Applicability of The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 to arbitral proceedings which commenced before/after the 1996 Act came into force – An analysis

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Introduction:

85. Repeal and savings.—

(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,— (a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

The Bill entitled 'ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018' was introduced in Lok Sabha by the Minister for Law and Justice, Mr. PP Chaudhary, on July 18, 2018 which seeks to amend the Arbitration and Conciliation Act, 1996. The Act contains provisions to deal with domestic and international arbitration, and defines the law for conducting conciliation proceedings.

The relevant provisions connection to the subject matter of this article are:

"After Section 86 of the principal Act, the following Section shall be inserted and shall be deemed to have been inserted with effect from the 23rd October, 2015, namely:—

"87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—

(a) not apply to—

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(ii) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such Court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to Court proceedings arising out of or in relation to such arbitral proceedings.".

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Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 shall be omitted and shall be deemed to have been omitted with effect from the 23rd October, 2015.

Key features of the 2018 Bill relating to the subject matter of article are:

Relaxation of time limits: Under the 1996 Act, arbitral tribunals are required to make their award within a period of 12 months for all arbitration proceedings. The Bill proposed to remove this time restriction for international commercial arbitrations. Completion of written submissions: Currently, there is no time limit to file written submissions before an arbitral tribunal. The Bill requires that the written claim and the defence to the claim in an arbitration proceeding should be completed within six months of the appointment of the arbitrators.

Applicability of Arbitration and Conciliation Act, 2015: The Bill clarifies that the 2015 Act shall only apply to arbitral proceedings which started on or after October 23, 2015.

The Arbitration And Conciliation (Amendment) Bill, 2018[4] The Arbitration and Conciliation (Amendment) Bill, 2018 amendments which, when passed will apply to the Arbitration and Conciliation Act, 1996 are pursuant to the Srikrishna Committee Report released in July, 2017, recommending further amendments on the back of the 2015 amendments, primarily to improve on or clarify various provisions.

At the very outset, the proposed Bill clarifies that the objective of the amendments is to promote institutional arbitration by creating an independent, statutory body to govern the entire process of Arbitration in India right from the stage of appointment of arbitrator. It further proposes to create a robust eco system for commercial arbitration to flourish and thrive in India.

One of the major legal hurdles faced while implementing the Amendment Act, 2015was regarding the applicability of the same to Court proceedings arising out of arbitrations, invoked prior to the amended Act coming into force.

In other words, one of the most contentious issues in recent times has been the correct interpretation of Section 26 of the Amendment Act and whether the amendments apply to Court proceedings:

(i) filed after the amendments came into force in 2015, but in respect of arbitrations commenced before the amendments;

(ii) Court proceedings which were pending at the time the amendments came into effect but were decided thereafter. In this context there were conflicting decisions of various Courts.

Application of the 2015 Amendments post 2018 Amendment Bill

In order to address this issue, a new Section 87 has been proposed in the Amendment Bill, 2018 to clarify that unless parties agree otherwise the Amendment Act, 2015 shall not apply to the following:

Arbitral proceedings that have commenced prior to the Amendment Act, 2015 coming into force i.e. prior to 23.10.2015.

Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such Court proceedings are commenced prior to or after the commencement of the Amendment Act, 2015

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The Supreme Court recently passed a judgment in the matter of: BCCI v. Kochi Cricket Pvt. Ltd. And Etc.

It ruled that the 2015 amendments would apply to all Court proceedings filed after the amendments came into effect (October 23, 2015), regardless of when the arbitration was commenced.

"Crucially, it was also held that the 2015 amendments would apply to pending proceedings that may have been filed prior to the amendments but were pending at the time amendments came into force."

The 2018 amendments however provide that the 2015 amendments will apply only to proceedings actually filed after October 23, 2015

Being so, the Supreme Court has directed that its aforesaid judgment be transmitted to the Law Ministry and the Attorney General to take note of its interpretation.

Analysis of the Judgement

The judgment itself raises questions. Assuming a petition were filed to challenge an award prior to the 2015 amendments but was pending on the date of the amendments, by virtue of the judgment, an automatic stay that was earlier effective would no longer apply. It would then be open to the award-creditor to apply for enforcement and the award-debtor would have to file a separate application for a stay (in which case a deposit of the award amount would be probable), thus taking away a benefit that a party had prior to the 2015 amendments.
It remains to be seen whether the Government takes note of the Supreme Court's interpretation and effects amendments in consonance.

The amendments are a welcome development in the field of arbitration and when implemented will assist further in India being seen as an arbitration friendly jurisdiction.

Section 26 of the Amending Act needs to be compared with Section 85(2)(a) of the said Act. The following table sets out the two provisions:-

Pre-amendment	Post-amendment
36. Enforcement.—Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.	"36. (1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-Section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court. (2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said

	arbitral award in accordance with the provisions of sub-Section (3), on a separate application made for that purpose. (3) Upon filing of an application under sub-Section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing: Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908."

The provisions of the old Act of 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act of 1996). It is necessary to examine deep into the matter whether the phrase —'in relation to arbitral proceedings' can be and/or cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator.

It appears to cover not only proceedings pending before the arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for the award becoming a decree and also appeal arising thereunder.

In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force.

If a narrow meaning of the phrase —in relation to arbitral proceedings‖ is to be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

The provisions made in the proposed amendment of 2018, which are extracted below supports this view.

They are:

“Applicability of Arbitration and Conciliation Act, 2015: The Bill clarifies that the 2015 Act shall only apply to arbitral proceedings which started on or after October 23, 2015.

“After Section 86 of the principal Act, the following Section shall be inserted and shall be deemed to have been inserted with effect from the 23rd October, 2015, namely:—

"87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—

(a) not apply to—

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(ii) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such Court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to Court proceedings arising out of or in relation to such arbitral proceedings.".

It is suggested to examine this controversy in the matter that Section 26 of the Amending Act, if a narrow view of the expression —to the arbitral proceedings‖ is to be taken, is silent on those categories of cases where the arbitral proceedings commenced prior to 23.10.2015 and where even the award was made prior to 23.10.2015, but where either a petition under Section 34 was under contemplation or was already pending on 23.10.2015;

In such eventuality, the amended provisions pertaining to those categories would apply only if they were merely procedural and did not affect any accrued right; In the facts of the present case, the amendment to Sections 34 and 36, which pertain to the enforceability of an award, certainly affect the accrued rights of the parties; As a result, the petitions filed by the appellants under Section 34 of the said Act would have to be considered under the un-amended provisions of the said Act and consequently, the appellants would be entitled to automatic stay of enforcement of the award till the disposal of the said petitions.

The phrase "date of commencement of the arbitral proceedings" is a legal fiction and on the date of commencement there are in fact no arbitral proceedings instituted. A request for reference of disputes to arbitration is the date of commencement of the arbitral proceedings. It is submitted that the phrase "arbitral proceedings" is not a standalone phrase but it is in conjunction with the words "commenced in accordance with Section 21". Arbitral proceedings commences on such notice, irrespective of whether the reference is ultimately made to the arbitral tribunal or not. It only seeks to identify the date of commencement and not the nature of the proceedings to which it applies. It sets a time line i.e. starting line.

A perusal of Section 26 of the Amendment Act of 2015 clearly indicates that unless the parties otherwise agree, no provisions of the Amendment Act would apply to arbitral proceedings commenced in accordance with the provisions of Section 21 of the Arbitration and Conciliation Act, 1996 prior to 23rd October, 2015. It also makes it clear that the provisions of Amendment Act shall apply in relation to the

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arbitral proceedings commenced on or after the date of commencement of the Amendment Act. It is thus clear that if in an arbitration agreement is entered into prior to 23rd October, 2015, and the parties had agreed that the parties would be governed not only by the provisions of the Arbitration and Conciliation Act, 1996 but also by statutory amendment thereto or repeal thereto and if the notice invoking arbitration agreement under Section 21 is received by the other party prior to 23rd October, 2015 when the arbitral proceedings contemplated under Section 21 is commenced, the party will be governed by not only the provisions of Arbitration and Conciliation Act, 1996 but also by the statutory amendments thereto or repeal thereto and not otherwise.

If, however, there was no such agreement between the parties to apply the provisions of statutory amendments or repeal to the Arbitration and Conciliation Act, 1996 and the arbitral proceedings have commenced prior thereto 23rd October, 2015 by virtue of Section 21 of the Arbitration Act, such arbitral proceedings will be governed by the provisions of the Arbitration and Conciliation Act, 1996 before its amendment brought into effect by Amendment Act w.e.f. 23rd October, 2015 irrespective of the fact that the award is rendered after 23rd October, 2015 or that the arbitration petition challenging an award is pending as on 23rd October, 2015 or filed thereafter.

Since the arbitral proceedings commences on receipt of the notice invoking arbitration agreement by the other party as contemplated under Section 21 read with Section 43 of the Arbitration and Conciliation Act, 1996, if such notice is received by the other side after 23rd October, 2015, the provisions of the Amendment Act would apply to such matters. The parties cannot agree that they will not be bound by the provisions of the Amendment Act.

A plain and simple interpretation of Section 26 of the Amendment Act on conjoint reading with other provisions of the Arbitration Act referred to aforesaid wherein the term 'arbitral proceedings' are referred would clearly indicate that the provisions in the Arbitration and Conciliation Act prior to the provisions of Amendment Act having been brought into effect would apply to all the arbitral proceedings wherein a notice invoking arbitration agreement under Section 21 was received by the other party prior to 23rd October, 2015 and the provisions of the Arbitration Act duly amended by the Amendment Act would apply to all the arbitral proceedings which have commenced after 23rd October, 2015 by virtue of a receipt of notice invoking arbitration agreement by other party in view of Section 21 of the Arbitration and Conciliation Act, 1996. The phrase "the date of commencement of the arbitral proceedings" is a legal fiction and has to be read in conjunction with the words "commenced in accordance with Section 21”.

Even today certain Courts in India deal with the matters under Section 30 of the Arbitration Act, 1940 in respect of which notice for appointment of an arbitrator under Section 37(3) of the Arbitration Act, 1940 was issued prior to the provisions of the Arbitration & Conciliation Act, 1996 came into effect. All such matters where the arbitral proceedings commenced under the provisions of Arbitration Act, 1940 are continued to be governed by the provisions of the said Act though an arbitration petition challenging the award under Section 30 of the Arbitration Act, 1940 is filed after the Arbitration & Conciliation Act, 1996 came into force.

The Bombay High Court in the case of Reshma Rejendra Desai and another – vs- L And T Finance Limited, reserved on : 25TH January, 2018 pronounced on : 21ST February, 2018 considered this matter and pronounced the order which indicates as:

“If notice invoking arbitration agreement is received by other party prior to 23rd October, 2015, the arbitration proceedings would commence prior to 23rd October, 2015. The provisions of the Arbitration & Conciliation Act, 1996 in force prior to 23rd October, 2015 would be applicable to such matters for all the purposes. If notice invoking arbitration clause is received by other party after 23rd October, 2015, the parties will be governed by the provisions of the Arbitration & Conciliation (Amendment) Act, 2015 for all the purposes. The date of filing of the arbitration petition under Section 34(1) of the Arbitration & Conciliation Act, 1996 is not relevant for the purpose of deciding the applicability of the provisions of the Arbitration & Conciliation Act, 1996 i.e. pre-amendment or post amendment”.

“The expression "arbitral proceedings" described in Section 26 of the Arbitration & Conciliation (Amendment) Act, 2015 refers to two different periods i.e. (i) before 23rd October, 2015 and (ii) after 23rd October, 2015. The expression "in relation to the arbitral proceedings" provided in section 26 of the Arbitration & Conciliation (Amendment) Act, 2015 does not refer to the arbitral proceedings in Court. The expression "in relation to the arbitral proceedings" prescribed in Section 26 has to be read with Section 21 of the Arbitration & Conciliation Act, 1996. Even in those cases where the notice invoking arbitration agreement under section 21 is received by other party after 23rd October, 2015, the provisions under Section 34(5) and 34(6) are directory and not mandatory. The Court has ample power to direct the petitioner to issue notice along with papers and proceedings upon the respondent after the petitioner files the arbitration application under Section 34(1)and before such petition is heard by the Court at the stage of admission.”

Despite the aforesaid controversy about applicability of the Arbitration Act 1940 or Arbitration and Conciliation Act 1996 in terms of Section 85 of the act 1996, I give below the various judgments of both Supreme Court and High Courts, dealing the said section 85 of Act 1996

DECISIONS OF SUPREME COURT

1. In the case of Sukhwant Rai –vs- D. V. Sehgal (Retd.), decided on : August 3, 1998 and reported in 1999 9 SCC 56 = 1998 0 Supreme(SC) 746(SC) the Court heard counsel for the appellant as well as respondents 2 and 3 who are the main contesting parties. So far as respondent 1 is concerned, he is the arbitrator, a retired Judge of the high Court, who was appointed as an arbitrator in the present case. The grievance of the appellant before the High Court was that he had no faith in the arbitrator for the grounds raised before the High Court. The Judge of the High Court by the impugned order overruled these objections with the result that the appointed arbitrator continued to arbitrate. That is how the appellant came before the Court. While issuing notice on the SLP, the Court granted ad interim stay of further proceedings before the arbitrator, Respondent 1. During the pendency of these proceedings, counsel for the appellant fairly stated that he gives up all his allegations against the arbitrator. Respondent 1-arbitrator on the other hand also took a fair stand that he does not want to continue as an arbitrator. In view of these developments, therefore, the Court is not called upon to consider whether the allegations earlier made against the arbitrator were justified or not. The result is that the appointed arbitrator, Shri D. V. Sehgal, now, is not going to pass any award as he has resigned as arbitrator in this case. Under these circumstances, the appeal is allowed only to the limited extent that the order passed by the trial Judge continuing Respondent 1-arbitrator any further will not survive as Respondent 1 himself has resigned as an arbitrator. Whatever further course may be open to both the sides in accordance with law will not stand affected by the present order. The Court mentions that the counsel for Respondents 2 and 3 submitted that once the appointed arbitrator has resigned, a new arbitrator will have to be appointed as per the provisions of the new Act, 1996 and the appeal in which the arbitrator was appointed would not survive any further. Counsel for the appellant on the other hand joined issues and submitted that under these circumstances, the appeal can be heard on merits. The Court expresses no opinion on these rival contentions. It will be for the appropriate Court, if at all seized of the matter, to consider these grievances. Appeal disposed of accordingly.

2. In the case of M/s. Sardar Construction Co. –vs- State of Gujarat. SLP (Civil) No. 14668 of 1998, decided on 25-1-1999 and reported in 1999 0 AIR(SC) 2422 = 1999 0 AIR(SCW) 2548 = 1999 1 ArbLR 700 = 1999 2 CLT(SC) 123 = 1999 2 JT 271 = 1999 2 RAJ 147 = 1999 2 Scale 138 = 1999 3 SCC 114 = 1999 3 Supreme 24 = 1999 0 Supreme(SC) 79(SC-DB) the Court held that Arbitration proceedings in relation to dispute arising from works contract. Transfer to Tribunal. Arbitration Tribunal Act came to effect on 1.1.1994. Award in question passed prior to that date and matter pending before Court. Section 21 overrides provisions of Arbitration Act in so far as they are inconsistent with Arbitration Tribunal Act. Matter pending before Court transferred to Arbitration Tribunal. The award in the present case, though given prior to 1.1.1994 which is the date of commencement of the Gujarat Public Works Contracts Disputes arbitration Tribunal Act, 1992, had not attained finality at the time when the said act came into force. Under Section 21 of the said Act, the provisions of the arbitration act shall, insofar as they are inconsistent with the provisions of the Act, cease to apply to any dispute arising from a works contract and all arbitration proceedings in relation to such dispute before an arbitrator, umpire, Court or authority shall stand transferred to the Tribunal. In the present case, the arbitration proceedings in relation to the dispute were pending before the Court and hence the High Court has rightly transferred these proceedings to the Tribunal. Under Section 3 of the said act on reference to the Tribunal, the Tribunal has to make an award which shall be deemed to be a decree within the meaning of Section 2 of Civil Procedure Code, 1908 and it shall be executed accordingly. The Court, therefore, agreed with the reasoning and conclusion of the High Court. The SLP is dismissed.

3. In the case of Thyssen Stahlunion GMBH etc. –vs- Steel Authority of India Ltd. Civil Appeal No. 6036 of 1998, with Civil Appeal No. 4928 of 1997 and Civil Appeal No. 61 of 1999, decided on 7-10-1999 and reported in 1999 0 AIR(SC) 3923 = 1999 0 AIR(SCW) 4016 = 1999 8 JT 66 = 1999 3 RAJ 355 = 2000 1 RCR(Civ) 25 = 1999 6 Scale 441 = 1999 9 SCC 334 = 2000 25 SCL 102 = 1999 10 Supreme 378 = 1999 0 Supreme(SC) 1162(SC-DB) the Court held that

The provisions of the old Act of 1940 shall apply in relation to arbitral proceedings which have commenced before coming into force of the new Act of 1996). The phrase “in relation to arbitral proceedings” cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the Arbitrator. It would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under Section 17 thereof and also appeal arising thereunder. In cases where arbitral proceedings have commenced before coming into force of the new Act and are pending before the Arbitrator, it is open to the parties to agree that new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force. Once the arbitral proceedings have commenced, it cannot be stated that right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act that some legal proceedings for its enforcement must be pending under that Act at the time new Act came into force. If narrow meaning of the phrase “in relation to arbitral proceedings” is to be accepted, it is likely to create great deal to confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the New Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted. A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act (Foreign Awards (Recognition and Enforcement) Act. 1961).

Section 85(2)(a) of the new Act is in two limbs :

(1) Provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties and

(2) new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. First limb can further be bifurcated into two :

(a) Provisions of old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force and

(b) old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force.

The expression “in relation to” is of widest import. This expression “in relation to” has to be given full effect to, particularly when read in conjunction with the word “the provisions” of the old Act. That would mean that the old Act will apply to whole gambit of arbitration culminating in the enforcement of the award. If it is not so, only the word “to” could have sufficed and when the legislature has used the expression “in relation to”, a proper meaning has to be given. This expression does not admit of restrictive meaning. First limb of Section 85(2)(a) is not a limited saving clause. it saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act.

The contention that if it is accepted that the expression “in relation to” arbitral proceedings would include proceedings for the enforcement of the award as well, the second limb of Section 85(2)(a) would become superfluous cannot be accepted. The second limb also takes into account the arbitration agreement entered into under the old Act when the arbitral proceedings commenced after the coming into force of the new Act.

Multiple and complex problems would arise if the award given under the old Act is said to be enforced under the new Act. Both the Acts are vastly different to each other. It has been rightly contended that when arbitration proceedings are held under the old Act, the parties and the arbitrator keep in view the provisions of that Act for the enforcement of the award. As noted above, under the old Act, there is no requirement for the arbitrator to give reasons for the award. That is not mandatory under the new Act. Section 27 of the old Act provides that arbitrator or umpire may, if they think fit, make an interim award, unless of course different intention appears from the arbitration agreement. Interim award is also an award and can be enforced in the same way as the final award. It would certainly be a paradoxical situation if for the interim award, though given after the coming into force of the new Act, it would still be the old Act which would apply and for the final award, it would be the new Act. Yet another instance would be when under Section 13 of the old Act, the arbitrators or umpire have power to state a special case for the opinion of the Court on any question of law involved in the proceedings. Under sub-section (3) of Section 14 of the old Act when the Court pronounces its opinion thereon such opinion shall be added to and shall form part of the award. From this part of the award no appeal is maintainable under Section 39 of the old Act.

Section 85(2)(a) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act up-till the time of the enforcement of the award. This Section 85(2)(a) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. There is a presumption that Legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. It is correct that the new Act is a remedial statute and, therefore, Section 85(2)(a) calls for strict construction, it being a repealing provision. But then as stated above where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter.

It is not necessary that for the right to accrue that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different.

In the instant case when arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036/98 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the Court. It was only later on that it changed the stand and now took the position that new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. Appellant it-self led the respondent Sail in believing that the old Act would apply. Sail had filed objections to the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by the Thyssen under Sections 14 and 17 of the old Act. The Court has been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. The Court, therefore, could not adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. The Court is, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on the Section 85(2)(a) would only lead to the confusion and hardship.

The above construction is is consistent with the wording of Section 85(2)(a) using the terms “provision” and “in relation to arbitral proceedings” which would mean that onve the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well.

Held further: Present day the Courts tend to adopt purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act. But then if the construction of the new Act leads to inconvenient and unjust results, the concept of purposive approach has to be shed.

Also Held : Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act.

Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that.

Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal 61 of 1999) uses the expression “for the time being in force” meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. The expression “for the time being in force” not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. Expression “unless otherwise agreed” as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. The Court accepts the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. The Court has seen Section 28 of the Contract Act. It is difficult for the Court to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions “unless otherwise agreed” and “law in force” it does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.

Foreign Awards Act gives the party right to enforce the foreign award under that Act. But before that right is exercised Foreign Awards Act has been repealed. It cannot, therefore, be said that any right had accrued to the party for him to claim to enforce the foreign award under the Foreign Awards Act. After the repeal of the Foreign Awards Act a foreign award can now be enforced under the new Act on the basis of the provisions contained in Part II of the new Act depending whether it is a New York Convention Award or Geneva Convention Award. It is irrespective of the fact when the arbitral proceedings commenced in a foreign jurisdiction. Since no right has accrued Section 6 of the General Clauses Act would not apply.

In the very nature of the provisions of Foreign Awards Act it is not possible to agree to the submissions that Section 85(2) (a) of the new Act would keep that Act alive for the purpose of enforcement of a foreign award given after the date of commencement of the new Act though arbitral proceedings in foreign land had commenced prior to that. It is correct that Section 85(2)(a) uses the words “the said enactments” which would include all the three Acts, i.e., the old Act, Foreign Awards Act and the Arbitration (Protocal and Convention) Act, 1937. Foreign Awards Act and even the 1937 Act contain provisions only for the enforcement of the foreign award and not for the arbitral proceedings. Arbitral proceedings and enforcement of the award are two separate stages in the whole process of arbitration. When the Foreign Awards Act does not contain any provision for arbitral proceedings it is difficult to agree to the argument that in spite of that the applicability of the Foreign Awards Act is saved by virtue of Section 85(2)(a). As a matter of fact if the Court examines the provisions of Foreign Awards Act and the new Act there is not much difference for the enforcement of the foreign award. Under the Foreign Awards Act when the Court is satisfied that the foreign award is enforceable under that Act the Court shall order the award to be filed and shall proceed to pronounce judgment accordingly and upon the judgment so pronounced a decree shall follow. Sections 7 and 8 of the Foreign Awards Act respectively prescribe the conditions for enforcement of a foreign award and the evidence to be produced by the party applying for its enforcement. Definition of foreign award is same in both the enactments. Sections 48 and 47 of the new Act correspond to Sections 7 and 8 respectively of the Foreign Awards Act. While Section 49 of the new Act states that where the Court is satisfied that the foreign award is enforceable under this Chapter (Chapter I, Part II, relating to New York Convention Awards) the award is deemed to be decree of that Court. The only difference, therefore, appears to be that while under the Foreign Awards Act a decree follows, under the new Act foreign award is already stamped as the decree. Thus if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award are juxtaposed there would appear to be hardly any difference.

Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section 85(2)(a) in so far these apply to the Foreign Awards Act and 1937 Act, would appear to be quite superfluous. Literal interpretation would render Section 85(2)(a) unworkable. Section 85(2)(a) provides for a dividing line dependent on “commencement of arbitral proceedings” which expression would necessarily refer to Section 21 of the new Act.

Section 2(2) read with Section 2(7) and Section 21 falling in Part I of the new Act make it clear that these provisions would apply when the place of arbitration is in India, i.e., only in domestic proceedings. There is no corresponding provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as “date of commencement” in those foreign proceedings. The Court, therefore, held that on proper construction of Section 85(2)(a) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and foreign award would be enforced under the Foreign Awards Act. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act.

Therefore, a foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act (Foreign Awards (Recognition and Enforcement) Act. 1961).

4. In the case of National Aluminium Company Limited –vs- Metalimpex Limited Case No. : 2 of 1999, date of decision : 2/1/00 and reported in 2000 3 ArbLR 422 = 2000 Supp1 JT 629 = 2001 1 RAJ 548 = 2001 6 SCC 372 = 2000 0 Supreme(SC) 243(SC), the Court held that the arbitration agreement was entered into between the parties under the Arbitration Act, 1940 before it was repealed by the Act. Section 85 of the Act provided for repeal and saving. The Chief Justice of India under Section 11 of the Act read with the Appointment of Arbitrators by the Chief justice of India Scheme, 1996 designated the Court to consider the request of NALCO.

An arbitration agreement within the meaning of Section 7 of the Act exists between the parties. It relates to international commercial arbitration. Request was accordingly made to the Chief Justice of India. It is not required of the Court to go into the merit of disputes between the parties. There is, however, a contract between them for supply of aluminium ingots by NALCO to Metalimpex. NALCO is claiming US $ 62,112.93 towards loss of sales realisation, interest thereon and other charges. Disputes having arisen between the parties, NALCO nominated Mr. B. Pahadi as arbitrator and called upon Metalimpex to nominate its arbitrator. Metalimpex having failed to do so within the stipulated period, NALCO has thus made request to nominate an arbitrator on behalf of Metalimpex. Notices were issued to Metalimpex but it failed to respond. Ultimately, service on Metalimpex was effected by means of publication in the newspaper Daily Jankantha which has a wide circulation in Bangladesh. Still Metalimpex failed to appear.

It appears to me that the Court could not travel beyond the terms of the agreement. If both the parties were represented before me and they had agreed, a sole arbitrator could have been appointed. The Court examined the request of NALCO and found there is an arbitration agreement between the parties which relates to international commercial arbitration. Arbitration would be governed by the Act though the arbitration was entered into before the enforcement of the Act which was 25-1-1996.

The Court, therefore, accepts the request of NALCO and would appoint Justice S.K. Mohanty, a retired Judge of the Orissa High Court, as an arbitrator nominated by Metalimpex.

5. In the case of P. Anand Gajapathi Raju & Ors. –vs- P.V.G. Raju (Died) by Ors., Civil Appeal No. 5251 of 1993, decided on 28-3-2000 and reported in 2000 0 AIR(SC) 1886 = 2000 0 AIR(SCW) 1489 = 2000 2 ArbLR 204 = 2000 2 CLT(SC) 162 = 2000 4 JT 590 = 2000 2 RAJ 213 = 2000 3 Scale 330 = 2000 4 SCC 539 = 2000 3 Supreme 464 = 2000 0 Supreme(SC) 617 = 2000 2 UJ 1138(SC-DB) the Court considered the power of the Court. On reference of parties to arbitration. Pending appeal before Supreme Court parties entering into arbitration agreement and seeking reference of dispute to arbitration. Phrase "which is the subject of an arbitration agreement" also connotes an arbitration agreement brought into existence while action is pending. Submission of first statement on substance of dispute not a bar on Court referring parties to arbitration if other party does not object. Language of Section 8 pre-emptory. It is obligatory for Court to refer parties to arbitration. All rights, obligation and remedies would be governed by Arbitration Act.

The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are : (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring

the parties to arbitration before it submits his first statement on the substance of the dispute. This last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, as is the case before us, therefore is no bar on the Court referring the parties to arbitration.

The phrase "which is the subject of an arbitration agreement" does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending. In the matter before the Court, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in clause (e) of Section 2 of the new Act and not the Court to which an application under Section 8 of the new Act is made. An application before a Court under Section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of Section 2(e) of the new Act.

6. In the case of M/s. Fuerst Day Lawson Ltd. –vs- Jindal Exports Ltd. Civil Appeal No. 3594 of 2001, (Arising out of SLP (C) No. 6841 of 2000), decided on 4-5-2001 and reported in 2001 0 AIR(SC) 2293 = 2001 0 AIR(SCW) 2087 = 2001 3 CompLJ 9 = 2001 Supp1 JT 263 = 2001 2 RAJ 1 = 2001 3 Scale 708 = 2001 6 SCC 356 = 2001 32 SCL 466 = 2001 4 Supreme 141 = 2001 0 Supreme(SC) 869(SC-DB) the Court observed what is the date of the commencement of this Act? On 22.8.1996 and is deemed to have been effective from 25.1.1996, held that from the plain and literal reading of the said provision and the Gazette Notification, it is clear that the Act came into force on 22.8.1996. But the purposive reading would show that the Act came into force in continuation of the first Ordinance which was brought into force on 25.1.1996. This makes the position clear that although the Act came into force on 22.8.1996, for all practical and legal purposes it shall be deemed to have been effective from 25.1.1996 particularly when the provisions of the Ordinance and the Act are similar and there is nothing in the Act to the contrary so as to make the Ordinance ineffective as to either its coming into force on 25.1.1996 or its continuation up to 22.8.1996. Thus the Court concludes that the Act was brought into force with effect from 22.8.1996 vide Notification No. G.S.R. 375 (E) dated 22-8-1996 published in the Gazette of India and that the Act being a continuation of the Ordinance is deemed to have been effective from 25.1.1996 when the first Ordinance came into force.

Foreign award given after commencement of 1996 Act, although arbitration proceedings had commenced prior to enforcement of 1996 Act. Whether 1996 Act would apply, yes. High Court holding to the contrary, whether correct, no. Effect. Appeal allowed, case remanded to High Court for enforcement of foreign award.

Prior to the enforcement of the Act, the Law of Arbitration in this country was substantially contained in three enactments namely (1) The Arbitration Act, 1940, (2) The Arbitration (Protocol and Convention) Act, 1937 and (3) The Foreign Awards (Recognition and Enforcement) Act, 1961. A party

holding a foreign award was required to take recourse to these enactments. Preamble of the Act makes it abundantly clear that it aims at to consolidate and amend Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of Court and to give speedy justice. In this view, the stage of approaching Court for making award a rule of Court as required in Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of Court i.e. a decree. Since the object of the act is to provide speedy and alternative solution of the dispute, the same procedure cannot be insisted under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of foreign award. In para 40 of the Thyssen judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference as found is that while under the Foreign Award Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, a party holding foreign award can apply for enforcement of it but the Court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the Court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of Court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and Scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the Court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view the Court has taken. In our opinion, for enforcement of foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the Court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the Court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of the Thyssen judgment. Part II of the Act relates to enforcement of certain foreign awards. Chapter 1 of this Part deals with New York Convention Awards. Section 46 of the Act speaks as to when a foreign award is binding. Section 47 states as to what evidence the party applying for the enforcement of a foreign award should produce before the Court. Section 48 states as to the conditions for enforcement of foreign awards. As per Section 49 if the Court is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court and that Court has to proceed further to execute the foreign award as a decree of that Court. If the argument advanced on behalf of the respondent is accepted, the very purpose of the Act in regard to speedy and effective execution of foreign award will be defeated. Thus none of the contentions urged on behalf of the respondent merit acceptance so as to uphold the impugned judgment and order. The Court has no hesitation or impediment in concluding that the impugned judgment and order cannot be sustained. In the light of the discussion made and the reasons stated hereinabove, the impugned judgment and order are set aside. The case is remitted to a Single Judge of the High Court for proceeding with enforcement of the award in the light of the observations made above. The appeal is allowed in terms indicated above.

7. In the case of Delhi Transport Corporation Ltd. –vs- Rose Advertising. Civil Appeal No. 105 of 2002, decided on 17-4-2003 and reported in 2003 0 AIR(SC) 2523 = 2003 2 ArbLR 1 = 2003 2 BBCJ(SC) 128 = 2003 3 CompLJ 114 = 2003 2 JLJR(SC) 194 = 2003 4 JT 100 = 2003 2 RAJ 37 = 2003 2 RCR(Civ) 552 = 2003 4 Scale 141 = 2003 6 SCC 36 = 2003 44 SCL 467 = 2003 3 Supreme 431 = 2003 0 Supreme(SC) 478(SC-DB) the Court held that Agreement between parties entered on 15.1.1993 regarding display of advertisements on body of appellant buses. Agreement contained arbitration clause.

Disputes and difference arose. Petition under Section 20 of Old Arbitration Act filed by respondent on 16.1.1996. Petition became infructuous when counsel for appellant stated before Court on 19.7.1996 that arbitrator had already been appointed. Award made by arbitrator on 6.10.1998. Execution application for enforcement of award. Single Judge of High Court upheld objection regarding maintainability of execution under Act, 1996 and held that Act, 1940 continued to apply. Division bench set aside the judgment and held that case would be governed by 1996 Act. In Appeal, it was open to parties to agree as to which law will continue to govern their relationship. Conduct of arbitration proceedings and participation of parties showed that parties acted under 1996 Act. Impugned judgment was unassailable. Parties continued controversy on point whether old Act, 1940 applied or case was governed by 1996 Act. There was no occasion for appellant to apply for setting aside the award. Question whether time for making application for setting aside award could be extended will have to be decided when application was made. Question left open.

8. In the case of M/s. N.S. Nayak & Sons –vs- State of Goa. Civil Appeal No.97 of 2002, with C.A. Nos. 98, 99, 100 & 101 of 2002, decided on 8-5-2003, and reported in 2003 3 ArbLR 109 = 2003 2 CivCC 713 = 2003 3 CompLJ 193 = 2003 2 RAJ 253 = 2003 2 RCR(Civ) 786 = 2003 4 Scale 622 = 2003 6 SCC 56 = 2003 44 SCL 460 = 2003 3 Supreme 772 = 2003 0 Supreme(SC) 568(SC-DB) the Court held that in pending appeals under the old Act contention raised that appeals be decided under the New Act. Contention rejected by High Court. Arbitration clause in agreement provided that provisions of Arbitration Act, 1940 were to apply to arbitral proceedings. When award was passed under the old Act, remedy of filing appeal or petition for setting aside said award would be under Old Act. Phrase in arbitration clause ‘in relation to arbitral proceedings’ could not be given a narrow meaning but would cover also proceedings before the Court. Appeal was without merit.

9. In the case of State of West Bengal –vs- Amritlal Chatterjee. Civil Appeal No. 2477 of 1997, with Civil Appeal No. 2478 of 1997, decided on 3-9-2003 and reported in 2003 0 AIR(SC) 4564 = 2003 3 ArbLR 158 = 2003 3 CivCC 291 = 2004 3 CompLJ 11 = 2003 4 JCR(SC) 130 = 2003 Supp1 JT 308 = 2003 3 RAJ 267 = 2004 1 RCR(Civ) 252 = 2003 7 Scale 274 = 2003 10 SCC 572 = 2003 47 SCL 804 = 2003 7 Supreme 85 = 2003 0 Supreme(SC) 850(SC-DB) the Court held that Arbitrator appointed on 7th September 1994 and disputes referred to him under the Arbitration Act, 1940. Since arbitrator failed to enter upon reference, respondent filed application for removal of arbitrator and appointment of new arbitrator. New arbitrator appointed by order dated 22.8.1996. In Appeal, legality of order questioned on ground that Arbitration and Conciliation Act came into force on 25.1.1996. Question as to when proceedings commenced. Proceedings shall be deemed to have commenced on the date when request for referring dispute for arbitration was received. Provisions of Arbitration Act, 1940 shall apply in relation to arbitral proceedings which commenced before Arbitration and Conciliation Act, came into force unless otherwise agreed to by parties. Impugned order suffered no illegality.

12. 30. In the case of Delhi Transport Corporation Ltd. –vs- Rose Advertising.Civil Appeal No. 105 of 2002, decided on 17-4-2003 and reported in 2003 0 AIR(SC) 2523 = 2003 2 ArbLR 1 = 2003 2 BBCJ(SC) 128 = 2003 3 CompLJ 114 = 2003 2 JLJR(SC) 194 = 2003 4 JT 100 = 2003 2 RAJ 37 = 2003 2 RCR(Civ) 552 = 2003 4 Scale 141 = 2003 6 SCC 36 = 2003 44 SCL 467 = 2003 3 Supreme 431 = 2003 0 Supreme(SC) 478(SC-DB) the Court observed that agreement between parties entered on 15.1.1993 regarding display of advertisements on body of appellant buses-Agreement contained arbitration clause. Disputes and difference arose-Petition under Section 20 of Old Arbitration Act filed by respondent on 16.1.1996. Petition became infructuous when counsel for appellant stated before Court on 19.7.1996 that arbitrator had already been appointed. Award made by arbitrator on 6.10.1998. Execution application for enforcement of award. Single Judge of High Court upheld objection regarding maintainability of execution under Act, 1996 and held that Act, 1940 continued to apply-Division bench set aside the judgment and held that case would be governed by 1996 Act. Appeal. It was open to parties to agree as to which law

will continue to govern their relationship. Conduct of arbitration proceedings and participation of parties showed that parties acted under 1996 Act. Impugned judgment was unassailable.

Parties continued controversy on point whether old Act, 1940 applied or case was governed by 1996 Act. There was no occasion for appellant to apply for setting aside the award. Question whether time for making application for setting aside award could be extended will have to be decided when application was made. Question left open.

13. In the case of National Aluminium Co. Ltd. –vs- Pressteel and Fabrication (P) LTD. another. IA No. 2 of 2003 in Civil Appeal No. 2522 of 1999, decided on 18-12-2003 and reported in . 2003 Supp2 Bom CR 445 = 2004 2 Mh LJ 870 = 2003 0 Supreme(Mah) 1415 (SC-DB), the Court observed that on appointing arbitrator the Supreme Court does not retain any power or control over the arbitral proceedings. Arbitral award could be challenged only before the principal civil court of original jurisdiction under Section 34. An award if challenged within stipulated time becomes un-executable, not open to the court to pass an interlocutory order regarding the award. Correctness of the claim made by the applicant has to be adjudicated. Delay in filing objections to award due to bona fide prosecution in wrong forum ought to be condoned. Parties agreeing, by consent, for arbitration under 1996 Act permissible under Section 85(2)(a). Having agreed to such a course, not open to the parties to raise a plea of applicability of 1940 Act at the appellate stage for challenging or modification of the award.

14. In the case of Delhi Transport Corporation Ltd. –vs- Rose Advertising Civil Appeal No. 105 of 2002, decided on 17.4.2003. and reported in 2003 2 MPWN(SC) 115 = 2003 0 Supreme(MP) 531(SC-DB), the Court held that proceedings filed after commencement of 1996 Act, governed also under 1996 Act as arbitration clause containing option and arbitrator also passed award under the 1996 Act, and this Act applies. Time limit fixed under for setting aside award expired. Court before whom application to be made has to decide whether time can be extended.

15. In the case of Milkfood Ltd. –vs- M/s. GMC Ice Cream (P) Ltd. Civil Appeal No. 9672 of 2003, with C.A. Nos. 9673-74 of 2003, decided on 5-4-2004 and reported in 2004 0 AIR(SC) 3145 = 2004 1 ArbLR 613 = 2004 3 BBCJ(SC) 161 = 2004 4 JT 393 = 2004 1 RAJ 684 = 2004 2 RCR(Civ) 642 = 2004 4 Scale 291 = 2004 7 SCC 288 = 2004 3 Supreme 151 = 2004 0 Supreme(SC) 424(SC-3J), the Court held : Majority Judgment [S.B. Sinha, J. for V.N. Khare, CJI and for himself]

So far as the Arbitral Proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion where after only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply. It is relevant to note that it is not mandatory to approach the Court for appointment of an arbitrator in terms of Sub-Section (2) of Section 8 of the 1940 Act. If the other party thereto does not concur to the arbitrator already appointed or nominate his own arbitrator in a given case, it is legally permissible for the arbitrator so nominated by one party to proceed with the reference and make an award in accordance with law. However, in terms of Sub-Section (2) of Section 8 only a legal fiction has been created in terms whereof an arbitrator appointed by the Court shall be deemed to have been nominated by both the parties to the arbitration proceedings.

Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non-obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall be apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would not apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act where for also necessity of reference to Section 21 would arise. The Court is to interpret the repeal and savings clauses in such a manner so as to give an pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the fact of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression 'commencement of arbitration proceedings must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commences only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so and even the case laws do not suggest the same.

In this case, the Munsif by an order dated 7.8.1995 i.e. before the 1996 Act came into force not only stayed further proceedings of the suit but also directed that in the meanwhile the matter be referred to arbitration. The matter was referred to arbitration as soon as the notice dated 14.9.1995 was issued and served on the other side.

It may be true that before the High Court apart from Shri H.L. Agrawal, Shri Uday Sinha also came to be appointed; but the change in the constitution of the arbitral tribunal is irrelevant for the purpose of determining the question as to when the arbitration proceeding commenced within the meaning of Section 21 of the 1996 Act. The purported reference of the dispute to the arbitrator was merely a reference to new arbitral tribunal which concept is separate and distinct from that of commencement of arbitration proceeding.

The arbitrators, therefore, have also not held that notice dated 14.9.1995 was not served upon the respondent but merely proceeded on the basis that the same would be relevant for the purpose of determining the question as to when the arbitral proceeding shall commence. In fact it does not appear that such a question was raised either before the arbitrators or before the High Court. The respondent, therefore, cannot be permitted to raise the same before us for the first time.

For the reasons aforementioned, the Court is of the view that in this case, the 1940 Act shall apply and not the 1996 Act. However, it is accepted at the Bar that the arbitrators had already entered into the reference. The proceedings before the arbitrators were not stayed. Only making of the award was stayed. In that view of the matter, in the peculiar facts and circumstances of this case, the Court is of the opinion that although the old Act would apply, the entire arbitral proceedings need not be reopened and the arbitrators may proceed to give their award. The award shall be filed in the Court having jurisdiction where after the parties may proceed in terms of the old Act. The Court hopes and trust that the award shall be made and all the legal proceedings shall come to an end at an early date and preferably within a period of four months from the date of the communication of this order. This order has been passed in the interest of justice and in the peculiar facts and circumstances of this case.

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Minority Judgment [S.H. Kapadia, J.]

A bare reading of Section 21 of the 1996 Act indicates that arbitral proceedings in respect of a dispute commences on the date on which request to refer such dispute to arbitration is received by the respondent, unless otherwise agreed by the parties. Section 21 is similar to section 14 of the English Arbitration Act 1996 which provides that parties are free to agree as to when arbitration is to be regarded as commencing both under the Arbitration Act 1996 and for limitation purposes.

In the present matter, one is concerned with transitional provision, i.e. Section 85(2)(a) which enacts as to how the statute will operate on the facts and circumstances existing on the date it comes into force and, therefore, the construction of such a provision must depend upon its own terms and not on the basis of Section 21.

In the light of what is stated above, the Court refers to the facts of the present case. The parties entered into an agreement on 7.4.1992 which contained an arbitration clause 20, which inter alia stated that in the case of dispute between the parties arising in relation to the contract, the dispute shall be referred to a single arbitrator, in case both sides agree upon one such arbitrator and failing such agreement, the dispute shall stand referred to two arbitrators, one to be appointed by the either party, and in case of disagreement, between the two arbitrators, the dispute was to be referred to an umpire to be appointed by the two arbitrators. Before entering upon the reference under clause 20 quoted above, all such arbitration proceedings were to be governed by the provisions of the Arbitration Act, 1940 or under any statutory re-enactment. This clause is similar to the one considered by this Court in the case of Delhi Transport Corporation Ltd. On the strength of the agreement dated 7.4.1992, the respondent herein filed title suit No. 40 of 1995 for injunction and in the said suit, the appellant herein applied for stay under section 34 of the 1940 Act. Suffice it to state that on 6.5.1997, when the matter came up before the High Court, the parties agreed that all disputes between them may be referred to arbitrators chosen by the parties as per the agreement. A consent order was accordingly passed on that day by the High Court referring the dispute to the arbitrators. Therefore, for all practical purposes, the arbitration commenced on 6.5.1997, by which time the 1996 Act had come into force. In the circumstances, the Court is in agreement with the majority decision of the arbitrators that the proceedings in the present case would be governed by the provisions of the 1996 Act. For above reasons, respectfully dissented from the opinion of Sinha, J.

16. In the case of U.P. State Sugar Corpn. Ltd. –vs- Jain Construction Co. & Anr. Civil Appeal No. 5479 of 2004, (Arising out of SLP (C) No. 4459 of 2004), decided on 25-8-2004 and reported in 2004 0 AIR(SC) 4335 = 2004 3 Arb LR 1 = 2004 4 BBCJ(SC) 208 = 2005 1 CivCC 371 = 2005 1 JCR(SC) 38 = 2004 7 JT 61 = 2004 3 RAJ 1 = 2004 4 RCR(Civ) 248 = 2004 7 Scale 307 = 2004 7 SCC 332 = 2004 6 Supreme 449 = 2004 0 Supreme(SC) 950(SC-DB) the Court held that it is true that the arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932. It has been so held in Jagdish Chandra Gupta –vs-. Kajaria Traders (India) Ltd. [AIR 1964 SC 1882]. The Court, however, noticed that this Court in Firm Ashoka Traders despite following Jagdish Chandra Gupta held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause under Section 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by

the High Court that the Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent-firm was registered under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on. [See Delhi Development Authority –vs- Kochhar Construction Work and Another-(1998) 8 SCC 559]. The said questions, thus, would fall for consideration before the High Court.

In respect of arbitral proceedings commenced before coming into force of 1996 Act provisions of 1940 Act would apply. Respondent filed application u/s 20 of Act, 1940 Act in 1991-Arbitral proceedings in respect of a particular dispute commenced on a date on which request for that dispute to be referred to arbitration was received.

17. In the case of Neeraj Munjal & Ors. –vs- Atul Grover Minor & Anr. Civil Appeal No. 3100 of 2005, (@ SLP (C) No. 5177 of 2005), decided on 5-5-2005 and reported in 2005 0 AIR(SC) 2867 = 2005 0 AIR(SCW) 2814 = 2005 2 ArbLR 119 = 2005 3 BBCJ(SC) 313 = 2005 5 JT 383 = 2005 3 PLR(SC) 192 = 2005 2 RAJ 90 = 2005 2 RCR(Civ) 644 = 2005 4 Scale 716 = 2005 5 SCC 404 = 2005 4 SCJ 403 = 2005 4 Supreme 18 = 2005 0 Supreme(SC) 784(SC-DB), the Court held that it is not a case where the parties accepted or proceeded on the basis that the 1996 Act would govern the arbitral proceedings. The reference admittedly was made prior to coming into force the 1996 Act. The question before this Court in Civil Appeal No. 1920 of 1997 was as to whether the National Consumer Disputes Redressal Commission had the jurisdiction to refer the dispute to an Arbitral Tribunal, whether by consent of the parties or otherwise. In view of the decision of this Court in Skypak Couriers Ltd., it was held that it had no such jurisdiction. In the meantime, however, as the parties before the Commission had agreed to such a reference to the arbitrator, the arbitrator had entered into a reference and passed an award; this Court allowed the parties to enforce the said ward. This Court did not have any jurisdiction to direct that the award should be enforced in terms of the provisions of the 1996 Act which was not applicable. This Court also could not have deprived the parties from a remedy which is otherwise available to them in law. It is true that this Court did not pass an order when such an application was filed by the Appellants herein being I.A. No. 4 in Civil Appeal No. 1920 of 1997 but the same was not necessary to do as the parties were at liberty to raise the said question before the High Court. A Court of law has no jurisdiction to direct a matter to be governed by one statute when provisions of another statute are applicable. This Court merely directed the parties to enforce the said award which would mean that the same should be enforced in accordance with law. If a party to the lis has a right to question an award in terms of the 1940 Act, no Court has the requisite jurisdiction to deprive him therefrom.

The Court, therefore, is clearly of the opinion that the provisions contained in the 1940 Act would govern the proceedings arising out of the award and not the 1996 Act. Reference to the 1996 Act was a mere inadvertence on the part of this Court. The Single Judge of the High Court was also not correct in holding that as no leave to challenge the award was granted by this Court, the Appellants could not avail the remedies provided for under the 1940 Act. It is not in dispute that the question as regard applicability of the 1940 Act and the 1996 Act has not been gone into by this Court or the Division Bench of the High Court. The order of this Court dated 25.7.2003, in our opinion, would not be a bar for the Appellants to approach this Court again; particularly in view of the fact that the Division Bench itself has refused to go into the said question and asked the parties to file an application before this Court for clarification. The principle of res-judicata in a situation of this nature cannot be said to have an application. In Shakuntla Devi –vs- Kamla & Ors. [2005(4) SCALE 21] this Court has clearly laid down the law that principle of res judicata has certain exceptions, one of which would be a case where the earlier declaration obtained by the Court is established to be contrary to an existing law.

18. In the case of Mahipatlal Patel –vs- Chief Engineer, decided on : 04/01/2008 and reported in 2008 0 AIR(SC) 330 = 2008 Supp AIR(SC) 330 = 2008 0 AIR(SCW) 2737 = 2008 2 ArbLR 198 = 2008 3 JCR(SC) 82 = 2008 4 RCR(Civ) 177 = 2008 6 Scale 89 = 2008 12 SCC 64 = 2008 0 Supreme(SC) 584(SC-DB), the Court observed that this appeal is directed against an order passed by the chief Justice of the High Court of Orissa at Cuttack dated 20th of May, 2005 for appointment of an arbitrator and for

referring the dispute between the parties to him for adjudication. By the impugned order, on consideration of clause 50 of the agreement entered into by the parties which provides for arbitration and in view of Section 85 of the Act, held that no appointment could be made under Section 11 of the Act and further held that the appellant in terms of Clause 50 of the agreement had to approach the arbitration tribunal and, accordingly, the application for appointment of arbitrator was rejected. Feeling aggrieved, the appellant has come up by way of a special leave petition which on grant of leave was heard in the presence of the counsel for the parties. The core question involved in this appeal relates to the interpretation of Section 85 of the Act.

The High Court, has given a construction to the language of Section 85 of the Act and held that the provisions of the repealed Act 1940 in the present case would apply. Before the Court proceeds further, considered the arbitration clause as entered into by the parties in the agreement. Clause 50 of the agreement contains provisions for arbitration which provides, inter alia, that except as otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions mentioned therein before and as to the quality of the workmanship or materials used in the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders of these conditions concerning the work or the execution or failure to execute the same with or arising during the progress of the work after completion of or abandonment thereof shall be referred to the arbitration by the Arbitration Tribunal constituted by the State Government which shall consist of three members of whom one shall be chosen from among the officers belonging to Orissa Superior Judicial Service (Sr. Branch), one from Engineers in the active service of government not below the rank of a Superintending Engineer and the remaining member shall be chosen from officers belonging to the Orissa Finance Service not below the rank of class-I officer.

It was held by the High Court in the impugned order that in view of clause 50 of the agreement, it was only the arbitration tribunal before which the disputes and differences could be referred and, therefore, no appointment could be made under Section 11 of the Act. The High Court in the impugned order while rejecting the application for appointment of an arbitration under Section 11 of the Act further held that the arbitration clause 50 clearly provides that if the contractor did not make any payment for arbitration in respect of any claim in writing within 90 days after receiving intimation from the Government that the bill was ready for payment, that claim of the contractor shall be deemed to have been waived and absolutely barred and the government shall be discharged and released of all the liability under the contract in respect of such claim.

The Court is of the view that the order of the High Court is not sustainable in law. An order of the Orissa High Court on the question of existence of an arbitration tribunal was brought to our notice by the counsel for the parties from which it clearly appears that the arbitration tribunal created under the arbitration Act, 1940 does not exist for deciding the disputes which had arisen out of an agreement entered into after the arbitration Act, 1940 was repealed. Accordingly, it has been held that the arbitration tribunal set up by the Arbitration Act, 1940 does not exist as on date and the present dispute between the parties cannot be referred to the said tribunal which is not in existence in the eyes of law. It has also been accepted by the counsel for the parties that against this order of the High Court, no appeal was filed or steps taken by either of the parties, that is to say, that it has now been accepted that there is no existence of any arbitration tribunal. On the basis of the aforesaid judgment of the Chief Justice of the High Court, it has been accepted that no arbitration tribunal is in existence. Therefore, without going into the merits and in view of the aforesaid decision of the Orissa High Court, the Court is of the view that in the absence of existence of any arbitration tribunal, it is only the High Court to exercise its power under Section 11 of the Act to appoint an arbitrator to go into the disputes and differences between the parties. Accordingly, the Court sets aside the order of the High Court. The Court now requests the High Court to decide the

application under Section 11 of the Act on merits. It is expected that the said application shall be decided and dispose of within three months from the date of supply of a copy of this order to it. This appeal is thus allowed to the extent indicated above. There will be no order as to costs.

19. In the case of Fuerst Day Lawson Ltd. and Ors. etc. etc. –vs- Jindal Exports Ltd. and Ors. etc. etc. Special Leave Petition (Civil) Nos. 11945, 13625, 13626-13629 and 22318-22321 of 2010 and Civil Appeal No. 5156 of 2011 (Arising out of SLP (Civil) No. 31068 of 2009), Civil Appeal No. 5157 of 2011 (Arising out of SLP (Civil) No. 4648 of 2010) and Civil Appeal No. 36 of 2010, decided on: 08.07.2011, and reported in 2011 0 AIR(SC) 2649 = 2011 3 ArbLR 82 = 2012 1 JCR(SC) 143 = 2011 7 JT 469 = 2011 4 RCR(Civ) 775 = 2011 8 SCC 333 = 2011 0 Supreme(SC) 639(SC-DB) the Court held that the common question that arise in these appeals is whether an order passed under Section 49and 50 of Arbitration and Conciliation Act, which is not appealable, can be appealed against under Letters Patent Appeal. Considering the self-contained nature of 1996 Act, it was held that the Letters Patent Appeal is not available to the case.

20. In the case of Purushottam s/o Tulsiram Badwaik –vs- Anil & Ors. CIVIL APPEAL NO.4664 OF 2018, decided on : 02-05-2018 and reported in 2018 4 AIR(Bom)(R) 448 = 2018 0 AIR(SC) 2325 = 2018 3 ALD(SC) 188 = 2018 5 AllMR(SC) 467 = 2018 2 ApexCJ(SC) 443 = 2018 3 ArbLR 145 = 2018 4 BomCR(SC) 457 = 2018 3 CurCC(SC) 324 = 2018 0 DNJ(SC) 746 = 2018 4 JT 603 = 2018 3 KHC(SN) 3 = 2018 2 LawHerald(SC) 550 = 2018 5 MLJ(SC) 107 = 2018 3 RCR(Civ) 109 = 2018 6 Scale 607 = 2018 8 SCC 95 = 2018 6 Supreme 74 = 2018 0 Supreme(SC) 527 = 2018 2 WLN 108;(SC-DB), the Court held that the requirements of section 7 for there being an arbitration agreement fulfilled. Arbitral proceedings commencing after Act 1996 coming into force, however the clause referring to Arbitration Act, 1940 and not the Act 1996. Held, in case there is an arbitration agreement in terms of section 7 and the proceedings started after coming into force of Act 1996. The proceedings would be governed by Act 1996 notwithstanding any reference to Act 1940.

The appellant and the respondents had entered into a Partnership Agreement. The appellant had also executed a registered Power of Attorney in favour of the partners. The respondents filed Special Civil Suit for declaration, damages, accounts and permanent injunction against the appellant. Soon after receipt of the notice, the appellant preferred an application under Section 8 of 1996 Act to refer the dispute to arbitration in view of clause 15 in the Partnership Agreement. The Trial Court rejected said application. The appellant filed Civil Revision Application in the High Court. The High Court rejected the challenge and dismissed the Civil Revision.

The Court found that the proceedings would be governed by Act 1996. Appeal allowed.

Decisions of High Courts

1. In the case of M/s. Kothari Co. –vs- Union of India others. Notice of Motion No. 2411 of 1998 in Arbitration Petition No. 223 of 1998 in Award No. 19 of 1998 along with Notice of Motion 3129 of 1998 in Arbitration Petition No. 251 of 1998, decided on 3-2-1999 and reported in 1999 4 BomCR 402 = 1999 0 Supreme (Mah) 73(Bom) the Court considered validity of arbitration agreement and held that in this case it was held that the Court can exercise jurisdiction vested in it under Section 33 only when the parties to the arbitration are challenging the existence validity of agreement.

2. In the case of M/s. Trishul Steels._-vs- The Municipal Corporation of the City of Aurangabad through its Administrator another. Writ Petition No. 147 of 1986, decided on 8/11-10-1999 and reported in 1999 4 All MR 522 = 2000 1 All MR 592 = 2000 2 BomCR 140 = 2000 2 Bom LR 466 = 2000 1 Mh LJ 529 = 1999 0 Supreme (Mah) 775(Bom-DB) the Court held that in the case at hand the petitioner is importing steel rods and wire and they are being processed in different operations namely pickling, threading, flattening and galvanizing. The product which is exported is distinguishable in its appearance and size as compared to the one which is originally imported. The processes carried out are also described as cleaning, sizing and metalizing and it cannot be accepted that these processes carried out at the factory of the petitioner at Aurangabad do not amount to an activity of manufacture. There is no dispute that the petitioner's factory is registered under the Factories Act, 1948 and it is carrying out manufacturing activities. The Court, therefore, has no difficulty in holding that the material that is exported by the petitioner outside the Corporation limits is different from the material which is imported from the Bombay market and the said change is brought about as a result of the processes as stated hereinabove in the factory of the petitioner and thus the said exported goods do not come within the ambit of Rule 16(e) of the Octroi Rules. The proviso to Rule 16(e) does not apply to the instant case and therefore, the petitioner could not claim refund under Rule 18 of the Octroi Rules read with Standing Order No. 14.

For the above stated reasons, the Court held that the challenge raised in the petition against the Municipal Corporation declining the refund of Octroi on the exported goods is unsustainable and the petition must therefore, fail. The petition is hereby dismissed. Rule discharged. No costs.

3. In the case of Union of India. -vs- M/s. R.K. Goel and Associates. Arbitration Petition No. 65 of 2000, decided on 4-4-2000 and reported in 2000 3 BomCR 666 = 2000 3 MhLJ 616 = 2000 0 Supreme(Mah) 269(Bom) the Court observed that even though proceedings had commenced under 1940 Act parties by virtue of Arbitration Agreement can make provisions of 1996 Act applicable. The provisions of the Arbitration and Conciliation Act, 1996 would apply only in the event the application for reference under Section 21 was made after the said Act had come into force. Insofar as the 1940 Act is concerned, if the proceedings had commenced they would be continued. The exception carved out is "unless otherwise agreed by the parties" as provided in Section 85(2)(a) of the Arbitration and Conciliation Act. The expression "Unless otherwise agreed by the parties" has been construed to mean that if there is a prior agreement in writing then even though the proceedings have commenced under the old Act and even though expressly the new Act will not apply, by virtue of the Agreement, the provisions of the new Act are made applicable.

The dispute between the parties was referred to arbitrator before the Arbitration and Conciliation Act, 1996 had come into force. After the first and second Arbitrator resigned, a third Arbitrator came to be appointed on 25th June, 1998, and the award was made on 14th January, 1999. Though the exact date was not available on record, the copy of the Award was served on the parties by end of January, 1999. The application for setting aside the award was filed on 19th November, 1999. In terms of arbitration clause, the parties had agreed that the arbitration proceedings will be governed by any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force. Therefore, though the proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force, by virtue of the terms of the arbitration clause the Award must be held to have been passed under the provisions of the new 1996 Act. As the Award was passed under the provisions of new Act, the petition filed on 19.11.1999 to challenge the award made on 14.1.1999 the copy of which was served on the parties by the end of January, 1999 was barred by limitation as per provisions of Section 34(3) of the new Act and as such the same was liable to be dismissed.

4. In the case of Pushpa P. Mulchandani (Mrs.) others. –vs- Admiral Radhakrishin Tahilani (RETD.) others. Review Petition No. 15 of 1999 in Arbitration Petition No. 432 of 1998, decided on 15-9-2000 and reported in 2001 1 AllMR 396 = 2001 2 ArbLR 284 = 2001 1 BomCR 592 = 2001 1 BomLR 169 = 2000 4 MhLJ 819 = 2000 0 Supreme(Mah) 726(Bom) the Court observed that Act, 1996 is self-contained Code. Original Sides Rules 772 to 789 of the High Court made under Arbitration Act, 1940 not applicable. Provisions in Section 9 of the Arbitration and Conciliation Act indicate an intention on the part of the Legislature to make the Arbitration and Conciliation Act, 1996 a self-contained self-operative Code with regard to the subject matter of arbitration and conciliation. The Arbitration and Conciliation Act, 1996 is enacted to make the law a self-contained Code and the provisions of the Civil Procedure Code are not applicable, unless specifically made applicable. The necessary corollary of this conclusion would be that the rules made under the Arbitration Act, 1940 (i.e. Rules 772 to 789) of the High Court Original Sides Rules would not have application to arbitrations under the 1996 Act. It is precisely for this reason that fresh Rules 803-A to 803-F have been made by amendment in the High Court Original Side Rules.

Amendment to application filed under Section 34 of the Act for setting aside award after expiry of limitation as prescribed under Section 34 (2) seeking additional grounds not permissible. An application for setting aside the award under Section 34 of the Arbitration and Conciliation Act, 1996 has to be made within the limitation prescribed by the Act. This necessarily means that all grounds on which the award is sought to be set aside have to be taken in the petition itself. It is, therefore, not permissible for the Court to permit an amendment of the petition, that too after the period of limitation prescribed in the section has expired. That would tantamount to entertaining a fresh petition beyond the period of limitation.

Provisions of Section 21 not applicable to proceedings under the Arbitration and Conciliation Act, 1996. Sections 4 to 24 also not applicable in view of implied exclusion. Section 21 of the Limitation Act, 1963 applies to suits. In the Limitation Act, 1963, "suit" has been specifically defined in Section 2 (1) as not including an appeal or an application. Section 2 (b) of the limitation Act of 1963 defines the expression "application" as including a petition. Thus, on a conjoint reading of the Limitation Act, the 1996 Act and the rules made thereunder, the provisions of Section 21 would not apply to proceedings under the 1996 Act which are commenced by petitions which are excluded from the definition of suit as defined under Section 2 (1). The Limitation Act, 1963 does not in terms prescribed any limitation for an application to set aside an award. This is obviously so for Section 34 itself has prescribed the limitation in sub-section (3), the limitation being a period of three months from the date on which the party making that application had received the arbitral award, or if a request has been made under Section 33, from the date on which such a request has been disposed of by the arbitral tribunal. The proviso to sub-section (3) enables the Court to entertain such an application if satisfied that the applicant was prevented by sufficient cause from making the application, but provides that such an application can be entertained only within a further period of 30 days, but not thereafter.

The intention of the Legislature is obvious. The intention is to expedite arbitration proceedings. The Legislature has, therefore, provided in clear terms that after a period of three months and 30 days, the Court has no power to condone the delay in the presentation of the application. This is a clear indication of the intention of the Legislature to exclude the provisions of Sections 4 to 24 of the Limitation Act, 1963. Notwithstanding that the Arbitration and Conciliation Act, 1996 contains no specific words of exclusion, an examination of the scheme of the Act would suggest that the intention is to exclude the application of the provisions of Sections 4 to 24 of the Limitation Act. This is clearly evidenced by the words "but not thereafter" used at the end of the proviso to sub-section (3) of Section 34.

5. In the case of Oil and Natural Gas Corporation Limited. –vs- R.S. Avtar Singh Co. Arbitration Petition No. 501 of 2002, decided on 31-10-2002 and reported in 2003 2 ArbLR 219 = 2003 Supp1 BomCR 341 = 2003 2 MhLJ 29 = 2002 0 Supreme(Mah) 1187(Bom) the Court held that Arbitral proceeding commencing under 1940 Act before coming into force of the 1996 Act, Court would have jurisdiction u/s 33 of 1940 Act to determine challenge to arbitration agreement.

6. In the case of Union of India, through –vs- M/s.R.K.Goel and Associates Engineers & Contractors. Appeal No.748 OF 2000, in Arbitration Petition No.65 of 2000, decided on : 24th March, 2008 and reported in 2008 5 AIR(Bom)(NOC)(R) 856 = 2009 1 MhLJ 354 = 2008 0 Supreme(Mah) 441(Bom-DB) the Court observed that dismissal of arbitration petition by applying bar by limitation of new Act, while award passed in accordance with old Act. Petition filed in accordance with old Act. Challenged. As matter would be governed by old Act not by new Act, held, dismissal not proper.

7. In the case of Union of India –vs- R.K. Goel and Associates. Appeal No. 748 of 2000 in Arbitration Petition No. 65 of 2000, decided on: March 24, 2008 and reported in 2008 5 AIR(Bom)(NOC)(R) 856 = 2009 1 ArbLR 610 = 2008 0 Supreme(Mah) 442(Bom-DB) the Court held that dismissal of arbitration petition by applying bar by limitation of new Act, while award passed in accordance with old Act. Petition filed in accordance with old Act. Challenged. As matter would be governed by old Act not by new Act, held, dismissal not proper.

8. In the case of State of Goa –vs- Chinna Nachimuthu Constructions, Engineers And Contractors, Bangalore. Appeal under Arbitration Act No. 1 of 2000,decided on 3-7-2008 and reported in 2008 4 AIR(Bom)(R) 612 = 2008 5 AllMR 736 = 2008 3 ArbLR 220 = 2008 4 BomCR 510 = 2009 1 GoaLR 28 = 2009 1 MhLJ 342 = 2008 0 Supreme(Mah) 925(Bom-DB) the Court observed that the material facts before as are not different, that there is nothing on record to show that the parties had agreed before the arbitrator for application of the procedure under the new Act and the agreement to the contrary could not be said to have operated on its own without both the parties exercising their option to be governed by the procedure under the new Act. Both the Counsel for the parties relied on the conduct of the other side to point out how the appellant had acquiesced in the applicability of the new Act and the respondent had acquiesced in the application of the procedure under the old Act. However, admittedly, both the parties had not agreed to and opted for the applicability of the new Act after the new Act came into force. The appellant, in fact, applied to the arbitrator that he becomes functus officio since he had failed to deliver the award within the time stipulated and the respondent had opposed this request. There being no agreement before the arbitrator that the procedure under the new Act would apply, the Court did not propose to take into account the conduct of the parties for deciding the applicability of the law which should govern the arbitration.

9. In the case of Mr Puneet Malhotra and Anr. –vs- Mr. R.S.Gai,Sole Arbitrator & others. Writ Petition No.4064 of 2008 with Arbitration Petition No.340, 341, 2,310 of 2007 with Arbitration Petition (L) No.590, 591, 592, 593 of 2007, decided on: 23rd October, 2008 and reported in 2009 0 AIR(Bom) 42 = 2008 6 AllMR 856 = 2008 4 ArbLR 398 = 2008 6 BomCR 551 = 2009 2 RCR(Civ) 570 = 2008 0 Supreme(Mah) 1540(Bom-FB) (3J) the Court observed that a comparison of the provisions of subsection (2) of Section 34 of the 1996 Act with the provisions of Section 30 of the 1940 Act shows that the grounds on which an award could be set aside by the Court under the 1940 Act are different than the ones on which an award can be set aside under sub-section (2) of Section 34 of the 1996 Act. But, so far as the provisions of Article 3 of Schedule I of the Bombay Court Fees Act is concerned, the grounds on which the Court can set aside an Award is not relevant, because the subject matter of the provisions of Bombay

Court Fees Act is payment of Court fees on plaint, application, petition or memorandum of appeal and not the grounds on which the Court can grant reliefs to the applicant, plaintiff, petitioner or appellant.

10. In the case of State of Goa –vs- N.S.Nayak and Sons, reported in 2000 3 AllMR 587(Bom) the Court held that the appeal, filed against order passed under old Act and continued so, and parties not raised any objection for such proceedings, has to be dealt with in the terms of old Act.

11. In the case of the Bombay Gas Co. Ltd. –vs- Parmeshwar Mittal others. Arbitration Petition No. 220 of 1996, decided on 1-8-1997 and reported in 1998 0 AIR(Bom) 118 = 1998 2 BomCR 25 = 1997 3 MhLJ 863 = 1997 0 Supreme(Mah) 402(Bom) the Court observed that Section 34 implies readiness and willingness of party to go for arbitration-Notice not served about reference to arbitration proceeding cannot be said to be commenced under Section 21 of Act. Non-commencement of proceeding till new Act. The new Act provision would apply and not the old Act. The Section 34 lays down the principle that where any party to an arbitration agreement commences a legal proceeding against any other party to the agreement in respect of the matter agreed to be referred and other party to such legal proceedings may apply for stay of the proceedings. On such application being made if the Court is satisfied that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement and the conduct of the applicant has not been blameworthy, the Court may make an order anything the proceedings. Thus the section confers discretionary power on the Court to grant stay of proceedings. The stay of a suit is refused when there are impediments to arbitration or when the party does not come in time or fails to comply with the provisions of the section. Having regard to the nature and scope of section, it is difficult to hold that mere filing of an application for stay of the proceedings would amount to commencement of arbitral proceedings. It is true that an application under Section 34 implies readiness and willingness of the party to go for arbitration, but it cannot be equated with a notice under Section 21 which constitutes commencement of arbitral proceedings. It is pertinent to note that the power to grant stay under Section 34 is essentially a discretionary power and the Court may refuse the application for various reasons. Therefore, mere filing of an application under Section 34 cannot amount to commencement of arbitral proceedings, unless there is a notice given by the party to other side for referring the dispute to arbitration, arbitral proceedings cannot be said to be commenced within the meaning of Section 21 of the Act. Section 85 clearly provides that unless arbitral proceedings have commenced before the commencement of the Act the provisions of the new Act would apply and not the old Act. The contention that the new Act has no application to pending suits cannot be accepted in view of the clear language of Section 85. Court has, therefore, no hesitation to hold that the present application filed under Section 8 is perfectly maintainable in law.

Mere filing of application under Section 34 cannot be said that proceedings commenced within meaning of Section 21 of Act, 1940. Thus when proceedings had not commenced when new Act of 1996 came into force, provisions of new Act would apply. The Section 21 lays down the principle that where any party to an arbitration agreement commences a legal proceeding against any other party to the agreement in respect of the matter agreed to be referred and other party to such legal proceedings may apply for stay of the proceedings. On such application being made if the Court is satisfied that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement and the conduct of the applicant has not been blameworthy, the Court may make an order staying the proceedings. Thus the Section confers discretionary power on the Court to grant stay of suit is refused when there are impediments to arbitration or when the party does not come in time or fails to comply with the provisions of the section. Having regards to the nature and scope of Section, it is difficult to hood that mere filing of an application for stay of the proceedings would amount to commencement of arbitral proceedings. It is true that an application under Section 34 implies readiness and willingness of the party to go for arbitration, but it cannot be equated with a notice under Section 21 which constitutes commencement of arbitral proceedings. It is pertinent to note that the power to grant stay under Section 34 is essentially a discretionary power and the Court may refuse the application for various reasons.

Therefore, mere filing of an application under Section 34 cannot amount to commencement of arbitral proceedings.

Held, Section 34 of old Act given discretionary powers whereas Section 8 of New Act is obligatory-Vested right without notice under Section 21 not applicable. Only application for stay under old Act does not create any right.

Held, Section 34 of old Act given discretionary powers whereas Section 8 of New Act is obligatory. Vested rights without notice under Section 21 not applicable-Only application for stay under old Act does not create any right. The provisions of the new Act in Courts opinion clearly demonstrate a contrary intention. Section 8 of the new Act makes a complete departure from the old provisions which only provided for stay of the suit in the discretion of the suit. Section 8 on the other hand makes it mandatory for the Court to render the parties to arbitration. The element of discretion is thus completely taken away. While Section 34 required that the party making the application was ready and willing to do all things necessary to the proper conduct of the arbitration both at the time when judicial proceedings were commenced and when the application was made. There is no such requirement under Section 8 of the new Act. This by necessary implication the right, if any, under 34 of the old Act is not saved under the provisions of the new Act.

Dispute as to fabrication of record, whether can be referred to arbitration, held, yes.

Fabrication of records, for reference to arbitration challenged. Opposite party guilty of fraud, matter not to be referred to arbitration. Held, alleged fraud, Party can approach Criminal Court or Civil Court. Arbitration cannot be denied on such grounds. Coming then to second ground of defence, the respondents have alleged that the petitioner has fabricated the record and, therefore, the dispute should not be referred to the Arbitrator. It is contended that the action of the respondent amounts to a criminal offence and such as issue cannot be referred to Arbitration. The argument is without any merit. In the first place in view of the mandatory nature of Section 8, the argument cannot be accepted. In any event, it is settled position of law that it is the person against whom fraud is alleged has an option to have the matter decided by the civil court. Merely because the respondents have made allegations of fabrication of record against the petitioner, the dispute cannot taken out of arbitration.

As application for stay is as per Act of 1940; would amount to commencement of old Act only. Held, Section 34 is for stay which is courts discretionary power. Not amounting to notice under old Act. Proceeding still not commenced. It is true that an application under Section 34 implies readiness and willingness of the party to go for arbitration, but it cannot be equated with a notice under Section 21 which constitutes commencement of arbitral proceedings. It is pertinent to note that the power to grant stay under Section 34 is essentially a discretionary power and the Court may refuse the application under Section 34 cannot amount commencement of arbitral proceedings. In Courts opinion, unless there is a notice given by the party to other side for referring the dispute to arbitration, arbitral proceedings cannot be said to be commenced within the meaning of Section 21 of the Act.

12. In the case of M/s. Reshma Constructions –vs- State of Goa. Civil Rev. Application No. 165 of 1997, decided on 12-3-1998 and reported in 1998 3 BomCR 837 = 1999 1 MhLJ 462 = 1998 0 Supreme(Mah) 162(Bom) the Court held that the expression "otherwise agreed by the parties" in Section 85(2)(a) of the 1996 Act, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression "otherwise agreed" does not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act. The intention of the Legislature in this regard is evident from the later portion of the saving clause which provides that the new Act shall apply to the arbitral proceedings commenced after enforcement of the new Act, but in relation to the agreement which had already been entered into and which contains provision for reference of the matter to the arbitration. In other words, in relation to the matters wherein the arbitration proceedings would commence after enforcement of the new Act, but under the agreement already executed before coming into force of the new Act the provisions of the new Act would apply to such proceedings. In respect of such proceedings, it is not left to the will of the parties to adopt the procedure of their choice - old or new Act but such proceedings are necessarily to be governed by the provisions of the new Act. But one thing is clear from this provision that the provisions of the new Act are made applicable even to the proceedings which commence after coming into force of the new Act, but under the agreement executed before coming into force of the new Act. Bearing this in mind, it will be thus clear that the expression "otherwise agreed by the parties" necessarily refers to the intention of the parties regarding applicability of the provisions of the new or old Act and not to the time factor. In this view of the matter, the findings of the trial Court that the said agreement was required to be executed after enforcement of the new Act is not only erroneous and contrary to the scheme and spirit of the Act, but tends to defeat the very object and purpose sought to be attained by the new Act. In fact, the trial Court had rushed to the conclusion that such an agreement is necessarily to be executed after enforcement of the new Act without analyzing even the scope and meaning of the expression "otherwise agreed by the parties". On plain reading of above quoted sub-clause 25 of the agreement between the parties, it is clear that the parties have in no uncertain terms agreed that the arbitration proceedings between the parties would be governed by the provisions contained in the Arbitration Act, 1940 as well as in terms of any modification or re-enactment thereof. It was further agreed therein that the law time being in force shall apply to such proceedings. These terms in the agreement disclose, that the parties had unequivocally agreed to be governed, in the matter of procedure of the proceedings relating to the arbitration, by the law which was in force at the time of execution of the agreement as well as by any further statutory changes those may be brought about in such law. The agreement between the parties does not disclose any intention on the part of the parties to the agreement to provide for the procedure to be followed in the arbitration under the agreement, shall always be one that has been provided under the old Act. The intention appears to be to the contrary. In this view of the matter, the finding of the trial Court that because the parties to the agreement in the case in hand, had not entered into a new agreement, relating to the applicability of the new Act to the pending proceedings, after enforcement of the new Act, the provisions of the new Act are not applicable to the proceedings between the parties, cannot be sustained and is liable to be set aside.

Objections to the award filed. Act of 1996 came into force in the meantime. Provisions of 1996 Act being applicable to proceedings in view of agreement between parties to that effect, it would be unjust to deny opportunity to the parties to take recourse under Section 33 and/or Section 34 of the 1996 Act Period spent by them under bona fide belief that proceedings were governed by 1940 Act would be excluded for the purpose of calculation of limitation period in terms of Section 14 of the Limitation Act. It is well-established rule of interpretation of statute that while the words of an enactment are important, the context is no less import. The words, therefore, should be read in context and not in isolation.

13. In the case of Thyssen Stahlunion GMBH –vs- Steel Authority of India Limited. Decided on : 09/01/1998 and reported in 1999 48 DRJ 210 = 1998 0 Supreme(Del) 668(Del) the Court held that for

execution of arbitration award where the arbitration proceedings commenced before the commencement of the Act, the proceedings shall be governed by the Act of 1940.

14. In the case of Good Value Enginirs –vs- M.M.S. Nanda. Suit 2461 of 1997, decided on : 10/18/2001 and reported in 2002 2 AD(Del) 622 = 2002 61 DRJ 573 = 2001 2 ILR(Del) 563 = 2001 7 ILRDLH 275 = 2001 0 Supreme(Del) 1531(Del) the Court considered commencement of arbitral proceedings. Whether in the facts of the case in hand the provisions of the Arbitration Act, 1940 or the provisions of the Arbitration and Conciliation Act, 1996 would apply. Arbitral proceedings according to section 21, commences when a request for the dispute to be referred to the arbitration is received by the respondent. Arbitration proceedings commenced before Arbitration and Conciliation Act, 1996. Arbitration Act, 1940 would continue to apply. Nothing to show on the record that there was any agreement to the contrary. Provision of the Arbitration Act, 1940 would apply.

Whether in the facts of the case in hand the provisions of the Arbitration Act, 1940 or the provisions of the Arbitration and Conciliation Act, 1996 would apply. Arbitral proceedings according to section 21, commences when a request for the dispute to be referred to the arbitration is received by the respondent. Arbitration proceedings commenced before Arbitration and Conciliation Act, 1996. Arbitration Act, 1940 would continue to apply. Nothing to show on the record that there was any agreement to the contrary. Provision of the Arbitration Act, 1940 would apply.

Under Section 21 of the Arbitration and Conciliation Act, 1996, the Arbitral proceedings commences then a request for the dispute to be referred to the Arbitration is received by the respondent. Once the arbitral proceedings had commenced before the Arbitration and Conciliation Act, 1996, then the Arbitration Act, 1940 would continue to apply, keeping in view the strict provisions of sub-Section (1) to Section 85 of the Arbitration and Conciliation Act, 1996. In the present case, vide the notice issued in November 1995 such a request had been made. Thus, arbitral proceedings had commenced before coming into force of the Arbitration and Conciliation Act, 1996. There is nothing to show on the record that there was any agreement to the contrary to indicate that the parties wanted, the Arbitration and Conciliation Act, 1996 to apply and the net result would be that in the absence of contract to the contrary, it is the provisions of the Arbitration Act, 1940, that would govern.

15. In the case of Varun Seacon Limited –vs- Bharat Bijlee Limited. C.A. 224 of 1996, decided on: 08/14/1997 and reported in 1998 0 AIR(Guj) 99 = 1998 1 GCD 377 = 1997 2 GLH 747 = 1997 3 GLR 2553 = 1997 0 Supreme(Guj) 386(Guj) the Court considered the Power to refer parties to arbitration where there is an arbitration agreement. Application to that effect must be made not later than submitting first statement on substance of the dispute. Admittedly in the case respondent defendant had not filed any written statement on merits & had only submitted application to stay proceedings of the suit. Such application did not debar the defendant from prosecuting application under Sec. 8 of New Act. Now a party is disentitled from getting stay of the suit only if the party has earlier submitted its statement on the substance of the dispute, that is, if earlier the defendant has filed its reply on merits.

In the instant case, admittedly the respondent defendant had not filed any written statement on merits and had submitted Civil Misc. Application No. 113 of 1995 with a prayer to stay the proceedings of the suit on the ground that the disputes between the parties were required to be referred to arbitration. Hence

mere filing of applications for adjournment to file Written Statement did not debar the defendant from prosecuting application under Sec. 8 of the New Act.

Applicability to pending proceedings after New Act coming in force. Looking to the provisions under Sec. 85(2) of the New Act only the pending arbitral proceedings are saved. As such applications under Sec. 34 of the old Act which are pending in a Civil Court on date of commencement of the New Act are governed by the New Act & not by the old Act.

Looking to the provisions of Sub-sec. (2) of Sec. 85 of the New Act, it is clear that the New Act, while repealing the Old Act, intended to save the repealed Act only for the pending arbitral proceedings. Thus an intention inconsistent with the provisions of Sec. 6 of the General Clauses Act is clearly manifested insofar as the question of applicability of Sec. 34 of the Old Act to pending judicial proceedings is concerned and, therefore, application under Sec. 34 of the Old Act which are pending in Civil Court on the date of commencement of the New Act are governed by the New Act and not by the Old Act.

Where a party to the proceedings had no right or privilege under the repealed Act, which imposed a procedural restriction or a procedural disability on the other side, repeal of the Old Act and simultaneous re-enactment without that disability does not continue the procedural disability, even on application of Sec. 6 of the General clauses Act. It is clear that the restriction contained in Sec. 34 of the Old Act that the party should not have taken any other step in the proceedings was a procedural disability on the defendant rather than a right on the plaintiff. This Court is, therefore, justified in taking the view that pending applications under Sec. 34 of the Old Act such as Civil Misc. Application No. 113 of 1995 in the present case are covered by the provisions of Sec. 8 of the New Act and not by Sec. 34 of the Old Act.

16. In the case of Rajputana Hotels Pvt. Ltd. –vs- Pradeep Kumar Sriya. S.B. Civil Revision Petition No. 600 of 1999, decided on : May 27, 1999 and reported in 1999 0 AIR(Raj) 312 = 1999 4 CCC 372 = 1999 2 RLR 145 = 2000 1 RLW(Raj) 585 = 1999 0 Supreme(Raj) 397 = 1999 3 WLC 660 = 1999 1 WLN 651 (Raj) the Court held that Act of 1996 came into force before the award was given under the Act of 1940 and according to Sec. 85(2) of the Act of 1996 it allows the Act of 1940 to govern the pending proceedings. Sec. 81 prohibits its retrospective effect and no jurisdictional error or irregularity.

17. In the case of H.P.State Council For Child Welfare –vs- The Unique Mixers And Furnaces Pvt. Ltd. O.M.P. (M) No.56 of I998, decided on : 03/03/2000 and reported in 2001 0 AIR(HP) 22 = 2000 1 CurLJ(HP) 394 = 2000 0 Supreme(HP) 39(HP) the Court observed the issue that whether arbitral proceedings had commenced before 25.1.1996 when the act came into force. Section 85(2)(a) shows that in spite of repeal of the old Act, the provisions of said Act would continue to apply to all arbitral proceedings which commenced before coming into force of the Act. Unless parties had agreed to the applicability of the Act to such arbitral proceedings. Arbitral proceedings had commenced on 31.8.1995 much before Coming into force of the Act. Therefore, in view of terms contained in agreement r/w Section 85 of the Act in absence of anything on record to show that parties had agreed to the applicability of provisions of the Act to the arbitral proceedings. The present case would be governed by provisions of the old Act As such present petition made under Section 34, is not maintainable. Award not liable to be set aside.

18. In the case of Goyal Brothers –vs- Indore Vikas Pradhikaran. Civil Revision No. 230 of 1999 (I), decided on : 03-01-2001 and reported in 2001 2 MPWN 83 = 2001 0 Supreme(MP) 877(MP) the Court considered arbitral proceedings commencing before enforcement of 1996 Act are saved and held that the provisions of repealed Act will continue to apply and application is maintainable. Arbitral proceedings commence on the date on which request for referral to arbitrator is received, application u/s 11 of 1940 Act maintainable.

19. In the case of National Thermal Power Corporation Limited –vs- Vijay Fire Protection Systems Limited. Interim Application 8470 of 2001, decided on: 11/09/2001, and reported in 2002 4 AD(Del) 68 = 2002 61 DRJ 869 = 2001 7 ILRDLH 483 = 2001 0 Supreme(Del) 1620 (Del) the Court considered the disputes between the parties with regard to the application of New Act or Old Act. Application filed by the petitioner under Old Act before the commencement of New Act pending and application under Section 85 of New Act filed by the respondent for dismissal of the application of the petitioner. General conditions of the contract cannot be read as overriding or as an exception to the specific arbitration agreement between the parties. With the filing of application, before commencement of New Act, a right accrued in favor of the petitioner to get it decided under the provisions of the Old Act. The Court held that if the challenge to the constitution of the Arbitral Tribunal is raised after coming into force of the new Act then in terms of arbitration clause the right to get it decided accrued only under the new Act But if the challenge has already been made before coming into force of the new Act the same shall be decided in accordance with the provisions of the old Act. An arbitration clause as in present case does not wipe off the right already accrued in favor of the petitioner to get the petition under Sections 5, 11 and 12 decided in accordance with the provisions of the old Act. Application under Section 85 of New Act dismissed.

20. In the case of Oil and Natural Gas Corporation Limited –vs- R.S. Avtar Singh Co. Arbitration Petition No. 501 of 2002, decided on 31-10-2002 and reported in 2003 2 ArbLR 219 = 2003 Supp1 BomCR 341 = 2003 2 MhLJ 29 = 2002 0 Supreme(Mah) 1187(Bom), the Court held that Arbitral proceeding commencing under 1940 Act before coming into force of the 1996 Act and Court would have jurisdiction u/s 33 of 1940 Act to determine challenge to arbitration agreement.

21. In the case of R.Arulsigamani and another –vs- Pauldurai alias Perumal

C.R.P. (P.D.) No.1569 of 2002, decided on : 08 April 2003 and reported in 2003 3 ArbLR 34 = 2003 2 MLJ 404 = 2003 0 Supreme(Mad) 610(Mad) the Court considered commencement of Arbitral Proceedings and stay of legal proceedings and held that there cannot be violation of the arbitration clause by the parties to arbitration agreement.

22. In the case of Mahanagar Telephone Nigam Limited –vs- Unibros. Suit 266A of 2001, decided on : 05/05/2003 and reported in 2003 4 AD(Del) 727 = 2003 2 ArbLR 346 = 2003 105 DLT 837 = 2003 71 DRJ 719 = 2003 1 ILR(Del) 461 = 2003 12 ILRDLH 342 = 2003 0 Supreme(Del) 436 (Del), the Court considered the issue that the petitioner seeking direction to be issued to arbitrator to file award Along with arbitral records. Impugned award dated 29.12.2000. Arbitration clause in the contract between parties states that provisions of the 1940 Act or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings. Award sought to be filed before court, dated 29.12.2000. Case governed by the Arbitration and Conciliation Act, 1996.

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Petition under Sections 14 and 17 of the Old Act of 1940 not maintainable in view of said arbitration clause in the contract.

23. In the case of Tata Iron And Steel Company Ltd –vs- N.B.Exports, Bangalore, C.R.P. : 25 of 2001 decided on : 05-30-03. and reported in 2003 0 AIR(Kar) 2025 = 2003 3 ArbLR 70 = 2003 4 KarLJ 284 = 2003 3 KLO 2214 = 2003 0 Supreme(Kar) 409(Karnt), the Court considered application of the Act to the proceedings initiated under Arbitration Act 1940. Suit filed on 31-5-1995, application filed, reference to arbitrator sought, revision upon, and remand allowed the application on 29-9-2000. Arbitration and Conciliation Act coming into force on 25-1-1996, whether the provisions of the new Act are applicable, yes.

The Arbitration and Conciliation Act, 1996 which has come into effect on 25.1.1996 has repealed the Arbitration Act, 1940, and while repealing the 1940 Act, the saving clause provides that the provisions of the old Act are applicable to the pending arbitral proceedings. Admittedly, no arbitral proceedings were pending pertaining to the subject matter when the 1996 Act came into force and when the provisions of the Arbitration Act, 1940, have been repealed with effect from 25.1.1996. The question of making an application under Section 34 of the 1940 Act does not arise as the Act itself has been repealed.

24. In the case of Subhash Projects And Marketing Limited –vs- Jain Farms And Resorts Ltd. C.R.P. : 990 of 2002, decided on : 07-25-03 and reported in 2003 0 ILR(Kar) 4343 = 2003 0 Supreme(Kar) 602(Karnt) the Court considered the issue - Can proceedings be initiated under new Act if not done under the old Act? Arbitration proceedings not commenced during the time when the old Act in force -can they be initiated under the new Act, yes. Section 16 of the Arbitration and Reconciliation Act, 1996 empowers the Arbitrator to rule on its own jurisdiction including the ruling on any objection with respect to existence or validity of Arbitration Agreement. Therefore any objections in respect to existence or validity of arbitration agreement have to be considered by the Arbitrator in the light of the pleadings and materials that may be placed by the parties on record and the attendant circumstances. Since there is nothing in the new Act which prohibits the application of its provisions, and since the proceedings have begun after the new Act came into force, the provisions of the new Act applies.

Effect of repealing of old Act was also considered.

Arbitration proceedings not commenced during the time when the old Act in force, Whether can be initiated under the new Act, yes. In MMTC Ltd., -vs- STERLITE INDUSTRIES (INDIA) LTD (1996 (6) SCC 716) the Hon'ble Supreme Court has answered a similar question. The point involved in the said case before the Supreme Court was the effect of the Arbitration and Conciliation Act, 1996, on the arbitration agreement made prior to the commencement of the New Act. In the said case, it is held as follows:- "The question is whether there is anything in the New Act to make such an agreement unenforceable? There is no indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of sub-section (1) of Section 10 is satisfied and sub-section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the act and, therefore, is a valid arbitrator's agreement. The appointment of arbitrators must therefore, be governed by Section 11 of the New Act."

25. In the case of B.B.Verma and Co. –vs- Clear Water Works Ltd., Misc.Civil Case 838 of 1997 of decided on : Dec 02, 2003, and reported in 2004 1 MPHT 191 = 2004 1 MPLJ 465 = 2003 0 Supreme(MP) 1226(MP), the Court observed that disputes arose between the parties. The applicant submitted an application under Section 20 of the Arbitration Act, 1940 for appointment of Arbitrator before the 11th Additional District Judge, Jabalpur. That was registered as Civil Suit No. 13-A of 1995. By order dated 7-4-1997 the Court held that it has no territorial jurisdiction to appoint the Arbitrator in view of the words used in several clauses in the agreement. Before this order was passed the new Act had come into force on 26-9-1996.

The applicants case is that the work in the contract was to be executed at Birsinghpur in District Shahdol of State of Madhya Pradesh and the payments were to be made there. Therefore, according to the applicant, the cause of action arose in Madhya Pradesh. It is also the applicants case that the old Act has been repealed and, therefore, his application under Section 11 of the new Act for appointment of Arbitrator is maintainable.

In the present case the proceeding under Section 20 of the old Act for appointment of Arbitrator was pending on the date the new Act came into force. A copy of the application under Section 20 of the Act was served on the non-applicant. The Court passed the order dated 7-4-1997 rejecting the application under Section 20 of the old Act on the ground that it has no territorial jurisdiction to entertain the application under Section 20 of the old Act. An appeal was filed against this order by the applicant but it was withdrawn. Therefore, the order of the District Court that it had no jurisdiction to entertain the application under Section 20 of the old Act became final. That question cannot be reopened by making an application under Section 11 of the new Act.

In the present case the agreement specifically provides that the Court at Delhi would have jurisdiction to decide the suit. The words used in the agreement are: "all disputes and claims, if any, out of or in respect of this agreement are to be settled at Delhi or be triable only in any Competent Court situated at Delhi". The non-applicant company is carrying on business at Delhi and the performance of the contract was to be completed in District Shahdol in the State of M. P. Therefore, the Courts at both the places would have the jurisdiction if the civil suits were to be filed for damages for breach of contract. It is well settled that where two Courts or more have the jurisdiction then Section 20 of the Code of Civil Procedure permits choice of the Court in the contract. In such a case an agreement between the parties that the dispute between them shall be tried in one of such Courts is valid and is not contrary to public policy. [hakam Singh v. Gammon (India) Ltd. , AIR 1971 SC 740]. In A. B. C Laminart Pvt. Ltd. v. A. P. Agencies, Salem, AIR 1989 SC 1239, the Supreme Court has held : "if under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it can not be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy". The same view has been reiterated in Angile Insulations v. Davy Ashmore India Ltd. , AIR 1995 SC 1766. In this view of the matter in the present case the application under Section 11 of the new Act is not maintainable before the Chief Justice or his designate in Madhya Pradesh.

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26. In the case of M/s.Moolchand Exports (P)Ltd., -vs- M/s.Man-Producten Rotterdam BV & Another. O.S.A.No.29 of 1999, decided on : 26 July 2004 and reported in 2004 3 ArbLR 564 = 2004 4 CTC 690 = 2004 4 LW 295 = 2004 4 MLJ 182 = 2004 0 Supreme(Mad) 942(Mad-DB), the Court held that enforcement of award passed under Foreign under the respective enactment would be proceeded with only under the respective enactment after the parties agree to adopt new enactment.

27. In the case of Durga Devi Chhapolia and others. –vs- State of Orissa.

ARBP No. 16 of 2004, Date of Judgment : 6.5.2005, and reported in 2005 Supp OLR 737 = 2005 0 Supreme(Ori) 371(Ori) the Court observed that appointment of Arbitrator and reference of dispute to Arbitrator. Proceeding commenced under the Old Act. Proceeding once commenced under the Old Law and not otherwise agreed to by the parties to the agreement, the old law will continue to apply. Civil Judge set aside the NIL award of Tribunal on the ground of violation of principles of natural justice. Parties must approach the Tribunal again to settle the dispute afresh in compliance with the principles of natural justice. Petitioners have no remedy under the new law.

28. In the case of National Thermal Power Corporation Limited –vs- Prefab Granites Limited. decided on : 08-16-05 and reported in 2005 6 ALT 347 = 2006 1 ArbLR 399 = 2005 4 RCR(Civ) 742 = 2005 0 Supreme(AP) 744 (AP-DB) the Court observed that Arbitral proceedings initiated prior to coming into force of New Act, a suit under section 17 of old Act maintainable. Appeal under new Act against the judgment in suit, not maintainable merely because suit filed subsequent to coming into force of new Act. It is not in dispute that the cause of action in this case arose prior to coming into force of the Arbitration and Conciliation Act 1996. Invocation, appointment of Arbitrator, continuation of arbitral proceedings and passing of the award took place as per the procedure prescribed under the old Act. In that view of the matter, the only recourse open for the appellant is under Section 17 of the old Act.

A conjoint reading of the above two provisions makes it abundantly clear that the proceedings of the arbitration that were initiated or the date of commencement of the arbitration as provided under Section 21 would be from the date on which the appointment of arbitrator was sought for. This invocation of the arbitration clause in the instant case had taken place prior to the commencement of the new Act (22-8-1996). Therefore, the scheme/notification issued by the High Court and published in the Gazette on 31-8-2000, in our considered view, is inapplicable to the facts and circumstances of this case for the simple reason that the said notification refers to the proceedings initiated or arisen subsequent to the date of commencement of the new Act.

Insofar as the proceedings that were initiated prior to coming into force of the new Act are concerned, they shall be governed by the old Act only and, therefore, it is obvious that only a suit is maintainable under Section 17 of the old Act but not an appeal. In other words, appeal under the new act is not maintainable merely on the ground that the suit was filed subsequent to coming into force of the new Act. The further proceedings pursuant to the award are governed by the provisions of the old Act only, particularly in view of section 17 of the new (sic. old) Act.

29. In the case of Executive Engineer, Canal Lining, Division No.2 –vs- Vijay Kumar, Govt. Contractor, Civil Revision No. 3973 of 2003, decided on : November 25, 2005 and reported in 2006 3 ArbLR 279 = 2006 1 LawHerald 862 = 2006 143 PLR 96 = 2006 2 RCR(Civ) 115 = 2005 0

Supreme(P&H) 1207(P&H) the Court observed that whether the arbitration proceedings having commenced on 16.8.1996 i.e. when 1996 Act had come into force, the provisions of 1996 Act would be applicable or the provisions of 1940 Act are applicable ? Held, Provisions of 1996 Act would be applicable to the facts of the present case - Once it is held that the present case is governed by 1996 Act, the petition filed by the contractor under sections 14 and 17 of 1940 Act was not maintainable and the objections filed in that application had also to be rejected. Once it is held that the case is governed by 1996 Act, the petition filed under sections 14 and 17 of 1940 Act, was not maintainable.

30. In the case of P. Gopal Raju, Prop. Global Engg.Works –vs- Secretary, Government Of India, Ministry Of Urban Development. M. F. A 7458 Of 2003

Decided On : 08/21/2006, and reported in 2006 5 AIR(Kar)(R) 673 = 2006 0 ILR(Kar) 3523 = 2006 4 KLO 3263 = 2006 0 Supreme(Kar) 637 (Karnt-DB) the Court observed that a particular provision is available for the purpose of conducting any proceedings, the mindset of the persons involved in invoking or considering such provision is also important.

31. In the case of Cosmo Ferrites Ltd. –vs- Himachal Builders. Arbitration Case No. 50 of 2003, decided on : 09/04/2006 and reported in 2006 2 CurLJ(HP) 56 = 2006 2 HLJ 1305 = 2007 3 ShimLC 165 = 2006 3 ShimLC 165 = 2006 0 Supreme(HP) 268(HP) the Court observed that the petitioner filed objections to the effect that the proceedings are governed by the Arbitration Act, 1940 and not by the Act of 1996. Held, that during the arbitration proceedings the petitioner raised no objection with regard to the applicability of the Act and proceeded to appoint the arbitrator and it was not specified that the proceedings would be under the old act of 1940. The conduct of the parties shows that they had agreed that the provisions of new Act will apply. The petitioner is estopped from raising this plea. Petition dismissed with costs.

Claim highly belated and time barred. The petitioner contending that the claim itself barred by time. Held, that the court cannot replace the award of the arbitrator(s), if the award of the arbitrator is based on evidence and is not opposed to public policy of India, the same cannot be set aside even if it is erroneous. Petition dismissed with costs.

Petitioner pleads that the arbitrator appointed by the respondent was not qualified to be appointed as such. Held that no objection was raised during the arbitration proceedings which continued for many years. Thus in view of the provisions of Section 4 r/w Section 12 and 13 of the Arbitration and Conciliation Act, the petitioner has waived of its right to raise such an objection. This contention is rejected. Petition dismissed with costs.

32. In the case of Executive Engineer, Sundargarh Irrigation Division and two others. –vs- Sri Gokul Chandra Kanungo. W.P.(C) No.741 of 2003, (Date of Judgment : 9.1.2007), and reported in 2007 2 ArbLR 486 = 2007 Supp1 OLR 436 = 2007 0 Supreme(Ori) 21(Ori-DB) the Court observed that the dispute between O.P. and the State Government. Ex parte award passed by the Arbitration Tribunal. Civil Judge remitted back the dispute to the Arbitration Tribunal for fresh disposal. Civil Revision. Arbitrator appointed on agreement of the parties. Arbitration proceeding was to be continued under the New Act.

33. In the case of Usha Breco Ltd. –vs- Asia Resorts Ltd. O.S.A. No.15 of 2003, decided on : 03/02/2007 and reported in 2007 1 CurLJ(HP) 113 = 2007 1 HLJ 540 = 2007 0 Supreme(HP) 34(HP-DB) the Court held that Appointment of Arbitrator contented that the petition filed under Section 20 of the 1940 Act, the claims of the respondent are time barred. Not referable to he arbitrator under Section 20 of the 1940 Act. Held, that the Hon'ble Supreme Court of India had condoned the delay under Section 5 of Limitation Act. The 1940 Act stands repealed but in the 1996 Act under Section 85(2) provisions of 1940 Act would apply in relation to the arbitral proceedings which commenced before the coming into force of 1996 Act. The arbitrator under Section 20 of the 1940 Act appointed shall enter upon the reference and pass the arbitral without any delay. The fees and other expenses to be shared by both the parties into the ratio of 50:50. Appeal dismissed.

34. In the case of Mr Puneet Malhotra and Anr. –vs- Mr. R.S.Gai,Sole Arbitrator & others. Writ Petition No.4064 of 2008 with Arbitration Petition No.340, 341, 2,310 of 2007 With Arbitration Petition (L) No.590, 591, 592, 593 of 2007, decided on: 23rd October, 2008 and reported in 2009 0 AIR(Bom) 42 = 2008 6 AllMR 856 = 2008 4 ArbLR 398 = 2008 6 BomCR 551 = 2009 2 RCR(Civ) 570 = 2008 0 Supreme(Mah) 1540(Bom-FB)(3J) the Court held that a comparison of the provisions of subsection (2) of Section 34 of the 1996 Act with the provisions of Section 30 of the 1940 Act shows that the grounds on which an award could be set aside by the Court under the 1940 Act are different than the ones on which an award can be set aside under sub-section (2) of Section 34 of the 1996 Act. But, so far as the provisions of Article 3 of Schedule I of the Bombay Court Fees Act is concerned, the grounds on which the Court can set aside an Award is not relevant, because the subject matter of the provisions of Bombay Court Fees Act is payment of Court fees on plaint, application, petition or memorandum of appeal and not the grounds on which the Court can grant reliefs to the applicant, plaintiff, petitioner or appellant.

35. In the case of State of U.P.-vs- M/s. Allied Construction Engineers and Contractors. (First Appeal from Order No. 82 of 2002, decided on 6th February, 2009), and reported in 2009 2 ADJ 589 = 2009 2 AWC 1953 = 2009 0 Supreme(All) 447(All-DB), the Court held that Appellant-State, has already acted upon award by paying principal sum, so determined by arbitrator (i.e., Chief Engineer, Irrigation Dept., U.P.) to respondent-Contractor. But raised a dispute with regard to interest. As per award, rate of interest for pre-reference period is fixed @ 15% p.a. Whereas pendente lite and subsequent period is fixed @ 18% p.a. Question whether proceedings, which continued before Arbitrator under Act of 1996, as per agreement between parties in accordance with Section 85(2)(a) of Act of 1996, is binding upon parties only for arbitration proceedings before arbitrator, or also for proceedings before Court, arising out of said proceedings. There is a gulf of difference between commencement and agreement. Commencement is to be understood, when agreement is to be seen. Once parties have proceeded under Act of 1996, there is no such scope for agreeing parties to deviate from statutory compulsion. Hence, appeal under Section 39 of Act of 1940 against order under Section 34 of 1996 Act, is unsustainable. However, neither appellant can canvass cause on merit in an unsustainable proceedings nor Act of 1996 can be override, in respect of interest. As appellant proceeded before Court under Section 34 of Act of 1996, obviously an appeal is to be made under Section 37 of said Act, but not under Section 39 of Act of 1940. Held, Executive Engineer, representing case, cannot be said to be an unauthorised representative.

36. In the case of Deputy Manager (Engg.), Food Corporation of India, Engineering Division-II, Vijayawada and another –vs- M/s. Satyanarayana Contractors Company, Gudivada and others. C.M.A.No. 4573 of 2004, decided on 31-7-2009 and reported in 2009 6 ALD 500 = 2009 6 ALT 187 = 2009 0 Supreme(AP) 514(AP-DB), the Court held that the Act applicable for a dispute arisen prior to 1996 Act. Even though parties are governed by law under Arbitration Act, 1940 as on date of dispute, still parties have an option to be governed by any subsequent law for time being in force by mutual agreement. Application dismissed.

37. In the case of the Managing Director, APSRTC, RTC X Roads, Musheerabad, Hyderabad & Another –vs- A. Annaiah, Contractor, Hindupur, Anantapur District Civil Revision Petition No.1102 of 2009, decided on : 06-10-2009 and reported in 2010 1 ALD 351 = 2009 0 Supreme(AP) 677(AP) the Court observed that arbitration proceedings which started before promulgation of new Act of 1996 will continue to be governed by repealed Act of 1940 unless parties agree otherwise. Merely because award was passed purportedly under provisions of new Act of 1996, it cannot be inferred that Corporation had agreed to be governed by new Act.

38. In the case of The Hyderabad Stock Exchange Limited, Rep. By its Chairman, Hyderabad –vs- M/s. Kaveri Projects Limited, Rep. By its Managing Director, Secunderabad & Another, Civil Misc. Aappeal No. 2582 OF 2002, decided on : 14-10-2009 and reported in 2010 3 ALT 539 = 2009 0 Supreme(AP) 705(AP-DB) the Court observed that after named sole arbitrator entered reference, no application made for appointment of Arbitrator in terms of Section 11. As such ,sole named Arbitrator will be governed by provisions of 1996 Act. Section 11 has no application, impugned order set aside. Appeal allowed.

39. In the case of Hyderabad Stock Exchange Ltd., Hyderabad –vs- Kaveri Projects Ltd., Secunderabad and another. CMA No.2582 of 2002, Decided on : Fourteenth Day of October, 2009 and reported in 2010 1 ALD 763 = 2009 0 Supreme(AP) 703 (AP-DB) the Court observed that Agreement reached between parties when old Act of 1940 was governing the field. At the time of reference parties gave their consent before Arbitrator that they were keen to be governed by new Act of 1996. Arbitral proceedings were already underway. No representation for appointment of Arbitrator in terms of Section 11 of new Act was made by the parties before chief justice till passing of award. As such, due to agreement between the parties Section11 of new Act of 1996 will not apply in instant case.

40. In the case of Dhirubai D. & Company, Engineers & Contractors, Secunderabad, rep. by its Partner, Mr. Amit Patel –vs- Nizam Sugar Factory Limited, Hyderabad, rep. by its General Manager (Personnel) and others. CM.A. Nos.1601 of 2000 and 585 of 2001, decided on : 24-12-2009 and reported in 2010 1 ALD 675 = 2010 1 ALT 721 = 2009 0 Supreme(AP) 929(AP-DB) the Court observed that Arbitral proceedings commenced under Arbitration Act, 1940 before coming into force of 1996 Act are saved under Section 85 (2) of 1996 Act. Section 85 (2) of 1996 Act with non-obstante clause saves arbitral proceedings under 1940 Act which "commenced before" 1996 Act came into force unless parties agree to be governed by new Act. When contract prohibits any claim for compensation on account of delay in completion of work, arbitrator would be acting illegally and without jurisdiction if such claim for compensation is allowed. Having accepted to complete work during extended period, as permitted by clause in contract, contractor cannot be allowed to raise claim compensation, under the same clause in which he sought extension of time. Arbitrator has power to award interest, however, if agreement specifically bars claim for interest, Arbitrator cannot award interest.

41. In the case of Mohanlal and others –vs- Choudhary Builders Pvt. Ltd. Indore and another, Civil Revision No. 99 of 2010 (I), decided on 28.6.2010 and reported in 2010 4 MPLJ 395 = 2011 1 MPWN 79 = 2010 0 Supreme(MP) 469(MP) the Court observed that the new Act of 1996 is applicable in pending arbitral proceedings under Act of 1940, if agreed by parties.

42. In the case of Maduri & Molugu, a firm represented by its Managing Partner Maduri Rajeswar & Others –vs- Molugu Srinivasulu & Others, Civil Revision Petition No.31 Of 2010, date of Judgment : 30-07-2010 and reported in 2010 5 ALD 669 = 2010 6 ALT 243 = 2010 0 Supreme(AP) 673(AP) the Court observed that Section 85 (2) of the new Act saves the proceedings that had arisen under the old Act and those proceedings be governed by provisions of the old Act itself. Trial court has power under Order 20 Rule 17, CPC to pass an order similar to one of passing final order which is normally passed in suits for partition and redemption of mortgage. Even if a suit is not for partition or for redemption of mortgage, where preliminary decree and thereafter a final decree must be passed, power of the Court to undertake the exercise, similar to the one passing final decree always rests with it.

43. In the case of N.T.P.C. Ltd. –vs- District Judge And Another. (Civil Misc. Writ Petition No. 8259 of 2003, decided on 25th April, 2011), and reported in 2011 5 ADJ 351 = 2011 0 Supreme(All) 1220 All) the Court observed that whether first notice for appointment of arbitrator would be the notice dated 27.1.1996 or 30.8.1995. Obviously respondent No. 2 sent letters dated 22.6.1995/31.7.1995 requesting the General Manager to arbitrate the dispute as Sole Arbitrator which letter was not replied by G.M. itself. On contrary NTPC tried to delay the matter by stating that there is no dispute. As per terms of contract respondent No. 2 rightly sent letter dated 30.8.1995 having waited for almost one month and by realising that G.M. himself is not willing to proceed as sole Arbitrator. Therefore, first letter sent by respondent No. 2 seeking appointment of Arbitrator is of 30.8.1995 whereby he requested to appoint sole arbitrator. Arbitration proceeding shall commence as soon as notice is given requesting for Arbitrator. Once proceeding have commenced, subsequent letters would not give a fresh cause of action.

44. In the case of National Thermal Power Corporation Ltd., Vidyut Nagar, Gautam Buddha Nagar –vs- District Judge, Gautam Buddha Nagar And Another

(Civil Misc. Writ Petition No. 8259 of 2003, decided on 25th April, 2011), and reported in 2011 7 ADJ 775 = 2011 5 AWC 4466 = 2011 0 Supreme(All) 1229(All), the Court observed that Arbitration clause in agreement between parties. Dispute as to non-payment of dues. From order of District Judge appointing sole arbitrator. Appears that despite notice having been issued. Petitioner-NTPC chose not to appear before District Judge to contest matter by filing W.S. District Judge passed order ex-parte. One more opportunity given by District Judge to CMD to appoint sole arbitrator or to give three names to Court. Petitioner-NTPC did not respond, as a result District Judge appointed sole arbitrator. Whether first notice for appointment of arbitrator would be notice dated 27.1.1996 or 30.8.1995. First letter sent by respondent No. 2 seeking appointment of arbitrator is of 30.8.1995. Whereby he requested CMD to appoint sole arbitrator. Mere fact that District Judge in his order has referred to only one of letter dated 27.1.1996. That would not make any difference, since necessary facts are already on record, that were never disputed by petitioner-NTPC by filing W.S. before Court below, no interference warranted.

45. In the case of Union of India –vs- M/s. K. C. Sharma. Writ Petition No.17021 of 2015(J), decided on 16.6.2016 and reported in 2016 4 MPLJ 485 = 2016 2 MPWN 101 = 2016 0 Supreme(MP) 329(MP) the Court observed that the proceedings originated under the Act, 1940 and parties agreed to continue under the same Act, even after resignation of first arbitrator, then provisions of the Act, 1940 would be applicable. Petitioner rightly raised objection against maintainability of execution proceedings brought under the Act, 1996.

46. In the case of Vohra Textile Mills –vs- Union of India and another. Civil Revision No. 383 of 1998, decided on 1st May, 2018 and reported in 2018 9 ADJ 701 = 2018 0 Supreme(All) 979(All), the Court held

that by impugned order observed that application under Section 36 of 1996 Act was maintainable because arbitral proceedings commenced on 6.2.1996, on date arbitrator was appointed. Challenge against. Arbitration proceedings commence on date a party applies for appointment of an arbitrator. Parties had agreed to be governed by new Act and not by repealed Act of 1940. Interference with impugned order declined. Revision Dismissed.

Conclusion

Foreign award given after the commencement of the Arbitration and Conciliation Act, 1996 can be enforced only under the 1996 Act.

The provisions of the old Act of 1940 shall apply in relation to arbitral proceedings which have commenced before coming into force of the new Act of 1996; award given after 1996 Act came into force even in proceedings commenced before can be enforced under old Act and not under new Act.

The phrase “in relation to Arbitral proceedings” occurring in Section 85(2) of the Arbitration and Conciliation Act, 1996 would cover not only proceedings pending before the Arbitrator but would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under Section 17 thereof and also appeal arising thereunder.

Submission of first statement on substance of the dispute is not a bar on the Court to refer the parties to arbitration if the party who wants the matter to be referred to arbitration applies to the Court and the other party who has brought the action does not object.

The phrase "which is the subject of an arbitration agreement" in Section 8 of the Arbitration and Conciliation Act does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court.

The phrase also connotes an arbitration agreement being brought into existence while the action is pending.

The Supreme Court in an appeal can refer the parties to arbitration where the parties pursuant to an arbitration agreement entered into during pendency of appeal seek reference of the matter to arbitration.

A foreign award given after the commencement of Arbitration and Conciliation Act, 1996, though arbitration proceedings might have commenced before its commencement, can be enforced only under Arbitration and Conciliation Act.

By virtue of Section 85 of Arbitration and Conciliation Act, Arbitration Act, 1940 stood repealed but it is always open to parties to agree as to which law will continue to govern their relationship.

In a proceeding where the award was passed under the Arbitration Act, 1940, remedy of filing appeal or petition for setting aside the said award would be as per provisions of the Old Act and not under Arbitration and Conciliation Act, 1996.

Words "commencement of the arbitration proceedings" not defined in Act, 1940, have to be given their ordinary meaning having regard to provisions in Chapter II thereof. Service of notice in terms of Chapter II of the Arbitration Act, 1940 shall set the ball in motion where after only the arbitration proceeding commences.

Arbitral proceedings would not be maintainable at instance of an unregistered firm having regard to mandatory provisions in Section 69 of Partnership Act.

A Court of law has no jurisdiction to direct a matter to be governed by one statute when provisions of another statute are applicable.

In case there is an arbitration agreement in terms of section 7 and the proceedings started after coming into force of Act 1996; the proceedings would be governed by Act 1996 notwithstanding any reference to Act 1940.

Summary disposal of SLP does not mean affirmation of High Court view.

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