NAGPUR HIGH COURT

Chouthmal Jivrajjee Poddar

Vs

RamChandra Jivrajjee Poddar

First Appeal No. 45 of 1947. decided on 17.4.1954

(Hidayatullah, Actg. C.J. and R. Kaushalendra Rao, J.)

10.12.1954. 17.04.1954

JUDGMENT

Hidayatullah, Actg. C.J

1. This appeal is against the decree based on an award passed by the Third Additional District Judge, Nagpur in Civil Suit No.27-A of 1945. The second defendant is the appellant here.

2. One Seth Jivraj died on 12-2-1937. He was a big businessman and left extensive properties, movable and immovable. The parties are three sons and two grandsons of Jivraj. The following genealogy shows the relationship:

3. After the death of Jivraj, attempts were made by the heirs to divide the property amicably, but Deviprasad (defendant 4) did not agree to such a course. The other four claimants, namely, Ramchandra (plaintiff), Chouthmal (defendant 2) and the other defendants, Birdichand (defendant 1) and Mathuraprasad (defendant 3) entered into an agreement (Ex.P-1) to refer the dispute to arbitration. This was on 18-4-1940. By that agreement they asked the arbitrators to divide all the property left by Seth Jivraj into five shares. The arbitrators gave their award on 13-6-1944. On 13-11-1944 Ramchandra applied to the Court for a direction to the arbitrators to file the award and all documents and papers and requested the Court to pass a decree in accordance with the award.

4. Deviprasad, though not a party to the agreement was also joined as a defendant since the award gave a share to him also. The properties of Jivraj were distributed by the award and Chouthmal was directed to pay Rs. 25,048-11-0 to Ramchandra (plaintiff), Rs. 13,147-12-0 to Birdichand (defendant 1), Rs. 30,293-2-3 to Mathuraprasad (defendant 3) and Rs. 38,831-2-3 to Deviprasad (defendant 4).

5. It is not necessary to give more details of the award because they will be mentioned when the occasion therefor arises. All the defendants except Chouthmal accepted the award. Deviprasad who appeared in answer to the notice sent to him made a statement that the award of the

arbitrators was "agreeable" to him. He also prayed that a decree in terms of the award be passed. Chouthmal, on the other hand, raised many objections to the award and asked that the award be declared null and void. The objections were considered by the Additional District Judge. He disallowed them and passed a decree in terms of the award. Chouthmal appeals.

6. The objections raised to the award are numerous and range from a plea of limitation to misconduct both in law and in fact. It is not necessary to give a summary of the objections. The points for determination in this appeal, based upon the objections raised in the Court below, will appear during the course of this judgment.

7. The first contention of the appellant is that the application is barred by time. For this purpose the appellant urges that the arbitration in this case is governed by the Arbitration Act, 1940. The respondents contend that the Act does not apply. The agreement to refer the dispute to arbitration was made on 18-4-1940. The Arbitration Act came into force on 1-7-1940. The Act repealed and re-enacted Article 178, Limitation Act. Under the old article the period of limitation was six months from the date of the award. Under the new article, limitation is ninety days from the date of the service of the notice of the making of the award. By section 48 of the Act of 1940 it is provided that the provisions of the Act are not to apply to any reference pending at the commencement of the Act, but the law in force immediately before the commencement of the Act, is, notwithstanding any repeal effected by the Act, to continue to apply. The appellant contends that inasmuch as the arbitrators did not enter upon the reference fill 1-12-1940, the reference was not pending on 1-7-1940. The respondents contend that the reference was pending ever since 18-4-1940 and that in any event limitation runs from the date of service of notice of the making of the award and no notice contemplated by Section 14 (1) of the Act (if applicable) has yet been served in the manner laid down in section 42 of the Act or otherwise and the new article does not bar this application. The appellant replies that the plaintiff Ramchandra and others were present in answer to the written notice that the award was to be pronounced and after the award was read out, their signatures were obtained on the order-sheet. It is contended that this was substantial compliance with the law and sufficient to start limitation and that the notice given on 12-6-1944 is the notice of the making of the award.

8. We have first to decide whether the provisions of the Arbitration Act, 1940, were applicable to this arbitration. The proceedings, the award and the order-sheets maintained by the arbitrators show that the arbitrators took no action till 1-12-1940. That was after the Act had come into force. If it can be said that the reference was pending before the arbitrators on the date the Act came into force, then by reason of section 48 of the Act, the new article of the Limitation Act would not apply. The burden of proving that the plaint or application is within time lies upon the plaintiff or the applicant. See - '*Mohd. Akbar Khan v. Mt. Motai*'[1], (A). There are, however, occasions in which the burden though initially on the plaintiff or the applicant, shifts to the other side. As their Lordships have themselves pointed out in that case:

> "No doubt, in some cases the evidence may reach a point at which the onus of proving a suit to be out of time rests upon the defendant, and regard must always be had to the party in whose knowledge the relevant facts may appear
> to be."

9. The point involved here is twofold. If on the making of the agreement the reference can be said to be pending, then there is no need to consider anything else. For this purpose the meaning of Section 48, Arbitration Act, has to be found. This is the first point. If, however, the matter does not fall outside the present Arbitration Act, then the question would arise whether the plaintiff can be said to be out of time when no notice as required by section 14 of the Act was served upon him. This is the second point.

10. The word "reference" is defined in the Act to mean "reference to arbitration". If the amplified expression is read into the section, it reads: "The provisions of this Act shall not apply to any reference to arbitration pending.... andc." The question is whether the reference began to pend after the arbitrators began their sittings on 1-12-1940, or at any time earlier. No evidence was led in this behalf; nor was even an affidavit filed or offered to be filed. Both parties possess the necessary knowledge and the burden of proof cannot be placed with advertence to the second dictum of their Lordships quoted above. Between the 18th of April when the agreement was made and the 1st of December when the sittings commenced, it is possible that the arbitrators accepted their appointment. The words "entering upon the reference" are not mentioned in Section 48. All that is stated is that the reference to arbitration should be pending. In our judgment, a reference begins to pend the moment the agreement has been placed in the hands of the chosen arbitrators and they have signified their assent to deal with the matter.

11. It was contended that the arbitrators live at different places and it was unlikely that they ever came together before 1-12-1940 when they commenced their regular sittings. In - '*Bajranglal Laduram v. Ganesh Commercial Co*[2]*.', Harries, C.J.*, explained that the earlier opinion expressed by Cockburn, C.J., in - '*Baker v. Stephens*[3]*',* was not accepted in - '*Iossifoglu v. Coumantaros*[4]*',* The test laid down by the learned Chief Justice and concurred in by Chatterjee, J., seems to point in the same direction. There is no doubt that if the arbitrators came to know about the agreement and expressed their assent to act as arbitrators, the reference would be pending within Section 48. Our difficulty in this matter is mainly because the parties have not chosen to place the date before us for consideration. At one time we were hesitant whether or not to send this case down for specific pleadings and evidence on the point but on second reflection we felt that it would not serve any useful purpose. The second defendant, knowing the date on which the arbitrators accepted to act as such, should have informed the Court of that date. His omission to tell us the date, or even to swear an affidavit, makes his contention weak. It was for him to show that section 48 of the Act came into play in the present case. The normal presumption of law is that the procedure and limitation existing on the date of the suit or petition apply to them. See - '*Soni Ram v. Kanhaiya Lal*[5]*',* He who says that the law in existence does not apply, but the earlier law since replaced does, has the burden on him of showing why that should be so; and if any condition precedent to the non-applicability of the existing law has to be made out, it is the party relying on the old law who has to make it out. In the present case, the plaintiff has given the date of the agreement. It is prior to the present Act and as many as two and a half months had passed before the Act came into force. It is unlikely that the agreement remained unknown to the arbitrators during that period or that they had not signified their acceptance of the appointment. In our judgment, the evidence in the case reached a point where it became incumbent on the answering defendant, if he set up a plea of limitation, to point out the date. We have said above that it is difficult to rely upon the second proposition of their Lordships; but taking the matter as it stands, it is the defendant who is more to blame than the plaintiff and we have, therefore, to decide against him.

12. Even if the plaintiff may be said to be wrong and the matter is governed by the present Act and the new Article 178, the position of the answering defendant is not any different. Under Article 178 time begins to run from the date of the service of the notice of the making of the award. In the present case, there was no such notice as is contemplated by Section 14, Arbitration Act; nor was any such notice served upon the parties as required by section 42 of the Act. All that was done was to send a notice to the parties that the award would be pronounced on 13-6-1944. That was on 12-6-1944. That notice is not the notice which the law contemplates under Section 14, Arbitration Act, or Article 178, Limitation Act. This was ruled in - '*Holaram Verhomal v. Governor-General*'[6], - '*Jai Kishen v. Ram Lal Gupta*[7]', and - '*Jagdish Mahton v. Sundar Mahton*[8]', In all the three cases the party knew of the making of the award from other sources, but there was no notice served upon it as required by the two sections of the Arbitration Act. It was held that that was not enough to start limitation under Article 178. The notice contemplated by Section 14 has to be served as required by Section 42. In the present case, after the award was ready, the parties present were asked to sign the order sheet in token of their knowledge.

13. The award was undoubtedly made the same day and signed in the presence of the parties; but the law requires a notice of this fact, presumably in so many words to be communicated to the party concerned. In - '*Jagdish Mahton v. Sundar Mahton (cit. sup.)*, it was held that Section 14 has to be complied with strictly and any other compliance thereof would not make limitation run under Article 178. In our judgment, if the award was made on 13-6-1944, even though it may be in the presence of all the parties concerned, there was no notice in writing of the making and signing of the award and the signatures on the order sheets in token of presence before the arbitrators, cannot take the place of the notice contemplated by the Arbitration Act. We are thus of opinion that even if the matter fell to be governed by the new Article 178, time did not begin to run against the present plaintiff and therefore the application was not barred by time.

14. It is contended that the application itself must be regarded as premature and rejected on that ground alone. This topic is also covered by the ruling reported in - '*Jagdish Mahton v. Sundar Mahton*[9] '. We need not repeat what was stated there and the matter must be decided as was done in the Patna case. In our opinion, the application was not barred by time.

15. This brings us to the next contention which is based upon the same set of facts. The arbitrators took four years to give their award. It is contended that if the new Act applied to the arbitration proceedings, then the arbitrators had to give their award within four months and that nobody except the Court acting under Section 28, Arbitration Act, can extend the time beyond what the law has fixed. In the present case, there was no application to the Court, and there could be none inasmuch as the arbitration was made out of Court. Thus extension of the time was not available from the Court as the matter was not pending before any Court.

16. Here again, the dispute is whether the second defendant having participated in the arbitration proceedings right up to the end, can be allowed to resile from the position that the arbitrators had jurisdiction over this controversy. Rulings were cited on either side. In - '*Patto Kumari v. Upendra Nath Ghosh*[10]', and - '*Asa v. Mt. Bhuran*[11]', relied on by the respondents, the principle of estoppel was made applicable, while in - '*Kamta Prasad Nigam v. Ram Dayal*[12]', that principle was not applied. There can be no doubt that the policy of the law always was that the awards

should be given as expeditiously as possible and now under the present Act the period of four months is made an implied condition of every reference and time cannot be extended till the Court has agreed thereto. In the present case, the award took years to come and but for the fact that the new Act was not applicable, we would have considered whether the award was challengeable on this ground. As to estoppel, there is no doubt that it does play its part: See - '*Chowdhri Murtaza Hossein v. Mt. Bibi Bechunnissa*[13]',

17. We have, however, shown above that the award is governed not by the new law but by the old, because the reference was pending and Section 48 itself excludes the application of the new law to old arbitration proceedings. It may also be pointed out that the answering defendant did not himself raise a specific plea about this matter and tried to argue his case under the general plea that the award was invalid. The objection was probably waived. There is also the further fact that the appellant continued to take part in the arbitration till a day or two before the award and then too after knowing that the award was against him. The earlier ruling is more pertinent as it was given under the old law. In these circumstances, these two points about the applicability of the new law and the period of limitation applicable to the application for filing the award as well as the period within which the award had to be given must be answered against the appellant.

18. The next contention of the appellant is that the award as originally made was added to by the arbitrators after they had ceased to be arbitrators by reason of their decision already given. This matter arises in this way. The arbitrators in dividing the landed property had made certain allotments. They had mentioned the property by referring to the total acreage but not to numbers. The document was presented for registration but the Sub-Registrar returned the document on the ground that the numbers were not stated and some corrections were not initialled. The arbitrators thereafter initialled all the corrections and also noted in the margin against the items transferred the numbers of the fields. Shri Bobde contends that under Section 13, Arbitration Act, the arbitrators could only correct an accidental slip or clerical error
but could not add to the award as they had done. He relied upon Halsbury's Laws of England (Simond's Edition), page 46, para.100, - '*Ramji Ram v. Salig Ram*'[14], - '*Parshottamdas v. Kekhushru Bapuji*[15]', - '*Sutherland and Co. v. Hannevig Bros. Ltd*[16].', and - '*Pedler v. Hardy*[17]',

19. There can be no doubt that once an arbitrator has given his decision, he cannot add to it or vary it in any way. He is, thereafter, 'functus officio'. In the present case, however, what the arbitrators have done cannot be described as adding to the award. In list A of the award at pages 212-213 the details of the property were given and all that has been done is to put these details in the award in the schedules as required by the Sub-Registrar. Even in the schedules there was sufficient reference to the property allotted in the shape of the name of the village and total area.

20. We have compared the marginal notes now added, with the body of the award and we find that all that the arbitrators have done is to supply certain omissions. There is no change in the decision nor is there an iota of addition except that what was implicit in the award was made clear. The rulings cited do not cover such a case. Indeed, the omission can only be described as accidental because if the arbitrators were alive to this they would not have consciously omitted to put in the details.

21. Since the arbitrators can present a document for registration, they cannot be said to have finished their work till they have obtained registration of their award. They may be regarded as

having finished their work for deciding the dispute but not their work of getting their decision registered. In the present case, the arbitrators having presented the document for registration, were bound to supply the omissions which the Sub-Registrar pointed out. If by supplying these accidental omissions they altered or added to their decision, something could be said. But they neither added to their 'decision' nor altered it in the sense in which Shri Bobde suggests. If the argument of Shri Bobde is carried to its logical extreme, the whole award must remain inoperative and invalid even though the number of but one field was omitted. We think that the matter is covered by Section 13 of the Act if the Act applied. The argument of Shri Bobde that if the arbitrators had produced a document which could not be registered, it could not be altered to make it registrable, is not of general application. It is the duty of the arbitrators to give a proper and binding decision. They cannot change their decision even to bind the parties or to make the award full. That is the effect of the rulings cited. But if there is nothing in the merits but there is an omission in the script of an accidental nature, the arbitrators can certainly act to rectify the defect even within the powers given by Section 13 of the Act.

22. Connected with this point is whether the registration was effective. It was contended that the property which was divided included some lands in Hyderabad. The Registration Act in force in Hyderabad was shown to us and it was contended that the document also required registration in Hyderabad. Apparently the document was not registered there and it is contended that as Deviprasad who was given property in Hyderabad, cannot derive any title thereto, the award becomes ineffective and that property still remains undivided. We do not accept this argument. Deviprasad is not making any complaint of the lack of registration. It is the appellant's contention that Deviprasad derives no benefit from the award in any event. We shall deal with that point later. We, however, consider that the failure to register the document in Hyderabad does not render it invalid. The learned Judge below has ordered that the decree shall not be effective with respect to the property situated in Hyderabad because that property was outside his jurisdiction and that is all that can be said.

23. Shri Bobde also contended that the arbitrators could not make an award in respect of Hyderabad property at all, inasmuch as it was situated outside British India. He referred to - '*Premchand v. Hiralal*[18]*',* This argument is also unsound because the arbitrators are not circumscribed in their jurisdiction as a Court of law is. They have no territorial bounds and can divide property wherever situated all over the world. Whether or not a Court of law can make an effective decree in respect of property situated outside its own jurisdiction does not fall to be considered here because the only property which is situated in Hyderabad has been excluded from the decree and that is not a concern of the appellant but of Deviprasad to whom it goes but who makes no grievance and is content with what he gets. These points, therefore, have no force.

24. The next point which bears upon the award as a whole is the position of Nagarmal in this arbitration. The contention of the appellant is that Nagarmal joined in the deliberations, though he was only an umpire required to act only if difference arose between the two arbitrators. Alternatively it is contended that Nagarmal was not present at all the meetings and this invalidates the award. Lastly, it is contended that in any event the position of Nagarmal was so vague that he himself did not understand his own duties.

25. Since there was a fight on whether the pleas were sufficient to cover this argument, we shall first refer to the pleas. In his written statement, in reply to the application of Ramchandra for the

filing of the award, the appellant had stated as follows:

> "As to para.2 of the application it is admitted that there was a reference to arbitration by an agreement dated 18-4-1940 signed by the applicant and the non-applicants 1 to 3, that the non-applicants 5 and 6 were appointed as arbitrators and that the non-applicant No.7 was nominated as an umpire. It is, however, denied that there was any award acting on the said reference or that the award is legal, valid or anywise binding on this non-applicant."

Again in a subsequent paragraph it was stated as follows:

> "(ix) Disputes arose among the heirs of said Seth Jivrajji as to the administration and distribution of the estate of Seth Jivrajji, more particularly as to payment of his debts, actual divisible assets and as to proper division and on 18-4-1940 the applicant and the non-applicants 1, 2 and 3 executed an agreement of reference appointing the non-applicants 5 and 6 as arbitrators and the non-applicant 7 as umpire. The non-applicant 4 did not join in the said
> reference."

At yet another place the appellant stated as follows:

> "The agreement of reference is not valid because the same person non-applicant 7 has been appointed the arbitrator and the umpire and alternatively because the position of non-applicant 7 under the agreement is vague and uncertain. He has been described as an arbitrator in the award and has signed the alleged award as an arbitrator himself when he has been present at some meetings and absent in others."

26. Before giving the purport of the above pleas it is necessary to advert to what the applicant Ramchandra himself said in his application under Section 14 of the Arbitration Act. This is what he said:

> "That the dispute between the parties, applicant and non-applicants 1 to 3, was referred to arbitrators Nos. 5 to 7, the arbitrator non-applicant No.7 being the umpire, by an agreement of reference dated 18-4-1940. Acting on that reference, the arbitrators have given their award and the same is registered on 18-9-1944 at Wardha."

The first prayer clause appended to this application reads as follows:

> "(a) That the arbitrators and the umpire nonapplicant 7 be directed to file the award, all documents and papers in connection therewith in Court."

In his reply to the written statement filed by Chouthmal appellant, Ramchandra stated as follows:

> "It is denied that the agreement of reference is not valid. The agreement appointed the non-applicants 5 to 7 as arbitrators and non-applicant 7 was to act as an umpire if

necessary. There was no vagueness and uncertainty in the agreement. In any case, it is submitted that the point has no importance in the present case as there was no difference of opinion amongst the arbitrators and the decision is unanimous. It is denied that the non-applicant 7 has signed the award having remained absent on any important sitting of the case, when any important work was transacted. It is submitted that no important work, whatsoever, or hearing of the case as such was done on the date on which the non-applicant 7 is alleged to have remained absent. The non-applicant 2 could not point out more than one date, i.e., 8-3-1941, on which it is alleged that the non-applicant 7 was not present. It is admitted that this meeting did not conduct any important business and absence in that meeting does not invalidate the award."

27. It is thus the case of Ramchandra that there were three arbitrators and one of them was to be an umpire that all of them acted together and unanimously gave the award with the concurrence of all of them, that Nagarmal was absent only at one meeting and that at that meeting no important work was transacted. It is the case of the appellant that Nagarmal was not an arbitrator at all; he was only an umpire and was required to act if difference arose between the two arbitrators, that he could not participate in the deliberations of the arbitrators and finally that Nagarmal did not himself understand his own position which was vague. A reference to the agreement at this stage becomes necessary. The agreement is written in English and has been drafted by counsel. This was admitted before us and also in the case. In the opening portion, which may be described as the preamble, it is stated as follows:

"An agreement to refer the dispute noted below to the arbitrators named (1) Shivprakashji Poddar of Hinganghat, (2) Balmukundji Poddar of Bombay, and (3) Nagarmalji Poddar of Pulgaon, Seth Nagarmaiji Poddar being appointed as an umpire hereafter called the Committee."

In the body of the agreement the reference is sometimes to "arbitrators", sometimes to "the Committee" and sometimes to "the Committee of arbitrators". The final paragraph reads as follows:

"The award of this Committee shall be final, legally binding and enforceable upon all the heirs who are signatories to this agreement."

28. The order sheets and the proceedings display a disparity. The order sheets are signed by all three, but the proceedings are signed by two only, with Nagarmal left out. All the letters addressed by the parties to the committee were addressed to the arbitrators other than Nagarmal. In the body of the proceedings the parties were always referred to Nagarmal for filing documents, statements etc. A few quotations from the letters which have been written from time to time will illustrate the above point. In Ex. P-5 at p.91 of the original record there is a letter written by Birdichand which begins as follows:

"Bhaiji Shivprakashji Balmukundji,
Accept salutations of Birdichand.....andc."

Again at pages 93-97 of the record there is yet another letter of Birdichand on 7-3-1941 which is also addressed to the two arbitrators.' At p.175 there is a letter by Ramchandra Poddar which is dated 9-4-1943 and is written to "Shriman Poojya Panchji Saheb Shivprakashji Balmukundji Poddar". At p.194 there is a letter dated 8-9-1943 by Mathuraprasad addressed to "Shri Poojya Shivprakashji Balmukundji."

29. The appellant makes a point by saying that though Nagarmal could remain present at the meetings to avoid re-hearing of the evidence in case of difference, he could not participate in the proceedings. The parties themselves realised that there were only two arbitrators and not three. Nagarmal's attitude in not signing the proceedings but only the order sheets and the attitude of the parties in addressing the two arbitrators and not Nagarmal clearly show that Nagarmal was not to take part in the deliberations of the arbitrators. As against this, it is contended that Nagarmal imposed his will upon the arbitrators and sat and deliberated with them. The award itself was referred to, to show that Nagarmal himself did not realise his own position. This is what is stated in the body of the award:

> "Nagarmal Poddar has been authorized, under the same reference, to decide in the capacity of the Sar Panch (Head Committee) any matter of the case if there be a difference of opinion among the arbitrators in deciding the same. But as there was no difference of opinion among us the three arbitrators at any place whatsoever during the entire proceedings of this case, there was absolutely no occasion on which Nagarmal Poddar was required to exercise the power of the Sar Panch."

Yet there is clear evidence to show that all the arbitrators conferred together. The question is: Could the two arbitrators overrule Nagarmal if they agreed among themselves, or had Nagarmal to agree with any particular view before it could be accepted? The fact that there was no difference of opinion between the three of them is not material to the issue about Nagarmal's position. All the three arbitrators went into the witness-box and were questioned about this matter. We may now refer to their evidence. Shivaprakash who was examined as 2 D.W.4 stated that he was not well, that he had lost his memory and that he did not remember the facts clearly. All the same, he gave his evidence at great length and it does not appear that his memory was in any way affected. Yet he stated as follows:

> "The parties had proposed the arbitrators. I don't know who were to be the Panchas and who was the Sar Panch. According to me, all the panchas have equal position. Nobody acted as a Sar Panch and nobody was appointed as Sar Panch. I don't know whether the agreement was in English or Marathi or Marwadi."

He, however, stated that the award was scribed in the presence of all the arbitrators. Balmukund was also examined as 2 D.W.3. He admitted that para.50 of the award was written after joint deliberations of all the three arbitrators, and that the notes made by the arbitrators remained with Nagarmal. Nagarmal himself was examined as 2 D.W.5 and this is what he stated:

> "I think that I was appointed as Sar Panch to decide the matter. I was to decide the matter

> in case there was difference of opinion between the panchas. We were appointed panchas to decide the matter in respect of the estate of Jivraj only."

Again he stated as follows:

> "The interpretation about the appointment of panchas and Sar Panch as stated in the agreement is made by us in para.1 of the award and we acted according to it. We decided that we would do which will be agreed to by all the panchas and accordingly I acted as a Panch in the proceedings."

There is no other evidence on this point.

30. The trial Court in dealing with this matter held that Nagarmal was only a Sar Panch, that is to say, president of the committee of arbitrators. The learned Judge
referred to - '*Lala v. Abdus Samed*[19]', and held that where the matter is referred to arbitration of three persons, two of whom are described as panchas and the third as a Sar Panch, the matter is to be decided by all three and it is not that the third person acts only when there is a difference among the other two. According to the learned Judge, there was a misdescription of Nagarmal and the word "umpire" really meant a Sar Panch. He also took into consideration that Chouthmal participated in the arbitration for a period of four years and submitted to the jurisdiction of the committee and must, therefore, be deemed to have waived this objection.

31. The law on the subject is to be found in Halsbury's Laws of England, Simond's Edition, Volume 2, p.31, para.68. The word "umpire" is a term of art and has a special meaning in the law relating to arbitrations. The agreement was scribed by a lawyer who evidently understood what an umpire's functions are in arbitrations. An umpire may be appointed by the selected arbitrators or the appointment may be made by the contending parties. The umpire only acts when there is a difference between the arbitrators themselves. He may sit with the arbitrators and watch the proceedings, hear the evidence and look into the papers, but he is not supposed to confer with the arbitrators so as to mould their decision. A Sar Panch is a panch but has a position akin to a chairman. It was the easiest thing for the contending parties to have named Nagarmal as a Sar Panch. They did not do so but designated him as an umpire constituting the whole body of three into a committee. The utilization of the word "committee" does not make the position any the clearer. Even as a committee the two arbitrators could act first, leaving it to the umpire to decide on a difference between them and the decision may yet be regarded as a decision of the committee. Indeed, that is precisely how Nagarmal understood his own position. In the award itself it is clearly stated that there was no occasion for Nagarmal to act as Sar Panch. If he conducted the proceedings on behalf of all the three arbitrators and presided at such meetings, he did act as a Sar Panch. What Nagarmal is suggesting, and the award also suggests, is that there was no occasion to decide on a difference between the other two arbitrators, thereby high lighting his own position as an umpire as understood in arbitrations. When this is coupled with the facts that the parties addressed their letters to the two arbitrators and not Nagarmal, that Nagarmal did not sign the proceedings, that Nagarmal was not present at the very first meeting at which the course of business was settled, and that Nagarmal admits that he never acted as a Sar Panch or umpire (whichever he was), there is no doubt whatever that Nagarmal did not really understand his own position nor did the other arbitrators. He deliberated along with the arbitrators and

moulded their decision with his advice and suggestions and yet he wants to show that he was not acting as a Sar Panch, much less an umpire. In our opinion, Nagarmal was appointed an umpire and his position was correctly understood by the parties and by the arbitrators, including Nagarmal. If Nagarmal acted before there was a difference, this would constitute an illegality, though there was no objection to his sitting with the arbitrators. He could not influence their opinion. See - '*Winteringham v. Robertson*[20]', If Nagarmal was an arbitrator, he was not an umpire and the reference itself would be defective since it names him as such. In any event, we are quite satisfied that Nagarmal's position was so vague as to leave it open to him to act either as an umpire or as an arbitrator or as a Sar Panch at his
sweet will, and such a reference cannot beregarded in law as proper. We accordingly hold that the reference was invalid for this reason.

32. The next point to consider is the effect of the will which Jivraj made before his death in respect of his property. The will is Ex. 2 D-1 dated 8-9-1936. In that will Jivraj made a statement as follows:

> "My entire movable and immovable property is my self-acquired property. None of my sons, grandsons (son's sons), relatives or anybody else has any huq (right or share) therein."

Jivraj went on to say that his two brothers, Seth Jamnadharji and Seth Jitmalji, and himself had acquired property jointly. Later they separated and divided the property. Even though a partition had taken place, considerable business went on in partnership with his brothers, but Jivraj was owner of his own share and also of his share in the property which remained joint in partnership with his brothers. He also stated that he had executed a registered deed of gift in which he had given property to his three sons and his two grandsons, Mathuraprasad and deviprasad. He also expressed a wish that after his death those persons should get the property which had been gifted to them. He appointed Chouthmal (appellant) and Keshavdeo son of Nagarmal Poddar as the executors of the will. He charged these executors to take the property into their possession and to manage it and to pay off the debts that were due and also to continue to stop the work of partnership according to their own wishes. He thus charged the executors to divide the property left by him into five equal shares after paying off the debts and the expenses. These shares were to go to the four persons who had entered into the agreement and Deviprasad. This will was attested by Shri A.V. Khare, Advocate, and Akbar Ali Mohammad Ali, Honorary Magistrate.

33. The will has been sufficiently proved and nothing remains to consider with regard to execution or attestation. The case of Ramchandra was that this will was revoked by another document executed by Jivraj. That document is Ex. P-13. It is a letter addressed to Ramchandra, dated 20-1-1937. Jivraj in that letter said that he had executed a will and given it to Chouthmal and had appointed him as an executor but because the will was not liked by Ramchandra, he was revoking it with his free will and pleasure and that he was going to tell Birdichand and Chouthmal also about the same, so that Chouthmal should destroy the will. In that letter it was stated that all should live amicably and that if difference of opinion arose, they should act in the manner decided by Nagarmal, that all persons should bear in mind that the cattle which were there should not suffer in any way and that the letter was to be used if it was found necessary to do so, otherwise not.

34. The lower Court held that this amounted to a revocation of the will. There is no doubt that in this conclusion the lower Court was in error. A will can only be revoked by a document executed in the same manner as a will or by tearing or destroying the will. See Section 70, Succession Act. In the present case there is no evidence that Chouthmal was ever asked to destroy the will or that Jivraj himself destroyed it. The will produced is intact. The evidence of Akbar Ali (2 D.W.2) that the will was stated by Jivraj to be revoked is neither here nor there. Exhibit P-13 was not proved, though denied, and it is not attested as required by law and cannot, therefore, be regarded as adequate to revoke the earlier will. See also - '*Ruprao v. Ramrao*[21]', It is probable that Jivraj thought that with such a letter in existence Chouthmal would not insist upon the will. But it is clear that the will continues to be operative unless Jivraj is found now to be incompetent to make the will. That, of course, is another matter. Before us the learned counsel for the respondent did not attempt to support the conclusion of the trial Court that the will had been revoked.

35. Now, two questions arise in this behalf:

> (i) Is the will contrary to the agreement to refer the dispute to arbitration, or in other words, does the directions in the will conflict in any way with what the arbitrators have done? and
> (ii) Whether Chouthmal could refer the matter to arbitration, since being one of the two executors, the concurrence of Keshavdeo to the reference was not obtained.

36. The first point is quite simple. In the will there were three things said by Jivraj. The first was that the property was his self-acquired property and none of the claimants before us had any share in it. The second was that the property was to be divided in five shares but not so as to affect the disposition of the property made by the deed of gift, Ex. P-5, dated 19-5-1934 and other gifts. The third was that the cattle which were being maintained by the family should be looked after carefully. The arbitrators, in dealing with this matter, have done what Jivraj had directed in the will without seeing it. The will was not brought to their notice till 12-6-1944, that is to say, a day previous to the delivery of the award. Chouthmal, for reasons best known to him, did not mention this will. Whether he thought that the wishes of Jivraj contained in Ex. P-13 had to be respected with regard to the will, we do not know. There is no allegation of any fraud nor would such an allegation help, unless the fraud prevented Jivraj from destroying the will. But this much is certain that Chouthmal brought the will into the light of day when he had already seen the award and knew that it had gone against him. The arbitrators' award divides the property into five equal parts, in so far as the arbitrators could, and gives equal shares to all of them. It takes into account all the property left by Jivraj and gives effect to the gift deeds already made by him. Whether or not the arbitrators considered all the liabilities left by Jivraj or brought into division the entire assets left by him, is a matter on which we will have to say something hereafter. One thing is certain that the main agreement did not run counter to the behests of Jivraj contained in the will; nor did the award of the arbitrators. There was, however, a possibility that they might have decided contrary to the will.

37. In our opinion, therefore, the existence of the will, apart from the points which we have reserved as also the point whether Chouthmal was competent to make a reference at all, with or without the concurrence of Keshavdeo, does not make much difference. If the will was there and

it was binding, it had to be given effect to, arbitration or no arbitration. If reference to arbitration was possible, the terms of the will could not be varied by the arbitrators. It is just a coincidence that they decided
the matter in the same way. The question is whether Chouthmal did not empower them to decide differently. Thus, this question is bound up with the other question.

38. We must say that it was the duty of Chouthmal to bring to light this document earlier. Even in the application for a succession certificate, a certified copy of which has been produced as Ex. P-14, Chouthmal did not refer to the will. It seems that Chouthmal purposely withheld the will till the very last minute and then tried to make capital out of it by saying that the arbitration could not be made.

39. We shall now consider what is the effect of the will on the arbitration agreement, regard being had to the fact that Chouthmal was an executor and there was also a co-executor with him who did not join in the reference.

40. There may be occasions in which an executor may, instead of involving the estate in costly litigation, refer the dispute to arbitration. Those occasions, however, must be special. As was pointed out by Farran, C.J., in - '*Ghellabhai v. Nandubai*[22]*',*

> "The position of an executor is a peculiar one. His office being a private one of trust named by the testator and not by the law, the person nominated may refuse though he cannot assign the office (William on Executors, 9th Edition, p.225)."

As stated above, it must in any event be regarded as an extraordinary act on the part of an executor not to execute the will himself but to leave its execution to an outside agency. This argument assumes a greater importance in the present case because we have not one executor but two. The property, according to the will, had to be taken charge of by the two executors and applied in the manner directed in the will. If Chouthmal wished to make a reference to arbitration and such a reference was permissible in law, he had at least a duty to consult his co-executor before making the reference. It is incorrect to say that Chouthmal would be bound personally by his agreement and his position as an executor he must agitate in some proceeding other than this. This was the argument of the learned Advocate-General in reply to this objection. In our judgment, Chouthmal could at any time point out the flaw in the reference and state that the reference was illegal for the reason that he alone had made the reference and not his co-executor and that the will not having been brought to the notice of the arbitrators, they were left free to decide even against the tenor of the will, which is not permissible, - '*Soudamino Ghose v. Gopal Chandra Ghose*[22]*',* In our opinion, the agreement is open to this objection.

41. The next point to consider which might affect the award as a whole is whether the refusal of Deviprasad to join in the agreement affects its validity. Connected with it is the further question whether Deviprasad can take the share which the award gives him, his consent in Court notwithstanding. It was contended that the agreement was only by four persons, whereas the property was to be divided amongst five and Deviprasad, who was the fifth, had not agreed to refer the matter to arbitration. It was argued that such an agreement or arbitration based thereon was illegal and void. The

analogy of a partition suit, namely, that all the parties must be before the Court was invoked and it was contended that the agreement was for that reason ineffective. Alternatively, it was argued that Deviprasad could not claim any benefit under the award and could not be made a party in the proceedings to file the award. Deviprasad's acceptance of the decision of the arbitrators was characterised as having no value and it was contended that the lower Court should not have joined Deviprasad at all and should have discharged him and, in any event, passed no decree in his favor. It was also contended that in the absence of Deviprasad's consent to the agreement, no property could be earmarked for his acceptance in advance and the consent of Deviprasad later could not bind the others.

42. The second point presents no difficulty at all. Whether or not the arbitration was good, one thing is certain, namely, that Deviprasad could not take any advantage of the award given by the arbitrators. Reference may be made in this connection only to one case. In - '*Chaudhri Hira Sing v. Chaudhri Gunga Sahai*[23]', there was a reference to arbitration. A person who was deaf and dumb and thus not entitled to inherit the property was not a party to the agreement to refer the dispute to arbitration. The arbitrators, however, awarded him a share and he attempted to enforce the award against the others. The case was heard by a Full Bench of the Allahabad High Court. The decision of the Full Bench was given by Pearson, J., (Stuart C.J., Pearson, Straight and Oldfield, JJ., concurring: Spankie, J., dissenting). It was held by the Full Bench as follows:

> "The award could only bind the parties to the arbitration, and the plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right which the law disallows. * * * * * * It has been urged, and may be granted, that a person who was not originally a party to arbitration proceedings may subsequently become a party to them, but it does not appear that the plaintiff ever became a party to the proceedings which terminated in the award dated 4-1-1875. * * * * It has been suggested that the defendants, by their assent to the award, are estopped from questioning the plaintiff's right of inheritance in this suit by the provisions of section 115, Indian Evidence Act; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable."

The learned Judge went on to say that the rule of estoppel did not apply there because the defendants in expressing their acquiescence in the award did not intend to deceive the plaintiff or led him to take any action which had put him in a different position from that which he occupied before in respect of the property in suit.

43. This decision was affirmed by their Lordships of the Privy Council. Their Lordships observed:

> "Of the five Judges by whom it was then heard four were of opinion that the award could only bind the parties to the arbitration and the plaintiff, not being a party thereto, was not bound by it, and not being bound by it, could not claim to take any advantage from it, and that it could not confer on him, who was not a party to the

> arbitration, a right which he did not possess by law. The remaining Judge was of opinion that the award might be evidence of a family arrangement or cession of claim by the defendants which might be enforced as against them. Accordingly the suit was dismissed. * * * * Hirasingh was a stranger to the submission and was under no obligation to abide by the award, and consequently he could not avail himself of it. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal and the costs thereof shall be paid by the appellant."

44. This decision, though it involves the consideration of giving a share to a person who originally was not entitled thereto, does not turn upon that distinction as was sought to be made out by the learned Advocate-General for the respondents. The proposition laid down there is quite plain. If persons choose a domestic tribunal, they may well be bound by its decision, but they cannot compel a stranger who is not joined in the reference to submit to that decision. That being so, there can never be any mutuality between persons who refer the dispute to arbitration and those who do not or refuse to do so. Once it is held that the person who stands out is not bound by the award, it stands to reason that the persons who had referred the matter to arbitration can also say that they would not allow a stranger to take benefit under the award. Thus, whatever view we take of Deviprasad's refusal to join in the arbitration agreement, it is clear that Deviprasad could not get the benefit of the decree which has been made on the award; nor could that decree be made effective in his favor.

45. It was contended that the award will have to be recorded as a whole and we cannot pick and choose between different portions of it. That may be so; but the decree of the Court is in the power of the Court and the decision about Deviprasad need not be put in the operative portion of the decree and might be put in a schedule thereto.

46. The other point, however, is not without difficulty. In - '*Chhottey Lal v. Mt. Madho Bibi*[24]*',* a Divisional Bench observed that an award in a partition case was not effective unless all the share-holders agreed to have the dispute decided through arbitration. Roe,J., with whom Coutts,J., agreed, observed as follows:

> "It would seem to me that an award purporting to partition the property of a joint family but liable to be set aside at once by Chottey Lal and in 16 years' time by Keshwar Narain is not a valid award. In my opinion, proviso 1 to section 21 of Sch.2 has not been fulfilled. I am not satisfied that the matter has been referred to arbitration by all the parties necessary to a suit for partition. Notwithstanding the provisions of Order 1, Rule 9, I hold that the partition of the family property cannot be regarded as having been validly referred to arbitration. In this view the learned Subordinate Judge's order directing that the award be filed should be set aside."

This view finds support in a decision of a single Judge in - '*Abdul Ghani v. Siraj-ud-Din*'[25]*,*

47. A contrary view has, however, been expressed in several cases. The above ruling was

expressly dissented from in - '*Diala Ram v. Mt. Nihali Bai*'[26], In - '*Jnanandra Nath v. Jitendra Nath*[27]', - '*Jadunath Chowdhry v. Kailas Chunder Bhattacharjee*[28]', and - '*Dharnidhar v. Sakharam*[29]', a different view was taken. It was held there that the arbitration agreement bound the parties in spite of the fact that the property was partitioned not only among those agreeing to refer the dispute to arbitration, but others who had not so agreed. In a later case of the Patna High Court reported in - '*Muhammad Sayed Khan v. Abdul Gafur*[30]', (Pat) it was held that the persons referring the matter to arbitration would be bound in any event, even though there may be others interested in the dispute who had not agreed to abide by the decision of the domestic tribunal.

48. The point is not free from difficulty. In a partition suit all parties must be before the Court to reach a final and effective decision about the enjoyment of the property. No partition suit can go on without all the sharers being parties thereto. Whether the same principle should apply also to a domestic tribunal is a matter on which there is considerable difference of opinion. See Sircar (T.L.L.) Law of Arbitration in British India, p.275. There is considerable force in the view expressed by Roe,J., in '*Chottey Lal v. Mt. Madho Bibi* ' (cit sup.) that even before a domestic tribunal all parties must be present before an effective partition of the joint property can be made. At the same time, it is also clear that there might be occasions in which, after making the shares of those who agree and putting the residue in the share of those who do not, the latter might appear and claim the share allotted to them. In such an event, it would be against the principles of justice to say that though every one had ultimately agreed to the proposed partition, the partition should itself be cancelled at the instance of one who had undertaken to abide by the result of the arbitration. It is, however, not difficult to see that there might also be cases in which the person standing out might not agree and the award itself might not be worth much because it would be liable to be set aside anyhow at the instance of the party not agreeing to arbitration. Such a case does not arise here. We have already held that the award must be set aside on other grounds. It is really academic on which ground the award is set aside, so long as it is. Had this matter been the only point in the case, we would have expressed a final opinion on it. Had we been required to decide it, it would have been difficult to overlook the fact that though Deviprasad had not concurred in making the reference the others did so in spite of his standing out. This was expressly so stated in the agreement of reference. There was also the further point that Deviprasad appeared and did not object to the partition as made between those who had made the reference; nor did he raise any objection to the share allotted to him. While Deviprasad cannot himself enforce the award in view of the pronouncement of their Lordships of the Privy Council, it would have been difficult to countenance an objection from one who had entered into the agreement with this prospect in view.

49. This brings us to a large number of objections on the grounds of incompleteness, error, misconduct, including legal misconduct, and partiality. It is also contended that
the arbitrators approached the partition of the property as if it was joint family
property and not the separate property of Jivraj. We shall now deal with these objections.

50. The award is written in 57 paragraphs and no less than 45 of those paragraphs were challenged before us. That leaves over only certain preambles which alone have not been the subject of controversy. In a word, the whole award has been challenged. In doing so the appellant overlooked the fundamental fact that this Court or the Court below did not sit as an appellate Court over the arbitrators. Their decision given on points referred to them cannot be reviewed at large and we cannot construct an award for the arbitrators. All that we have to see is whether the

award can be challenged on the ground of excess of jurisdiction, incompleteness or misconduct as understood in law. It would be necessary, therefore, only to refer to some of the objections which we consider are not open for consideration in view of the fact that the arbitrators' decision on that point must be taken to be final.

51. It may be pointed out that one of the duties cast upon the arbitrators was to recover such property as belonged to Jivraj in whosoever's hands it may be. This is what the arbitration agreement directed:

> "The Committee will call upon the heirs to submit in writing their respective demands and objections if any and the list of the property which every one of them had or has in his possession together with other necessary particulars to enable them to find out and trace the property giving the heirs necessary time. This Committee of Arbitrators will accumulate, summarise (sic) and value all the belongings, including the moveables and immovables of the late Seth Jivrajji Poddar, which was and is in possession of his sons, grandsons and other outside party or parties after properly scrutinizing the account books, other concerning documents and oral evidence either direct or indirect and take all necessary steps whatever the Committee shall deem fit to ascertain the total assets and liabilities of the late Seth Jivrajji Poddar. After summing up the total assets, the Committee will distribute the balance after making payment of the legal liabilities amongst the above mentioned heirs.
>
> The Committee will have full powers to decide any question relating to the distribution of the said assets either equally or unequally under some special circumstances as they deem fit and proper.....
>
> X X X X X X X
>
> The award of this Committee shall be final, legally binding and enforceable upon all the heirs who are signatories to this agreement."

With such a direction, it is impossible to see how the decision of the arbitrators that a particular property did or did not belong to Jivraj can be questioned, unless we constitute ourselves into an appellate Court over the arbitrators' decision, which is not permissible in law. We shall now, therefore, refer very briefly to such objections as were raised which we consider were not open to scrutiny either in this Court or in the Court below.

52. We cannot go into the questions which have been raised in the objection filed by Chouthmal in the Court below contained in para.7(xiv) and relating to issues 4, 4(a), 5 to 9 and 18. They are to be found at pp.28 to 35 of the paper book. Of course, in so far as there might be an allegation of turpitude in dealing with the matter, it can be gone into; but the decision of the arbitrators, in our judgment, cannot be questioned. We, therefore, decline to consider the objections raised because we are not hearing an appeal from the arbitrators' decision, as already stated above.

53. We shall now take up the question of such misconduct which has been raised before us. For this purpose we shall divide the topic into legal misconduct and actual misconduct involving turpitude.

54. The first objection is that the arbitrators in dealing with the property of Seth Jivraj applied a different standard to Chouthmal from that applied to the other heirs. The second is that they examined, some witnesses behind the back of the parties, particularly Chouthmal, and entered, into communications with Birdichand without bringing it to the notice of Chouthmal. The third is that they deliberately included certain debts which need not have been paid and excluded other debts which ought to have been taken into account in giving a final decision about the partition of all the assets.

55. As regards the standard which has been applied, we have found no evidence of any discrimination. This ground is really connected with another ground taken about the 'turpis' conduct of the arbitrators in giving relief to the other heirs of Jivraj at the expense of Chouthmal. That matter will have to be examined over again and, therefore, we reserve it for the moment. We shall take up the question of examination of witnesses behind the back of Chouthmal.

56. It is contended that the liability due to Mst. Chand Bai was inquired from Chand Bai behind the back of the parties (para.34). Similarly, an inquiry was made from Mahadeo Kanahaiyalal (para.37). It is also contended that inquiry regarding Ramchandra's manganese profits referred to in para.44 of the award was made behind the back of the parties. Similarly, it is stated that inquiries and statements from Ramchandra and Mathuraprasad were taken on 14-8-1943, which was not the date fixed for hearing of parties (vide order-sheets dated 13-8-1943 and 16-8-1943, pp.151 and 152 of the paper book). It is also stated that inquiries and instructions were taken from Birdichand on 1-6-1944 and certain accounts were 'smuggled in' without drawing the attention of all the parties concerned. Lastly it is contended that advice was taken from one advocate, Shri Parande, to which reference is made at p.246 of the paper book, inasmuch as Rs. 500/- were paid to him for his advice.

57. As regards the advice which was taken from Shri Parande, there is nothing to show that it was irregular. Advice from counsel can certainly be taken on matters on which the arbitrators find themselves at a loss in view of the complexities of the law. This was laid down by their Lordships of the Privy Council in 3 Ind App 209 (PC) (L) and in - '*Louis Dreyfus and Co. v. Arunachala Ayya*[31]', See also '*Rolland v. Cassidy*[32]',

58. As regards the inquiry from Chand Bai, all that the arbitrators found out was that she had given a sum of Rs. 1,000/- to Jivraj for investment on her behalf and that she had already received that amount through Birdichand. Since the 'khalsa', i.e., the estate of Jivraj, was not required to pay that amount to Chand Bai, no loss can be said to have been occasioned to anybody concerned. So long as Chand Bai had paid that sum and it had been paid back by Birdichand, the account books were only taken into consideration and the amount adjusted. Either the amount had to be paid to Chand Bai or it had to be paid to Birdichand, and it did not matter which it was so long as there was no additional burden upon the estate. In view of this, we do not consider that this point has much significance.

59. Similarly, the inquiry regarding Ramchandra's manganese profits was not made the subject of a direct objection in the statement filed by Chouthmal in the Court below. In view of the lateness with which this objection is now raised (and even here not in the grounds of appeal), we do not attach any importance to it.

60. As regards inquiries from Ramchandra and Mathura Prasad on 14-8-1943, there is no doubt a note in the order-sheet that they should see the arbitrators on that date. They saw the arbitrators and their statement was recorded but it was read out on 16-3-1943. Merely calling upon one of the parties to appear on any date, so that he may be informed about what he has to do next time would not constitute that misconduct which would entitle a Court to throw out the entire award. Chouthmal continued to appear for a long time after this and should have objected to this proceeding then and there. As their Lordships have pointed out, such objections are not entertained at the end. This is what their Lordships stated in that case:

> "On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrator proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favorable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

61. With regard to the inquiry from Mahadeo Kanhaiyalal, it concerns certain shares which, it was alleged, were with Birdichand. In this connection the arbitrators stated in para.36 as follows:

> "Chouthmal has not proved by giving any independent evidence in support of his say in connexion with issue No.28 that Birdichand had received shares of 40 (to) 50 thousand rupees from Mahadeo Kanhaiyalal of Wardha. Birdichand says that he (Birdichand) did not receive the above share. From the inquiry which the arbitrators have made in connexion with the above matter, it becomes clear that Birdichand has not received the above shares."

The authority of the arbitrators to make such inquiry as they deem fit cannot be questioned. The only question that can be raised is whether an inquiry was made behind the back of Chouthmal. No objection was specifically taken with regard to inquiry from Mahadeo Kanhaiyalal as was done in respect of the inquiry from Mst. Chand Bai. Considering that the amount involved in the other objection was only Rs. 1,000/-and this involved a sum of rupees forty to fifty thousand, it is to be expected that such an objection would at least have been taken in the Court below. No issue having been framed in the Court below as was done on other objections, vide issue No.7(1), we do not think that we are entitled to enter into this question at such a late stage when evidence on that part of the case is not available. It matters not that Kanhaiyalal was the scribe of the award. There is no suggestion that Kanhaiyalal influenced the decision of the arbitrators simply because he had scribed the document for the arbitrators. If objection had been taken to this part of the decision in the Court below, probably, evidence would have been forthcoming to show what the nature of the inquiry was. In view of the fact that there was no issue framed and no allegation made, a reference to this matter in the evidence cannot be taken note of without serious prejudice to the other side.

62. This leaves over certain inquiries from Birdichand and accounts filed at a late stage of the

case to show that Nagarmal was not indebted to the estate. We shall deal with this point later as we have to consider whether the conduct of Nagarmal involved any turpitude which would entitle us to set aside this award.

63. We shall now take up the question whether the arbitrators were at fault in not taking into account all the assets of Jivraj. It is contended that certain properties were excluded from consideration, while other properties which should have been taken into consideration were not considered. Reference is made in this connection to certain debts due from Nagarmal (a point we have reserved), to the shares worth Rs. 40,000/- in the possession of either Madaheo Kanhaiyalal or Birdichand (a point we have just now disposed of), to the Hinganghat property, the Ranchi property and debts due from parties and other debtors totalling Rs. 55,885/8/3 and two sums of Rs. 5,000/- and Rs. 8,311/- due from Shivprakash, one of the arbitrators. With regard to the debts due from Shivprakash, Chouthmal is estopped by his admission which he made before the arbitrators and we need say no more about it.

64. As regards the Hinganghat and Ranchi properties, the award, at its best, would be incomplete but would not be liable to be set aside. The law allows the Court to refer the award to the arbitrators for completion on any point which may have been left out. In view of the fact that we are setting aside the award, this aspect of the question loses all its value.

65. As regards the debts due from parties and other debtors totaling Rs. 55,885/8/3, the arbitrators have dealt with this matter in their schedules beginning from p.222 to p.226 of the paper book. They have given their reasons why they considered that these debts should not have been collected; and unless it can be said that the arbitrators acted with any oblique purpose, the question of calling into account their award does not arise. The arbitrators were given full power to determine this question and they having determined it, it is not open for review, as we are not hearing an appeal against their decision.

66. Similarly, an objection was raised with regard to a 'bagicha' situated at Hinganghat which, it was stated, was already the subject-matter of another award given by Sir Sorabjee. By that award the 'bagicha' was given to Seth Jamnadhar Poddar and the jamakharch in respect of that 'bagicha' had already been made in the account books of the firm of Seth Jarnnadhar Poddar. The arbitrators, therefore, only stated that the property be transferred to the name of the firm. Inasmuch as the arbitrators were merely giving effect to an award already pronounced, they cannot be said to have acted wrongly or capriciously in including this direction in their award. We do not consider that this was in excess of jurisdiction on their part and we also consider that this subject cannot legitimately be urged in view of the ample powers given to the arbitrators by the parties agreeing to arbitration.

67. This leaves over for consideration the question whether there has been any partiality in dealing with Chouthmal 'vis-a-vis' the other claimants and whether there is any evidence of moral turpitude in the arbitrators.

68. It is contended by Chouthmal that Jivraj financed his sons and grandsons so that they could do business on their own. He opened 'khatas' in the names of these persons in his own account books and this property must therefore belong to the parties concerned. At the very start, Chouthmal is misrepresenting the facts. At p.17 of the paper book in para.6(vii) this is what

Chouthmal himself has said:

> "Seth Jivraj, no doubt, provided all possible facilities to his sons and grandsons for trading and was showing interest in their well-being as father and grandfather but he kept separate khatas in his books of their transactions and he used to deal with them in these khatas as he dealt with strangers."

In this statement there is an implicit admission that the property which apparently stood in the khata of the sons and grandsons still belonged to Jivraj. The 'khata' in favor of Chouthmal began at a date when he was a young boy; and it is impossible to think that at that early age Jivraj had an idea of inducting him into his vast business, with vast assets at his disposal. Though Shri Bobde suggested that Marwadi children begin to enter into business even from tender years, we cannot, while allowing every consideration to the argument, hold that this can be the case. At the very first meeting of the arbitrators the line of action was settled by the arbitrators. They drew up two issues which they decided unanimously. These issues were:

> "(1) Which property should be treated as of the Khalsa?
> (2). Whether the under-mentioned khatas which are in the Bahi-Khatas of khalsa should be treated as private (personal) khatas of Chouthmal Poddar, or should they be treated as of the Khalsa or mixed?"

These issues were decided even before the rest of the arbitration was gone into; and in view of what their Lordships of the Privy Council have said in 3 Ind App 209 (PC), we can only say that since Chouthmal stood by and took a chance of the decision being in his favor, he cannot now be heard to say that this was wrong and the whole matter be considered at large. He stood by for no less than four years while the arbitration was going on and his first objection came only a day before the award was given. In our opinion, this point cannot be heard at this stage.

69. We may dispose of another argument by which Chouthmal set up a plea of limitation. His contention was that the agreement took place in 1940, while Jivraj died in 1937 and there was more than three years' gap between the two events. Inasmuch as he claimed the 'khata' as his own and the balances as his money, the claim could only succeed if brought within three years. What has been found is that the 'khata', though in the name of Chouthmal, was really a 'khata' of Jivraj and Chouthmal held the property for and on behalf of his father. On the death of the father, the property belonged to all the heirs and Chouthmal could not prescribe against the co-heirs without ouster. There is no plea of ouster and thus the contention must fail.

70. Next we have to consider whether in dealing with these 'khatas' there has been any different standard applied to Chouthmal. It is contended that while the arbitrators took into account balances in favor of Birdichand and others, they only selected certain items against Chouthmal but did not take into account the balances in his favor. After the death of Jivraj the bulk of the property, if not all of it, passed into the hands of Chouthmal and any balance which was in his favor constituted so much assets of Jivraj in his hands. The arbitrators were given ample power to decide this matter in their own way and they felt that regard being had to the history of the family property, these items should be taken as belonging to the Khalsa. We do not think that there is

any evidence of any bias or application of varying standards. The basic difference between the case of Birdichand and others on the one hand and the case of Chouthmal on the other lay in that Birdichand and others did not possess the property of Jivraj, while Chouthmal had the property in his hands. From this fact alone a difference in approach is indicated and we think that the arbitrators were fully justified in dealing with the matter as they did.

71. This brings us to the question whether the arbitrators were in error in treating the assets as belonging to a joint Hindu family. It is no doubt true that the arbitrators have applied the principles of a coparcenary to this case. Shri Bobde who appeared for the appellant contended on the strength of - '*Maruti Aba v. Akaram Pandu*[33]*',* that this amounted to misconduct in law and entitled him to ask that the award be set aside. It is no doubt true that if the arbitrators made a grievous mistake of law incidental to their award, it might have to be set aside. But it appears to us that whether they applied the correct law to the facts of the case or not, the resulting decision cannot be challenged. Once it has been held, as has been shown above, that the property in the hands of Chouthmal and others belonged to the 'Khalsa' (as the estate of Jivraj was described), it matters not whether the onus was placed on the parties to prove that any property in their hands was their self-acquired property or not. There is no suggestion from Chouthmal, who did not enter into the witness box, that any property was his. He only relies on the 'khatas' being his own, a fact countered by his own statement quoted in para. 68. He was the best person to have deposed on his own behalf and his abstention from the witness-box is an important circumstance against him. However, this point also loses its value in view of what our decision on the enforceability of the award is to be. We record this only for completion of our judgment. We hold, therefore, that there is no error in the award which merits its setting aside on the ground that the approach to the problem was wrong. It was not unfair in view of the attitude taken by Chouthmal even in the Court below.

72. This leads us now to the question of actual misconduct involving turpitude on the part of the arbitrators. In this connection three grounds were made - one against each arbitrator. It was contended that the debts of Shivprakash were allocated to all the parties and were not earmarked in anyone's share. It is suggested that this was done because those persons whom Shivprakash has favored would forego their claims upon him and thus benefit him to that extent. This is no more than a surmise; and even if the entire debts of Shivprakash had been allocated to, say, Birdichand, the same objection would have been raised. There is nothing to show that those persons who have been allotted the debt due from Shivprakash have done anything to merit such a criticism. The conduct of Shivprakash on this account cannot be questioned. The rulings in - '*Motilal v. Mt. Sharda Devi*[34]*',* and - '*Sherbanubai Jafferbhoy v. Hooseinbhoy Abdoolabhoy*[35]*',* cannot thus help.

73. As against Balmukund, it is contended that he wanted assistance from Chouthmal in his bobbin factory business and asked Chouthmal to join him as a partner. This offer was turned down by Chouthmal but was accepted by Keshavdeo the son of Nagarmal. It is suggested that Balmukund had reason to be annoyed with Chouthmal and that, in any event, the offer of Balmukund was itself improper. While we do not express any opinion on the second part of the case and feel that Balmukund would have been wiser if he had not made such an offer to Chouthmal during the pendency of the arbitration proceedings, we cannot say that this leads to an irresistible inference that there was misconduct on the part of Balmukund. Keshavdeo was an independent person. No doubt, he was a natural son of Birdichand, given in adoption to

Nagarrmal, but Keshavdeo's conduct in affording assistance to Balmukund and entering into partnership with him in the bobbin factory business cannot lead to the inference that Balmukund did anything improper in the conduct of the arbitration proceedings. It was open to Balmukund to take any partner and as Keshavdeo was not a party to this matter, except perhaps in a distant capacity as co-executor with Chouthmal, we do not consider this action of Keshavdeo and Balmukund as sufficient to constitute misconduct.

74. The position of Nagarmal, however, is different. This is tied up with another objection which was raised, namely, that all the debts due from Jivraj were not cleared before the assets were distributed. To understand this it is necessary to advert to one or two facts. Jivraj was a partner in a firm called "Jamnadhar Poddar Firm". Originally there were three partners, namely, Jivraj, Jamnadhar and Jitmal. After the deaths of Jamnadhar and Jitmal, the partnership continued with Nagarmal taking the place of Jamnadhar to whom he was given in adoption, and Amolakchand in place of Jitmal. Nagarmal was the managing partner of this business. The contention of Chouthmal was that Jivraj was indebted to this firm to the extent of over Rs. 2,50,000/- and that the indebtedness should have been cleared by taking accounts of that firm. After the death of Jivraj, Chouthmal was taken into partnership and
Chouthmal contended that no partition should take place till his position with the firm
was also cleared.

75. In the account books of Jivraj there are numerous 'khatas' of which a list is to be found in the supplementary paper book in the case. These included 'khatas' of Nagarmal. It was contended by Chouthmal that Nagarmal was shown indebted to the extent of Rs. 1,33,923/11/3, and this matter had also to be gone into. Chouthmal contended that if this money had been recovered from Nagarmal, it could have been paid to the account of Jivraj's indebtedness with the firm. Paragraph 50 of the award deals with this matter. This is how the arbitrators decided the point:

> "In the account books of Soniramji Jivraj of Nagpur, amounts are to be given and taken in the 'Sir' (Partnership) Khata of Bhai Nagarmal and in the khata of revered Soniramji Jitmal. Only jama-kharch is to be made in respect thereof. The jama-kharch thereof also will be made at the time when the jama-kharchas of the partnership of Jamnadharji Poddar firm will be made. It does not appear that anything remains to be given or taken on account of the above."

76. It was strenuously contended that this was an attempt to whitewash the indebtedness of Nagarmal. It is true that if the assets of Jivraj had to be finally partitioned, it was necessary for the arbitrators to take accounts of the shop of Jamnadhar Poddar. It was also necessary for them to find out what was the indebtedness of Nagarmal and then to set off the net amount found against the indebtedness of Jivraj to the firm; to find out what, ultimately, had to be paid to the firm. If this had been done, it is very likely that no amount would have been available for distribution amongst the various claimants and Chouthmal would not have been required to pay anything. We cannot express any opinion because the accounts of Jamnadhar Poddar firm are not before the Court. We cannot help saying, however, that the manner in which this matter was gone into was certainly improper. The final meeting of the arbitrators took place on 29-5-1944 and that appears to be the last meeting to decide the dispute. The next meeting took place on 5-6-1944 and the order-sheet shows that by then the award was ready. During this period a letter was

written by Birdichand, which is Ex. P-4 at p.62 of the original record. In this Birdichand gave an account of the indebtedness of Nagarmal and opined as follows:

> "In view of this, nothing remains due (from him) on account of the above two items."

Strong exception is taken to this proceeding and Nagarmal, when he was in the witness-box, was closely questioned above it. This is what Nagarmal stated:

> "The witness reads para.50 of the award as well as p.108 of Birdichand's report filed in Court (Ex. P-4). The witness reads the entries marked A and B on p.108 of Ex. P-4 and states as follows:
> When this report was given by Birdichand I asked my Munim to find out the state of this account in respect to the item in question. He prepared the account and from that I found out that nothing was due from me. The extracts submitted by my Munim were perused by other Panchas but were not kept on record. The said extracts were not shown to Birdichand or Chouthmalji."

77. Page 108 of Birdichand's report contains items regarding the indebtedness of Nagarmal to Jivraj. It appears, therefore, that Birdichand was asked to report about this indebtedness and submitted a letter which was not brought to the notice of Chouthmal, inasmuch as the award was prepared between 29th May and 5-6-1944, while the letter itself was written on 1st June. Similarly, the arbitrators were asked to see some private account prepared by the Munim of Nagarmal which was not shown to Chouthmal or placed on the record. We do not know how the arbitrators were convinced that Nagarmal did not owe anything to Jivraj and the evidence was not also made available. For a Sar-panch or umpire this was an extraordinary conduct, inasmuch as his own account was involved. It is no doubt true that if an arbitrator has a personal interest and that interest is known to the parties, his appointment as an arbitrator cannot be questioned. But where an arbitrator is personally concerned and 'prima facie' stands indebted to the estate, it is but fair and reasonable to expect that whatever evidence was brought to the notice of the arbitrators to show that the indebtedness did not exist, should be placed in the hands of all the parties concerned and also on the record, so that it could be scrutinized further. In our judgment this conduct of Nagarmal involved a turpitude which cannot be overlooked. Bound up with this is the fact that the assets of Jivarj in the firm of Jamnadhar Poddar or his indebtedness to that firm were not deliberately gone into because that would not have left any assets for division which has been ordered by the arbitrators. The fact that the arbitrators were putting up at the house of Birdichand may not by itself be sufficient, but it enabled them to enter into a private conference on a very important topic with Birdichand to the exclusion of the others. In our judgment, Chouthmal is entitled to raise this ground and he has so raised it in the objection made in the Court below. He did that also by a letter before the award was delivered. This constitutes such misconduct which would entitle us to refuse to accept the award.

78. There are some minor points remaining which may be briefly touched. They relate to the allotment of immovable property to the children of Balmukund, the husbands of Jivraj's daughters and daughters' sons. We need not go into these matters. Jivraj had already executed a number of gift deeds by which the property was given. It may be that the land in the name of

Champalal son of Chouthmal may not have been given to him and there may be some capriciousness in the allotment of lands, but they are not so vital as to entitle us, if nothing else were proved, to set aside the entire award. We, therefore, do not touch upon them in view of our decision on the main issues.

79. There are two matters which only remain. They concern the creation of a trust and certain directions issued by the arbitrators in relation thereto. These are shown in Sen. III of the award. They involve a sum of Rs. 23,178/14/9. To make up this sum eight preference shares of the Andhra Valley which, according to the decision of the arbitrators on issue No.4, were said to be with Chouthmal, and a bungalow on the Kamptee Road valued at Rs. 20,000/- were transferred. In dealing with this trust the arbitrators observed as follows:

> "Amounts have been set apart for charity according to the wishes of the deceased Seth Jivrajji and according to the account books (and the same have been mentioned in Sch.3). According to the agreement of arbitration (reference to arbitration) we the arbitrators are not responsible for making arrangements thereof. But in this connexion we advise all the parties that they all together should create a separate trust of all these amounts and the same (the trust so created) should consist of two persons of this family and (two) persons from outside."

The arbitrators thereupon made further recommendations how the trust should work.

80. The arbitrators having found that it was no concern of theirs to make this trust according to the reference submitted to them, they should have refrained from making any arrangements for this trust. According to the terms of reference, they were required to divide all the property among the heirs of Seth Jivraj. They should have, if asked to make this trust, requested the parties to agree to refer this matter to them for decision before they took any action. The lower Court should have, in any event, excised this portion of the award from its decree and should have, in the event of accepting the award, asked the arbitrators to distribute this property as well. The learned Additional District Judge accepted this direction and added his own order in the following words: "That in respect of the above items, it is hereby ordered that a trust be created in respect of the above property which will consist of four trustees, two from the family and two outsiders." He then added the directions which the arbitrators had added. We do not know who is more at fault. The arbitrators should have refrained from making this disposition of property, but the learned Judge at least should have seen that it was no part of their business to create trusts and endow charities. In our opinion, this was clearly in excess of the reference.

81. In the letter Ex. P-13, dated 20-1-1937, Jivraj had recommended that the cattle maintained by the family should be well looked after. In the award reference is made to the Goshala at p.61 of the record and this arrangement for cattle figures there. Inasmuch as the arbitrators were not dividing the property according to the behests of Jivraj but an agreement made by the parties, it was their duty to overlook this aspect of the case. It was no concern of theirs to provide for cattle and the reason which we have given about the charities applies also here.

82. This matter need not, however, require any special treatment in view of our decision not to accept the award. If the award had been accepted, we would have given directions in regard to

these matters and would have decided whether the award should be remitted to the arbitrators or the portion involving excess of jurisdiction should be excised. The matter, however, does not fall for consideration in view of our decision on other points.

83. In conclusion, therefore, we hold that the appeal is entitled to succeed. The award cannot be made into a decree of the Court. The decision of the Court below is set aside and the suit of Ramchandra is dismissed. In view of the fact that most of the grounds which have succeeded in this Court were not originally included in the memorandum of appeal but were brought in by applications for amendment, and the conduct of Chouthmal in going on with the arbitration for four years when he had so much to complain of from the very start, we think that the appellant should be deprived of his costs in this Court. The award is, therefore, set aside. The respondents shall bear the costs incurred in the lower Court.
Appeal allowed.

Cases Referred.

[1] AIR 1948 PC 36 at p.38
[2] AIR 1951 Cal 78
[3](1867) 2 QB 523
[4](1941) 1 KB 396
[5]35 All 227 (PC)
[6] AIR 1947 Sind 145
[7] AIR 1944 Lahore 398
[8] AIR 1949 Pat 393
[9](cit. sup.) at pp.397-398
[10] AIR 1919 Pat 93
[11] AIR 1936 Lah 466
[12] AIR 1951 All 711
[13]3 Ind App 209 at p.220 (PC)
[14]14 Cal LJ 188
[15] AIR 1934 Bom 6
[16](1921) 1 KB 336
[17](1902) 18 TLR 591
[18] AIR 1928 Nag 295
[19]17 Ind Cas 320 (Oudh)
[20](1858)' 27 LJ Ex 301 at p.303
[21] AIR 1952 Nag 88
[21]21 Bom 335 at p.341
[22] AIR 1915 Cal 745
[23]11 Ind App 20 (PC)
[24] AIR 1918 Pat 132
[25] AIR 1939 Lah 154
[26] AIR 1936 Pesh 96
[27] AIR 1928 Cal 275
[28]37 Cal 63
[29] AIR 1921 Nag 176
[30]115 Ind Cas 680
[31] AIR 1931 PC 289 at p.293
[32](1888) 13 AC 770 at p.777 (Can)
[33] AIR 1947 Bom 400
[34] AIR 1948 All 222
[35] AIR 1948 Bom 292