REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.2879-2880 OF 2018
(Arising out of SLP (C) Nos.19545-19546 of 2016)

BOARD OF CONTROL FOR CRICKET IN INDIA … APPELLANT

VERSUS

KOCHI CRICKET PVT. LTD. AND ETC. … RESPONDENTS

WITH
CIVIL APPEAL NO. 2881 OF 2018
(Arising out of SLP (C) No.20224 of 2016)

WITH

CIVIL APPEAL NO. 2882 OF 2018
(Arising out of SLP (C) No.5021 of 2017)

WITH

CIVIL APPEAL NOs. 2883-2884 OF 2018
(Arising out of SLP (C) Nos.8372-8373 of 2017)

WITH

CIVIL APPEAL NOs. 2885-2886 OF 2018
(Arising out of SLP (C) Nos.8374-8375 of 2017)

WITH

CIVIL APPEAL NOs. 2887-2889 OF 2018
(Arising out of SLP (C) Nos.8376-8378 of 2017)

WITH

CIVIL APPEAL NOs. 2890-2891 OF 2018
(Arising out of SLP (C) Nos.9599-9600 of 2017)

WITH

CIVIL APPEAL NO. 2892 OF 2018
(Arising out of SLP (C) No.33690 of 2017)

J U D G M E N T

R.F. NARIMAN, J.

1. Leave granted.

2. The present batch of appeals raises an important question as to the construction of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015

(hereinafter referred to as the "Amendment Act"), which reads as follows:

> "**Section 26. Act not to apply to pending arbitral proceedings.**
>
> Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

3. The questions raised in these appeals require the mentioning of only a few important dates. In four of these appeals, namely, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors**. (SLP(C) No. 19545-19546 of 2016), **Arup Deb & Ors. v. Global Asia Venture Company** (SLP(C) No. 20224 of 2016), **M/s Maharashtra Airports Development Company Ltd. v. M/s PBA Infrastructure Ltd.** (SLP(C) No.5021 of 2017) and **UB Cotton Pvt. Ltd. v. Jayshri Ginning and Spinning Pvt. Ltd.** (SLP(C) No.33690 of 2017), Section 34 applications under the Arbitration and Conciliation Act,

1996 (hereinafter referred to as the "1996 Act") were all filed prior to the coming into force of the Amendment Act w.e.f. 23rd October, 2015. In the other four appeals, the Section 34 applications were filed after the Amendment Act came into force. The question with which we are confronted is as to whether Section 36, which was substituted by the Amendment Act, would apply in its amended form or in its original form to the appeals in question.

4. The relevant facts of the first appeal namely, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.** (SLP(C) Nos. 19545-19546 of 2016), are as follows. A notice dated 18th January, 2012 was sent by Respondent No.1 invoking arbitration under a franchise agreement dated 12th March, 2011. A Sole Arbitrator was appointed, who delivered two arbitral awards dated 22nd June, 2015 against the Appellant and in favour of the Respondents. On 16th September, 2015, the Appellants filed an application under Section 34 of the 1996 Act in

the Bombay High Court challenging the aforesaid arbitral awards. On 26th November, 2015, the Respondents filed two execution applications in the High Court for payment of the amounts awarded under the two awards, pending enforcement of such awards. These were resisted by two Chamber Summons filed by the Appellants dated 3rd December, 2015, praying for dismissal of the aforesaid execution applications stating that the old Section 36 would be applicable, and that, therefore, there would be an automatic stay of the awards until the Section 34 proceedings had been decided. The Chamber Summons were argued before a learned Single Judge, who, by the impugned judgment in Special Leave Petition (Civil) No.19545-19546 of 2016, dismissed the aforesaid Chamber Summons and found that the amended Section 36 would be applicable in the facts of this case. This is how the appeal from the aforesaid judgment has come before us.

5. As aforementioned, the skeletal dates necessary to decide the present appeals in the other cases would only be that so far as two of the other appeals are concerned, namely, **Arup Deb & Ors. v. Global Asia Venture Company** (SLP(C) No.20224 of 2016) and **M/s Maharashtra Airports Development Company Ltd. v. M/s PBA Infrastructure Ltd.** (SLP(C) No.5021 of 2017), the Section 34 applications were filed on 27th April, 2015, and 25th May, 2015 respectively and the stay petitions or execution applications in those cases filed under Section 36 were dated 16th December, 2015 and 26th October, 2016 respectively. In **U.B. Cotton Pvt. Ltd. v. Jayshri Ginning and Spinning Pvt. Ltd.** (SLP(C) No.33690 of 2017), the Section 34 application was filed on 22nd February, 2013 and the execution application was filed in 2014, which was transferred, by an order dated 12th January, 2017, to the Commercial Court, Rajkot as Execution Petition No. 1 of 2017. In the other cases, namely, **Wind World (India) Ltd. v. Enercon GMBH**

through its Director (SLP(C) Nos.8372-8373 of 2017), **Yogesh Mehra v. Enercon GMBH through its Director** (SLP(C) Nos.8376-8378 of 2017), **Ajay Mehra v. Enercon GMBH through its Director** (SLP(C) Nos.8374-8375 of 2017), and **Anuradha Bhatia v. M/s Ardee Infrastructure Pvt. Ltd.** (SLP(C) Nos.9599-9600 of 2017), the Section 34 applications were filed after 23rd October, 2015, viz., on 7th December, 2016 in the first two appeals, on 6th December, 2016 in the third appeal and on 4th January, 2016 in the last appeal.

6. Section 36, which is the bone of contention in the present appeals, is set out hereinbelow:

PRE-AMENDED PROVISION

> "**Section 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."

AMENDED PROVISION

"**Section 36. Enforcement.**

(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 (5 of 1908)."

7. Wide ranging arguments have been made on behalf of the parties before us. Shri C.A. Sundaram, learned Senior Advocate, leading the charge on behalf of the Appellants, has argued that Section 26 of the Amendment Act consists of two parts. According to him, the second part, which makes the Amendment Act applicable in relation to arbitral proceedings commenced on or after the date of commencement of this Act, is the principal part, whereas the first part of Section 26 is in the nature of a proviso or exception. It is his submission, therefore, that so far as the first part is concerned, Section 6 of the General Clauses Act, 1897 would be attracted, in which event the vested right to challenge arbitral awards would continue by virtue of the said Section under the old Act, which would, therefore, apply to the facts of all these cases. For this purpose, he relied upon certain passages in **Thyssen Stahlunion v. Steel Authority of India** (1999) 9 SCC 334, **N.S. Nayak & Sons v. State of Goa** (2003) 6 SCC 56, and **Milkfood Ltd. v GMC Ice Cream**

Pvt. Ltd. (2004) 7 SCC 288. Given the fact that the vested right is preserved, the amendment is only prospective in nature, and for this purpose, he has cited a large number of judgments, starting with the celebrated judgment in **Garikapati Veeraya v. N. Subbiah Choudhry** (1957) SCR 488. He then referred to a chart of the effect of the amendments made in general by the Amendment Act, in which he divided the amended sections into three parts, namely, those that are only procedural, those that are only substantive and those that are procedural as well as substantive. In his submission, Section 36 is substantive in nature, in that, in place of an automatic stay of the award under the old regime, Order LXI, Rule 5 of the CPC will now be applicable. As a result of this, instead of an automatic stay, a deposit of the entire amount or substantial amount of the award would now have to be made in the interim period between the award and the decision in the Section 34 application. He referred to the 246th Law Commission Report as well as

the debates leading to the Amendment Act to buttress his submissions. He also referred to the report of a High Level Committee headed by Justice B.N. Srikrishna, delivered on 30th July, 2017, in which, after referring to the divergent views taken by the High Courts, the Committee recommended that the Amendment Act will not apply to arbitral proceedings as well as Court proceedings which arise out of such arbitral proceedings, where the arbitral proceedings themselves have commenced in accordance with Section 21 before the commencement of the Amendment Act. Concomitantly, according to the High Level Committee, the Amendment Act will only apply to arbitral proceedings commenced on or after the commencement of the Amendment Act and to Court proceedings that arise out of or in relation to such arbitral proceedings.

8. Shri K.V. Viswanathan, learned Senior Advocate appearing on behalf of the BCCI in Civil Appeal arising out of SLP(C) No.19546 of 2016, has argued that the

expression “arbitral proceedings” in both parts of Section 26 refers only to proceedings before an arbitrator and is the same in both parts. Consequently, it is clear that it is only arbitral proceedings that have commenced after 23rd October, 2015 and Court proceedings in relation thereto, that will be governed by the Amendment Act. If the arbitral proceedings have commenced under the old Act, then those proceedings as well as all Court proceedings in relation thereto, would be governed only by the old Act. According to him, Section 6 of the General Clauses Act would be attracted, insofar as Court proceedings are concerned, when the first part of Section 26 is applied. According to him, the second part would not become superfluous on his reading of Section 26, as the option given to the parties would be given only on application of the first part and not the second. According to the learned senior counsel, the judgment in **Thyssen** (supra) is determinative of the present case, inasmuch as an entirely new challenge procedure under Section 34 is laid

down by the amendments made in 2015, somewhat like the challenge procedure laid down in the original Section 34 of the 1996 Act, when contrasted with Section 30 of the Arbitration Act, 1940. According to the learned senior counsel, party autonomy must be respected, and this being the position, parties who have entered into agreements in the expectation that the old regime will apply cannot suddenly be foisted with a completely different regime under the Amendment Act. According to the learned senior counsel, Section 85 of the 1996 Act is similar to Section 26 of the Amendment Act and, therefore, the judgment in **Thyssen** (supra) must apply on all fours. The learned senior counsel also forcefully put to us a number of anomalies that would arise if the amendment to Section 36 were to be given retrospective operation. According to him, the right to be governed by the broad appellate/supervisory procedure found in sections 34 and 37 of the 1996 Act would be a vested right, resulting in the Amendment Act not being

applicable. Insofar as Section 36 is concerned, the learned senior counsel made elaborate submissions on the difference between enforceability and execution, and stated that whereas the former dealt with substantive rights, the latter dealt with procedural rights. Equally, the expression "has been" contained in the amended Section 36(2) is purely contextual and equivalent to the expression "is". For this, he has cited certain judgments which we will refer to in due course. According to the learned senior counsel, the decision in **National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.** (2004) 1 SCC 540, which exhorted the legislature to amend Section 36, cannot take the matter any further, in that the said decision cannot be read to say that Section 36 should be substituted with retrospective effect.

9. Shri Tushar Mehta, learned Additional Solicitor General appearing in SLP (C) No.5021 of 2017, supported the arguments of his predecessor and added that, given a retrospective operation of Section 36,

various anomalies would arise, which would lead to hardship and inconvenience and that, therefore, we should not impart retrospective operation to the aforesaid provision.

10. Shri Arvind Datar, learned senior advocate appearing in SLP (C) No.20224 of 2016, supported Shri Viswanathan in stating that the amendments made by the Amendment Act were very far reaching and changed the basis of challenge to arbitral awards. It would not be fair to retrospectively change the rules of the game insofar as such awards are concerned. According to the learned senior counsel, the expression "in relation to" that was used in Section 85 of the 1996 Act, as expounded in **Thyssen** (supra), was because Section 85 repealed three enactments together, and not because it sought to refer to Court proceedings. He reiterated that in the interest of clarity, the report of the High Level Committee, headed by Justice B.N. Srikrishna referred to by Shri Sundaram, was the correct position so that it clearly be delineated that the

moment arbitral proceedings commenced before the Amendment Act, such “proceedings”, which would include all Court proceedings in relation thereto, would be governed by the old Act, and only arbitral proceedings commenced after the Amendment Act came into force, together with related Court proceedings, would all be governed by the Amendment Act.

11. Shri Anirudh Krishnan, learned Advocate appearing for the intervenor in SLP (C) No.20224 of 2016, referred to Section 85A contained in the 246th Law Commission Report which, according to him, was given a go-by and was not followed in Section 26. He referred to the Law Minister’s speech stating that the amendment must be given prospective effect and further argued that the reason why the expression “in relation to” was used in the second part of Section 26 was because a distinction was made on whether the seat of the arbitral tribunal was in India or outside India. According to the learned counsel, since amendments have been made in Part II of the 1996

Act as well, if a seat based categorization is seen, the expression "in relation to" would not apply to Court proceedings simpliciter, but to arbitral tribunals which have their seat outside India. He further argued that Sections 34 and 36 are part of one scheme and are the "appeal package" insofar as arbitral proceedings are concerned and must, therefore, go along with the arbitral proceedings. This being the position, it is clear that the pre-amendment position would apply in case of arbitrations which commenced before the Amendment Act came into force.

12. Leading arguments for the other side, Shri Neeraj Kaul, learned senior counsel appearing in SLP(C) Nos.19545-19546 of 2016, emphasized that in the first part of Section 26, there is an absence of the mention of Court proceedings. According to the learned senior counsel, this was of great significance and would, therefore, show that the Amendment Act would retrospectively apply to Court proceedings, as

distinguished from arbitral proceedings. On a correct construction of Section 26, according to the learned senior counsel, the second part of Section 26 takes within its sweep both arbitral proceedings as well as Court proceedings in relation thereto and would, therefore, apply to arbitral proceedings as well as Court proceedings in relation thereto, which have commenced after the Amendment Act came into force. For this purpose, he relied heavily on paragraph 23 in **Thyssen** (supra) and, submitted that, therefore, on a true construction of Section 26, Section 34 proceedings that have commenced before the Amendment Act came into force would be governed by the Amendment Act, and arbitral proceedings which commenced after the Amendment Act, together with Section 34 applications made in relation thereto, would then be governed under the second part of Section 26 of the Amendment Act. According to the learned senior counsel, no vested right exists inasmuch as Section 34 proceedings are not appellate proceedings.

In any case, Section 26 evinces a contrary intention and would take away any such right assuming a vested right is involved. He countered the arguments of Shri Viswanathan, in particular, by stating that the original intent of the 1996 Act was to minimise Court intervention and to restrict the grounds of challenge of arbitral awards, and inasmuch as the decisions of this Court in **ONGC v. Saw Pipes Ltd** (2003) 5 SCC 705 and **ONGC Ltd. v. Western Geco International Ltd.** (2014) 9 SCC 263 had gone contrary to the original intention of the 1996 Act, all that the Amendment Act did was to bring the 1996 Act back, in accordance with its original intent, by nullifying the aforesaid judgments. He added that the ground of patent illegality that had been added by the Amendment Act also differs from the said ground as understood in the earlier case law, and has been added only qua domestic and not international commercial arbitrations. Learned senior counsel then argued that given the fact that court proceedings in this country take an inordinately long time,

the whole object of the amendment to Section 36 would be stultified, if Section 36 is only to apply to court proceedings that result from arbitral proceedings, which have commenced on and after the commencement of the Amendment Act. That this could never be the case is clear from a judgment of the House of Lords, reported as **Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow and Partners**, (1984) 2 WLR 340, which is strongly relied upon. Learned senior counsel also stated that there is no distinction between execution and enforcement, and "enforcement" under Section 36, is nothing but execution of an award, as if it were a decree under the Code of Civil Procedure, 1908. He further argued that it is well settled that execution proceedings are procedural in nature and would be retrospective and, therefore, the substituted Section 36 would apply even in cases where the Section 34 application is made before the commencement of the Amendment Act. Another argument was that the

expression “has been” contained in Section 36(2), as amended, would, in any case, refer to Section 34 proceedings that have already been filed, even pre-amendment, and for this purpose, he referred to certain judgments.

13. Shri P. Chidambaram, learned senior counsel appearing for the Respondents in SLP (C) Nos.8372-8373 of 2017, emphasised the word “but” that appears in Section 26, which not only segregates the first part of Section 36 from the second part, but also makes it clear that the two parts apply to two different situations. The first part, according to learned senior counsel, would apply to the arbitral proceedings themselves i.e. from the Section 21 stage up to the Section 32 stage of the 1996 Act, whereas the second part would include all proceedings that begin from the Section 21 stage and all court proceedings in relation thereto. According to Shri Chidambaram, Section 36, in its original form, is only a clog on the right of the decree holder. He argued that

there is no corresponding vested right in the judgment debtor to indefinitely delay proceedings and for this purpose, he cited several judgments. According to the learned senior counsel, Section 36 proceedings are entirely independent of Section 34 proceedings and the moment Section 36 speaks of an award being enforceable under the Code of Civil Procedure as if it were a decree, enforceability only means execution and nothing else. He then referred to **Satish Kumar v. Surinder Kumar**, (1969) 2 SCR 244 to show that an award is not mere waste paper when it is delivered and before it becomes a decree, as it decides the rights of the parties and, therefore, being final and binding on parties, is a judgment delivered between parties, which may become executable on certain conditions being met, but which do not detract from the fact that the award itself has "vitality".

14. Shri Kapil Sibal, learned senior counsel appearing on behalf of the Respondents in SLP (C) Nos.8374-8375

of 2017, has argued before us that the Statement of Objects and Reasons for the Amendment Act, in particular paragraph 4 thereof, would make it clear that the Amendment Act was necessitated because of India's poor performance in contract enforcement among the nations in the world. For this reason, according to the learned senior counsel, it is clear that Section 26 needs to be interpreted in such a manner as would further the object of the Amendment Act and that this being so, it is clear that Section 26 must be read as being a provision which is not a savings provision at all, but a provision which destroys all rights, if any, that vested in the Appellants in the 1996 Act as unamended. For this purpose, he cited certain judgments which will be referred to in the course of our judgment.

15. Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the Respondents in SLP (C) Nos.8376-8378 of 2017, has stated that the correct construction of Section 26 would be the intermediate between the

extremes that have been canvassed before us by learned counsel appearing on behalf of the Appellants. According to him, it is important to emphasise that the first part applies only to arbitral proceedings before an arbitral tribunal and the second part would apply only to court proceedings in relation thereto. This becomes clear from two things; one, the expression “to” appearing in the first part as contrasted with the expression “in relation to” appearing in the second part; and, two, the presence of Section 21 of the 1996 Act in the first part and its absence in the second part of Section 26. According to him, this would be the correct interpretation of Section 26, which would result in no anomalies, as it is clear that the date of commencement of an arbitral proceeding would be fixed with reference to Section 21 and the date of commencement of a court proceeding would be fixed with reference to the date on which the court proceeding is filed, and it is only arbitral proceedings and court

proceedings which are filed after the commencement of the Amendment Act that would be so covered.

16. Shri Nakul Dewan, learned Advocate appearing on behalf of the Respondent in SLP (C) No.20224 of 2016 has argued that the first part of Section 26 speaks of "the arbitral proceedings" commenced in accordance with the provisions of Section 21. The second part of Section 26 omits the word "the" as well as Section 21, making it clear that it is the arbitral proceedings before the Arbitrator alone that is referred to in the first part of Section 26, as opposed to Court proceedings referred to in the second part of Section 26, where the expression "in relation to arbitral proceedings" does not contain the word "the". According to him, such interpretation is not contrary to the doctrine of party autonomy, which is never conferred on any party without limits, there being non-derogable provisions in the 1996 Act from which parties, even by agreement, cannot derogate. According to the learned counsel, each and every Court proceeding under the

1996 Act is a separate and distinct proceeding and it is the date of such proceeding alone which is relevant for the purpose of determining whether the Amendment Act applies. According to the learned counsel, there is no vested right to resist the execution of an award merely because an application for setting aside the award is pending under Section 34 of the 1996 Act. Even on the assumption that there is such a vested right, it is taken away, given the clear legislative intent of Section 26 of the Amendment Act. Lastly, he argued that on facts, clause 22.2(5) of the agreement between the parties automatically brought in all amendments to the 1996 Act and that, therefore, Section 36 in its amended form would necessarily apply to the facts in this case.

17. Having heard extensive and wide ranging arguments on the reach of Section 26 of the Amendment Act, it will be important to first bear in mind the principles of interpretation of such a provision. That an Amendment Act does include within it provisions that may be repealed

either wholly or partially and that the provisions of Section 6 of the General Clauses Act would generally apply to such Amendment Acts is beyond any doubt – See **Bhagat Ram Sharma v. Union of India**, 1988 (Supp) SCC 30 at 40-41. That such a provision is akin to a repeal and savings clause would be clear when it is read with Section 27 of the Amendment Act and Section 85 of the 1996 Act, which are set out hereinbelow:

> "**Section 27. Repeal and savings.**
>
> (1) The Arbitration and Conciliation (Amendment) Ordinance, 2015, is hereby repealed.
>
> (2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.
>
> xxx xxx xxx
>
> **Section 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."

18. At this point, it is instructive to refer to the 246th Law Commission Report which led to the Amendment Act. This Report, which was handed over to the Government in August, 2014, had this to state on why it was proposing to replace Section 36 of the 1996 Act:

"**AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE**

43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under section 34 has expired or after the section 34 petition has been dismissed. In other words, the pendency of a section 34 petition renders an arbitral award unenforceable. The Supreme Court, in National Aluminum Co. Ltd. v. Pressteel & Fabrications, (2004) 1 SCC 540 held that by virtue of section 36, it was impermissible to

pass an Order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order under section 42, the Bombay High Court in Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai 2014 (1) Arb LR 512 (Bom) applied the same principle to the powers of a Court under section 9 of the Act as well. Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.

44. The Supreme Court, in National Aluminium, has criticized the present situation in the following words:

"However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."

45. In order to rectify this mischief, certain amendments have been suggested by the Commission to section 36 of the Act, which

provide that the award will not become unenforceable merely upon the making of an application under section 34.

So far as the transitory provision, so described by the Report, is concerned, the Report stated:

"76. The Commission has proposed to insert the new section 85-A to the Act, to clarify the scope of operation of each of the amendments with respect to pending arbitrations/proceedings. As a general rule, the amendments will operate prospectively, except in certain cases as set out in section 85-A or otherwise set out in the amendment itself."

The Report then went on to amend Section 36 as follows:

"Amendment of Section 36

19. In section 36, (i) add numbering as sub-section (1) before the words "Where the time" and after the words "Section 34 has expired," delete the words "or such application having been made, it has been refused" and add the words "then subject to the provision of sub-section (2) hereof,"

(ii) insert sub-section "(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 the award unenforceable, unless upon a separate application made for that purpose, the Court grants stay of the operation of the

award in accordance with the provisions of sub-section (3) hereof;"

(iii) insert sub-section "(3) Upon filing of the separate application under subsection (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing."

(iv) insert proviso "Provided that the Court shall while considering the grant of stay, in the case of an award for money shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908."

[**NOTE**: This amendment is to ensure that the mere filing of an application under section 34 does not operate as an automatic stay on the enforcement of the award. The Supreme Court in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr, (2004) 1 SCC 540, recommends that such an amendment is the need of the hour.]"[1]

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[1] As a matter of fact, the amended Section 36 only brings back Article 36(2) of the UNCITRAL Model Law, which is based on Article 6 of the New York Convention, and which reads as under:

> "36(2). If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

The transitory provision Section 85A was then set out as follows:

> "Insertion of Section 85A
>
> A new section Section 85A on transitory provisions has been incorporated.
>
> Transitory provisions.— (1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations –
>
> (a) the provisions of section 6-A shall apply to all pending proceedings and arbitrations. Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.
>
> (b) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.
>
> (c) the provisions of second proviso to section 24 shall apply to all pending arbitrations.
>
> (2) For the purposes of the instant section,—
>
> (a) "fresh arbitrations" mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

> (b) "fresh applications" mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.
>
> [NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.]"

19. The debates in Parliament in this context were referred to by counsel on both sides. Shri T. Satpathy (Dhenkanal) stated:

> "You have brought in an amendment to Section 25 (a) saying that this Act will not be retrospective. When the Bill for judges' pension and salary could be retrospective, why can you not amend it with retrospective effect so that ONGC-RIL case could be brought under this Act and let it be adjudicated as early as possible within 18 months and let the people of this country get some justice some time. Let us be fair to them."

To similar effect is the speech of Shri APJ Reddy, which reads as under:

> "It is unclear whether the amended provisions shall apply to pending arbitration proceedings. The Law Commission of India, in its 246th Report, which recommended amendments to the Arbitration & Conciliation Act, 1996, had proposed to insert a new Section 85-A to the Act, which would clarify the scope of operation

> to each amendment with respect to pending arbitration proceedings. However, this specific recommendation has not been incorporated into the Ordinance. One of the reasons for bringing about this ordinance is to instill a sense of confidence in foreign investors in our judicial process, with regard to certainty of implementation in practice and ease of doing business. Therefore, it is strongly urged to incorporate Section 85A as proposed by the 246th Report of the Law Commission of India, where it clearly states the scope of operation of the amended provisions."

The Law Minister in response to the aforesaid speeches stated:

> "Nobody has objected to this Bill but some of our friends have observed certain things. They have said that the Bill is the need of the hour and that a good Bill has been brought. A few suggestions have been given by them. One of the suggestions was that it should have retrospective effect. If the parties agree, then there will be no problem. Otherwise, it will only have prospective effect."

20. Finally, Section 26 in its present form was tabled as Section 25A at the fag end of the debates, and added to the Bill. A couple of things may be noticed on a comparison of Section 85A, as proposed by the Law Commission, and Section 26 as ultimately enacted. First

and foremost, Section 85A states that the amendments shall be prospective in operation and then bifurcates proceedings into two parts – (i) fresh arbitrations, and (ii) fresh applications. Fresh arbitrations are defined as various proceedings before an arbitral tribunal that is constituted, whereas fresh applications mean applications to a Court or Tribunal, made subsequent to the date of enforcement of the Amendment Act. Three exceptions are provided by Section 85A, to which the Amendment Act will apply retrospectively. The first deals with provisions relating to costs, the second deals with the new provision contained in Section 16(7) (which has not been adopted by the Amendment Act) and the third deals with the second proviso to Section 24, which deals, inter alia, with oral hearings and arguments on a day-to-day basis and the non-grant of adjournments, unless sufficient cause is made out.

21. What can be seen from the above is that Section 26 has, while retaining the bifurcation of proceedings into

arbitration and Court proceedings, departed somewhat from Section 85A as proposed by the Law Commission.

22. That a provision such as Section 26 has to be construed literally first, and then purposively and pragmatically, so as to keep the object of the provision also in mind, has been laid down in **Thyssen** (supra) in paragraph 26 as follows:

> "26. Present-day courts tend to adopt a 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. We have seen above that this approach was adopted by this Court in *M.M.T.C. Ltd. case* [(1996) 6 SCC 716]. Provisions of both the Acts, old and new, are very different and it has been so observed in *Sundaram Finance Ltd. case* [(1999) 2 SCC 479]. In that case, this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to the old Act may actually lead to misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In the case of *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners* [(1984) 1 All ER 733 (HL)] the award was given before Kuwait became a party to the New York

> Convention recognised by an Order in Council in England. The House of Lords held that though a foreign award could be enforced in England under the (U.K.) Arbitration Act, 1975 as when the proceedings for enforcement of the award were initiated in England Kuwait had become a party to the Convention. It negatived the contention that on the date the award was given Kuwait was not a party to the New York Convention."
>
> (at pages 370-371)

Similarly, in **Milkfood Limited** (supra) at 315, this Court, while construing Section 85 of the 1996 Act, had this to say:

> "70. 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 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 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 wherefor 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 a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts 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 commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from *Shetty's Constructions* [(1998) 5 SCC 599] are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(*a*) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore."

23. All learned counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is

what exactly is contained in both parts. The two parts are separated by the word 'but', which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression "but" means only that there is an emphatic repetition of the first part of Section 26 in the second part of the said Section. For this, he relied upon the Concise Oxford Dictionary on Current English, which states:

> "introducing emphatic repetition; definitely (wanted to see nobody, but nobody)".

Quite obviously, the context of the word "but" in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

24. What will be noticed, so far as the first part is concerned, which states, "Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree…" is that: (1) "the arbitral proceedings" and their commencement is mentioned in

the context of Section 21 of the principal Act; (2) the expression used is “to” and not “in relation to”; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, “…but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act” makes it clear that the expression “in relation to” is used; and the expression “the” arbitral proceedings and “in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence.

25. That the expression “the arbitral proceedings” refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

> “Conduct of Arbitral Proceedings”

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral

tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force.[2]

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[2] Section 29A of the Amendment Act provides for time limits within which an arbitral award is to be made. In **Hitendra Vishnu Thakur v. State of Maharashtra** (1994) 4 SCC 602 at 633, this Court stated:

> "(*iii*) Every litigant has a vested right in substantive law but no such right exists in procedural law.
>
> (*iv*) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral

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> (*v*) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29A of the Amendment Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.

proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings – arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part

cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

26. We now consider some of the submissions of learned counsel for the parties as to what ought to be the true construction of Section 26. According to Shri Sundaram, the second part of Section 26 should be taken to be the principal part, with the first part being read as an exception to the principal part. This is so that Section 6 of the General Clauses Act then gets attracted to the first part, the idea being to save accrued rights. Section 6 applies unless a contrary intention appears in the

enactment in question. The plain language of Section 26 would make it clear that a contrary intention does so appear, Section 26 being a special provision having to be applied on its own terms.

27. Thus, in **Transport and Dock Workers' Union & others v. New Dholera Steamship Ltd., Bombay and others,** (1967) 1 LLJ 434, a Five Judge Bench of this Court held: _

> "6. It was contended before us that as an appeal is a continuation of the original proceeding the repeal should not affect the enforcement of the provisions of the Ordinance in this case. Reliance is placed upon Section 6 of the General Clauses Act, 1897 wherein is indicated the effect of repeal of an enactment by another. It is contended that as the Payment of Bonus Ordinance has been repealed by Section 40(1), the consequences envisaged in Section 6 of the General Clauses Act must follow and the present matter must be disposed of in accordance with the Ordinance as if the Act had not been passed. It is submitted that there was a right and a corresponding obligation to pay bonus under Section 10 of the Ordinance and that right and obligation cannot be obliterated because of the repeal of the Ordinance. This argument is not acceptable because of the provisions of the second sub-

section of Section 40. That sub-section reads as follows:

> "40. *Repeal and saving*.
>
> (1)***
>
> (2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 29th May, 1965."

Section 6 of the General Clauses Act applies ordinarily but it does not apply if a different intention appears in the repealing Act. Here a different intention is made to appear expressly and the special saving incorporated in the repealing Act protects only anything done or any action taken under the Ordinance which is deemed to have been done or taken under this Act as if the Act had commenced on 29th May, 1965. Nothing had been done under the Ordinance and no action was taken which needs protection; nor was anything pending under the Ordinance which could be continued as if the Act had not been passed. There was thus nothing which was to be saved after the repeal of the Ordinance and this question which might have arisen under the Ordinance now ceases to exist."

In **Kalawati Devi Harlalka v. CIT** (1967) 3 SCR 833, a repeal and savings provision contained in Section 297 of the Income Tax Act, 1961 was held to evidence an

intention to the contrary under Section 6 of the General Clauses Act as follows:

> "14. The learned counsel for the appellant submits that Parliament had Section 6 of the General Clauses Act in view, and therefore no express provision was made dealing with appeals and revisions, etc. In our view, Section 6 of the General Clauses Act would not apply because Section 297(2) evidences an intention to the contrary. In *Union of India* v. *Madan Gopal Kabra* [25 ITR 5] while interpreting Section 13 of the Finance Act, 1950, already extracted above, this Court observed at p. 68:
>
> > "Nor can Section 6 of the General Clauses Act, 1897, serve to keep alive the liability to pay tax on the income of the year 1949-50 assuming it to have accrued under the repealed State law, for a "different intention" clearly appears in Sections 2 and 13 of the Finance Act read together as indicated above."
>
> It is true that whether a different intention appears or not must depend on the language and content of Section 297(2). It seems to us, however, that by providing for so many matters mentioned above, some in accord with what would have been the result under Section 6 of the General Clauses Act and some contrary to what would been the result under Section 6, Parliament has clearly evidenced an intention to the contrary."

28. Shri Sundaram's submission is also not in consonance with the law laid down in some of our judgments. The approach to statutes, which amend a statute by way of repeal, was put most felicitously by B.K. Mukherjea, J. in **State of Punjab v. Mohar Singh**, 1955 1 SCR 893 at 899-900, thus:

> "In our opinion the approach of the High Court to the question is not quite correct. Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained

> from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."
>
> (Emphasis Supplied)

This statement of the law has subsequently been followed in **Transport and Dock Workers Union & Ors. v. New Dholera Steamships Ltd., Bombay and Ors.** (supra) at paragraph 6 and **T.S. Baliah v. T.S. Rengachari**, 1969 3 SCR 65 at 71-72.

29. Equally, the suggested interpretation of Shri Viswanathan would not only do violence to the plain language of Section 26, but would also ignore the words "in relation to" in the second part of Section 26, as well as ignore the fact that Section 21 of the 1996 Act, though mentioned in the first part, is conspicuous by its absence in the second part. According to Shri Viswanathan, the expression "arbitral proceedings commenced" is the same in both parts and, therefore, the commencement of arbitral proceedings under Section 21 is the only thing to

be looked at in both parts. Thus, according to the learned senior counsel, if arbitral proceedings have commenced prior to coming into force of the Amendment Act, the said proceedings, together with all proceedings in Court in relation thereto, would attract only the provisions of the unamended 1996 Act. Similarly, when arbitral proceedings have commenced under Section 21 after the coming into force of the Amendment Act, those proceedings, including all courts proceedings in relation thereto, would be governed by the Amendment Act. This is not the scheme of Section 26 at all, as has been pointed out above. Further, this argument is more or less the conclusion reached by the report of the High Level Committee, headed by Justice B.N. Srikrishna, to amend the 1996 Act.[3] It can be seen from the report of the High Level

[3] Shri Tushar Mehta, learned ASG, referred to a press release from the Government of India, dated March 7th, 2018, after arguments have been concluded, in a written submission made to us. According to him, the press release refers to a new Section 87 in a proposed amendment to be made to the 1996 Act. The press release states that the Union Cabinet, chaired by the Prime Minister, has approved the Arbitration and Conciliation (Amendment) Bill, 2018 in which a new Section 87 is proposed to be inserted as follows:

Committee that an amendment would be required to Section 26 to incorporate its findings. Section 87 of the proposed Arbitration and Conciliation (Amendment) Bill, 2018 cannot be looked at, at this stage, for the interpretation of Section 26 of the Amendment Act for two

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> "A new section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act of 2015 (b) 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 of 2015 and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings."

The Srikrishna Committee had recommended the following:

> "The Committee feels that permitting the 2015 Amendment Act to apply to pending court proceedings related to arbitrations commenced prior to 23 October 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. It may also not be advisable to make the 2015 Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23 October 2015 and related court proceedings.
>
> **Recommendations**

reasons: (i) Section 87, as ultimately enacted, may not be in the form that is referred to in the press release; and (ii) a proposed Bill, introducing a new and different provision of law can hardly be the basis for interpretation of a provision of law as it now stands. Obviously, therefore,

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1. Section 26 of the 2015 Amendment Act may be amended to provide that:

a. unless parties agree otherwise, the 2015 Amendment Act shall not apply to: (a) arbitral proceedings commenced, in accordance with section 21 of the ACA, before the commencement of the 2015 Amendment Act; and (b) 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 2015 Amendment Act; and

b. the 2015 Amendment Act shall apply only to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.

2. The amended Section 26 shall have retrospective effect from the date of commencement of the 2015 Amendment Act."

The High Level Committee recommended this after referring to divergent views taken by various High Courts. This included the interpretation given by the Calcutta High Court in **Electrosteel Castings Limited v. Reacon Engineers (India) Pvt. Ltd.** (A.P. No. 1710 of 2015 decided on 14.01.2016) and **Tufan Chatterjee v. Rangan Dhar**, (FMAT No. 47 of 2016 decided on 02.03.2016), the Madhya Pradesh High Court in **Pragat Akshay Urja Limited Company v. State of M.P and Ors**., (Arbitration Case Nos. 48, 53 and 54/2014, decided on 30.06.2016), the Madras High Court in **New Tirupur Area Development v. Hindustan Construction Co. Limited**,

Shri Viswanathan's approach leads to an amendment of Section 26, as recommended by the Srikrishna Committee, and not interpretation thereof. For all these reasons, his argument must, therefore, be rejected. Shri Datar's argument is more or less the same as Shri

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(Application No. 7674 of 2015 in O.P. No. 931 of 2015) and the Bombay High Court in **Rendezvous Sports World v. BCCI** (Chamber Summons No. 1530 of 2015 in Execution Application (L) No. 2481 of 2015, Chamber Summons No. 1532 of 2015 in Execution Application (L) No. 2482 and Chamber Summons No. 66 of 2016 in Execution Application (L) No. 2748 of 2015 decided on 08.08.2016).

In addition to this, the following decisions by various High Courts also deal with the applicability of the Amendment Act:

i. Calcutta High Court: **Nitya Ranjan Jena v. Tata Capital Financial Services Ltd.**, GA No. 145/206 with AP No. 15/2016, **West Bengal Power Development Corporation Ltd. v. Dongfang Electric Corporation**, 2017 SCCOnline Cal 9388, **Saraf Agencies v. Federal Agencies for State Property Management**, AIR 2017 Cal. 65, **Reliance Capital Ltd. v. Chandana Creations**, 2016 SCC Cal. 9558 and **Braithwaite Burn & Jessop Construction Company Ltd. v. Indo Wagon Engineering Ltd.**, AIR 2017 (NOC 923) 314.

ii. Bombay High Court: **M/s. Maharashtra Airport Development Company Ltd. v. M/s. PBA Infrastructure Ltd.**, 2017 SCCOnline Bom (7840), **Enercon GmbH v. Yogesh Mehra**, 2017 SCC Bom 1744 and **Global Aviation Services Pvt. Ltd. v. Airport Authority of India**, Commercial Arbitration Petition No. 434/2017,

iii. Madras High Court: **Jumbo Bags Ltd. v. New India Assurance Company Limited**, 2016 (3) CTC 769.

iv. Delhi High Court: **ICI Soma JV v. Simplex Infrastructures Ltd.**, 2016 SCC Online Del 5315, **Tantia-CCIL (JV) v. Union of India**, ARB. P. 615/2016, **Raffles Design International India Pvt. Ltd. v. Educomp**

Viswanathan's, and suffers from the same infirmity as Shri Viswanathan's interpretation. Shri A. Krishnan, in bringing in the concept of "seat", is again doing complete violence to the language of Section 26, as "place of arbitration" is a

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Professional Education Ltd. and Ors., OMP (I) (COMM.) 23/2015, **Orissa Concrete and Allied Industries Ltd. v. Union of India and Ors.,** Arb. P. No. 174 of 2016, **Takamol Industries Pvt. Ltd. v. Kundan Rice Mills Ltd.**, EX. P. 422/2014 & EA No. 739/2016, **Apex Encon Projects Pvt. Ltd. v. Union of India & Anr.**, 2017 SCC Online Del. 9779 and **Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Pvt. Ltd.**, 2017 SCC Online Del 7808.

v. Patna High Court: **SPS v. Bihar Rajya Pul Nirman Nigam Ltd.**, Request Case No. 14 of 2016 and **Kumar and Kumar Associates v. Union of India**, 2017 1 PLJR 649.

vi. Gujarat High Court: **OCI Corp. v. Kandla Export Corporation & Ors.**, 2017 GLH (1) 383, **Abhinav Knowledge Services Pvt. Ltd. v. Babasaheb Amdebdkar Open University**, AIR 2017 (NOC 1012) 344 and **Pallav Vimalbhai Shah v. Kalpesh Sumatibhai Shah**, O/IAAP/15/2017.

vii. Kerala High Court: **Shamsudeen v. Shreeram Transport Finance Ltd**., ILR 2017 Vol. 1, Ker. 370 and **Jacob Mathew v. PTC Builders**, 2017 (5) KHC 583.

viii. Tripura High Court: **Subhash Podder v. State of Tripura**, 2016 SCC Tri. 500.

ix. Chhatisgarh High Court: **Orissa Concrete and Allied Industries Limited v. Union of India and Ors.**, Arbitration Application No. 34/2014.

x. Rajasthan High Court: **Dwarka Traders Pvt. Ltd. v. Union of India, S.B.**, Arbitration Application No. 95/2013 and **Mayur Associates, Engineers and Contractors v. Gurmeet Singh & Ors.**, S.B. Arbitration Application No. 74/2013.

xi. Himachal Pradesh High Court: **RSWM v. The Himachal Pradesh State Supplies Co. Ltd.**, Arb Case No. 104/2016

well-known concept contained in Section 20 of the 1996 Act, which finds no mention whatsoever in Section 26 of the Amendment Act. For these reasons, his interpretation cannot also be accepted.

30. Shri Neeraj Kishan Kaul, learned senior counsel appearing on behalf of Respondents in SLP(C) Nos.19545-19546 of 2016, has argued that the first part of Section 26 does not apply to Court proceedings at all, thereby indicating that the Amendment Act must be given retrospective effect insofar as Court proceedings in relation to arbitral proceedings are concerned. For this purpose, he relied on **Minister of Public Works of the Government of the State of Kuwait** (supra).

31. In that case, the question that arose was as to the correct construction of Section 7(1) of the U.K. Arbitration Act, 1975. The said section was given retrospective effect

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and **P.K. Construction Co. & Ors. v. Shimla Municipal Co. & Ors.**, Civil Writ Petition No. 2322/2016.

xii. Punjab & Haryana High Court: **Alpine Minmetals India Pvt. Ltd. v. Noble Resources Ltd.**, LPA No. 917/2017.

in applying the New York Convention to arbitration agreements that were entered into before the convention was made applicable, for the reason that nobody had an accrued right/defence which was taken away. All defences available in a common law action on the award would be available and continued to be available. Hence, it was held that the award could always have been enforced by one form of procedure and that it subsequently became enforceable by an alternative form. This judgment can have no application to the present case, inasmuch as the Amendment Act, as applicable to Court proceedings that arose in relation to arbitral proceedings, cannot be said to apply to mere forms of procedure, but also includes substantive law applicable to such Court proceedings post the Amendment Act. Also, it is wholly fallacious to say that since the first part of Section 26 does not refer to Court proceedings in relation to arbitral proceedings, the Amendment Act is retrospective insofar as such proceedings are concerned. The second part of Section

26 would then have to be completely ignored, which, as has been seen hereinabove, applies to Court proceedings in relation to arbitral proceedings only prospectively, i.e. if such Court proceedings are commenced after the Amendment Act comes into force. For these reasons, such an interpretation of Section 26 is unacceptable.

32. Shri Chidambaram, appearing on behalf of some of the Respondents, has argued that the interpretation accepted by this Court *supra* is the correct interpretation. He has also argued that, alternatively, the expression "in relation to arbitral proceedings" in the second part of Section 26 would also include within it arbitral proceedings before the arbitral tribunal, as otherwise Section 26 would not apply the Amendment Act to such arbitral proceedings. We are afraid that this alternative interpretation does not appeal to us, for the simple reason that when the first part of Section 26 makes it clear that arbitral proceedings commenced before the Amendment Act would not be governed by the Amendment Act, it is

clear that arbitral proceedings that have commenced after the Amendment Act comes into force would be so governed by it, as has been held by us above. The negative form of the language of the first part only becomes necessary to indicate that parties may otherwise agree to apply the Amendment Act to arbitral proceedings commenced even before the Amendment Act comes into force. The absence of any reference to Section 21 of the 1996 Act in the second part of Section 26 of the Amendment Act is also a good reason as to why arbitral proceedings before an arbitral tribunal are not contemplated in the second part.

33. Shri Sibal has argued that Section 26 is not a savings clause at all and cannot be construed as such. According to the learned senior counsel, Section 26 manifests a clear intention to destroy all rights, vested or otherwise, which have accrued under the unamended 1996 Act. We are unable to accept these submissions as it is clear that the intendment of Section 26 is to apply the Amendment

Act prospectively to arbitral proceedings and to court proceedings in relation thereto. This approach again does not commend itself to us.

34. Dr. Singhvi has, however, argued that the approach indicated by us above could be termed as an "intermediate approach", i.e. it is an approach which does not go to either of the extreme approaches of Shri Sundaram, Shri Viswanathan and Shri Datar or that of Shri Sibal. Further, according to the learned senior counsel, this approach has the merit of both clarity, as well as no anomalies arising as a result, as it is clear that the Amendment Act is to be applied only prospectively with effect from the date of its commencement, and only to arbitral proceedings and to court proceedings in relation thereto, which have commenced on or after the commencement of the Amendment Act. We think this is the correct approach as has already been indicated by us above.

35. The judgment in **Thyssen** (supra), was strongly relied upon by counsel on both sides. It is, therefore, important to deal with this judgment in a little detail. In **Thyssen** (supra), Section 85 of the 1996 Act came up for consideration. What is clear is that Section 85(2)(a) had the expression "in relation to arbitral proceedings" in both parts of sub-section (2)(a). When speaking of the repealed enactments, it stated that they will apply "in relation to" arbitral proceedings which commenced before the 1996 Act came into force, but that otherwise the 1996 Act shall apply "in relation to" arbitral proceedings, which commenced on or after the 1996 Act came into force.

36. The judgment in **Thyssen** (supra) construed Section 85 as follows:

> "23. 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*) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (*a*)

> provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (*b*) the 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 the widest import as held by various decisions of this Court in *Doypack Systems (P) Ltd.* [(1988) 2 SCC 299], *Mansukhlal Dhanraj Jain* [(1995) 2 SCC 665], *Dhanrajamal Gobindram* [AIR 1961 SC 1285 : (1961) 3 SCR 1020] and *Navin Chemicals Mfg*. [(1993) 4 SCC 320] This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was 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. The 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."
>
> (at page 369)
>
> [Emphasis Supplied]

The judgment then goes on to refer to Section 48 of the Arbitration Act, 1940, which is set out therein as follows:

> "48. *Saving for pending references*.—The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall notwithstanding any repeal effected by this Act continue to apply."
>
> (at page 349)

Paragraph 33 goes on to state the difference between Section 85(2)(a) of the 1996 Act and the earlier Section 48 of the 1940 Act, as follows:

> "33. Because of the view of Section 85(2)(*a*) of the new Act which we have taken, it is not necessary for us to consider difference in the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act. We may, however, note that under Section 48 of the old Act the concept is of "reference" while under the new Act it is "commencement". Section 2(*e*) of the old Act defines "reference". Then under Section 48 the word used is "to" and under Section 85(2)(*a*) the expression is "in relation to". It, therefore, also appears that it is not quite relevant to consider the provision of Section 48 of the old Act to interpret Section 85(2)(*a*)."
>
> (at page 375)
>
> [Emphasis Supplied]

Paragraph 25 specifically states that Section 6 of the General Clauses Act will not apply, inasmuch as a different

intention does appear from the plain language of Section 85(2)(a). Ultimately, after stating seven conclusions in paragraph 22, this Court went on to state that enforcement of an award under the 1940 Act would be an accrued right for the reason that the challenge procedure under Section 30 of the 1940 Act was wider and completely different from the challenge procedure under Section 34 of the 1996 Act, and that to avoid confusion and hardship, it would be important to refer to the expression "in relation to" as meaning the entire gamut of arbitral proceedings, beginning with commencement and ending with enforcement of an award.

37. The judgment in **Thyssen** (supra) dealt with a differently worded provision, and emphasized the difference in language between the expression "to" and the expression "in relation to". In reference to the Acts which were repealed under Section 85, proceedings which commenced before the 1996 Act were to be governed by the repealed Acts. These proceedings would be the entire

gamut of proceedings, i.e. from the stage of commencement of arbitral proceedings until the challenge proceedings against the arbitral award had been exhausted. Similar was the position with respect to the applicability of the 1996 Act, which would again apply to the entire gamut of arbitral proceedings, beginning with commencement and ending with enforcement of the arbitral award. It is clear, therefore, that Section 85(2)(a) has two major differences in language with Section 26: one, that the expression “in relation to” does not appear in the first part of Section 26 and only the expression “to” appears; and, second, that “commencement” in the first part of Section 26 is as is understood by Section 21 of the 1996 Act. The second part of Section 85(2)(a) is couched in language similar to the second part of Section 26 with this difference, that Section 21 contained in the first part of Section 26 is conspicuous by its absence in the second part.

38. The judgment in **Thyssen** (supra) was followed in **N.S. Nayak** (supra). After setting out paragraph 32 of the judgment in **Thyssen** (supra) and paragraphs 22 and 23 of the aforesaid judgment, this Court concluded:

> "13. As stated in paragraph 22, Conclusion 1 without any reservation provides that the provisions of the old Act shall apply in relation to the arbitral proceedings which have commenced before coming into force of the new Act. Conclusion 2, in our view, is required to be read in context with Conclusion 1, that is to say, the phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the 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 the award becoming a decree under Section 17 thereof and also appeal arising thereunder. Hence, Conclusions 1 and 2 are to be read together which unambiguously reiterate that once the arbitral proceedings have started under the old Act, the old Act would apply for the award becoming a decree and also for appeal arising thereunder.
>
> 14. Conclusion 3 only reiterates what is provided in various sections of the Arbitration Act, which gives option to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator.

> The phrase "unless otherwise agreed by the parties" used in various sections, namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(*a*) etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. Reason being, the arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It is also settled law that the right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in the new Act. In the present cases, the appeals were pending before the High Court under the provisions of the old Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said Act. Hence, there is no substance in the submission made by the learned counsel for the appellant."
>
> (at pages 63-64)

The majority judgment in **Milkfood Limited** (supra), after referring to the judgments in **Thyssen** (supra) and **N.S. Nayak** (supra), concluded that, on the facts of that case,

the 1940 Act will apply and not the 1996 Act. These judgments are distinguishable for the same reasons, as they only follow and apply **Thyssen** (supra).

39. From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by “enforcement” in Section 36. On the one hand, it has been argued that “enforcement” is nothing but “execution”, and on the other hand, it has been argued that “enforcement” and “execution” are

different concepts, “enforcement” being substantive and “execution” being procedural in nature.

40. At this stage, it is necessary to set out the scheme of the 1996 Act. An arbitral proceeding commences under Section 21, unless otherwise agreed by parties, when a dispute arises between the parties for which a request for the dispute to be referred to arbitration is received by the respondent. The arbitral proceedings terminate under Section 32(1) by the delivery of a final arbitral award or by the circumstances mentioned in Section 32(2). The mandate of the arbitral tribunal terminates with the termination of arbitral proceedings, save and except for correction and interpretation of the award within the bounds of Section 33, or the making of an additional arbitral award as to claims presented in the proceedings, but omitted from the award. Once this is over, in cases where an arbitral award is delivered, such award shall be final and binding on the parties and persons claiming under them, under Section 35 of the 1996 Act. Under

Section 36, both pre and post amendment, 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. It is clear that the scheme of the 1996 Act is materially different from the scheme of the 1940 Act. Under Section 17 of the 1940 Act, once an award was delivered, the Court had to pronounce judgment in accordance with the award, following which a decree would be drawn up, which would then be executable under the Code of Civil Procedure. Under Section 36 of the 1996 Act, the Court does not have to deliver judgment in terms of the award, which is then followed by a decree, which is the formal expression of the adjudication between the parties. Under Section 36 of the 1996 Act, the award is deemed to be a decree and shall be enforced under the Code of Civil Procedure as such.

41. This brings us to the manner of enforcement of a decree under the Code of Civil Procedure. A decree is

enforced under the Code of Civil Procedure only through the execution process – see Order XXI of the Code of Civil Procedure. Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order LXI, Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, "Stay of Proceedings and of Execution". This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI, Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards. This being the case, we need to refer to some judgments in order to determine whether execution proceedings and proceedings akin thereto give rise to vested rights, and whether they are substantive in nature.

42. In **Lalji Raja and Sons v. Hansraj Nathuram**, (1971) 1 SCC 721 at 728, this Court was concerned with a judgment debtor's right to resist execution of a decree.

Section 20(1)(b) of the Code of Civil Procedure (Amendment) Act, 1951 was extended to Madhya Bharat and other areas, as a result of which the judgment debtor's right to resist execution of a decree was protected. In this context, this Court held that the Amendment Act of 1951 made decrees, which could have been executed only by courts in British India, executable in the whole of India. Stating that the change made was one relating to procedure only, this Court held:

> "15. This provision undoubtedly protects the rights acquired and privileges accrued under the law repealed by the Amending Act. Therefore the question for decision is whether the non-executability of the decree in the Morena Court under the law in force in Madhya Bharat before the extension of "the Code" can be said to be a right accrued under the repealed law. We do not think that even by straining the language of the provision it can be said that the non-executability of a decree within a particular territory can be considered as a privilege. Therefore the only question that we have to consider is whether it can be considered as a "right accrued" within the meaning of Section 20(1)(*b*) of the Code of Civil Procedure (Amendment) Act, 1950. In the first place, in order to get the benefit of that provision, the non-executability of the decree must be a right and secondly it must

be a right that had accrued from the provisions of the repealed law. It is contended on behalf of the judgment-debtors that when the decree was passed, they had a right to resist the execution of the decree in Madhya Bharat in view of the provisions of the Indian Code of Civil Procedure (as adapted) which was in force in the Madhya Bharat at that time and the same is a vested right. It was further urged on their behalf that that right was preserved by Section 20(1)(*b*) of the Code of Civil Procedure (Amendment) Act, 1950. It is difficult to consider the non-executability of the decree in Madhya Bharat as a vested right of the judgment-debtors. The non-executability in question pertains to the jurisdiction of certain courts and not to the rights of the judgment-debtors. Further the relevant provisions of the Civil Procedure Code in force in Madhya Bharat did not confer the right claimed by the judgment-debtors. All that has happened in view of the extension of "the Code" to the whole of India in 1951 is that the decrees which could have been executed only by courts in British India are now made executable in the whole of India. The change made is one relating to procedure and jurisdiction. Even before "the Code" was extended to Madhya Bharat the decree in question could have been executed either against the person of the judgment-debtors if they had happened to come to British India or against any of their properties situated in British India. The execution of the decree within the State of Madhya Bharat was not permissible because the arm of "the Code" did not reach Madhya Bharat. It was the invalidity of the order transferring the decree to the

> Morena Court that stood in the way of the decree-holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgment-debtors. Even if the judgment-debtors had not objected to the execution of the decree, the same could not have been executed by the court at Morena on the previous occasion as that court was not properly seized of the execution proceedings. By the extension of "the Code" to Madhya Bharat, want of jurisdiction on the part of the Morena Court was remedied and that court is now made competent to execute the decree.
>
> 16. That a provision to preserve the right accrued under a repealed Act "was not intended to preserve the abstract rights conferred by the repealed Act.... It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute" — See Lord Atkin's observations in *Hamilton Gell* v. *White.* [(1922) 2 KB 422]. The mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause — See *Abbot* v. *Minister for Lands* [(1895) AC 425] and *G. Ogden Industries Pvt. Ltd.* v. *Lucas.* [(1969) 1 All ER 121]"

In **Narhari Shivram Shet Narvekar v. Pannalal Umediram** (1976) 3 SCC 203 at 207, this Court, following **Lalji Raja** (supra), held as follows:

> "8. Learned counsel appearing for the appellant however submitted that since the Code of Civil Procedure was not applicable to Goa the decree became inexecutable and this being a vested right could not be taken away by the application of the Code of Civil Procedure to Goa during the pendency of the appeal before the Additional Judicial Commissioner. It seems to us that the right of the judgment debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment debtor. *A fortiori* the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the appellate court is bound to take notice of the change in law."

Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

43. The matter can also be looked at from a slightly different angle. Section 36, prior to the Amendment Act,

is only a clog on the right of the decree holder, who cannot execute the award in his favour, unless the conditions of this section are met. This does not mean that there is a corresponding right in the judgment debtor to stay the execution of such an award. Learned counsel on behalf of the Appellants have, however, argued that a substantive change has been made in the award, which became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege in favour of the Respondents. It has been argued, relying upon a number of judgments, that since Section 36 is a part of the enforcement process of awards, there is a vested right or at least a privilege accrued in favour of the Appellants in the unamended 1996 Act applying insofar as arbitral proceedings and court proceedings in relation thereto have commenced, prior to the commencement of the Amendment Act. The

very judgment strongly relied upon by senior counsel for the appellants, namely **Garikapati Veeraya** (supra), itself states in proposition (v) at page 515, that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides specifically or by necessary intendment and not otherwise. We have already held that Section 26 does specifically provide that the court proceedings in relation to arbitral proceedings, being independent from arbitral proceedings, would not be viewed as a continuation of arbitral proceedings, but would be viewed separately. This being the case, it is unnecessary to refer to judgments such as **Union of India v. A.L. Rallia Ram**, (1964) 3 SCR 164 and **NBCC Ltd. v. J.G. Engineering (P) Ltd.**, (2010) 2 SCC 385, which state that a Section 34 proceeding is a supervisory and not an appellate proceeding. **Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corpn. Ltd.**, (2010) 3 SCC 34 at 47-49, which was cited for the purpose of stating that a Section

34 proceeding could be regard as an “appeal” within the meaning of Section 7 of the Interest on Delayed Payments To Small Scale and Ancillary Industrial Undertakings Act, 1993, is obviously distinguishable on the ground that it pertains to the said expression appearing in a beneficial enactment, whose object would be defeated if the word “appeal” did not include a Section 34 application. This is made clear by the aforesaid judgment itself as follows:

> “36. On a perusal of the plethora of decisions aforementioned, we are of the view that “appeal” is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re-agitation of entire matrix of facts and law. We have already seen in *Abhayankar* [(1969) 2 SCC 74] that even an order passed by virtue of limited power of revision under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving such a wide meaning to the term “appeal”, we are constrained to disagree with the contention of the learned counsel for the respondent Corporation that appeal shall mean only a

challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.

xxx xxx xxx

40. It may be noted that Section 6(1) empowers the buyer to obtain the due payment by way of *any proceedings*. Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. It is pertinent to note that as opposed to Section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by the Arbitration Act. Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act."

44. Learned senior counsel appearing on behalf of the Respondents, has also argued that the expression "has been" in Section 36(2), as amended, would make it clear that the section itself refers to Section 34 applications which have been filed prior to the commencement of the Amendment Act and that, therefore, the said section would apply, on its plain language, even to Section 34 applications that have been filed prior to the commencement of the Amendment Act. For this purpose, the judgment in **State of Bombay v. Vishnu Ramchandra** (1961) 2 SCR 26, was strongly relied upon. In that judgment, it was observed, while dealing with Section 57 of the Bombay Police Act, 1951, that the expression "has been punished" is in the present perfect tense and can mean either "shall have been" or "shall be". Looking to the scheme of the enactment as a whole, the Court felt that "shall have been" is more appropriate. This decision was referred to in paragraphs 60 and 61 of **Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.**, (1973) 1

SCC 813 at 838 and the ratio culled out was that such expression may relate to past or future events, which has to be gathered from the context, as well as the scheme of the particular legislation. In the context in which Section 11A of the Industrial Disputes Act, 1947 was enacted, this Court held that Section 11A has the effect of altering the law by abridging the rights of the employer. This being so, the expression "has been" would refer only to future events and would have no implication to disputes prior to December 15, 1971. However, in a significant paragraph, this Court held:

> "63. It must be stated at this stage that procedural law has always been held to operate even retrospectively, as no party has a vested right in procedure…."

45. Being a procedural provision, it is obvious that the context of Section 36 is that the expression "has been" would refer to Section 34 petitions filed before the commencement of the Amendment Act and would be one pointer to the fact that the said section would indeed apply, in its substituted form, even to such petitions. The

judgment in **L'Office Cherifien Des Phosphates and another v. Yamashita-Shinnihon Steamship Co. Ltd.,** (1994) 1 AC 486 is instructive. A new Section 13A was introduced with effect from 1st January, 1992, by which Arbitrators were vested with the power of dismissing a claim if there is no inordinate or an inexcusable delay on the part of the claimant in pursuing the claim. This Section was enacted because the House of Lords in a certain decision had suggested that such delays in arbitration could not lead to a rejection of the claim by itself. What led to the enactment of the Section was put by Lord Mustill thus:

> "My Lords, the effect of the decision of the House in the Bremer Vulkan case, coupled with the inability of the courts to furnish any alternative remedy which might provide a remedy for the abuse of stale claims, aroused a chorus of disapproval which was forceful, sustained and (so far as I am aware) virtually unanimous. There is no need to elaborate. The criticisms came from every quarter. Several Commonwealth countries hastily introduced legislation conferring on the court, or on the arbitrator, a jurisdiction to dismiss stale claims in arbitration. The history of the matter, and the reasons why the question was

> not as easy as it might have appeared, were summarized in an article published in 1989 by Sir Thomas Bingham (Arbitration International, vol. 5, pp. 333 et seq.), and there is no need to rehearse them here. Taking account of various apparent difficulties the Departmental Advisory Committee on Arbitration hesitated for a time both as to the principle and as to whether the power to dismiss should be vested in the court or the arbitrator, but the pressure from all quarters became irresistible and in 1990 the Courts and Legal Services Act inserted, through the medium of Section 102, a new Section 13A in the Arbitration Act, 1950."
>
> (at page 522)

The question which arose in that case was whether delay that had taken place before the Section came into force could be taken into account by an arbitrator in order to reject the claim in that case. The House of Lords held that given the clamor for change and given the practical value and nature of the rights involved, it would be permissible to look at delay caused even before the Section came into force. In his concluding paragraph, Lord Mustill held:

> "In this light, I turn to the language of Section 13A construed, in case of doubt, by reference to its legislative background. The crucial words are: "(a). . . there has been inordinate and inexcusable delay . . . " Even if read in

> isolation these words would I believe be sufficient, in the context of Section 13A as a whole, to demonstrate that the delay encompasses all the delay which has caused the substantial risk of unfairness. If there were any doubt about this the loud and prolonged chorus of complaints about the disconformity between practices in arbitration and in the High Court, and the increasing impatience for something to be done about it, show quite clearly that Section 13A was intended to bite in full from the outset. If the position were otherwise it would follow that, although Parliament has accepted the advice of all those who had urged that this objectionable system should be brought to an end, and has grasped the nettle and provided a remedy, it has reconciled itself to the continuation of arbitral proceedings already irrevocably stamped with a risk of injustice. I find it impossible to accept that Parliament can have intended any such thing, and with due respect to those who have suggested otherwise I find the meaning of Section 13A sufficiently clear to persuade me that in the interests of reform Parliament was willing to tolerate the very qualified kind of hardship involved in giving the legislation a partially retrospective effect. Accordingly, I agree with Beldam L.J. that the arbitrator did have the powers to which he purported to exercise. I would therefore allow the appeal and restore the award of the arbitrator."

46. In 2004, this Court's Judgment in **National Aluminium Company** (supra) had recommended that

Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the Section should be amended at the earliest to bring about the required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.

47. Both sides locked horns on whether a proceeding under Section 36 could be said to be a proceeding which is independent of a proceeding under Section 34. In view of what has been held by us above, it is unnecessary for us to go into this by-lane of forensic argument.

48. However, Shri Viswanathan strongly relied upon the observations made in paragraph 32 in **Thyssen** (supra) and the judgment in **Hameed Joharan v. Abdul Salam**, (2001) 7 SCC 573. It is no doubt true that paragraph 32 in **Thyssen** (supra) does, at first blush, support Shri Viswanathan's stand. However, this was stated in the context of the machinery for enforcement under Section 17 of the 1940 Act which, as we have seen, differs from Section 36 of the 1996 Act, because of the expression "in relation to arbitral proceedings", which took in the entire gamut, starting from the arbitral proceedings before the arbitral tribunal and ending up with enforcement of the award. It was also in the context of the structure of the 1940 Act being completely different from the structure of the 1996 Act, which repealed the 1940 Act. In the present case, it is clear that "enforcement" in Section 36 is to treat the award as if it were a decree and enforce it as such under the Code of Civil Procedure, which would only mean that such decree has to be executed in the manner

indicated. Also, a stray sentence in a judgment in a particular context cannot be torn out of such context and applied in a situation where it has been argued that enforcement and execution are one and the same, at least for the purpose of the 1996 Act. In **Regional Manager & Anr. v. Pawan Kumar Dubey** (1976) 3 SCR 540, at 544 it was held:

> "We think that the principles involved in applying Article 311(2) having been sufficiently explained in *Shamsher Singh's case* (supra) it should no longer be possible to urge that *Sughar Singh's case* (supra) could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to some conflict, it would, we think, vanish when the *ratio decidendi* of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its *ratio decidendi* and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same

> principles are applied in each case to similar facts."

49. For the same reason, it is clear that the judgment in **Hameed Joharan** (supra), which stated that execution and enforcement were different concepts in law, was in the context of Article 136 of the Limitation Act, 1963, read with Section 35 of the Indian Stamp Act, 1899, which is wholly different. The argument in that case was that Article 136 of the Limitation Act prescribes a period of 12 years for the execution of a decree or order, after it becomes enforceable. What was argued was that it would become enforceable only when stamped and Section 35 of the Stamp Act was referred to for the said purpose. In this context, this Court held:

> "And it is on this score it has been contended that the partition decree thus even though already passed cannot be acted upon, neither becomes enforceable unless drawn up and engrossed on stamp papers. The period of limitation, it has been contended in respect of the partition decree, cannot begin to run till it is engrossed on requisite stamp paper. There is thus, it has been contended, a legislative bar under Section 35 of the Indian Stamp Act

> for enforceability of partition decree. Mr Mani contended that enforcement includes the whole process of getting an award as well as execution since execution otherwise means due performance of all formalities, necessary to give validity to a document. We are, however, unable to record our concurrence therewith. Prescription of a twelve-year period certain cannot possibly be obliterated by an enactment wholly unconnected therewith. Legislative mandate as sanctioned under Article 136 cannot be kept in abeyance unless the selfsame legislation makes a provision therefor. It may also be noticed that by the passing of a final decree, the rights stand crystallised and it is only thereafter its enforceability can be had, though not otherwise."
>
> (at page 593)

It is for this reason that it was stated that enforceability of a decree under the Limitation Act cannot be the subject matter of Section 35 of the Stamp Act. Therefore, Section 35 of the Stamp Act could not be held to "overrun" the Limitation Act and thus, give a complete go-by to the legislative intent of Article 136 of the Limitation Act. Here again, observations made in a completely different context have to be understood in that context and cannot be applied to a totally different situation.

50. As a matter of fact, it was noticed that furnishing of stamp paper was an act entirely within the domain and control of the Appellant in that case, and any delay in the matter of furnishing the same cannot possibly be said to stop limitation, as no one can take advantage of his own wrong (see paragraph 13). As a matter of fact, the Court held that unless a distinction was made between execution and enforcement, the result in that case would lead to an "utter absurdity". The Court held, "absurdity cannot be the outcome of an interpretation of a Court order and wherever there is even a possibility of such absurdity, it would be a plain exercise of judicial power to repeal the same rather than encouraging it" (see paragraph 38).

51. Shri Viswanathan then referred us to this Court's judgment in **Akkayanaicker v. A.A.A. Kotchadainaidu and Anr.** (2004) 12 SCC 469, which, according to him, has followed the judgment in **Hameed Joharan** (supra). This judgment again would have no application for the

simple reason that the narrow point that was decided in that case was whether the time period for execution of a decree under Section 136 of the Limitation Act would start when the decree was originally made or whether a fresh period of limitation would begin after the decree was amended having been substantially scaled down by a Debt Relief Act. This Court held that as the original decree could not be enforced and only the amended decree could be enforced, 12 years has to be counted from the date of the amended decree. It is clear that this judgment also does not carry the matter further.

52. It was also argued that an award by itself had no legal efficacy, until it became enforceable, and that, therefore, until it could be enforced as a decree of the Court, it would continue to remain suspended. Here again, the judgment in **Satish Kumar** (supra) is extremely instructive. The question in that case was as to whether, under the 1940 Act, an award had any legal efficacy before a judgment followed thereupon and it was made

into a decree. A Full Bench of the Punjab and Haryana High Court held that until it is made a rule of the Court, such an award is waste paper. This Court strongly disagreed and followed its unreported decision in **Uttam Singh Dugal & Co. v. Union of India** as follows:

> "It seems to us that the main reason given by the two Full Benches for their conclusion is contrary to what was held by this Court in its unreported decision in *Uttam Singh Dugal & Co.* v. *Union of India* [Civil Appeal No. 162 of 1962—judgment delivered on 11-10-1962] . The facts in this case, shortly stated, were that Uttam Singh Dugal & Co. filed an application under Section 33 of the Act in the Court of the Subordinate Judge, Hazaribag. The Union of India, Respondent 1, called upon Respondent 2, Col. S.K. Bose, to adjudicate upon the matter in dispute between Respondent 1 and the appellant Company. The case of *Uttam Singh Dugal & Co.*was that this purported reference to Respondent 2 for adjudication on the matters alleged to be in dispute between them and Respondent 1 was not competent because by an award passed by Respondent 2 on April 23, 1952 all the relevant disputes between them had been decided. The High Court held inter alia that the first award did not create any bar against the competence of the second reference. On appeal this Court after holding that the application under Section 33 was competent observed as follows:

"The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J., in the case of *Bhajahari Saha Banikya* v. *Behary Lal Basak* [33 Cal. 881 at p. 898] the award is, in fact, a final adjudication of a Court of the parties own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the fact of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive … in reality, an award possesses all the elements of vitality, even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the

> same subject-matter". This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed."

This Court then held on the merits "that the dispute in regard to overpayments which are sought to be referred to the arbitration of Respondent 2 by the second reference are not new disputes; they are disputes in regard to claims which the Chief Engineer should have made before the arbitration under the first reference". This Court accordingly allowed the appeal and set aside the order passed by the High Court.

This judgment is binding on us. In our opinion this judgment lays down that the position under the Act is in no way different from what it was before the Act came into force, and that an award has some legal force and is not a mere waste paper. If the award in question is not a mere waste paper but has some legal effect it plainly purports to or affects property within the meaning of Section 17(1)(*b*) of the Registration Act."

(at pages 248-249)

53. Justice Hegde, in a separate concurring judgment, specifically stated that an award creates rights in property, but those rights cannot be enforced until the award is made a decree of the Court. The Learned Judge put it very well when he said, "It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps". The Amendment Act has only made an award executable conditionally after it is made, like a judgment of a Court, the only difference being that a decree would not have to be formally drawn following the making of such award.

54. Shri Viswanathan then argued, relying upon **R. Rajagopal Reddy v. Padmini Chandrasekharan** (1995) 2 SCC 630, **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.** (2001) 6 SCC 356, **Sedco Forex International Drill. Inc. v. CIT** (2005) 12 SCC 717 and **Bank of Baroda v. Anita Nandrajog** (2009) 9 SCC 462, that a clarificatory

amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that "for the avoidance of any doubt, it is clarified", this is not language that is conclusive in nature, but it is open to the Court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to learned senior counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being **Saw Pipes Ltd** (supra) and **Western Geco** (supra), as has been held in paragraph 18 in **HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)** 2017 SCC Online 1024, it is clear that such amendments would only be prospective in

nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

55. Learned counsel for the Appellants have painted a lurid picture of anomalies that would arise in case the Amendment Act were generally to be made retrospective in application. Since we have already held that the Amendment Act is only prospective in application, no such anomalies can possibly arise. It may also be noted that the choosing of Section 21 as being the date on which the Amendment Act would apply to arbitral

proceedings that have been commenced could equally be stated to give rise to various anomalies. One such anomaly could be that the arbitration agreement itself may have been entered into years earlier, and disputes between the parties could have arisen many years after the said arbitration agreement. The argument on behalf of the Appellants is that parties are entitled to proceed on the basis of the law as it exists on the date on which they entered into an agreement to refer disputes to arbitration. If this were to be the case, the starting point of the application of the Amendment Act being only when a notice to arbitrate has been received by the respondent, which as has been stated above, could be many years after the arbitration agreement has been entered into, would itself give rise to the anomaly that the amended law would apply even to arbitration proceedings years afterwards as and when a dispute arises and a notice to arbitrate has been issued under Section 21. In such a case, the parties, having entered into an arbitration

agreement years earlier, could well turn around and say that they never bargained for the change in law that has taken place many years after, and which change will apply to them, since the notice, referred to in Section 21, has been issued after the Amendment Act has come into force. Cut off dates, by their very nature, are bound to lead to certain anomalies, but that does not mean that the process of interpretation must be so twisted as to negate both the plain language as well as the object of the amending statute. On this ground also, we do not see how an emotive argument can be converted into a legal one, so as to interpret Section 26 in a manner that would be contrary to both its plain language and object.

56. However, it is important to remember that the Amendment Act was enacted for the following reasons, as the Statement of Objects and Reasons for the Amendment Act states:

> "2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of

time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and Report. The said Committee, submitted its Report to the Parliament on 4th August, 2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on “Amendments to the Arbitration and Conciliation Act, 1996” in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is

committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:—

(i) to amend the definition of “Court” to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

> (ix) to provide that application to challenge the award is to be disposed of by the Court within one year.
>
> 7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases."
>
> (Emphasis Supplied)

57. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's press release dated 7th March, 2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, "…have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act", and will now not be applicable to Section 34 petitions filed after 23rd October,

2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23rd October, 2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23rd October, 2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of Courts, which ultimately defeats the object of the 1996 Act.[4] It would be important to remember that the 246th

[4] These amendments have the effect, as stated in **HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)** 2017 SCC Online 1024 (at paragraph 18) of limiting the grounds of challenge to awards as follows:

> "…In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC v. Saw Pipes Ltd, (2003) 5 SCC 705, has been expressly done away with. So has the judgment in ONGC v. Western Geco International Ltd., (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Plant Co. Ltd. v. General Electric Co., (1994) Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein, viz., "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar (supra). "Justice or morality" has been tightened and is now to be understood as meaning only basic

Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to Court proceedings commenced on or after 23rd October, 2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated.

58. At the fag end of the arguments, Shri Viswanathan, in rejoinder, raised another point which arises only in Civil Appeals arising out of SLP(C) No. 8374-8375 of 2017 and 8376-8378 of 2017. According to him, the impugned judgment, when it dealt with the majority award in favour of respondent Enercon GmbH, went behind the award in ordering execution of a portion of the award in favour of Enercon, when the majority award, in paragraph 331(3)

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notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49. Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."

(b), specifically ordered the 2nd and 3rd defendants to pay to WWIL, which is a joint venture company, a sum of Rs.6,77,24,56,570/-. The majority award of the tribunal had specifically stated, in paragraph 298, as follows:

> "Enercon's claim is first pleaded as damages payable by the Mehra directors directly to Enercon. It also pleads an alternative claim for such further or other relief as the Tribunal considers appropriate (paragraph 18 of the application of 13 December 2015 and paragraph 323.4 of its closing written submission dated 13 May 2016, as also its Statement of Claim of 30 September 2014, at paragraph 102(M).) In the Tribunal's view, given that WWIL is only part owned by Enercon (hence Enercon's pecuniary disadvantage resulting from the Mehra directors' wrongdoing is not the same as that of WWIL) and further that WWIL remains the person most immediately affected by such wrongdoing, the liability of the Mehra directors is best discharged by requiring them to deciding upon such relief in favour of WWIL (as distinct from direct relief in favour of Enercon), the Tribunal sees no material disadvantage to Enercon, and, as for the Mehra directors, no possible prejudice or other unfairness, whether as a matter of pleading, the form of relief or otherwise."

It is only thereafter that the Tribunal awarded the aforesaid amount in paragraph 331(3)(b) as follows:

> "(b) Jointly and severally-
>
> (i) to pay to WWIL the sum of INR 6,772,456,570, being the profit made by Vish Wind on the sale of allotment rights to WWIL in the years ending 31 March 2011 and 2012 together with interest thereon at the rate of 3% over European Central Bank rate from those dates until the date of this Award.
>
> (ii) To pay to the Claimants their legal and other costs in the sum of €3,794,970."

59. It is thus Shri Viswanathan's contention that it is the decree holder alone who can execute such decree in its favour, and that in the present case it is WWIL who is the decree holder, insofar as paragraph 331(3)(b) is concerned and, that, therefore, Enercon's Chamber Summons, to execute this portion of the award, is contrary to the Code of Civil Procedure as well as a number of judgments construing the Code.

60. On the other hand, the submission of the other side is that the Mehra brothers, who are the 2nd and 3rd

defendants in the arbitration proceedings, are in control and management of WWIL, and have wrongfully excluded Enercon from such control and management. WWIL, therefore, will never put this decree into execution. This being so, the interest of justice requires that we should not interfere with the High Court judgment as there is no person that would be in a position to enforce the award apart from Enercon.

61. We are of the opinion that even though the High Court may not be strictly correct in its appreciation of the law, yet it has attempted to do justice on the facts of the case as follows:

> "These last words are important. If what Mr. Mehta says is correct and the decree was in favour of WWIL and not Enercon, that necessarily posits a *rejection* of Enercon's claim for damages and, therefore, a material disadvantage to Enercon. But this is not what the Arbitral Tribunal did at all. It *accepted* Enercon's plea. It accepted its argument that the Mehras were guilty of wrongdoing. It accepted that the Mehras were liable to make good any advantage or benefit they have received. The Arbitral Tribunal merely changed the vehicle or direction by which that

> recompense, restitution or recovery was to be made. The nomenclature is immaterial. Given the nature of disputes, indeed, WWIL could never put this decree into execution. It never sought this relief. It could not have. This is not in fact, as paragraph 298, says a relief in favour of WWIL at all although WWIL may benefit from it. It is a relief and a decree in favour of and only of Enercon."

In this view of the matter, we do not think it appropriate, in the interest of justice, to interfere with the impugned judgment on this count.

62. In view of the above, the present batch of appeals is dismissed. A copy of the judgment is to be sent to the Ministry of Law and Justice and the Learned Attorney General for India in view of what is stated in paragraphs 56 and 57 supra.

……J.
(R.F. Nariman)

……J.
(Navin Sinha)

New Delhi;
March 15, 2018.