Supreme Court of India
Kashinathsa Yamosa Kabadi, Etc vs Narsingsa Bhaskarsa Kabadi, Etc on 10 February, 1961
Equivalent citations: 1961 AIR 1077, 1961 SCR (3) 792
Author: S C.
Bench: Shah, J.C.

PETITIONER:
KASHINATHSA YAMOSA KABADI, ETC.

Vs.

RESPONDENT:
NARSINGSA BHASKARSA KABADI, ETC.

DATE OF JUDGMENT:
10/02/1961

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
KAPUR, J.L.
HIDAYATULLAH, M.

CITATION:
1961 AIR 1077 1961 SCR (3) 792
CITATOR INFO :
R 1970 SC 833 (12)
R 1972 SC1121 (9)

ACT:
Hindu Law-Partition-Reference to arbitration out of Court-Arbitrator actually dividing some Properties and giving possession to parties-Revocation of reference-Suit for Partition, maintainability of-Documents recording division by arbitrator-Registration, if necessary--Arbitration Act , 1940 (10 of 1940), s. 32-Registration Act, 1908 (16 of 1908), s. 17.

HEADNOTE:
The parties were members of a joint Hindu family possessed of considerable property movable and immovable. They voluntarily appointed Panchas to determine the shares of the parties and to divide the property. The Panchas first determined the shares of the parties and reduced the determination to writing. It was accepted by the parties and was signed by all of them and the Panchas. Thereafter, on various dates the Panchas divided several items of movable and immovable properties and the parties entered into possession of their shares. These divisions were duly

entered in the " partition books " and were signed by the parties and the Panchas. The Panchas were unable to divide the remaining properties and with the consent of the parties they appointed one G to divide them. G divided some of the properties but he too was unable to divide the remaining properties. One of the parties served a notice cancelling the authority of the Panchas and filed a suit for partition of the remaining properties. Upon an application made by the plaintiff for revoking the reference the Trial Court cancelled the arbitration as one of the Panchas was unwilling to proceed with the division. Another party filed a suit for partition of all the properties contending that the division made by the Panchas was not binding as the award had not been made a rule of the court and the reference had been revoked and as the award was not registered.

Held, that the divisions already made by the Panchas were binding on the parties and only the remaining properties were liable to be partitioned. By the reference to the Panchas, the

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parties ceased to be members of the joint Hindu family. Thereafter, by the division of the family assets which was accepted by the parties and by the taking into possession of their shares by the parties, the properties came under the individual ownerships of the parties to whom they were allotted; and in respect of the remaining properties they became tenants-in-common. The proceedings taken by the Panchas were not revoked by the order of the trial Court revoking the reference as they had been accepted and acted upon by the parties. Where an award made in arbitration out of court is voluntarily accepted and acted upon by the parties and a suit is thereafter filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent actings of the parties are binding. Such a plea is not barred by s. 32 of the Arbitration Act. The records made by the Panchas were documents which merely acknowledged partitions already made and were not required to be registered.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 218 to 223 of 1959.

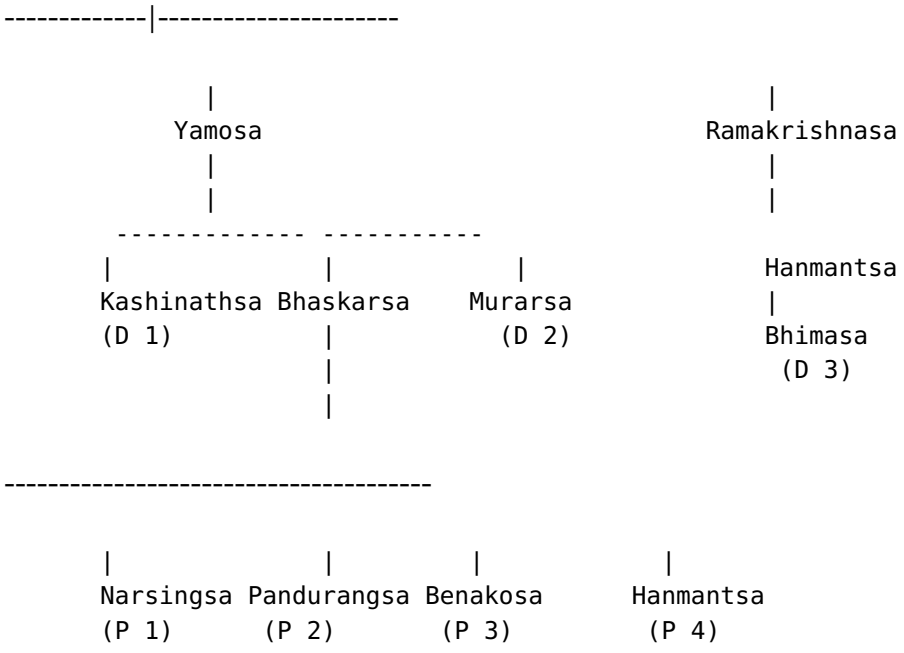
Appeals from the Judgment and Decree dated August 9, 1953, of the Bombay High Court in Appeals Nos. 605 and 606 of 1952 from Original Decrees.

B....B. Kotwal, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra, for the appellant (In C. As. Nos. 218 and 219 of 59), Respondent No. 1 (In C. As. Nos. 220 and 222 of 59), Respondent No. 2 (In C. A. No. 221 of 59) and Respondent No. 5 (In C. A. No. 223 of 59). W....S. Barlingay and A. G. Ratnaparkhi, for the appellants (In C. As. Nos. 220 and 221 of 59), Respondents Nos. 1 to 4 (In C. As. Nos. 218 and 223 of 59) and Respondents Nos. 3 to 6 (In C. As. Nos. 219 and 222 of 59).

Naunit Lal, for the appellants (In C. As. Nos. 222 and 223 of 59), Respondent No. 6 (In C. A. No. 218 of 59), Respondent No. 1 (In C. As. Nos. 219 and 221 of 59) and Respondent No. 3 (In C. A. No. 220 of 59).

R....Gopalakrishnan, for Respondents Nos. 5(a) to 5(c) (In C. A. No. 218 of 59), Respondents Nos. 2(a) to 2(c) (In C. As. Nos. 219, 220 and 222 of 59) and Respondents Nos. 3(a) to 3(c) (In C. A. No. 221 of 59) and Respondents Nos. 6(a) to 6(c) (In C. A. No. 223 of 59), 1961. February 10. The Judgment of the Court was delivered by SHAH, J.-These six appeals are filed with certificates under Art. 133 of the Constitution granted by the High Court of Judicature at Bombay. The appeals arise out of the judgments and decrees in suits Nos. 47 of 1948 and 36 of 1949 in the court of the Civil Judge, Senior Division, Dharwar. The following- geneology set out in the plaint in Suit No. 47 of 1948 explains the relationship between the parties:

Dongarsa



The principal contesting party in the suits was Kashinathsa, eldest son of Yamosa, and he was the first defendant in both the suits. For facility of reference, we propose to refer to the parties as they were arrayed in Suit No. 47 of 1948. Bhimasa the plaintiff in Suit No. 36 of 1949 will, therefore, be referred in this judgment as defendant No. 3. At a partition in 1893 between Dongarsa's branch and the other branches, the former branch received property of the aggregate value of Rs. 13,000/-. Members of that branch thereafter carried on business of weaving silk garments and also of sale and

purchase of silk garments. In 1912, defendant No. 1 started a cloth shop in the name of Kashinathsa Kabadi. In 1916, be started a commission agency business in the name of H. R. Kabadi Shop, and in 1920 he started, business in money-lending and silk goods. Since 1912, defendant No. 1 was the principal earning member of of the family and was attending to the various lines of business and he was assisted by the other members of the family. The family prospered and in course of time acquired a large estate. Before 1946, Bhaskarsa father of the plaintiffs and Ramakrishnasa and Hanmantsa grandfather and father respectively of defendant No. 3 had expired, and the first defendant was the senio- rmost member of the family. In 1946, disputer, arose between the members of the family and defendant No. 3 declined to continue in jointness with the other members of the family and demanded that he be given his half share after dividing the properties by metes and bounds. Claiming that he alone was instrumental in amassing the vast estate which exceeded in value to Rs. 14,00,000/-, defendant I submitted that the estate be divided in four equal shares and that one share be given to him and the remaining shares to the heirs of Bhaskarsa, defendant No. 2 and defendant No.

3. On August 17,1946, the disputes were referred under a deed in writing to three persons Vithaldas Devidas Vajreshwari a merchant of Betegiri, Devindrasa Tuljansa a common relation of the parties and Parappa Nagappa Jagalur a clerk of the pleader acting for the family-(whom we will collectively refer as the Panchas) with authority to determine what shares should be allotted to the different branches of the family and to determine the extra shares to be given to defendant No. 1 for " special exertions made by him in acquiring the property " and to divide the assets of the money lending and other properties of the family_ business as the " Panchas thought fit and proper." The Panchas accepted the reference and embarked initially upon an enquiry for ascertaining what shares in the family property should be allotted to the various contesting parties. On September 23, 1946, the Panchas decided that each of the four parties-defendant No. 1, defendant No. 2, the plaintiffs collectively and defendant No. 3-should be given a fourth share in the properties of the family. This decision was reduced to writing: it was signed by the Panchas and was accepted by the parties and in token of acceptance, they subscribed their signatures thereto. On the same day, gold ornaments of the value of Rs. 67,000/- were divided by the Panchas in four equal shares. A record thereof was made in the proceedings of the Panchas.

The Panchas then proceeded to award to each of the parties gold ornaments weighing 167 tolas 15 as. and silver 481 tolas and 4 as. On September 24, 1946, it is the case of defendant No. 1 that the Panchas decided to give him an additional share of the value of Rs. 40,000/- out of the property for bringing the family " to the present prosperous conditions " and the Panchas directed that defendant No. 2 should for that purpose pay out of his share Rs. 30,000/- to defendant No. 1 and the plaintiffs should pay Rs. 10,000/- to him and the old house of the joint family be allotted to him as his exclusive property. This was denied by the other parties. On October 12, 1946, the Panchas divided the residential houses and a record of this division was entered in five separate books hereinafter referred to as "partition books." In each of the " partition books the Panchas subscribed their signatures under the record of the division and allotment of the shares and the parties also signed underneath the same in token of acceptance of that division. On October 19, 1946, the Panchas divided an amount of Rs. 64,000/- entries regarding which had been posted in the family books of account. Each party was given Rs. 16,000/- and this division was entered in the account books of

Yamosa Dongarsa Kabadi and the entry was duly signed in token of acknowledgment of the correctness by all the parties. It is the case of defendant No. 1 that on that day another amount of Rs. 3,20,000/. which was " the unaccounted cash lying in the safe of the family but which was not entered in the books of account and details whereof were set out in a Tippan Book," was also divided and each party was given Rs. 80,000/-. of the two major contentions in this group of appeals, one has centered round the truth of the story about the division of this amount. 1 On October 20, 1946, the " four empty safes " and the warehouses and lands at Betgiri were divided. On October 21, 1946, the stock-in-trade of the silk shop was divided in four equal shares and on November 10, 1946, miscellaneous gold and pearl ornaments and the houses at Gadag and plots of land in the Hubli Cotton Market were similarly divided, On February 7, 1947, the agricultural lands, cattle and agricultural implements were divided. On February 22,1947, Rs. 24,000/as the accumulated cash on hand in the money lending business were divided into four equal shares. Divisions made on October 20, 1946, October 21, 1946, February 7 and February 22, 1947, were duly entered in the " partition books " and the entries were signed by the Panchas and were also by the parties in acknowledgment of the correctness of the divisions. On February 24, 1947, acknowledgments were obtained from the junior members of the family to the reference to the Panchas and to the decision of the Panchas dated September 23, 1946, whereby each branch was given a four annas share and also to the subsequent divisions made from time to time between September 23, 1946, and February 24, 1947. Between February 25, 1947, and April 10, 1947, cotton bales belonging to the family of the value of Rs. 3,20,000/were divided into four equal shares. The record of this division was not signed by the parties. After the furniture and utensils of the family were divided, there survived certain disputes about the outstandings of the family and other properties especially a dispute about Rs. 16,000/- lying in cash with the family which could not be decided. To resolve the disputes about these properties and the outstandings of the family, the Panchas, with the consent of the parties referred them for decision to one Bhim Rao Godkhindi, a senior pleader of the Gadag Bar. On November 3, 1947, the Panchas executed a writing in favour of Godkhindi authorising him to complete the work of partition of the estate. Godkhindi accepted the authority. On December 5, 1947, Godkhindi asked the parties to "state clearly " what according to them were the properties which remained to be partitioned, and the plaintiffs gave a list to Godkhindi of such properties. Between February 5 and February 9, 1948, outstandings of the value of Rs. 1,20,000/- were divided by Godkhindi and this was accepted by the parties. But Godkhindi was unable to proceed with the division of the remaining assets. On February 9, 1948, the first plaintiff served a notice canceling the authority of the Panchas to divide the properties of the family and on August 19, 1948, he filed Suit No. 47 of 1948 in the court of the Civil Judge, Senior Division, Dharwar, for partition of the properties remaining to be divided and for accounts of the joint family properties. By his plaint, the plaintiffs admitted that the parties had agreed to divide the property into four equal shares. in para. 6 of their plaint, they set out the properties which they alleged had not been divided. The plaintiffs claimed that they be awarded a fourth share in the outstandings of the assets of " Kashinathsa Yamosa Kabadi " and " H. R. Kabadi " shops, and in " a considerable amount of money that has been there" since the time of the ancestors the Tippan in respect of which it was alleged was with defendants Nos. 1 and 2 and in certain gold and silver articles, and lands and houses and rents which were recovered. On August 19, 1948, the plaintiffs also filed a petition in the court of the Civil Judge for leave to revoke the authority of the Panchas. Notice of this petition was served upon the Panchas, and the Panchas having expressed unwillingness to function the court passed an order cancelling their authority.

Thereafter defendant No. 3 filed Suit No. 36 of 1949 on August 16, 1949, for partition and separate possession of a half share in all the properties of the joint family. By his plaint, he claimed that he " had been told " that despite the decision of the Panchas dated September 23, 1946, he will be given a half share in the properties, that his consent to the divisions made by the Panchas was obtained by misrepresentation and that the Panchas were guilty of partiality and therefore their decisions were not binding on him. He averred that it was not possible for him to give the descriptions of the properties other than those described in the plaint and of all the movables belonging to the family and the money lending dealings, he claimed a declaration that the authority given to the Panchas had been revoked and for a decree for partition and separate possession of a half share in the property which may be proved to belong to the joint family.

In both the suits, defendant No. 1 contended that the Panchas had divided the properties in four equal shares after their decision to divide the same in that manner was accepted, that the Panchas from time to time had made actual division of the properties with the consent of the parties, that the division of the properties in each case was acted upon and properties allotted to the parties were reduced into possession by the parties to whom they were allotted, and that on that account the division could not be reopened. He also contended that the " unaccounted cash " had been divided on October 19, 1946, and each party was given his share therein, and that the Panchas had given to him an extra share of the value of Rs. 40,000/- in cash payable by the plaintiffs and defendant No. 2 and the residential family house at Betgiri. Defendant No. 2 supported the claim made by the plaintiffs.

The Civil Judge held that by virtue of the order passed in the petition for revoking the reference to the Panchas their authority as well as the proceedings and all the decisions given by them ceased to bind the parties because " the decisions stood cancelled." He also held that the decisions were not binding upon the parties as they were not filed in court; that the Panchas were not proved to have awarded to defendant No. 1 any additional share in the property of the family; and that the ,unaccounted cash" of the family which amounted to Rs. 3,20,000/- was not divided. He accordingly passed decrees in the two suits ordering that a fresh partition be effected of all the joint family property moveable and immoveable.

Against the decrees passed by the court of first instance defendant No. 1 preferred Appeal No. 605 of 1952, against the decree in Suit No. 47 of 1958 and Appeal No. 606 of 1952, against the decree in Suit No. 36 of 1949. In the two appeals, the High Court at Bombay by a common judgment modified the decrees passed by the court of first instance. In the view of the High Court, there were in law no valid awards made by the Panchas which could be set up in defence by defendant No. 1 to the claim made by the third defendant. They observed that the awards of the Panchas were not binding because they were not properly stamped and those that affected immoveable properties were not registered. But the High Court held that the division of the moveables such as gold and silver ornaments made on September 23, 1946, could not be reopened. They further held that the " unaccounted cash " amounting to Rs. 3,20,000/- was divided on October 19, 1946, and that each branch had received Rs. 80,000/-. The High Court accordingly modified the decree passed by the trial court in so far as it related to the gold and silver ornaments divided by the Panchas on September 23, 1946, and also in respect of the amount of the unaccounted cash of Rs. 3,20,000/-.

There were certain other modifications made in the decrees which are not material for the purposes of these appeals, as no arguments have been advanced at the bar relating thereto.

In these appeals by defendant No. 1, the plaintiffs and defendant No. 3, two principal questions fall to be determined: (1) whether defendant No. 3 is entitled to a half share in all the properties of the joint family ignoring the division already made and (2) whether the unaccounted cash which was estimated by defendant No. 3 and the plaintiffs at Rs. 4,00,000/- and which was stated by defendant No. 1 to be Rs. 3,20,000/was divided on October 19, 1946. On these two questions, the parties are differently arrived. On the first question, defendant No. 1 is supported by the plaintiffs and defendant No. 2. On the second question, defendant No. 1 is opposed by the plaintiffs and defendants Nos. 2 and 3.

After setting out the contentions of the parties, it is recited in the deed of reference that the parties had given authority to the Panchas to peruse the written and oral evidence and to decide what shares shall be allotted to the different branches and also to decide what may appear to be proper for providing an "extra share" to defendant No. 1. The agreement between the members of the joint Hindu family to appoint Panchas for dividing the family properties amounts to severance of the joint family status from the date of the agreement. Once reference is made, joint family status is severed and it is not postponed until the division of the property by metes and bounds.

To appreciate the contentions, it is necessary to follow the method adopted by the Panchas in dividing the properties. The decision of the Panchas to allot to each branch a fourth share was accepted by all the parties. Thereafter the Panchas proceeded to allot shares in the properties movable and immovable. The distribution of the properties was set out in writing and in acknowledgment of the fact that distribution was made as described the parties signed the writing:

> " We have appointed these as the Panchas. In accordance therewith all the Panchas heard all the information (placed below them) and all the Panchas unanimously decided on 23-9-1946 that Kashinathsa Yamosa Kabadi should be given a 1/4 share, that Narasingsa Bhaskarsa Kabadi should be given a 1/4 share, and that Bhimasa Hanumantasa Kabadi should be given a I share, and we all having consented to the said decision of the Panchas, we all and all the Panchas have put our respective signatures to the said decision of the Panchas. The details of the properties that have fallen to the shares of the different shares as per the decision effected in accordance with the said decision are as follows:"

This acknowledgment was not merely an agreement not to challenge the decision of the Panchas, but was made as evidencing the division actually made and reduced to writing. The trial court found that the properties separately allotted to the various branches were reduced into possession by the parties and the High Court agreed with that view. If the consent of the parties was not procured by fraud, misrepresentation or any other ground which may vitiate a partition under the general law, the division made by the Panchas and accepted by the parties would be binding upon them. It is always open to the members of a joint Hindu family to divide some properties of the family and to keep the remaining undivided. By the reference to the Panchas, the parties ceased, to be members of

the joint Hindu family. If thereafter the assets of the family were divided and that division was accepted by the parties, the properties reduced by the parties to their possession must be deemed to be of the individual ownership of the parties to whom they were allotted, and the remaining properties as of their tenancy- in-common. Evidently in this case, the Panchas suggested what they regarded as a just and -convenient method of partition and that method was accepted by the parties. Originally it was intended to make a general division or award in respect of all the properties and with that end in view a stamp paper of the value of Rs. 30/- was purchased. But in the course of the proceedings, effectuating a division of all the properties by a single award was apparently found inconvenient and a convenient method was adopted and the properties were divided by stages. In the first instance, the principle of division was discussed and decided upon and that principle was accepted by the parties. Thereafter the properties were divided in different sections.

The plea raised in his plaint by defendant No. 3 that his consent to the reference was obtained by coercion and undue influence is somewhat vague and indefinite. He merely stated that he had recently attained the age of majority, that defendant No. I was the head of the family and that he was not in a position ',either to say anything against him (defendant No. 1) or to act against him." He also stated that defendant No. I had threatened him that he (defendant No. 3) would be given a share only if he acted according to the behest of defendant No. 1 otherwise he would be driven out of the house without anything and therefore he " became helpless " and agreed to sign the " letter of authority passed in favour of the Panchas." He pleaded in para. 5 of the plaint that he had not agreed to take a more fourth share and that he " had all along been insisting upon receiving a half share," and that it was his intention to take his legitimate half share " without dispute if that could be managed " and as he believed that he would be given that share he did not immediately raise any objections He also stated that hill had been promised by defendant No. 1 that he would be given his share in the property. The learned trial judge rejected this plea holding that Defendant No. 3 failed to prove that he was " compelled by exercise of undue influence and coercion to agree to the reference to the Panchas, and that he had been promised by defendant No. I that he would be given a half share." In the High Court, the plea raised by defendant No. 3 about coercion and undue influence and the promise made by defendant No. I does not appear to have been seriously pressed. The plea of defendant No. 3 that he subscribed his signatures to the various decisions given by the Panchas from time to time because he believed that he was bound by the decision dated September 23,'1946, and that but for such belief he would not have subscribed his signatures to those decisions has in our judgment no force. Defendant No. 3, it appears on the evidence, voluntarily accepted the decision that each branch was to be given a fourth share and he accepted the division of the properties allotted to him on that footing.

Again by virtue of the order passed by the Civil Judge cancelling the reference, the proceedings taken by the Panchas including the division of the property which had been accepted were not revoked. The plaintiffs filed Misc. Application No. 15 of 1948 for an order revoking the reference and as the Panch Devendrasa was found unwilling to proceed with the work of dividing the property, the arbitration was cancelled. Under s. 12, sub-s. (2) of the Arbitration Act, where the authority of an arbitrator or arbitrators is revoked by leave of the court, the court may order that the arbitration agreement shall cease to have effect with respect to the difference referred. If the decisions of the Panchas had not been accepted by the parties with the revocation of the reference, all proceedings

which they had adopted might have fallen through; but the parties did accept the decisions made from time to time and the cancellation of the reference had not the effect of vacating the divisions already made. We are unable to agree with the view of the trial judge that the cancellation had the effect of nullifying all the interim divisions and that they must be deemed to have been impliedly set aside.

It is unnecessary to consider whether these decisions may be regarded as " interim awards " within the meaning of s. 27 of the Arbitration Act. The decisions given and divisions made were not merely tentative arrangements liable to be superseded at a later stage. The decisions were treated as final and were carried out. We agree with the High Court that whatever may be the original intention of the parties, the Panchas having with the consent of the parties proceeded to divide the properties in stages, each decision must be regarded as final with regard to the property divided thereby.

We are of the view that it was open to defendant No. I to set up the division of the properties made from time to time as a defence to the action filed by defendant No. 3. Even assuming that the records of the divisions made by the Panchas are awards strictly so called, what is set up in defence is not the awards made by the Panchas, but the partition of the property by agreement after accepting the method of partition suggested by the Panchas. To such a plea, there is in our judgment no bar of s. 32 of the Arbitration Act. By s. 32 it is provided:

> " 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. "

Before the Arbitration Act, 1940, was enacted, an award made by arbitrators appointed out of court even if it was -not made a rule of the court was regarded as equivalent to a final judgment and any suit filed on the original cause of action referred to the arbitrators was held barred. In Muhammad Nawaz Khan v. Alam Khan it was held by the Judicial Committee of the Privy Council that an award is valid even if no party has sought to enforce it by the summary procedure, (1) (1891) L.R. 18 I.A. 73.

Since the enactment of the Arbitration Act, 1940,, there has &risen wide divergence of judicial opinion among the High Courts on the question whether an award made in a reference out of court can be set up as a defence to an action filed by a party thereof on, the original cause of action when the award is not filed in court. Section 31, sub-s. (2) of the Arbitration Act provides:

> " Notwithstanding anything contained in any other law for the time being, in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other court "

and s. 33 sets out the procedure to be followed for challenging the existence, effect or validity of an arbitration agreement or an award or to have its effect determined. It is manifest that questions relating to the validity, effect or existence of an award can be decided by the court to which an application making it a rule of court lies.

In Babui S. K. Kuer v. B. N. Sinha (1), the Patna High Court held that by virtue of s. 32 of the Arbitration Act, 1940, an award made on a private reference to arbitration is not operative of its own force; it only becomes operative on being made a rule of the court. It was held in that case that an award cannot be set up as a defence to an action unless it is filed in court and a decree is obtained thereon. Similar view was taken in Sait Pamandass v. T. S. Manikyam Pillai Bhimavarapu Venkatasubbauva v. Addanki Bapadu and Firm Gulzarimal Gheesdal v. Firm Rameshrhandra Radhyeshyam (4). On the other hand, in Pamudurthi Suryanarayana Reddy v. Pamudurthi Venkata Reddi (1), it was held that ss. 32 and 33 of the Indian Arbitration Act, 1940, did not preclude a defendant from (1) (1952) l.L.R. 31 Pat. 886.

(2) A.I.R. 1960 And. Pra. 59.

(3) A.I.R. 1951 Mad. 458.

(4) I.L.R. [1959] Raj. 515.

(5) I.L.R. [1949] Mad. 11.

setting forth an award which had been fully performed by him but which was not filed in Court under s. 14 and on which a judgment was not pronounced or a decree given under s. 17 of the Act, in answer to the plaintiff's claim which was the subject matter of the reference and the award. That view was accepted in Rajamanickam Pillai v. Swaminatha Pillai (died) (,). It is not necessary in this appeal to express a considered opinion on this disputed question. It may be sufficient to observe that where an award made in arbitration out of court is accepted by the parties and it is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent actings of the parties are binding. By setting up a defence in the present case that there has been a division of the property and the parties have entered into possession of the properties allotted, defendant No. I is not seeking to obtain a decision upon the existence, effect or validity of an award. He is merely seeking to setup a plea that the property was divided by consent of parties. Such a plea is in our judgment not precluded by anything contained in the Arbitration Act. The records made by the Panchas about the division of the properties, it is true, were not stamped nor were they registered. It is however clear that if the record made by the Panchas in so far as it deals with immoveable properties is regarded as a non-testamentary instrument purporting or operating to create, declare, assign, limit or extinguish any right, title or interest in immoveable property, it was compulsorily registrable under s. 17 of the Registration Act, and would not in the absence of registration be admissible in evidence. But in our judgment, the true effect of what are called awards is not by their own force to

create any. interest in immoveable property they recorded (1) A.I.R. 1952 Mad. 24.

divisions already made and on the facts proved in this case, their validity depends upon the acceptance by the parties. The records made by the Panchas were documents which merely acknowledged partitions already made and were not by law required to be registered. On a perusal of Ex. 456A which is a translation of the tippan book in which are recorded the decisions which are signed by the parties, it is evident that the Panchas were merely recording what had been actually divided and they were not seeking to set out their decisions relating to division of property to be made. The question whether the various decisions recorded in Ex. 456A and in the, books of account were required by law to be stamped need not be decided. The documents were admitted in evidence by the trial court and no question of admissibility of those documents can be raised at a later stage of the suit or in appeal (see s. 36, Stamp Act).

We are unable to agree with the view of the High Court that the decisions dated October 12, 1946, October 20,1946, and November 10, 1946, were not intended to be final decisions. There is no reliable evidence to support the view of the High Court. Even if the divisions are not strictly in conformity with the shares declared in the decision dated September 23, 1946, the parties having accepted those divisions and having reduced the shares allotted to their possession, it is not open to them to seek to reopen the same on the ground that the division was unequal. Defendant No. 3 contended in the trial courts and the High Court that he had not taken possession, of the property allotted to his share. The trial court held that he had taken possession of all the properties which had fallen to his share and the plea that he has not obtained possession was untrue. The High Court has accepted that view. To sum up: on a consideration of the materials placed before the court, the reference to Panchas is proved to be made voluntarily by all the parties, that the Panchas had in the first instance decided that each branch was to get a fourth share in the properties and that decision was accepted by the parties, that division of properties made from time to time was also accepted by the parties, and subsequently, when the Panchas were unable to proceed with the division, the matter was referred by consent of the parties to Godkhindi and Godkhindi divided with the consent of the parties the outstandings. but he was unable to divide the remaining properties. For reasons we have already stated, the division made by the Panchas and by Godkhindi is binding upon the parties. Such properties as are not partitioned must of course be ordered to be divided and the division will be made consistently with the rules of Hindu law. To the division of such properties which have not been divided, the decision of the Panchas dated September 23, 1946, will not apply.

We may now turn to the second question whether on October 19, 1946, the amount of Rs. 3,20,000/- which was the " unaccounted cash with the family " was partitioned. It was the plea of defendant No. I that on that day after dividing the amount of Rs. 64,000/- the " unaccounted cash " which was found to be Rs. 3,20,000/- was actually divided and each branch was given Rs. 80,000/-. Defendant No. 1 relied upon his own testimony besides the testimony of Parappa (one of the Panchas) and of Huchappa---clerk of the family shop. Defendant No. 3 examined the other Panch Devendrasa. The trial court held that the testimony of Huchappa and Parappa was unreliable. Defendant No. 1 did admit that the family possessed Rs. 3,20,000/- as " unaccounted cash "; and the burden of proving that division was in fact made lay on him. The trial court observed that there was no writing evidencing the division of Rs. 3,20,000/-, no receipt was taken from any person for

payment of a share in that amount, and that it was highly improbable that a person like defendant No. 1 would part with substantial amounts without taking receipts.

The High Court disagreed with this view., They pointed out that there was no entry made in the books of account of this large amount of cash, and apprehending that a division of the property with a formal record which may ultimately be produced in court was likely to involve the members of the family in proceedings for concealment of income, no record was maintained of the division thereof. The High Court also relied upon the testimony of Parappa, Huchappa and defendant No. 1 and upon the circumstance that neither in the plaintiffs' plaint nor in the plaint of defendant No. 3 was any specific reference made to the refusal of defendant No. 1 to divide this amount. In our view, the High Court was right in the conclusion to which it arrived. It is true that it is difficult to rely upon the oral testimony of either side. Defendant No. I and defendant No. 3 are evidently interested persons and their testimony may not carry much weight. Parappa one of the Panchas deposed that the amount of Rs. 3,20,000/- was divided on August 19, 1947, and each branch received its share. He stated that the amount was not entered in the books of account. He further stated that after the safes were opened, the Tippan book was found together with the money and that the cash was counted but it was not compared with the Tippan book, that thereafter the amount was divided. According to this witness, there was no documentary evidence about that amount and he did not know whether the defendants had knowledge of the extent thereof He explained that no receipts were taken because defendant No. I did not demand the same, that he did not press for a writing as the parties said that it was a " secret arrangement ", and as the division was " with complete concord ", he did not think it necessary to take a writing or to record it in the books.

The testimony of Huchappa 'was similar. The other Panch Devendrasa stated that plaintiff No. 1 and defendant No. 2 had pressed the Panchas to give them their share in the " unaccounted cash ", saying that defendant No. I was " indefinitely postponing " it, that the Panchas advised defendant No. 1 to divide this amount, but he stated that he would be " reduced to equality " with others when' he had a large family and that he had made great efforts and that he should be given more property, otherwise he would not allow division of the " unaccounted cash " and the other property. The Panchas then told him that they had decided upon the share each should be given and no further proposal would be entertained by plaintiff No. 1. The witness then said that he left for Gadag. In cross-examination, he stated that he and the other Panchas had told defendant No.1 to give the shares of the unaccounted cash to the other sharers. The evidence of the witnesses clearly shows that the question relating to the division of the "unaccounted cash " was expressly discussed and the plaintiffs as well as defendant No. 3 were fully aware of the existence of this amount lying in the safe which was not entered in the books of account. It is the case of defendant No. I that the amount was divided on October 19, 1947. The first plaintiff and defendant No. 3 have denied this on oath; defendant No. 2 did not enter the witness box. The burden certainly did lie upon defendant No. 1 to establish the division of the amount but there are several important circumstances which go to prove that a partition must have been effected as alleged by defendant No. 1. From the sequence in which various properties were partitioned, it is clear that in the first instance the principle of division was decided and then the valuable properties like the immovable properties, the cash, stock in trade of the shops, were divided and then the division of properties of comparatively small value like the agricultural implements, pots and furniture was taken in hand. If there was a. large amount

of Rs. 3,20,000/- in cash lying undivided before dividing pots, pans and furniture, the other parties would have insisted upon the division of that amount.: - It is difficult to believe especially having regard to the plea that defendant No. 1 had adopted a refractory attitude with the other parties that defendant No. 3 accepted the division of properties of comparatively small value without insisting upon division of this large amount. There is also the circumstance that even though plaintiff No. I know about the existence of the " unacounted cash " in the safe, it was expressly mentioned in the plaint. We would have expected the plaintiffs to state expressly that on or about October 19, 1947, " unaccounted cash " was found in the safe and that even though defendant No. I was asked to divide the same by the remaining parties as well as the Panchas, he declined to accede to that demand. The conduct of defendant No. 3 in not setting out this item in his plaint renders the story that defendant No. I refused to divide this amount somewhat improbable. There is again no reference in the plaint filed by defendant No. 3 that the amount that was divisible was not divided on account of the attitude adopted by defendant No. 1. Counsel for defendant No. 3 relied upon the averments in para. 9 of the plaint that it was not possible for defendant No. 3 to give a description of the remaining properties and the movable articles belonging to the family and the money lending dealings. But there is in the plaint no reference to any cash amount. Schedules appended to the plaint are very detailed and it is difficult to believe that defendant No. 3 did not mention that this amount of Rs. 3,20,000/- was not divided even after demands were made and ignored. The plea that he apprehended that he might be called upon to pay court fee ad valorem on the amount if he specified it in the plaint is futile. Consistently with the 'practice prevailing in the courts in the Bombay Province, defendant No. 3 had paid Rs. 18,12,0 as court fee under Art. 17, cl. VII, on the plea that he and the other parties were in constructive possession of the entire property, belonging to the family. Properties worth lakhs of rupees were described in the schedules annexed to the plaint and if court fee ad valorem was not payable according to defendant No. 3 in respect of, those properties, we fail to appreciate why he should have apprehended that court fee ad valorem would still be payable if he claimed a share -in the cash amount of Rs. 3,20,000/-. There is also the other circumstances that with consent of the parties reference was made to Godkhindi by the three Panchas of all the matters which had remained to be settled, and in the statement made before him which was recorded in writing, there was no reference to the claim that the amount of Rs. 3,20,000/- had remained to be divided. Plaintiff No. 1 gave a detailed statement of the properties which remained to be divided and that document is dated December 5, 1947: Ex. D-482. Item 5 is " cash balance in the Dalali shops and in the house should be divided ", and again in cl. (12) it was stated " an account of the amounts in suspense (parabhare) account should be taken and the total of the said amount should be divided." Counsel for the plain. tiffs and the third defendant submitted that the original of this list was in Kannad which was translated into Marathi and the Marathi word which is translated into English as " suspense " was " parabhare ". That word according to the plaintiffs and the third defendant meant " unaccounted for ". It is difficult for us to express any opinion on this argument. It may be observed that the learned Judge of the High Court who delivered the judgment was himself conversant with the Marathi language and he was not prepared to accept that interpretation. But that by itself may not be sufficient to reject the plea of the plaintiffs. What is material is that in a detailed statement consisting of as many as 24 items the plaintiffs have not set out that this amount of Rs. 3,20,000/- which was found in the family safe and which the Panchas wanted to divide, was on account of the uncompromising attitude of the first defendant not divided. If the amount had not been divided, we have not the slightest doubt that in the statement this amount would have been

expressly included. Godkhindi was examined as a witness in these suits. The trial court found him to be a person who was wholly disinterested. It appears from the evidence of Godkhindi that no question about the division of Rs. 3,20,000/- was mooted. If the amount had not been divided, we have no doubt that this question would have been prominently brought to his notice; but no such plea was even raised. We are of the view having regard to these circumstances that the amount of Rs. 3,20,000/- must have been divided. In that view of the case, the decree passed by the High Court will be modified as follows:--

The properties of the joint family except the properties divided on September - 23, 1946, October 12, 1946, October 19, 1946, including the amount of Rs. 3,20,000/-, October 20, 1946, October 21, 1946, including the stock-in-trade, silks and sarees and cupboards, and on November 10, 1946, February 7, 1947, February 22, 1947, February 24, 1947, February 25, 1947, and the furniture, utensils and other movables between May and June, 1947, and the property divided on July 13, 1947, and the outstandings divided be- tween February 5, 1948, and February 9,1948, shall be partitioned between the parties. The partition will be made on the footing that defendant No. 3 is entitled to a half shar and defendant No. 1, the plaintiffs collectively and defendant No. 2 are each entitled to a 1/6 share. Defendant No. I will be entitled to his costs in Appeals Nos. 218 of 1959 and 219 of 1959. The other appeals filed by the plaintiffs and defendant No. 3 will be dismissed. One hearing fee.

C. As. Nos. 218 and 219 of 1959 allowed.

C. As. Nos. 220 to 223 of 1959 dismissed.