to the Jalgaon Municipality are *intra vires* and they do not offend against any provision of the Constitution.

The other two petitions before us, C. A. 1855 and C. A. 1917 of 1952, raise the same question with regard to the Islampur Municipality and the Anand Municipality. Both these Municipalities are governed by the District Municipal Act and the provisions of that Act are identical with the provisions of the Municipal Boroughs Act, and the petitioners in these two petitions have also challenged the provisions of law with regard to reservation of seats for women on the same grounds on which the petitioner in the petition we have just disposed of has challenged similar provisions.

The result therefore is that all the three petitions fail and they are dismissed. No order as to costs.

Rule discharged.

K. B. S.

APPEALS FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

BAI NARBADABAI WIDOW OF MULCHAND PURSHOTTAMDAS AND OTHERS, APPELLANTS (ORIGINAL DEFENDANTS TO THE SUIT AND PLAINTIFFS TO THE COUNTERCLAIM) *v.* NATVARLAL CHUNILAL BHALAKIA AND ANOTHER, RESPONDENTS (ORIGINAL PLAINTIFFS AND DEFENDANTS TO THE COUNTER CLAIM).* ...

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Indian Arbitration Act (X of 1940), ss. 17, 32—Whether suit to enforce award of arbitrators maintainable—Award in terms agreed upon by parties to arbitration—Failure of party to carry out terms of award—Remedy of aggrieved party—Issue not raised in trial Court but arising on pleadings and affecting jurisdiction of Court—Whether such issue can be raised and agitated for first time in appeal—Whether Court of appeal could decide on such issue—Whether partner entitled to sue for accounts of partnership for particular period—Whether partner suing for accounts of partnership must sue for all accounts of partnership.

Certain disputes between the plaintiffs and the defendants, including those in relation to their business 'N. C.' were referred to arbitration of certain named persons. The arbitrators made their award in terms agreed upon by the parties who subscribed their signatures to the award in token of their agreement. The consent terms, *inter alia*, provided that the defendants were to make up the accounts of the business 'N. C.' for Samvat years 2002 and 2003 and pay to the plaintiff their respective shares of the amount of income-tax for S. Y. 2001

* O. C. J. Appeal No. 47 of 1952: Suit No. 145 of 1951.

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in respect of that business which the plaintiffs had paid. As the defendants failed to carry out their part of the agreed terms, the plaintiffs filed this suit praying *inter alia* for accounts for S. Ys. 2002 and 2003 of the said business and for an order against the defendants for their contributions to the amount of the income-tax paid by the plaintiffs. The defendants filed their counter-claim asking for all partnership accounts of the business 'N. C.' since its inception in S. Y. 1997. The trial Court decreed the plaintiffs' suit and dismissed the counter-claim. On appeal on the question whether this was not in effect a suit to enforce the terms of the award and if so, whether such suit was maintainable,

Held, that the suit was in effect one to enforce the terms of the award and was therefore not maintainable.

The Indian Arbitration Act 1940, which is both a consolidating and amending act, provides a self-contained law with regard to arbitration, the main object of the Act being to expedite and simplify arbitration proceedings and to obtain finality. S. 32 of the Act lays down, *inter alia,* that notwithstanding any law for the time being in force no suit shall lie on any ground for a decision upon the existence, effect or validity of an arbitration agreement or award. The expression "effect of the award" is wide enough to cover a suit to enforce an award.

Moolchand Jothajee v. *Rashid Jamshed Sons and Co.*,[1] *Ratanji Virpal and Co.* v. *Dhirajlal Manilal*[2], *Ramchander Singh and others* v. *Munshi Mian*,[3] and *Radha Kishen* v. *Ganga Ram*,[4] followed.

Munshilal and Sons v. *Modi Brothers*[5] and *Nanhalal and another* v. *Gulabchand*,[6] dissented from.

Kurbanhussein Mahomedali v. *Husseinbhai*,[7], referred to and distinguished.

The mere fact that the parties to the Arbitration agreed to the terms of the award and that there has been no adjudication by the Arbitrators does not in away change the nature of the award. Once the parties have referred their disputes to a domestic forum it is that domestic forum alone which can decide upon the disputes. The decision of the forum, whether by consent of parties or *in invitum,* is an award with all its characteristics.

Where parties to a suit understand the controversy between them to be a particular controversy on the basis of which they raise issues on which the trial proceeds, the Court of Appeal would be reluctant to introduce and decide on new issues not raised in the Court below, though it finds that the formal pleadings are different from issues actually raised. But where as in the present case, the issue raised for the first time in the Court of Appeal affects the jurisdiction of the Court, whatever may be the understanding of the parties to the suit and whatever may be the basis on which both the parties to the suit proceeded with

[1] [1946] A. I. R. Mad. 346.
[2] [1942] Bom. 452.
[3] [1950] A. I. R. Pat. 48.
[4] [1951] A. I. R. Punjab 121.
[5] [1948] 1 Cal. 81.
[6] [1944] Nag. 340.
[7] (1947) 50 Bom. L. R. 604.

the trial of the suit, the Court of Appeal is bound to consider and decide upon such issue.

A partner suing for accounts of the partnership business must pray for all the accuonts of the partnership to be taken. It is not open to him to ask for accounts of partnership for a particular period only.

Facts material for the purpose of this report are these. One Purshottamdas Jhaverchand died in 1932 leaving him surviving three sons, Jethalal, Chunilal and Mulchand. The three sons became divided in estate in 1937. Jethalal died in 1937, Chunilal in 1948 and Mulchand in 1950. The members of the branches of the three separated brothers were carrying on certain business in the name of Popatlal Mulchand (yarn) and Popatlal Mulchand (cloth). Two new businesses were started in October in 1940. One was the business in yarn in the name and style of Natvarlal Chunilal and the other was a business in cloth in the name and style of Rasiklal Chunilal. In 1943 a writing was executed with regard to these two businesses which provided, *inter alia,* that profits that may remain over after payment of income-tax in respect of these two businesses should be equally divided among the three branches represented by the three sons of Purshottamdas Jhaverchand.

Disputes arose between these branches with regard to all the businesses mentioned above and they were referred to Arbitration of four named Arbitrators by a writing dated September 28, 1947, signed by parties representing the three branches.

The reference to Arbitration expressly stated that the award would be governed by the Indian Arbitration Act.

On February 7, 1948, the Arbitrators gave their award which was in two parts. The first dealt with the old businesses "Popatlal Mulchand" (yarn) and "Popatlal Mulchand" (cloth). The other part, with which the present suit is concerned, dealt with the two new businesses, 'Natvarlal Chunilal' and 'Rasiklal Chunilal.' As regards these businesses the parties to the disputes came to terms which were reduced to writing dated February 7, 1948, and signed by the parties. The Arbitrators also subscribed their signatures to the said writing in token of their promulgating their award in terms of those consent terms.

Natvarlal Chunilal and his brother (plaintiffs) carried out their part of the said award by consent. It was incumbent on the defendants Nos. 1 to 4 (representing the branch of Mulchand) and defendants Nos. 5 to 9 (representing the branch of Jethalal) in terms of the award to make up the accounts of the

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the business 'Natvarlal Chunilal' for Samvat years 2002 and 2003 and to pay to the plaintiffs their respective shares of the Income-tax in respect of that business up to Samvat year 2001 which the plaintiffs had paid on behalf of the business. As the defendants failed to carry out their obligations under the said award, the plaintiffs filed this suit praying, *inter alia,* for accounts of the business 'Natvarlal Chunilal' for Samvat years 2002 and 2003 and for an order against the defendants for payment of their respective shares of the Income-tax for Samvat year 2001. The defendants filed their counter-claim, praying that all the accounts of the business 'Natvarlal Chunilal' should be taken from its inception in Samvat year 1997. Mr. Justice Shah who heard the suit and counter-claim decreed the plaintiffs' suit and dismissed the counter-claim on February 11, 1952.

The defendants appealed. At the hearing of the appeal, a preliminary point was raised that the suit was in effect one to enforce the terms of the award and therefore not maintainable. The objection as to the maintainability of the suit was not raised by the defendants in the trial Court nor was it raised in the memorandum of appeal.

M. P. Amin, Advocate General, with *K. T. Desai* and *R. M. Kantawala,* for the appellants.

M. V. Desai with *A. S. Pradhan,* for the respondents.

Chagla C. J. This appeal arises out of a judgment and decree passed by Mr. Justice Shah. In order to understand the nature of the litigation a few facts may be stated. One Purshottamdas Jhaverchand died in 1932 leaving three sons Jethalal, Chunilal and Mulchand. Purshottamdas was doing two businesses in the name of "Popatlal Mulchand". One was a yarn business and the other was a cloth business which was started in 1932. On the September 2, 1938, a partnership agreement was entered into between Chunilal, Mulchand and the sons of Jethalal who had died in 1937 and the effect of the partnership agreement was that the business of Popatlal Mulchand (Yarn) was to be carried on by the three branches represented by the three sons of Purshottamdas. With regard to the cloth business an outsider was also interested and in respect of this business a partnership agreement was entered into on November 4, 1942 and that partnership agreement also dealt with the shares and the rights of the three branches represented by the three sons of Purshottamdas. Two new businesses

were started in October 1940. One was the business of Natvarlal Chunilal which was a yarn business and the other was the business of Rasiklal Chhotalal which was a cloth business. Rasiklal was the name of the son of Chhotalal who was the son of Chunilal. In 1943 a writing was executed with regard to these new businesses and that agreement provided that the profit that may remain over after deduction of income-tax with regard to these two businesses should be equally divided amongst the three branches represented by the three sons of Purshottamdas. There were disputes between the three branches with regard to the various businesses and these disputes were referred to arbitration on December 28, 1947. The reference to arbitration expressly stated that the award would be governed by the Indian Arbitration Act. Under this agreement four arbitrators were appointed. On February 7, 1948 the arbitrators gave their award and really the award was in two parts. The first part dealt with the business of Popatlal Mulchand (Yarn) and Popatlal Mulchand, the cloth business. The other part dealt with the two new businesses which had been started in 1940 and with regard to the business of Natvarlal Chunilal the award provided that it was agreed between Natvarlal Chunilal and Mulchand Purshottamdas and Narottamdas Jethalal that the same shall be divided and shared in equal shares by the three. This referred to the profits and loss found on examining the accounts of Natvarlal Chunilal for the Samvat years 2002, 2003 and part of 2004 ending with January 31, 1948. It further provided that the moneys coming to the shares of Narottamdas Jethalal and Mulchand Purshottamdas were to be received or paid in cash. The reference was made to Narottamdas Jethalal, the son of Jethalal and Mulchand Purshottamdas, the son of Purshottamdas Jhaverchand because it is common ground that this firm of Natvarlal Chunilal was being managed by Chunilal, the second son of Purshottamdas Jhaverchand. The award further provided that Narottamdas Jethalal and his brothers and Mulchand Purshottamdas and his family had no concern whatsoever with any business or works carried on hereafter i.e. from the date February 1, 1948, in the name of Natvarlal Chunilal, but Natvarlal Chunilal had agreed to pay to the three, in accordance with the item three (above), the profits made from his current quota as long as the said quota continued. The award also provided that Narottamdas Jethalal was bound to pay the amount in cash in respect of his one-third share and Mulchand Purshottamdas and

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the members of his family were bound to pay the amount in cash in respect of their one-third share with regard to income-tax paid by Natvarlal Chunilal in connection with dealings prior to the date January 31, 1948. A similar provision was made with regard to the business carried on in the name of Rasiklal Chhotalal. The plaintiff in the suit from which this appeal arises represents the branch of Chunilal and in the suit he has prayed for the accounts of the business of Natvarlal Chunilal for the Samvat years 2002 and 2003 and for the period ending January 31, 1948, to be taken under the directions of the Court and for an order that defendants Nos. 1 to 4 and defendants Nos. 5 to 8 who represent the branches of Mulchand and Jethalal should be ordered to pay to the plaintiff such sum as may be found due respectively by each group to the plaintiff on taking accounts in respect of the business of Natvarlal Chunilal. He has further asked for a relief in respect of the provision with regard to income-tax which was made in the award and the relief which he seeks is that defendants Nos. 1 to 4 and defendants Nos. 5 to 8 are respectively bound to pay to the plaintiff one-third share each of the amount paid by the plaintiff since February 7, 1948, and that may have to be paid by the plaintiff hereafter in respect of the business of Natvarlal Chunilal for the period ending January 31, 1948. He has also asked that defendants Nos. 1 to 4 may be ordered to pay to the plaintiff the sum of Rs. 10,760-8-0 being the one-third share of Rs. 32,281-8-0 paid by the plaintiff after February 7, 1948, as and by way of income-tax in respect of the business of Natvarlal Chunilal up to Samvat year 2001 and he has also prayed for a decree against defendants Nos. 5 to 8 with regard to an identical amount being their one-third share of the amount of income-tax paid by the plaointiff after the February 7, 1948.

The defendants filed a counter-claim to the suit and they wanted accounts to be taken of the firm of Natvarlal Chunilal from its inception in 1997.

The learned Judge held that the writing of the February 21, 1943, did not bring about a partnership between the three branches represented by the three sons of Purshottamdas but that the defendants were co-sharers with the plaintiff in the profits of Natvarlal Chunilal and he further took the view that the counter-claim was barred by the law of limitation. The learned Judge, therefore, decreed the plaintiff's claim and

dismissed the counter-claim. It is from that decision that this appeal has been preferred.

Now, it seems to us that there is a preliminary and an insuprarable difficulty in the way of the plaintiff in maintaining the suit. In paragraph 4 of the plaint the plaintiff himself sets out that there were disputes in December 1947 and January 1948 between the members of the branches of the three brothers *inter alia,* regarding the estate of Purshottamdas Jhaverchand and certain partnership business carried on in the name of Popatlal Mulchand in Bombay and also the business carried on by the plaintiff in the name of Natvarlal Chunilal and he goes on to say that ultimately all the said disputes and differences were referred to the arbitration of certain named persons. He further avers that the arbitrators made their award dated February 7, 1948, in respect of *inter alia* of the business of Natvarlal Chunilal. He further says that the said Chunilal and the plaintiff and his brother Chotalal, the said Mulchand and all the defendants except the 1st defendant accepted and agreed to the said award and signed the same in token thereof. The said award is hereafter referred to as the said agreement dated February 7, 1948. It is rather curious that the plaintiff in his evidence admitted that there was a partnership between him and the other two branches in the firm of Natvarlal Chunilal, and his case was not that the firm of Natvarlal Chunilal was a proprietory firm but that it was a partnership firm. That was also the contention of the defendants, and with very great respect to the learned Judge below, it seems difficult to understand why the learned Judge should have found a case of co-ownership with regard to the profits of the firm of Natvarlal Chunilal when the case of both the parties to the suit was that it constituted a partnership, and the first contention that was urged by the Advocate-General on behalf of the defendants was that if the plaintiff was a partner in the firm of Natvarlal Chunilal, it would not be open to him to maintain an action with regard to the accounts of a limited period of that partnership because, as pointed out, the prayer of the plaintiff is confined to the taking of accounts of Samvat years 2002, 2003 and part of 2004 but he does not want accounts to be taken of the Samvat years 1997 to 2001. The Advocate-General says that it is well-established law that a partner can only file a suit for partnership accounts provided he wants all the accounts of the partnership to be taken. It is not open to him to pick and choose and to select a particular period of the partnership as the period of

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which accounts should be taken. The Advocate-General seems to be right in his contention. But the answer given by Mr. M. V. Desai on behalf of the plaintiff is that this is not a suit for partnership accounts but this is a suit to enforce the award or agreement which has been referred to and which was given by the arbitrators on February 7, 1948. Now, if that is the nature of the suit, the question arises whether a suit to enforce an award is maintainable. Realising the difficulty in his way Mr. Desai, in the first place, attempted to argue that this was a suit to enforce an agreement that was arrived at between the parties subsequent to the award and his contention was that the award was merged in the agreement that the rights of the parties were determined under that agreement and that the suit was maintainable to enforce that agreement which was something very different from the award. In our opinion, that contention is not open to Mr. Desai in view of his own pleadings. Paragraph 4 of the plaint makes the position perfectly clear. As already pointed out, it refers to disputes between the parties—the disputes which relate to the subject-matter of the suit; it refers to reference to arbitration; it refers to the award and then it goes on to state that the parties "accepted and agreed to the said award and signed the same in token thereof". There is no plea of any agreement subsequent to the award. The plea is that the award was accepted and agreed to. At the highest this plea can only mean that the parties agreed not to challenge the award and to abide by the award. But the acceptance of the award and the agreement to abide by the award cannot change the nature of the award. If it was an award, it continued to be an award notwithstanding the fact that the parties have accepted it. It is difficult to accept the contention that merely on the parties abiding by the award and accepting the award the nature of the award changed and it became an agreement and that the award was merged in the agreement. Mr. Desai has next attempted to argue that the document dated February 7, 1948, and which has been marked in the Court below as Ex. A was not an award at all. Mr. Desai says that if one only looks at the two documents, Exh. A and Exh. G which is the other document executed by the arbitrators the distinction between the two documents is apparent. Mr. Desai says that whereas Exh. G states that there has been an adjudication by the arbitrators upon the disputes between the parties, Exh. A records an agreement between the

parties. In our opinion, parties appearing before the arbitrators may agree to take an award by consent. They may agree not to have the adjudication by the arbitrators. They may reduce the terms of agreement to writing and they may ask the arbitrators to promulgate that agreement as an award; but the mere fact that the parties have agreed to the terms of the award and that there has been no adjudication by the arbitrators does not in any way change the nature of the award. Once parties have referred their disputes to a domestic forum it is that domestic forum alone that can decide upon those disputes. The forum may decide upon those disputes by adjudicating upon those disputes, it may decide those disputes if the parties consent to take a decision on an agreement. Whether in one case or the other, the decision of the domestic forum, whether by consent or *in invitum*, is an award and has all the characteristics of an award. But the matter is not capable of argument because the plaintiff himself has described Ex. A as an award and has rightly so described it. Therefore if the suit is filed to enforce Ex. A, as Mr. Desai concedes, then clearly it is not a suit to enforce an agreement which is in any way independent of the award or which has no concern with the award but it is a suit to enforce the award and therefore we have to consider the question whether in law it is permissible to a party who has referred the disputes between him and the defendants to an arbitrator and that arbitrator has given his award relating to those disputes, to file a suit in respect of the very subject-matter of those disputes because it is not disputed that the suit relates to the very disputes which were referred to the arbitration of the four arbitrators; nor is it disputed that Exh. A deals with those disputes and embodies the decision with regard to those disputes arrived at by consent between the parties. Whatever the law on the subject may have been prior to the Arbitration Act X of 1940, it is clear that when this Act was passed, it provided a self-contained law with regard to arbitration. The Act was both a consolidating and amending law. The main object of the Act was to expedite and simplify arbitration proceedings and to obtain finality; and in our opinion when we look at the various provisions of the Arbitration Act it is clear that no such suit can be maintained to enforce an award made by arbitrators and an award can be enforced only by the manner and according to the procedure laid down in the Arbitration Act itself. Section 14 deals with signing and filing of the award. Section 15

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deals with the power of the Court to modify the award in cases set out in that section and s. 16 deals with the power of the Court to remit the award. Then we come to s. 17 and that provides that

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award".

Therefore s. 17 lays down the procedure by which a decree can be obtained on an award. The Act gives the right to the parties to challenge the award by applying for setting aside the award after the award is filed under s. 14, but if that right is not availed of or if the application is dismissed and the Court has not remitted the award, then the Court has to pronounce judgment according to the award and upon the judgment so pronounced a decree has to follow. Mr. Desai does not dispute, as indeed he cannot, that when the award was published by the arbitrators, he could have followed the procedure laid down in the Arbitration Act and could have applied for judgment under s. 17. But Mr. Desai contends that s. 17 does not preclude a party from filing a suit to enforce the award. Mr. Desai says that s. 17 gives a party a summary remedy to obtain judgment upon the award but that summary remedy does not bar a suit. Section 31 of the Act deals with jurisdiction of the Court and sub-s. (*1*) provides that

"subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates"

and sub-s. (*3*) provides that

"all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court".

Therefore the application for judgment in terms of the award must be made to the Court where the award has been filed and that is the only Court upon which jurisdiction has been conferred for this purpose. Then we have s. 32 and that provides that

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

Mr. Desai's contention is that only those suits which are specifically mentioned in s. 32 are barred, and according to him the

only suit that would be barred is a suit which calls for a decision of the Court with regard to the existence, effect or validity of an award and Mr. Desai says that his present suit does not call for a decision from the Court upon the existence, effect or validity of the award. Mr. Desai says that no question of the existence of the award arises in this suit; no question of validity also arises and he is not asking the Court to construe the award and to determine what is the effect of the award. In our opinion, the expression "effect of the award" is wide enough to cover a suit to enforce an award. Where a party files a suit to enforce an award, he does call upon the Court to give a decision upon the effect of the award. Unless the Court can give such effect it would not be possible for the Court to enforce the award. Although the party may not in terms ask for a decision of the Court to give effect to the award, the very fact that the party is asking the Court to enforce the award must result in the Court giving a decision upon its effect. The construction we are putting upon s. 32 is also consistent with the general scheme of the Act. If, as pointed out, the Act is both a consolidating and amending Act and its object was to provide a self-contained code relating to the law of arbitration and if the Act also provided all the machinery for enforcing an award, it is difficult to believe that the law contemplated a suit being filed to enforce the award. This point has come up for consideration before the various High Courts and we have a judgment of a Division Bench of the Madras High Court which has taken the same view which we are taking in this matter. That judgment is reported in *Moolchand* v. *Rashid Jamshed Sons & Co.*[1]. The decision is a decision of Chief Justice Leach and Mr. Justice Lakshmana Rao and the learned Chief Justice points out in the judgment that the scheme of the Act is to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act. The Division Bench of the Madras High Court was considering a suit which was filed to enforce an award and the view taken by the learned Chief Justice was that the suit which the appellants filed clearly raised the question with regard to the existence and validity of the award, and such a suit was expressly barred by s. 32. In coming to that conclusion the learned Chief Justice relied on a judgment delivered by me sitting on the Original Side and which is reported in *Rattanji Virpal & Co.* v. *Dhirajlal*

[1] [1946] A. I. R. Mad. 346.

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Manilal[1]. Although the point did not directly arise before me, I took the same view on a construction of s. 32 as has been subsequently taken by the Bench of the Madras High Court. This view has also been taken in *Ramchander Singh* v. *Munshi Mian*,[2]. That is a judgment of a Division Bench consisting of Mr. Justice Imam and Mr. Justice Ramaswami. The same view has been taken of the law by a single Judge of the Punjab High Court reported in *Radha Kishen* v. *Ganga Ram*.[3] As against this, Mr. Desai has relied upon a judgment of the Calcutta High Court reported in *Munshilal & Sons* v. *Modi Brothers*.[4] It is a judgment of Mr. Justice Das and he has taken a view contrary to the views taken by the Madras, Patna and Punjab High Courts. With respect, the point did not directly arise before Mr. Justice Das for decision. He was not dealing with a suit filed to enforce an award but he was dealing with proceedings for judgment upon the award and the question that arose for determination was whether the *karta* of a Hindu joint family carrying on business was competent to make a reference to arbitration on behalf of the family in its trading name and whether the award on such reference was valid, and the learned Judge held that such an award was valid and passed a judgment upon that award, and in discussing this question the learned Judge at page 93 discusses the question whether after the commencement of the Arbitration Act it was competent to a party to the award to file a suit to enforce the award and the view taken by the learned Judge is that because dishonest litigants against whom awards had been made used frequently to resort to suits to delay the enforcement of such awards by falsely setting up a plea of fraud, illegality or absence of jurisdiction s. 32 was enacted in order to bar suits contesting an arbitration agreement or an award and although the learned Judge conceded that ordinarily a person, in whose favour an award was made, would prefer to adopt the more expedicious procedure laid down in the Act for enforcing the award if the same be applicable, he could see no reason why such a person should not be allowed to proceed by way of a regular suit to enforce the award. With respect, we are unable to agree with the view taken by the learned Judge. The Arbitration Act, in our opinion, does not merely furnish a summary procedure to a party who wishes to avail himself of it but the Arbitration Act contains the whole law with regard

(1) [1942] Bom. 452.
(2) [1950] A. I. R. Pat. 48.
(3) [1951] A. I. R. Punj. 121.
(4) [1948] 1 Cal. 81.

to arbitration and also contains the only procedure which can be resorted to with regard to all matters arising out of arbitration agreements and awards made as a result of arbitration agreements. Mr. Desai also relied upon a judgment of the Nagpur High Court reported in *Nanhelal* v. *Gulabchand*[1] This is also a judgment of a single Judge Mr. Justice Pollock. The learned Judge takes the view that it was beyond dispute that it was also open to a person interested in an award to sue for the enforcement of that award. Now, the decision to which we have drawn attention makes it clear that far from it being beyond dispute, with respect to the learned Judge, several High Courts have taken the contrary view with regard to this matter. Mr. Desai has also relied on a recent decision of this Court reported in *Kurbanhussein Mahomedali* v. *Husseinbhai*.[2] Mr. Justice Sen and Mr. Justice Gajendragadkar were there considering a suit filed to enforce an award and the only question that really arose before them was whether the suit was within time or was barred by the law of limitation. The suit was filed before the Arbitration Act came into force and no question arose before that Bench of construing s. 32 of the Act. Mr. Desai is undoubtedly right that before the Act of 1940 the view was taken that an award did not lose its efficacy merely because it was not filed and no action was taken on it by proceedings under the Arbitration Law. But the question is whether that view is possible after the Arbitration Act came into force and the legislature enacted s. 32. Therefore, with respect, we agree with the view taken by the Madras High Court in *Moolchand* v. *Rashid Jamshed Sons & Co.*,[3] and the view taken by the Patna High Court in *Ramchander Singh* v. *Munshi Mian*[4] and the view taken by the Punjab High Court in *Radha Kishen* v. *Ganga Ram*.[5]

The result, therefore, is that the plaintiff cannot maintain this action to enforce the award. Mr. Desai says that in the Court below no point was taken as to the maintainability of the suit and the parties proceeded on the basis that the suit was to enforce an agreement and no question of enforcing the award arose and Mr. Desai points out that as the parties went to trial on certain issues, the Court of Appeal will not introduce a new element which was not present in the Court below

[1] [1944] Nag. 340.
[2] (1947) 50 Bom. L. R. 604.
[3] [1946] A. I. R. Mad. 346.
[4] [1950] A. I. R. Pat. 48.
[5] [1951] A. I. R. Punj. 121.

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and arrive at a decision which is contrary to what was understood between the parties as is clear from the issues raised between them. Now, the proposition put forward by Mr. Desai is perfectly sound. Whatever the pleadings may be, if parties understand the controversy between them to a particular controversy, if the parties raise issues understanding that controversy and if the parties go to a trial on those issues, then the Court of Appeal would be reluctant to come to a contrary conclusion merely because the formal pleadings are different from the issues actually raised. But this principle does not apply to the present suit because the question that we have to consider is not a question affecting the merits of the case but a question affecting the jurisdiction of this Court. Section 32 bars suits and a Civil Court would have no jurisdiction, according to us, to entertain and determine a suit filed to enforce an award and even if the parties agree that a Civil Court should entertain the suit to enforce the award the parties could not by their consent confer jurisdiction upon it. Therefore, whatever the parties may understand, whatever the parties may agree to, if the Court has no jurisdiction, the absence of jurisdiction cannot be made good by any understanding between the parties. Therefore if we are right in the view we take as to the interpretation of s. 32, then it is clear that Mr. Justice Shah, with respect, has no jurisdiction to try a suit which in substance and in effect was a suit to enforce an award. The result, therefore, is that the suit must fail on the preliminary ground that the suit is not maintainable, the suit being one to enforce an award duly given by arbitrators appointed by the parties and also because the award deals with the very disputes which are the subject-matter of the suit. The Advocate-General concedes that if the suit fails on this ground, the counter-claim must also fail.

The result, therefore, will be that the decree passed by the learned Judge will be set aside and the suit dismissed. The counter-claim also will be dismissed. With regard to costs, it is most unfortunate, as Mr. Desai points out, that heavy costs were incurred by the parties in litigating their disputes in the Court below. As the defendants did not raise this point in the Court below which would have put an end to this litigation they are not entitled to the costs of the suit. They are also not entitled to the costs of the appeal because this point was also not raised in the memo. of appeal. In our opinion, the fairest order to make with regard to costs would be that there will

be no order as to costs of the suit; no order as to costs of the counter-claim and no order as to costs of the appeal. There are certain cross-objections filed. There will be no order on the cross-objections. No order as costs.

Attorneys for appellants: *Malvi, Ranchhoddas & Co.*

Attorneys for respondents: *M. B. Cholhia & Co.*

Appeal allowed.

P. M. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

SITARAM HIRACHAND BIRLA (ORIGINAL OPPONENT No. 1), PETITIONER *v.* YOGRAJSING SHANKARSING PARIHAR AND OTHERS (ORIGINAL APPLICANT AND OPPONENTS NOS. 1 TO 7), OPPONENTS.*

1952 Dec. 19

Representation of the People Act (XLIII of 1951), ss. 81, 82, 83, 85, 90 (2), 90 (4), 92, 98—Election petition not properly verified when presented to Election Commission—Petition referred to Election Tribunal for trial—Application before Tribunal for amending petition by properly verifying it and for adding party—Tribunal granting application—Constitution of India, arts. 226, 227—Application by successful candidate to High Court for writ directing Tribunal to dismiss election petition—Powers of Election Tribunal—Discretion to dismiss petition for non-verification—Power to amend petition and add party—Person withdrawing candidature before publication of list of valid nominations whether a necessary party—Effect of non-joinder—Power of High Court to interfere on merits.

An election petition presented by an unsuccessful candidate (opponent No. 1) under s. 81 of the Representation of the People Act, 1951, and the list of particulars accompanying it, were not verified as required by s. 83 and the list was later on supplemented by another list. The Election Commission instead of dismissing the petition under s. 85 referred the petition and the lists to an Election Tribunal to be dealt with according to law. The Tribunal allowed the documents to be amended by way of proper vertification, added as opponent No. 7 a person who was duly nominated a candidate for the election but who before the valid nominations were published had withdrawn his candidature, and then proceeded to hear the election petition on merits. The successful candidate (petitioner) having applied to the High Court under arts. 226 and 227 of the Constitution of India for a writ directing the Tribunal to dismiss the election petition:

* Special Civil Application No. 2017 of 1952.