may be given against the terms of the written document. Proviso I, for example, lays down that any fact may be proved which would invalidate a document—facts such as fraud, intimidation, illegality, etc. There is, however, in the written statement of the defendant firm no allegation whatever of fraud. The only case which is disclosed in the written statement is the case that the written document of contract does not contain the real contract between the parties. In this view of the case all the argument about re-opening of accounts seems to us to be out of place, and so far as the cases* to which we have been referred are concerned, and which are set out in the judgment of the court of first instance, they do not appear to us to have any material bearing on the question with which we are dealing. In our opinion the defendants in this case were not entitled to put forward the plea that they had a right to call for a re-examination of the accounts and to demand a fresh settlement.

The only other point with which we have to deal is the liability of the firm in respect of this note, which admittedly was written by the first defendant, Narain Das. There can be no doubt that the three defendants are brothers, that they are members of a joint family, that they carry on business at Meerut in one shop; and it was admitted that Narain Das, who signed this promissory note, was the managing member of the family. These being the facts, we have no doubt whatever that the defendant firm was liable on the note.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

FAZAL ILAHI (PLAINTIFF) *v.* PRAG NARAIN (DEFENDANT) †

Civil Procedure Code (1908), *schedule II, paragraphs 5, 17—Reference to arbitration without the intervention of court—Refusal of arbitrator to act—Application to court for order of reference.*

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In the case of a private arbitrator refusing to act the court may, on the application of either party to the reference, make an order under paragraph 17

(1) *Puran Mal* v. *Ford MacDonald and Company* (1919) I. L. R., 41 All., 635.
(2) *Boo Jinatboo* v. *Sha Nagar Valab Kanji* (1886) I.L.R., 11 Bom., 78.

† First Appeal No. 180 of 1921, from an order of Shibendra Nath Banerji, Officiating Subordinate Judge of Allahabad, dated the 19th of August, 1921.

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and take action under paragraph 5 by appointing a new arbitrator, although there is no provision to that effect in the deed of agreement.

Where a party has gone to arbitration in a case in which if he had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17.

Bhajwan Das v. *Gurdayal* (1) and *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *S. M. Sulaiman* and Maulvi *Iqbal Ahmad*, for the appellant.

Munshi *Narain Prasad Ashthana*, for the respondent.

WALSH and RYVES, JJ.:—In this case an order of reference outside the court was made to two arbitrators and an umpire, both the arbitrators being vakils of this Court and the umpire being a barrister, formerly of this Court. No order of reference was found necessary or was in fact obtained under paragraph 17 of the second schedule, we do not know why, but presumably because the parties were reasonable men of business and they did not consider it necessary to waste time and money in obtaining an order when they were entirely agreed about the procedure. The arbitration was begun, but unfortunately it fell through owing to one of the arbitrators declining to act. Thereupon, the present appellant applied to the Subordinate Judge of Allahabad for an order of reference under paragraph 17, and for an order under paragraph 5 appointing an arbitrator in the place of the vakil who had retired. The learned Judge took a very narrow view of the matter. He held that he was unable to appoint a fresh arbitrator, because there was no provision to that effect in the deed of agreement, and that it was not proposed to appoint anybody who was specifically named in that deed of agreement. If it were necessary, we should be prepared to hold that the words in paragraph 17, sub-clause (4), (which enables a court to make an order of reference to a particular arbitrator at the time of filing the reference) "if there is no such provision and the parties cannot agree," cover a case

(1) (1921) 19 A. L. J., 823. (2) (1894) I. L. R., 17 Mad., 498.

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where there has been a provision for a particular arbitrator who is either dead or retired. If he has died or refused to act, it is as though there were no provisions. But apart from that we think that the case is entirely covered by the decision in the rather curious case of *Bhagwan Das* v. *Gurdayal* (1), and particularly by the principle laid down in that case which we entirely endorse: "where a party has gone to arbitration in a case in which if he had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17." The decision in the case of *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (2) really supports the appellant, although the learned Judge did not seem to think it applicable, and the decision which he followed, namely, the case of *Ahmad Nur Khan* v. *Abdur Rahman Khan* (3), to which a member of this Bench was a party and which both of us endorse, has nothing whatever to do with the question raised in this case. The appeal must be allowed with costs and the matter sent back to the Subordinate Judge with directions to file the agreement of reference and to proceed with the appointment of the arbitrator in accordance with the provisions of the schedule.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Eyves.

MURLIDHAR (DEFENDANT) *v.* PITAMBAR LAL (PLAINTIFF) AND MANNI LAL AND OTHERS (DEFENDANTS).*

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Civil Procedure Code (1908), *order XXXII, rule* 4—*Guardian* ad litem—*Suit by minor to set aside a decree against him on the ground that he was not properly represented in the former suit.*

In all cases where a minor subsequently sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into.

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*Second Appeal No. 705 of 1920, from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 26th of February, 1920, reversing a decree of Gauri Shankar Tewari, Subordinate Judge of Allahabad, dated the 12th of December, 1918.

(1) (1921) 19 A. L. J., 828. (2) (1894) I. L. R., 17 Mad., 498.
(3) (1919) I. L. R., 42 All., 191.