears to indicate that a suit or an action on a foreign arbitral award governed by that Act is a possibility. The framers of the Protocol Act must be deemed to have known the Privy Council decision in 49 Ind App 366 at p. 373: (AIR 1922 PC 374 at p. 377) which held so before the Act.

46. I am therefore inclined to hold for these reasons that the appellant has a right to institute this suit but the awards and the judgments on the special case by the English Courts constitute a good and valid defense to such action in the facts of the present case under Section 4(2) of the Protocol Act.

47. The appeal therefore fails and must be dismissed with costs.

Bose, J.

48. This is an appeal from a judgment of G. K. Mitter, J. dismissing the appellants suit for a declaration that certain contracts and Awards based thereon, are illegal, void and unenforceable.

49. The appellant a registered partnership firm carrying on business in Calcutta entered into four contracts with the respondent, a company incorporated in England and carrying on business amongst other places at Calcutta, for sale of certain quantities of jute to the respondent and for delivery of the same in Italy. Two of the said contracts were entered into on 28th July 1947 and the other two on 5th September 1947 and the port of delivery was Genoa. The agreed time of shipment in respect of the July contracts was September/October/November 1947 and in respect of the September contracts, December 1947/January 1948. The Bought Notes which were passed in respect of the contracts contain inter alia the following words:

> 'We have this day bought from you on the terms and conditions of the London Jute Association contract the following bales of

Crop-1947-1948'.

50. Then follow several items - Mark, Quantity, Price, Freight, Shipment, Ports, Weight, Insurance Payment, Arbitration, Commission and Brokerage, Duty, License, Buyers - and particulars are given against each of these items except as against the item 'License' which is left blank. It is not necessary to set out the particulars given against the various items except that against the item 'Ports' the name 'Genoa' is mentioned and against the item 'Arbitration' - the words 'London or Private' appear.

51. At the time the contracts were entered into a licensing and a quota system introduced by the Government were in force and it was not possible to export any jute to foreign countries without obtaining a quota and license for such export, the procedure of which was laid down in Notifications issued by the Government from time to time. The appellants case as laid in the plaint is that at the time the contracts were entered into it was orally agreed that the performance by the appellant of the contracts would be solely dependent on obtaining license or quota from the Government of India to export jute to Italy and if the appellant failed to obtain after best efforts any license or quota for Italy the contracts would either wholly or to the extent of the failure to obtain such quota or license, cease to be binding. The appellant experienced difficulty in obtaining quota and the time for shipment was extended by mutual consent from time to time up to October 1948. In April 1948 and May 1948 the appellant succeeded in obtaining quota of 277 tons of jute amounting to 1552 bales for export to Italy and out of this the appellant shipped 742 bales in May 1948 and 100 bales in July 1948 against the four contracts with which we are concerned. The balance quantity was shipped against contracts with other parties.

52. In respect of the unshipped balances the respondent claimed damages for breach of contract and referred the disputes to the arbitration of the London Jute Association. The respondents claim was rejected by the Arbitrators, but upon appeal being preferred, the Appeal Committee of the London Jute Association, made four Awards stated in the form of a Special Case for the aggregate amount of £14501-15-2. The Special case was disposed of by Goddard C. J. in favor of the respondent. Appeals were taken against the decision of Goddard C. J. to the Court of Appeal and before the House of Lords, but the appeals were dismissed. The respondent thereupon took steps to enforce the Awards in this Country under the Arbitration (Protocol and Convention) Act 1937. In order to counteract the step taken by the respondent, the appellant filed the suit out of which this appeal arises challenging the validity of the contracts and the Awards made on the basis of such contracts. The learned trial judge has dismissed the appellants suit and hence this appeal.

53. The main contention of the learned counsel for the appellant is that the contracts which were entered into in July 1947 and September 1947 cannot be construed or regarded as imposing an absolute obligation on the sellers to ship goods to Italy irrespective of any license being obtained, because if it were so the contracts would be in breach or contravention of the regulations prevailing at the time and would be illegal and unenforceable. It is argued that both parties knew at the time when the contracts were entered into that it would be illegal to ship the goods to Italy unless a license was obtained and so both parties must have intended that the contracts would be carried out in accordance with the laws in force in this country. Accordingly in order to give business efficacy to the transactions a term must be implied in the contracts that they are subject

to a license to export being obtained. As no license could be procured to ship the balance of the goods the sellers were released from their obligation to perform the contract. In support of this argument reliance is placed on the decision of the Court of Appeal in England in the case of (1917) 2 KB 679. In this case a contract was entered into in London on the 19th August 1915 for sale of 50 tons of aluminium to be shipped by steamer to Vladivostok during December/January next. At the date of the contract there was to the knowledge of both parties, a prohibition against the export of aluminium from the United Kingdom except on license granted by the British Government. On 7th December 1915 an order was promulgated prohibiting any sale or dealing in aluminium without a permit whether or not the sale, purchase or dealing was effected in the United Kingdom. No aluminium was shipped under the contract and the buyers claimed damages for breach of contract. The disputes having been referred to arbitration and the arbitrators having differed, the Umpire made an Award in the form of a Special Case granting damages' in favor of the buyers. Bailhache, J. in disposing of the Special Case held that the Umpire was right and the learned Judge confirmed the award. The sellers appealed. On behalf of the sellers it was contended before the Court of Appeal that a term must be implied in the contract that it was subject to a license to export being obtained, or at the highest that the sellers would use due diligence to obtain a license; and as the sellers had made all possible efforts to obtain a license and failed, they were excused from performance of the contract.

54. On behalf of the buyers it was contended, on the other hand, that in order to give business efficacy to the contract it was necessary to imply a term that the sellers undertook to obtain a license and to ship the aluminium. The contract was absolute and unqualified in its terms and the risk of doing everything to carry out the contract was on the sellers. Upon this Viscount Reading C. J. observed as follows :

> 'It is admitted by both parties that some obligation must be implied in the contract. In my opinion the implied obligation is no higher than that the sellers shall use their best endeavors to obtain a permit. That is a term which is necessary to give the contract such business efficacy as both parties must have intended, when they entered into the contract.' (page 685) ..... The buyers contend that the implied obligation is that the sellers will obtain a license to ship and that if they do not they will pay damages. That is to say that the obligation to ship is absolute. In my opinion, if it were an absolute obligation it would be contrary to the law of England which governs this case. There was at the time of making the contract and at all material times a prohibition against the export of aluminium except under a license. If a license cannot be obtained aluminium cannot be shipped and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal and an absolute obligation to ship could not be enforced. I cannot agree that in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an absolute obligation to ship whether a license was or was not obtained. A party to a contract may warrant that he will obtain a license but no such term can be implied in this case. The reasonable view of the contract in my opinion having regard to the statement in the Moorcock, (1889) 14 PD 64 at p. 68. is that the sellers sold subject to their being able to ship under a license and that they impliedly undertook to use their best endeavors to

> obtain a license. The Umpire has found that they used their best endeavors, the failure to ship being due to their inability to obtain a license and therefore there has been no breach of contract. (page 686).

55. Lord Cozens Hardy M. R. and Scrutton L. J. agreed with the view expressed by the learned Chief Justice.

56. It is to be noted that in this Anglo Russian Merchant Traders case there was no question of any quota system being linked up with the licensing system. The obtaining of the license was not dependent on any action on the part of the sellers other than that of making an application for license and it had been satisfactorily established that the sellers had made all possible efforts to obtain the license but did not succeed. In the case before us, under the regulation of shipment by quota, established shippers had to choose one particular year out of the years 1937 to 1946 as their basic year. The appellant as an established shipper chose 1946 as their basic year but in that year they had made no shipments to Italy and so in the allotment of quota that was made in their favor, they got no quota for shipment to Italy. Notwithstanding that they had no quota for Italy, they entered into contracts in July 1947 in absolute terms for shipment to Genoa. On the 9th August 1947 the plaintiff appellant wrote to the respondent that as established shippers they had not received raw jute quota for Belgium and Italy. They did not give any indication in this letter that there was no likelihood of their getting any quota for Italy in future or that they had chosen 1946 as their basic year and as a result thereof no quota for Italy had been allotted to them. After this, the appellant entered into two further contracts for shipment to Genoa on 5th September 1947 and it is only on the 30th October 1947 that they write that 'We have no quota for Italy even under the current quota system we were not allotted quota for any quantity. We are therefore not in a position to ship until quota is allotted to us. As regards contract No. 57 of 28th July 1947 for 500 bales L. J. A. Tossa 2/3 Genoa October/November shipment the position stands the same as mentioned above.' After this disclosure the respondent on 5th November 1947 by their letter of that date expressed their surprise and stated as follows :

> 'We would never have sold the goods if we had known that you did not have quota in hand and we ask you to explain as to what was the necessity of your selling if you did not have quota in hand and also how you propose to fulfil the contracts now.'

57. This letter clearly shows that the respondent had incurred obligations to their buyers by entering into contracts of resale and it is also clear that the respondent was kept in the dark about the appellant having got no allotment of quota for Italy. Subsequent correspondence that passed between the parties are controversial in character, the appellant maintaining that the respondents representative Mulchand knew everything whereas the respondent asserted the contrary. Before the trial court the appellant set up a case of an oral Agreement as pleaded in paragraph 4 of the plaint. The learned Judge has not accepted this case of the appellant and he has given his reasons. I see no ground for not agreeing with the learned Judge on this point.

58. It also appears that it was possible for the appellant to ship goods from Chittagong in fulfillment of the contracts in question as one of the terms of the contract of London Jute Association was, that the shipment could be made either from Calcutta or Chittagong. On the partition of India and Pakistan, Chittagong became part of Pakistan and the Pakistan authorities appear to have put no obstacle or restriction in respect of the free export of jute from Chittagong

to foreign countries, for sometime after the 15th August 1947 and until about the beginning of 1948. So here again the appellant was in default.

59. The further fact which distinguishes this case from the Anglo Russian Merchant Traders case, 1917-2 KB 679, is that besides the four contracts with the respondent the appellant had entered into other contracts with different parties for export of goods to Italy and out of the quota that they succeeded in getting in 1948 they had shipped a substantial quantity of goods to Italy in fulfillment of these other contracts. This is clear from paragraph 9 of the plaint and the other materials on record. So the non-fulfillment of the contracts with the respondent is not solely attributable to the appellant failing to obtain a license. It has not been established that there was difficulty in obtaining a license for export even if a particular quota was allotted for export to a particular country. The position appears to be otherwise. At the material time the granting of licenses was dependent upon the quota being allotted and once a particular quota was sanctioned the license for export of that quota would be granted almost as a matter of course. It is thus quite plain that considerations which weighed with the court of appeal in construing the contract in the Anglo Russian Merchant Traders case, 1917-2 KB 679, were different and cannot furnish a guide for construction of the four contracts which are before us now. The present case is distinguishable from the Anglo Russian Traders case, 1917-2 KB 679. The case before us is one of self-induced frustration to use the expression of Lord Sumner. See *Bank Line Ltd. v. Arthur Capel and Co*[12]*.,* at 452.

60. Moreover there is no inherent illegality in the four contracts in question. The contracts could be carried into effect after procuring a quota and a license, that is, after complying with the regulations in force. The appellant has failed to establish that they used their best endeavours to obtain the quota and the license or that they had taken proper steps in that

[12](1919) AC 435

direction. In the case of *Standard Oil Co. v. Central Dredging Co*[13]*.,* affirmed in 252 New York Court of Appeal Reports 545 the American Court held a defendant liable when he did not show due diligence in obtaining the permission of the Government which was necessary before he could carry out his contract with the plaintiff.

61. In a decision of the Madras High Court reported in *G. A. G. Kotwala and Co. v. K. R. L. Narasimham*[14], a division bench considered the case of 1917-2 KB 679 and laid down that where there is absolute prohibition as to sale, the fact that there is a legislation to that effect is sufficient to make the defence of frustration complete. But where an enactment such as the Madras Tapioca (Movement Control) Order is in force, which prohibits exports of certain article outside the district or province except on permits, the prohibition is not absolute and complete but qualified, the qualification being that a permit will be necessary before such an export could be made. In such a case it has to be examined whether the party on whom the obligation rested to apply for and obtain the permit has discharged his obligation. In my view this main contention of the appellant must fail.

62. It has been further contended on behalf of the respondent that the provisions of the Arbitration (Protocol and Convention) Act, 1937 constitute a bar to the maintainability of the

suit. It is argued that the only remedy which the appellant has is to resist the enforcement of the Foreign Award after a notice is served upon the appellant under section 5 (3) of the Act but it is not open to the appellant to attack the validity of the Award by a suit instituted, for the purpose. Section 7 (3) of the Act of 1937 makes it clear that a party against whom an Award is sought to be enforced can resist the enforcement on any ground other than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1) or the existence of the conditions mentioned in clauses (b) and (c) of sub-section (2) and the court may either refuse to enforce the Award or adjourn the hearing to enable that party to take steps to have the award annulled by the competent tribunal. So the party aggrieved by the Award can challenge the Award on any ground other than those mentioned in sections 7 (1) and 7 (2) and the court has the power to refuse the enforcement of the Award. Now if the party aggrieved can resist enforcement on any ground, I see no reason why he cannot take the initiative and attack the Award in an action filed by firm, but must leave the Award, which is injurious to his interest, outstanding until the other party chooses to take steps to enforce it.

63. It has been held by the Privy Council that an action for cancellation of an Award is maintainable under Section 39 of the Specific Relief Act (*Kirkwood v. Maung Sin*[15],. It is true that this was not a case of foreign Award. But there is no reason why the principle of the decision of the Judicial Committee should not apply to a foreign Award. In a decision of the Lahore High Court reported in ILR 6 Lah 296: AIR 1922 Lahore 369, Sir Shadi Lal, C. J. and Campbell, J., held that on general principles as well as on the authorities, a person dissatisfied with an Award made without the intervention of a court of Justice is entitled to bring an action for a declaration that the Award is not binding and for delivery up and cancellation of the Award under section 39 of the Specific Relief Act. The party aggrieved by the Award is not bound to wait till his

[13]233 NYS 279 [15]52 Ind App 265: AIR 1925 PC 216

[14] AIR 1954 Mad 119

adversary seeks to enforce the Award by the summary process prescribed by the Indian Arbitration Act and then contest it by filing such objections as are allowed by the law, for such remedy is not his sole remedy and does not take away the remedy open to him under the provisions of Section 9 of the Code of Civil Procedure .

64. In another decision of the Privy Council reported in 49 Ind App 366, it has been held that a suit for a declaration that an Award is invalid for want of jurisdiction is maintainable.

65. It is true that this Lahore case and the Privy Council cases were decided prior to the enactment of sections 32 and 33 of the Arbitration Act, 1940 and as Section 32 expressly bars a suit for a decision upon the existence effect or validity or an Arbitration agreement or award it may be contended that these earlier decisions can no longer be regarded as good law so far as Awards governed by the Arbitration Act, 1940 are concerned. But it may be pointed out that in the case of *State of Bombay v. Adamjee Hajee Dawood and Co*[16]., Harries, C. J., held that sections 32 and 33 of the Arbitration Act on their true construction do not purport to deal with suits for declarations that there never was a contract or that a contract is void. The sections must be confined to attacks on arbitration agreements and Awards and the fact that the arbitration agreement may fall with the contract does not prevent the court declaring in a properly constituted suit that there never was a contract at all or that the contract is void and of no effect. Banerjee, J., held that section 32 does not have the effect of impliedly repealing section 39 of the Specific Relief Act and so a suit which challenges the validity of a contract is not hit by section

32 even though the arbitration agreement is contained in the Contract. So this case is an authority in support of the appellants suit in so far as it seeks to challenge the four contracts in question. The further question that arises is whether section 32 bars the suit in so far as it seeks to challenge the Awards. Mr. Bubimal Roy has argued that section 32 does not apply to Foreign Awards and reference is made by the learned counsel to the decision of the Judicial Committee reported in 49 Ind App 174 , in which it has been held that in a suit in India upon an Award made upon a submission to arbitration in England irregularity or misconduct in arriving at the Award is not a defense; the award can be set aside on those grounds only on motion under the English Arbitration Act, 1889 made within the time limited by Order 64 Rule 14 of the Rules of the Supreme Court in England. It is pointed out by the learned counsel that if a foreign award is included in section 32 the concluding portion of the section which provides that nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act, will come into conflict with the law as laid down in the Oppenheims case, 49 Ind App 174 ; a result which was not intended by the framers of section 32. It appears to me that this contention of Mr. Roy is correct. A foreign Award cannot be set aside on the ground of misconduct or irregularity upon an application made to this court under the provisions of Arbitration Act, 1940. If the latter part of section 32 cannot apply to foreign Award it will be illogical and contrary to all canons of construction to hold that the expression Award will have a different meaning in the earlier part of the section so as to include a foreign Award. A Division Bench of this court in the case of *Serajuddin and Co. v. M. Golodetz*[17], has observed that sections 32 and 33 of Arbitration Act, 1940 were not meant to apply to foreign awards or to foreign arbitration or to override the decision

[16] AIR 1951 Cal 147

[17] 63 Cal WN 717 at p. 734: AIR 1960 Cal 47 at p. 55

in Oppenheims case, 49 Ind App 174. For all these reasons I hold that the principles laid down in the Lahore case and the Privy Council cases are still applicable in the case of Foreign Awards.

66. It is true that in the present case the Award holder had already made an application for filing the Foreign Award under the provisions of the Arbitration (Protocol and Convention) Act, 1937 and the appellant could have taken all the grounds which have been taken in the suit, in the said application, for resisting the enforcement of the Award but it cannot be laid down as a universal proposition that the general right of action conferred by section 9 of the Code of Civil Procedure or by section 39 or section 42 of the Specific Relief Act is barred under all circumstances. The Award holder may not take steps to enforce the Award for quite a considerable time and the party aggrieved by the Award may not like to leave his business affairs or other affairs in a state of uncertainty with a heavy liability hanging on his head and wait till the enforcement of the Award is barred by limitation. Moreover as the court has very wide powers in dealing with a suit, it can, where it thinks fit adjourn the suit and ask the parties to have the Award annulled by the Competent Tribunal in the manner envisaged in section 7 (3) of the Act of 1937. The provisions of the Arbitration (Protocol and Convention) Act, 1937 cannot therefore be said to constitute a bar to the maintainability of the suit filed by the appellant, though the court might in the instant case have adjourned the suit and dealt with the points raised, in the application filed by the respondent.

67. The other points raised in this appeal have been dealt with by my learned brother and I do not wish to deal with them separately. I agree that this appeal should be dismissed with costs.

Appeal dismissed.