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(1999) 9 Supreme Court Cases 334

(BEFORE D.P. WADHWA AND M.B. SHAH, JJ.)

THYSSEN STAHLUNION GMBH .. Appellant;

Versus

STEEL AUTHORITY OF INDIA LTD. .. Respondent.

Civil Appeals No. 6036 of 1998† with No. 4928 of 1997
and No. 61 of 1999, decided on October 7, 1999

A. Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Applicability of Arbitration Act, 1940 notwithstanding its repeal — Where arbitration proceedings commenced before coming into force of 1996 Act but award rendered after commencement thereof, held, award would be enforced under provisions of the 1940 Act — General Clauses Act, 1897, S. 6 — If applicable

B. Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Once arbitral proceedings commenced under the 1940 Act, right to enforcement of the award would be a "right accrued" — For such right to accrue any legal proceedings for enforcement need not be pending under the 1940 Act at the time when the 1996 Act came into force — Statute Law — Repeal and saving provision — General Clauses Act, 1897, S. 6 — Applicability of

C. Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Expression "in relation to arbitral proceedings which commenced on or after this Act came into force" — Import of — Comprehends not only proceedings for arbitration but also proceedings for enforcement of award rendered in the arbitration pending at the time of commencement of the new Act — If a narrow meaning is given to the expression, it would create confusion and inconvenience — S. 48 of Arbitration Act, 1940 not relevant to interpret S. 85(2)(a) of new Act

D. Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Parties can agree to applicability of the 1996 Act even before the 1996 Act came into force and when the 1940 Act was still in force — That would not be in restraint of legal proceedings under Contract Act, 1872, S. 28 Exception I — So parties could agree that the law "for the time being in force", which means law as existing at the relevant time when arbitration proceedings, held, would apply — Arbitration proceedings include enforcement of the award also — Words and Phrases

E. Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Applicability of Arbitration Act, 1940 — Parties cannot agree to be governed by the old Act once the 1996 Act came into force and the proceedings had not commenced, though the arbitration agreement was under the old Act

F. Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Foreign award given after coming into force of the 1996 Act can be enforced only under Part II of the new 1996 Act, there being no vested right to have the same enforced under Foreign Awards (Recognition and Enforcement) Act, 1961 — This is irrespective of the fact when the arbitral proceedings commenced in the foreign jurisdiction — Besides S. 6 of General Clauses Act, 1897 not applicable

† From the Judgment and Order dated 21-9-1998 of the Delhi High Court in EP No. 47 of 1998

G. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Object and interpretation of — Ingredients analysed**

H. **Statute Law — Repealing and saving provision — Saving of the rights accrued under the Act — When arbitral proceedings commenced under the old (repealed) Act, right to have the award rendered in the said proceedings enforced under that Act is an accrued right — General Clauses Act, S. 6**

I. **Interpretation of Statutes — Subsidiary rules — Remedial statute — Strict construction of, if leads to inconvenient result construction which does not lead to such result would be preferable**

J. **Statute Law — Repeal and saving provision — Saving provision under the new Act preserving the existing right accrued under the old Act — Presumption that legislature does not intend to limit or take away vested rights unless language clearly indicates to the contrary**

In the case of *Thyssen Stahlunion GMBH* (CA No. 6036 of 1998) the contract for sale and purchase of prime cold rolled mild steel sheets in coils contained an arbitration agreement. Disputes and differences having arisen, the arbitration proceedings commenced on 14-9-1995 under the Arbitration Act, 1940. On this date request for arbitration was made to ICC under the arbitration clause in the contract. Award was given on 24-9-1997. By this time on 25-1-1996 the Arbitration and Conciliation Act, 1996 had come into force. On 13-10-1997 Thyssen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of the court. While these proceedings were pending in the High Court, Thyssen, on 12-2-1998, filed an application under Section 151 CPC for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act. The ground taken was that the arbitration proceedings had been terminated with the making of the award on 24-9-1997 and, therefore, the new Act was applicable for enforcement of the award. The respondent Steel Authority of India Ltd. (SAIL) opposed the maintainability of the execution petition. SAIL also filed objections to the award on various grounds under the old Act. The question which arose for consideration is:

> Whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply?

A Single Judge of the High Court held that proceedings would be governed by the old Act. Thyssen Stahlunion GMBH feeling aggrieved filed this appeal (CA No. 6036 of 1998) before the Supreme Court.

In the case of *Western Shipbreaking Corpn.* (CA No. 4928 of 1997) under memorandum of agreement dated 4-11-1994 M/s Clareheaven Ltd. agreed to sell to Western Shipbreaking Corporation a ship *M.V. Kaldera*. Clause (19) of the memorandum of agreement contained arbitration clause. Arbitration proceedings in this case were held in the United Kingdom prior to the enforcement of the new Act. The award was made on 25-2-1996 in London. The question which arose for consideration was: Whether the award was governed by the provisions of the new Act for its enforcement or by the Foreign Awards Act? A Single Judge of the High Court held that the new Act would be applicable. Western Shipbreaking Corporation filed appeal against that judgment before the Supreme Court (CA No. 4928 of 1997).

In the case of *Rani Constructions (P) Ltd.* (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal

Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, was as under:

> "Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

Disputes having arisen, these were referred to the sole arbitrator on 4-12-1993. The arbitrator gave his award on 23-2-1996 after the new Act had come into force. On account of difference of opinion in two judgments of the Himachal Pradesh High Court, both rendered by Single Judges, as to whether the old or the new Act will apply, a learned Single Judge of the High Court referred the question that when clause (*a*) of Section 85(2) of the new Act uses the expression "unless otherwise agreed by the parties" can the parties agree for the applicability of the new Act before the new Act came into force or have they necessarily to agree only after the new Act came into force? The Division Bench of the High Court by the impugned judgment dated 16-7-1998 held that clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996". (Paras 9 to 12)

Dismissing CAs Nos. 6036 of 1998 and 4928 of 1997 while allowing CA No. 61 of 1999, the Supreme Court

Held:

The award given on 24-9-1997 in the case of *Thyssen Stahlunion GMBH* v. *Steel Authority of India Ltd.* (Civil Appeal No. 6036 of 1998) when the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996, would be enforceable under the provisions of the Arbitration Act, 1940. Clause 25 containing the arbitration agreement in the case of *Rani Constructions (P) Ltd.* v. *H.P. SEB* (Civil Appeal No. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the Arbitration and Conciliation Act, 1996. The foreign award given in the case of *Western Shipbreaking Corpn.* v. *Clareheaven Ltd.* (Civil Appeal No. 4928 of 1997) would be governed by the provisions of the Arbitration and Conciliation Act, 1996. Thus the decisions of the Delhi High Court in Execution Petition No. 47 of 1998 and of the Gujarat High Court in Civil Revision Application No. 99 of 1997 are affirmed and the decision of the Himachal Pradesh High Court in Civil Suit No. 52 of 1996 is set aside. (Para 42)

The provisions of the old Arbitration Act, 1940 shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Arbitration and Conciliation Act, 1996. So the enforcement of the award has to be examined on the touchstone of the proceedings held under the old Act. (Para 29)

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.
(Para 23)

a The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder. The contention that if it is accepted that the expression "in relation to arbitral proceedings" would b include proceedings for the enforcement of the award as well, the second limb of Section 85(2)(*a*) would become superfluous and cannot be accepted.
(Paras 22 and 24)

M.M.T.C. Ltd. v. *Sterlite Industries (India) Ltd.*, (1996) 6 SCC 716; *Navin Chemicals Mfg. & Trading Co. Ltd.* v. *Collector of Customs*, (1993) 4 SCC 320; *Doypack Systems (P) Ltd.* v. *Union of India*, (1988) 2 SCC 299; *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*, (1995) 2 SCC 665, *relied on*

c In this view of the matter, Section 6 of the General Clauses Act would be inapplicable. It is, therefore, not necessary to examine if any right to enforce the award under the old Act accrued to a party when arbitral proceedings had commenced before the coming into force of the new Act and SAIL (CA No. 6036 of 1998) had acquired a right to challenge the award made under the old Act and there would be a corresponding right with Thyssen to enforce the award d under the old Act. (Para 25)

Section 85(2)(*a*) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act up till the time of the enforcement of the award. Thus Section 85(2)(*a*) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. Once the arbitral proceedings have commenced, it cannot be stated that e the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force. (Paras 28 and 22)

Sumitomo Heavy Industries Ltd. v. *ONGC Ltd.*, (1998) 1 SCC 305; *Abbott* v. *Minister for* f *Lands*, 1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC); *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*, (1972) 3 SCC 684 : (1972) 3 SCR 690; *CIT* v. *Shah Sadiq and Sons*, (1987) 3 SCC 516 : 1987 SCC (Tax) 270; *Bansidhar* v. *State of Rajasthan*, (1989) 2 SCC 557; *Lalji Raja & Sons* v. *Hansraj Nathuram*, (1971) 1 SCC 721; *M.S. Shivananda* v. *Karnataka SRTC*, (1980) 1 SCC 149 : 1980 SCC (L&S) 131; *Hamilton Gell* v. *White*, (1922) 2 KB 422 : 127 LT 728 (CA); *Gajraj Singh* v. *STAT*, (1997) 1 SCC 650; *Gujarat Electricity Board* v. *Shantilal R. Desai*, AIR 1969 SC 239 : (1969) 1 SCR 580; *Sohan Lal* v. *Amin Chand and Sons*, (1973) 2 SCC 608 : (1974) 1 SCR 453, *relied* g *on*

Director of Public Works v. *Ho Po Sang*, (1961) 2 All ER 721 : (1961) 3 WLR 39 : 1961 AC 901, *relied on*

Oil and Natural Gas Commission v. *Western Co. of North America*, (1987) 1 SCC 496 : (1987) 1 SCR 1024, *cited*

If a narrow meaning of the phrase "in relation to arbitral proceedings" is to h be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Acts.

Challenge of award can be with reference to the conduct of arbitral proceedings. (Paras 22 and 27)

Sohan Lal v. *Amin Chand and Sons*, (1973) 2 SCC 608 : (1974) 1 SCR 453, *relied on*

Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036 of 1998 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the court. It was only later on that it changed the stand and now took the position that the new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. The appellant itself led the respondent SAIL in believing that the old Act would apply. SAIL had filed objections to the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by Thyssen under Sections 14 and 17 of the old Act. Numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. Therefore, a construction cannot be adopted which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. It would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction of Section 85(2)(*a*) would only lead to confusion and hardship. This construction is consistent with the wording of Section 85(2)(*a*) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well. (Para 32)

There is a presumption that the legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. It is correct that the new Act is a remedial statute and, therefore, Section 85(2)(*a*) calls for a strict construction, it being a repealing provision. But then where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter. (Paras 28, 26 and 27)

M.M.T.C. Ltd. v. *Sterlite Industries (India) Ltd.*, (1996) 6 SCC 716; *Pepper* v. *Hart*, (1993) 1 All ER 42 : 1993 AC 593 : (1992) 3 WLR 1032 (HL); *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners*, (1984) 1 All ER 733 (HL), *relied on*

Therefore, it is not necessary to consider difference in the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act. However, it has to be noted 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*). (Para 33)

Hoosein Kasam Dada (India) Ltd. v. *State of M.P.*, AIR 1953 SC 221 : 1953 SCR 987, *relied on*

a In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they could so agree even before the coming into force of the new Act. There is nothing in the language of Section 85(2)(*a*) which barred the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings b under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of *Rani Constructions* (Civil Appeal No. 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. The expression for the time being in force not only refers c to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. The expression "unless otherwise agreed" as appearing in Section 85(2)(*a*) of the new Act would clearly apply in the case of *Rani Constructions* in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. d Parties could anticipate that the new enactment may come into operation at the time the disputes arise. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give an option to the parties e to agree that the new Act would apply to the pending arbitration proceedings.

(Paras 22 and 35)

Reshma Constructions v. *State of Goa*, (1999) 1 Mah LJ 462, *approved*

Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 does not render illegal a contract by which the parties agree that any future dispute shall be f referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at g that time would apply, there cannot be any objection to that. Thus construing clause 25, in *Rani Constructions* (CA No. 61 of 1999) the new Act will apply.

(Para 38)

The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act came into force. (Para 22)

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

(Para 22)

The Foreign Awards Act gave the party the right to enforce the foreign award under that Act. But before that right could be exercised the Foreign Awards Act had been repealed. It cannot, therefore, be said that any right had accrued to the party for him to claim to enforce the foreign award under the Foreign Awards Act. After the repeal of the Foreign Awards Act a foreign award can now be enforced under the new Act on the basis of the provisions contained in Part II of the new Act depending whether it is a New York Convention award or a Geneva Convention award. It is irrespective of the fact when the arbitral proceedings commenced in a foreign jurisdiction. Since no right has accrued Section 6 of the General Clauses Act would not apply. (Para 39)

In the very nature of the provisions of the Foreign Awards Act it is not possible to agree to the submissions that Section 85(2)(*a*) of the new Act would keep that Act alive for the purpose of enforcement of a foreign award given after the date of commencement of the new Act though arbitral proceedings in a foreign land had commenced prior to that. However, if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award are juxtaposed there would appear to be hardly any difference. (Para 40)

Shetty's Constructions Co. (P) Ltd. v. *Konkan Rly. Construction*, (1998) 5 SCC 599, *referred to*

Sundaram Finance Ltd. v. *NEPC India Ltd.*, (1999) 2 SCC 479; *D.C. Bhatia* v. *Union of India*, (1995) 1 SCC 104; *Kay* v. *Goodwin*, (1830) 6 Bing 576 : 130 ER 1403, 1405; *Dinshaw Manekji Petit* v. *G.B. Badkas*, AIR 1969 Bom 151 : 70 Bom LR 632; *Devkumarsinghji Kasturchandji* v. *State of M.P.*, AIR 1967 MP 268 : 1967 MPLJ 47 (DB); *Ellison* v. *Thomas*, (1861) 31 LJ Ch 867 *and* (1862) 32 LJ Ch 32 : 7 LT 342; *Coles* v. *Pack*, (1869) 5 CP 65 : 39 LJCP 63; *Gunter's Settlement Trusts, Re*, 1949 Ch 502 : (1949) 1 All ER 680; *State of Punjab* v. *Mohar Singh*, AIR 1955 SC 84 : (1955) 1 SCR 893; *Dhanrajamal Gobindram* v. *Shamji Kalidas and Co.*, AIR 1961 SC 1285 : (1961) 3 SCR 1020; *State Wakf Board* v. *Abdul Azeez*, AIR 1968 Mad 79 : (1967) 1 MLJ 190; *Netai Charan Bagchi* v. *Suresh Chandra Paul*, (1962) 66 CWN 767 : 1962 Cal LJ 183; *Shyam Lal* v. *M. Shayamlal*, AIR 1933 All 649 : ILR 55 All 775 (FB); *Heyman* v. *Darwins Ltd.*, 1942 AC 356 : (1942) 1 All ER 337 (HL); *G. Ekambarappa* v. *Excess Profits Tax Officer*, AIR 1967 SC 1541 : (1967) 3 SCR 864, *referred to*

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Suggested Case Finder Search Text (*inter alia*) :

repeal near saving*

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33. (1922) 2 KB 422 : 127 LT 728 (CA), *Hamilton Gell* v. *White* 355*f-g*, 355*g*, 357*g*, 373*f-g*
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The Judgment of the Court was delivered by

D.P. WADHWA, J.—

The facts

1. These three appeals raise three different questions relating to the construction and interpretation of Section 85 of the Arbitration and Conciliation Act, 1996 ("the new Act" for short) which contains repeal and saving provision of the three Acts, namely, the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 ("the old Act" for short) and the Foreign Awards (Recognition and Enforcement) Act, 1961 ("the Foreign Awards Act" for short).

2. This Section 85 of the new Act we reproduce at the outset:

"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."

3. In the case of *Thyssen Stahlunion GMBH* (CA No. 6036 of 1998) the contract for sale and purchase of prime cold rolled mild steel sheets in coils contains arbitration agreement. The relevant clauses are as under:

"12. Legal interpretation

12.1 This contract shall be governed and construed in accordance with the laws of India for the time being in force.

12.2 To interpret all commercial terms and abbreviations used herein which have not been otherwise defined, the rules of 'INCOTERMS 1990' shall be applied.

13. *Settlement of disputes*

All disputes or differences whatsoever between the parties hereto arising out of or relating to the construction, meaning or operation or effect of this contract or the breach thereof shall unless amicably settled between the parties hereto, be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), Paris, France by a sole arbitrator appointed by the Chairman of the Arbitral Tribunal of the Court of Arbitration of ICC and the award made in pursuance thereof shall be binding on both the parties. The venue for the arbitration proceedings shall be New Delhi, India."

4. Disputes and differences having arisen, the arbitration proceedings commenced on 14-9-1995 under the old Act. On this date request for arbitration was made to ICC under the arbitration clause in the contract. Mr Cecil Abraham of the Malaysian Bar was appointed sole arbitrator on 15-11-1995. Terms of reference in the arbitration were finalised on 13-5-1996. Hearing before the sole arbitrator took place from 7-1-1997 till 28-1-1997. Award was given on 24-9-1997. By this time on 25-1-1996 the new Act had come into force. On 13-10-1997 Thyssen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of the court (Arbitration Suit No. 352-A of 1997). While these proceedings were pending in the High Court, Thyssen, on 12-2-1998, filed an application under Section 151 of the Code of Civil Procedure for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act (Execution Petition No. 47 of 1998). The ground taken was that the arbitration proceedings had been terminated with the making of the award on 24-9-1997 and, therefore, the new Act was applicable for enforcement of the award. The respondent Steel Authority of India Ltd. (SAIL) opposed the maintainability of the execution petition. SAIL also filed objections to the award on various grounds under the old Act. The question which arose for consideration is:

> Whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply?

5. A learned Single Judge of the Delhi High Court by judgment dated 21-9-1998 held that proceedings would be governed by the old Act. Thyssen Stahlunion GMBH feeling aggrieved filed this appeal (CA No. 6036 of 1998).

6. In the case of *Western Shipbreaking Corpn.* (CA No. 4928 of 1997) under memorandum of agreement dated 4-11-1994 M/s Clareheaven Ltd. agreed to sell to Western Shipbreaking Corporation a ship *M.V. Kaldera*. Clause (19) of the memorandum of agreement contained arbitration clause which is as under:

> "If any dispute should arise in connection with the interpretation in fulfilment of this contract, same shall be decided by arbitration in the city of London, U.K. with English law to apply and shall be referred to a single arbitrator to be appointed by the parties hereto. If the parties cannot agree on the appointment of the single arbitrator, the dispute shall be settled by three arbitrators, each party appointing one arbitrator the third being appointed by London Maritime Arbitration (*sic*) Association in London.
>
> If one party fails to appoint an arbitrator either or by way of substitution for two weeks after the other party having appointed his arbitrator, has sent the party making default notice by mail, cable or telex to make the appointment, London Maritime Arbitration (*sic*) Association

shall after application from the party having appointed his arbitrator also appoint on behalf of the party making default.

The award rendered by the arbitrators shall be final binding upon the parties and may if necessary be enforced by any court or any other competent authority in the same manner as a document in the court of justice."

7. Arbitration proceedings in this case were held in the United Kingdom prior to the enforcement of the new Act. The award was made on 25-2-1996 in London. The question which arises for consideration is:

Whether the award is governed by the provisions of the new Act for its enforcement or by the Foreign Awards Act?

8. A learned Single Judge of the Gujarat High Court by the impugned judgment dated 21-4-1997 held that the new Act would be applicable. Western Shipbreaking Corporation is aggrieved and filed appeal against that judgment (CA No. 4928 of 1997).

9. In the case of *Rani Constructions (P) Ltd.* (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, is as under:

"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

10. Disputes having arisen, these were referred to the sole arbitrator on 4-12-1993. The arbitrator gave his award on 23-2-1996 after the new Act had come into force. On account of difference of opinion in two judgments of the Himachal Pradesh High Court, both rendered by Single Judges, as to whether the old or the new Act will apply, a learned Single Judge of the High Court referred the following question to a larger Bench:

"Whether the agreement referred to in Section 85(2)(*a*) of the Act of 1996 for the purpose of applicability of the said Act to the pending arbitral proceedings which had already commenced under the Act of 1940 is one necessarily to be entered into after the commencement of the Act of 1996 or any clause to that effect in an agreement already entered into between the parties before the enforcement of the Act of 1996 would be sufficient for that purpose."

11. The reference question does not appear to have been happily worded. What it means is that when clause (*a*) of Section 85(2) of the new Act uses the expression "unless otherwise agreed by the parties" can the parties agree for the applicability of the new Act before the new Act comes into force or have they necessarily to agree only after the new Act comes into force?

12. The Division Bench of the High Court by the impugned judgment dated 16-7-1998 held that clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996".

13. Arguments have been addressed in considerable detail for and against the application of the new Act or the old Act in the cases of *Thyssen* and *Rani Constructions* and the Foreign Awards Act in the case of *Western Shipbreaking Corpn*. We would, however, refer to these arguments in brief insofar we consider these to be relevant to decide the issues before us.

The submissions

14. Mr F.S. Nariman, who appeared for Thyssen made the following submissions:

1. Termination of arbitral proceedings by the final arbitration award and the enforcement of the award are two separate proceedings. Under Section 32[1] of the new Act arbitral proceedings shall terminate by the final award or by an order of the Arbitral Tribunal under sub-section (2) as provided therein. Thus after the arbitral proceedings are terminated and final award made, reference has to be made to the new Act for enforcement of the award as when award was given the old Act stood repealed.

2. In view of the savings provision under clause (*a*) of sub-section (2) of Section 85 of the new Act it is not necessary to refer to Section 6 of the General Clauses Act, 1897.[2]

1 "32. *Termination of proceedings.*—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(*a*) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(*b*) the parties agree on the termination of the proceedings, or

(*c*) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible."

2 "6. *Effect of repeal.*—Where this Act, or any Central Act or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or regulation had not been passed."

3. The new Act is based on UNCITRAL Model Law. It is a progressive Act. Objects which led to passing of the new Act should be kept in view. For this, reference may be made to the Preamble[3] of the new Act as well. In the Statement of Objects and Reasons[4], the

3 "Whereas the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

And whereas the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

And whereas the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

And whereas the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

And whereas the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

And whereas it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;

Be it enacted by Parliament in the forty-seventh year of the Republic as follows:"

4 *Statement of Objects and Reasons*

"The law on arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing world-wide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under—

(*i*) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

objectives behind introduction of the new arbitration law have been explained.

It is clearly intended that the enforcement of the award given after the new Act came into force would be governed by the new Act. Interpretation of the provisions of Section 85 has to be purposeful which advances the object of the new Act. In *Sundaram Finance Ltd.* v. *NEPC India Ltd.*[5] the question that arose for consideration was whether under Section 9 of the new Act the court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed. Under this section the court is empowered to pass interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. During the course of discussion this Court referred to the Statement of Objects and Reasons which led to the promulgation of the new Act and said: (SCC p. 483, para 9)

> "9. The 1996 Act (new Act) is very different from the Arbitration Act, 1940 (old Act). The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act (new Act) have to be interpreted being uninfluenced by the principles underlying the 1940 Act (old Act). In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

4. Law governing arbitration proceedings can be different than that governing the award. In this connection reference may be made to a decision of this Court in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.*[6]

> (*ii*) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
>
> (*iii*) to provide that the Arbitral Tribunal gives reasons for its arbitral award;
>
> (*iv*) to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction;
>
> (*v*) to minimise the supervisory role of courts in the arbitral process;
>
> (*vi*) to permit an Arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
>
> (*vii*) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
>
> (*viii*) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal; and
>
> (*ix*) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.
>
> 5. The Bill seeks to achieve the above objects."

5 (1999) 2 SCC 479

6 (1998) 1 SCC 305

In *Sumitomo Heavy Industries Ltd. case*[6] under the arbitration agreement between the parties proceedings were to be held at London in accordance with the provisions of the International Chamber of Commerce and the rules made thereunder as amended from time to time. Award was made on 27-6-1995. ONGC Ltd. filed a petition in the High Court at Bombay praying that the respondent be directed under Section 14 of the old Act to file the award in that Court. It was contended by ONGC that the award was invalid, unenforceable and liable to be set aside under the provisions of the Arbitration Act, 1940. This petition of ONGC was allowed by the High Court. It was noticed that during the course of preliminary hearing in the Queen's Bench Division, Commercial Court, in London, Potter, J. had observed that one of the aspects of the case for consideration was: (SCC p. 310, para 5)

> "(*4*) The curial law, i.e., the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract."

Decision of the Bombay High Court was challenged in this Court. This Court said that the central issue in the appeal was as to what was the area of operation of the curial law and went on to observe as under: (SCC pp. 313-14, paras 11-12)

> "*11*. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.
>
> *12*. The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd (in *Law and Practice of Commercial Arbitration in England*, 2nd Edn.) aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is '*functus officio*' (p. 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced. The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not

governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration."

5. Section 85 of the new Act provides for a limited repeal. This section be contrasted with Section 48 of the old Act, which is as under:

> "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."

This departure from the language used in Section 48 of the old Act is deliberate and has to be given effect to while considering the scope of Section 85 of the new Act.

6. Assuming that Section 6 of the General Clauses Act applies, the question whether a party gets a right at the time when the arbitration proceedings commenced under the old Act and that the award given after the coming into force of the new Act would yet be governed under the old Act, can be answered only if any vested right accrued to the party. Vested rights accrue when proceedings for enforcement of the award are taken and not before that. Right to take advantage of an enactment is not a vested right. One cannot have mere abstract right but only accrued right. Until award is made no party has an accrued right. Till the award is made nobody knows his rights. In this connection reference may be made to a decision of the Privy Council in *Abbott* v. *Minister for Lands*[7] which was followed by this Court in *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*[8]. Reference may also be made to another decision of this Court in *D.C. Bhatia* v. *Union of India*[9].

In *Abbott* v. *Minister for Lands*[7] the Court said that "the mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a 'right accrued' within the meaning of the usual saving clause". The appellant had contended that under the repealed enactment he had a right to make the additional conditional purchase, and this was an "accrued right" at the time the Crown Lands Act of 1884 was passed and that notwithstanding the repeal it remained unaffected by such repeal. The 1884 Act had repealed the earlier Crown Lands Act of 1861. The Board observed:

> "It has been very common in the case of repealing statute to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.
>
> It may be, as Windeyer, J. observes, that the power to take advantage of an enactment may without impropriety be termed a

7 1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC)
8 (1972) 3 SCC 684 : (1972) 3 SCR 690
9 (1995) 1 SCC 104

'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed'. They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment.

Even if the appellant could establish that the language of Section 2(*b*) was sufficient to reserve to him the right for which he contends, he would have to overcome further difficulties. That enactment only renders 'rights accrued' unaffected by the repeal 'subject to any express provisions of this Act in relation thereto'."

This Court in *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*[8] followed the decision of the Privy Council in *Abbott* v. *Minister for Lands*[7] holding that the mere right to take advantage of provisions of an Act is not an accrued right.

In *D.C. Bhatia* v. *Union of India*[9] the question which arose for consideration before this Court related to the interpretation and constitutional validity of Section 3(*c*) of the Delhi Rent Control Act. The Delhi Rent Control Act was amended with effect from 1-12-1988 when Section 3(*c*) was introduced which provided that the provisions of that Act will not apply to any property at a monthly rent exceeding Rs 3500. This Court while upholding the constitutional validity of the provisions as contained in Section 3(*c*) of the Delhi Rent Control Act observed (at SCC p. 124, para 57) that

"we are unable to uphold the contention that the tenants had acquired a vested right in the properties occupied by them under the statute. We are of the view that the provisions of Section 3(*c*) will also apply to the premises which had already been let out at the monthly rent in excess of Rs 3500 when the amendment made in 1988 came into force".

One of the contentions raised by the tenants was that they had acquired vested rights which could not be disturbed unless the amending Act contained specific provisions to that effect. They said that under the existing law the tenants had acquired valuable property rights and they could neither be evicted nor could the rent be enhanced and that even a suit could not be brought against a tenant on the expiry of the lease. This Court repealed the contention and said: (SCC pp. 122-23, paras 52-53)

"52. We are unable to uphold this contention for a number of reasons. Prior to the enactment of the Rent Control Act by the various State Legislatures, the legal relationship between the landlord and tenant was governed by the provisions of the Transfer

of Property Act. Delhi Rent Control Act provided protection to the tenants from drastic enhancement of rent by the landlord as well as eviction, except on certain specific grounds. The legislature by Amendment Act 57 of 1988 has partially repealed the Delhi Rent Control Act. This is a case of express repeal. By amending Act the legislature has withdrawn the protection hitherto enjoyed by the tenants who were paying Rs 3500 or above as monthly rent. If the tenants were sought to be evicted prior to the amendment of the Act, they could have taken advantage of the provisions of the Act to resist such eviction by the landlord. But this was nothing more than a right to take advantage of the enactment. The tenant enjoyed statutory protection as long as the statute remained in force and was applicable to him. If the statute ceases to be operative, the tenant cannot claim to continue to have the old statutory protection. It was observed by Tindal, C.J., in the case of *Kay* v. *Goodwin*[10]: (ER p. 1405)

> 'The effect of repealing a statute is to obliterate it as completely from the records of Parliament as if it had never been passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law.'

53. The provisions of a repealed statute cannot be relied upon after it has been repealed. But, what has been acquired under the repealed Act cannot be disturbed. But, if any new or further step is needed to be taken under the Act, that cannot be taken even after the Act is repealed."

7. The expression "in relation to" appearing in Section 85(2)(*a*) of the new Act refers to stage of arbitration proceedings under the old Act. Reference is made to various provisions of the new Act employing the words "arbitral proceedings" or "arbitral proceedings and award" to stress that in the new Act there are different stages in the process of arbitration. Section 42[11] of the new Act uses the expression "arising out of that agreement and the arbitral proceedings". There is a difference between the expressions "arising out of" and that "relating to".

8. Section 36[12] of the new Act is a deeming provision which provides for the enforcement of the award as if it is a decree of a civil court under the Civil Procedure Code. This stage comes after application

10 (1830) 6 Bing 576 : 130 ER 1403, 1405

11 "42. *Jurisdiction.*—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court."

12 "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."

for setting aside of the arbitral award under Section 34 has been dealt with. This Court in *Oil and Natural Gas Commission* v. *Western Co. of North America*[13] while dealing with the old Act said that till an award is transformed into a judgment and decree under Section 17 of the Arbitration Act, 1940, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made rule of the court upon the judgment and decree and in terms of the award being passed.

9. The claim of the respondents that they had acquired vested right to challenge the award under the old Act in view of Section 6 of the General Clauses Act is also incorrect. In this connection reference be made to Section 100 of the Code of Civil Procedure, which was amended by Section 37 of the Code of Civil Procedure (Amendment) Act, 1976. Now, by Section 100 provisions of second appeal were made more stringent. But then the right which a party had acquired before the amendment came into operation was saved specifically by clause (*m*)[14] of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976.

15. Mr S.G. Desai, learned counsel appearing for Rani Constructions supported Mr Nariman in his submissions. He also said that the expression "in relation to" appearing in Section 85(2)(*a*) refers to different stages of arbitration proceedings under the old Act and does not cover the proceedings after the award is given. We summarise his submissions as well:

1. Parties can agree to the applicability of the new Act even before the new Act comes into force. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitration proceedings though under an agreement under the old Act commence after the coming into force of the new Act. Reference may be made to *Dinshaw Manekji Petit* v. *G.B. Badkas*[15] for the expression "for the time being in force" and also construction of a similar expression in *Devkumarsinghji Kasturchandji* v. *State of M.P.*[16] In *Dinshaw Manekji Petit case*[15] the question before the High Court was the scope of the expression "in any law for the time being in force" as appearing in clause (*g*) of Section 19(1) of the Defence of India Act, 1939. This clause is as under:

> "(*g*) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

13 (1987) 1 SCC 496 : (1987) 1 SCR 1024

14 "97. (*m*) the provisions of Section 100 of the principal Act, as substituted by Section 37 of this Act, shall not apply to or affect any appeal from an appellate decree or order which had been admitted, before the commencement of the said Section 37, after hearing under Rule 11 of Order XLI, and every such admitted appeal shall be dealt with as if the said Section 37 had not come into force;"

15 AIR 1969 Bom 151 : 70 Bom LR 632

16 AIR 1967 MP 268 : 1967 MPLJ 47 (DB)

The learned Single Judge of the High Court considered the expression "law for the time being in force" and said that the natural import of the words "for the time being" indicate indefinite future state of thing, and in this connection reference was made to *Stroud's Judicial Dictionary* (3rd Edn.), Vol. IV, p. 3030 which is as follows:

> "The phrase 'for the time being' may, according to its context, mean the time present, or denote a single period of time; but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time (*Ellison* v. *Thomas*[17]; *Coles* v. *Pack*[18]). See also *Gunter's Settlement Trusts, Re*[19]."

The High Court said that in their ordinary sense, the words "law for the time being in force" referred not only to the law in force at the time of the passing of the Defence of India Act but also to any law that may be passed subsequently and which is in force at the time when the question of applicability of such law to arbitrations held under the said Section 19 arose.

In *Devkumarsinghji Kasturchandji* v. *State of M.P.*[16] Section 132(1) and Section 135 of the Madhya Pradesh Municipal Corporation Act, 1956 empowered the Municipal Corporation to impose a tax on lands and buildings which the Corporation did under the exercise of that power. The State Legislature enacted a law called the Madhya Pradesh Nagriya Sthavar Sampati Kar Adhiniyam, 1964 which provided for the levy of tax on lands and buildings in the urban areas in the State of Madhya Pradesh. Sub-section (3) of Section 4 of the Madhya Pradesh Corporation Act provided that the tax levied and payable under that Act shall be in addition to any other tax for the time being payable under any other enactment for the time being in force in respect of the land or the building or portion thereof. The Act of 1964 was challenged and one of the grounds of challenge was that the State Legislature having delegated its power to impose tax on lands and buildings in favour of the Municipal Corporation and municipalities under the Municipal Corporation Act, 1956 and the M.P. Municipalities Act, 1961 and the local authorities having imposed a tax on lands and buildings, the State Legislature had no power to levy tax on lands and buildings. The Court said that the expression "any other enactment for the time being in force" did not mean an enactment which was already in force at the time the Corporation imposed a tax under Section 132 of the Municipal Corporation Act but meant any legislation enacted whether before or after the imposition of the tax by the Corporation. The Court said that the general sense of the words "for the time being" is that of time indefinite

17 (1861) 31 LJ Ch 867 *and* (1862) 32 LJ Ch 32 : 7 LT 342
18 (1869) 5 CP 65 : 39 LJCP 63
19 1949 Ch 502 : (1949) 1 All ER 680

and refers to indefinite state of facts which will arise in future and which may vary from time to time.

2. Section 28[20] of the Contract Act does not bar the agreement between the parties if they wish that arbitration proceedings be governed by any enactment relating to arbitration that may be in force at the relevant time.

3. The expression "unless otherwise agreed" used in Section 85(2)(*a*) of the new Act would clearly apply to the case (Civil Appeal No. 61 of 1999). Parties were clear in their mind that the old Act or any other statutory modification or re-enactment of that Act would govern the arbitration. Parties can anticipate that the new enactment may come into operation at the time the disputes arise. It cannot be said that such an agreement is in restraint of legal proceedings. Agreement can be entered into even before or after the new Act comes into force.

4. There is no right in procedure. Right to challenge the award is still there in the new Act though now in the restricted form. It cannot be said that any prejudice has been caused to a party when it has to challenge the award under the new Act. The High Court was wrong that the arbitration clause was hit by Section 28 of the Contract Act and that the agreement for the application of the new Act has to be entered into only after the coming into force of the new Act.

16. At this stage itself we may also note the submissions made by Mr Krishnan Venugopal, counsel appearing for M/s Clareheaven Ltd. (CA No. 4928 of 1997) in support of the decision of the High Court holding that for enforcement of the foreign award the new Act would apply:

1. Section 85(2)(*a*) of the new Act cannot save the operation of the Foreign Awards Act. On a true construction of clause (*a*) it will have no application to the Foreign Awards Act, 1961. There is no accrued right in favour of the appellant in CA No. 4928 of 1997 to challenge the foreign award under the Foreign Awards Act, 1961. Reference in this connection

20 "28. *Agreements in restraint of legal proceedings void.*—Every agreement,—

(*a*) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(*b*) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent.

Exception 1.—Saving of contract to refer to arbitration dispute that may arise.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.—Saving of contract to refer questions that have already arisen.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration."

was made to a decision of this Court in *M.S. Shivananda* v. *Karnataka SRTC*[21]. In that case this Court said as under: (SCC p. 155, paras 12-13)

> "*12.* In considering the effect of an expiration of a temporary Act, it would be unsafe to lay down any inflexible rule. It certainly requires very clear and unmistakable language in a subsequent Act of the legislature to revive or recreate an expired right. If, however, the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. In order to see whether the rights and liabilities under the repealed Ordinance have been put to an end by the Act, 'the line of enquiry would be not whether', in the words of Mukherjea, J. in *State of Punjab* v. *Mohar Singh*[22], 'the new Act expressly keeps alive old rights and liabilities under the repealed Ordinance but whether it manifests an intention to destroy them'. Another line of approach may be to see as to how far the new Act is retrospective in operation.
>
> *13.* It is settled both on principle and authority, that the mere right existing under the repealed Ordinance, to take advantage of the provisions of the repealed Ordinance, is not a right accrued. Sub-section (2) of Section 31 of the Act was not intended to preserve abstract rights conferred by the repealed Ordinance. The legislature had the competence to so restructure the Ordinance as to meet the exigencies of the situation obtaining after the taking over of the contract carriage services. It could re-enact the Ordinance according to its original terms, or amend or alter its provisions."

Provisions of the Foreign Awards Act, 1961 cannot be put into operation as that Act has been repealed. In this eventuality, Section 6 of the General Clauses Act would apply. But then Western Shipbreaking Corporation did not acquire any vested right to enforce the foreign award under the Foreign Awards Act and as such Section 6 of the General Clauses Act by implication is inapplicable.

2. Western Shipbreaking Corporation did not acquire any vested right as by the time the foreign award was made the new Act had come into force for enforcement of the foreign award. Reference was made to two English decisions in *Abbott* v. *Minister for Lands*[7] and *Hamilton Gell* v. *White*[23].

In *Hamilton Gell* v. *White*[23] facts are plainly stated in the headnote, which we quote:

> "In September 1920, the landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit. By the Agricultural Holdings Act, 1914, when the tenancy of a holding is determined by a notice to quit given in view of a sale of the holding

21 (1980) 1 SCC 149 : 1980 SCC (L&S) 131

22 AIR 1955 SC 84 : (1955) 1 SCR 893

23 (1922) 2 KB 422 : 127 LT 728 (CA)

the notice to quit is treated as an unreasonable disturbance within Section 11 of the Agricultural Holdings Act, 1908, and the tenant is entitled to compensation upon the terms and subject to the conditions of that section. One of the conditions of the tenant's right to compensation under that section was that he should within two months after the receipt of the notice to quit give the landlord notice of his intention to claim compensation, and another condition was that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of his intention to claim compensation within the time so limited; but before the tenancy had expired, and therefore before he could satisfy the second condition, Section 11 of the Act of 1908 was repealed. He subsequently made his claim within the three months limited by the section."

The question was if the tenant had acquired any right for him to maintain the claim. For that purpose the Court was considering the provisions of Section 38 of the English Interpretation Act, 1889, which provides:

"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears the repeal shall not ... affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

Bankes, L.J. said:

"In my opinion the tenant had acquired a right under Section 11 of the Act of 1908. This is not like the case which was cited to us (*Abbott* v. *Minister for Lands*[7]) in argument where the tenant's right depended upon some act of his own. Here it depends upon the act of the landlord — namely, the giving of a notice to quit in view of a sale — in which event the section itself confers a right to compensation subject to the tenant complying with the conditions therein specified, and so far as it was possible to comply with them down to the time when the section was repealed he did in fact comply with them. For these reasons I think the question must be answered in the affirmative...."

Scrutton, L.J. said:

"The conditions imposed by Section 11 were conditions, not of the acquisition of the right, but of its enforcement. Section 38 says that repeal of an Act shall not (*c*) 'affect any right ... acquired ... under any enactment so repealed', or (*e*) 'affect any investigation, legal proceeding, or remedy in respect of any such right'. As soon as the tenant had given notice of his intention to claim compensation under Section 11 he was entitled to have that claim investigated by an arbitrator."

Atkin, L.J. said:

> "It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has 'acquired a right', which would 'accrue' when he has quitted his holding, to receive compensation. A case was cited in support of the landlord's contention: *Abbott* v. *Minister for Lands*[7] where the question was whether a man who had purchased certain land was entitled to exercise a right to make additional purchases of adjoining land under the powers conferred by a repealed Act, the repealing Act containing the usual saving clause. The Privy Council held that he was not. They said (*1*) that 'the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a "right accrued" within the meaning of the enactment'. I think that bears out the proposition that I have stated above. The result is that the tenant in this case has acquired a right to claim compensation under the Act of 1908 on his quitting his holding, and therefore the second question asked by the arbitrator should be answered in the affirmative."

3. There can be no accrued right to have a decree or an award enforced under a particular procedure that has been repealed by statute. Reference was made to a decision of this Court in *Lalji Raja & Sons* v. *Hansraj Nathuram*[24] and to the House of Lords' decision in the case of *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners*[25].

In *Lalji Raja & Sons* v. *Hansraj Nathuram*[24] this Court relying on the decision of the House of Lords in *Abbott* v. *Minister for Lands*[7] said (at SCC p. 728, para 16) that

> "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".

Further relying on another decision in *Hamilton Gell* v. *White*[23] the Court said 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

24 (1971) 1 SCC 721

25 (1984) 1 All ER 733 (HL)

upon happening of one or the other of the events specified in statute". (SCC Headnote)

In *Kuwait Minister of Public Works* v. *Sir Frederick Snow & Partners (a firm)*[25] there was a contract between the parties entered into sometime in 1958 relating to the construction of an international airport in Kuwait. Parties to the contract were the Government of the State of Kuwait and an English firm of civil engineering consultants (English firm). Disputes having arisen award was given by a Kuwaiti arbitrator on 15-9-1973. The award required payment by the English firm to the Government of the State of Kuwait of an amount well over 3.5 million. Proceedings to enforce the award were initiated in England on 23-3-1979. In 1975 an Act with the title "An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" came into force. The award was a foreign award or a convention award. The New York Convention came into being on 10-6-1958. The United Kingdom became a party to the Convention on 23-12-1975 and the 1975 Act was passed to give effect to the New York Convention. Kuwait became a party to the Convention on 27-7-1978. On 12-4-1979 an Order in Council was made declaring Kuwait a party to the Convention. Now the award was made before Kuwait had become a party to the Convention but when proceedings were initiated to enforce the award Kuwait had done so. It was contended by the English firm that the foreign arbitral award could only qualify as a convention award for the purpose of the 1975 Act if the State in which it was made was already a party to the Convention at the date of the award. Accordingly it was contended that the award was not a convention award and could not be enforced by the State of Kuwait against the English firm. The plea of the English firm was negatived. It was held that the award was maintainable if the State in which the award was made is a party to the Convention at the date when proceedings to enforce the award began, even if it was not a party at the date when the award was made. The Court considered in all Section 3 of the 1975 Act which provided:

> "An award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention shall, subject to the following provisions of this Act, be enforceable...."

The Court said that the use of the present tense in the word "is" in the phrase "which is a party to the New York Convention" must, as a matter of the ordinary and natural interpretation of the words used, mean that the phrase relates to the time of enforcement and not to any other time. In particular, if it had been the intention of the legislature that the phrase should relate to the date of the award, then the draftsman would surely have used the words which made that intention clear such as "which is and was at the date of the award a party to the New York Convention". The Court repelling the argument of the English firm observed as under:

"The first answer is that the presumption against interpreting a statute as having retrospective effect is based on the assumption that, if retrospective effect were to be given to it, the result would be to deprive persons of accrued rights or defences. In the present case I am not persuaded that to give the 1975 Act retrospective effect in the sense which has been discussed would deprive anybody either of an accrued right or of an accrued defence. On the footing that awards made in a foreign State before that State became a party to the Convention are not convention awards for the purposes of the 1975 Act, and cannot therefore be enforced under it, the result is simply that a person wishing to enforce such an award in the United Kingdom would be obliged to bring an action on it at common law, the right to do this being expressly preserved by Section 6 of the 1975 Act. It cannot therefore be said that, if the construction of the 1975 Act which I prefer is correct, the result is to make an award, which could not previously have been enforced against a person at all, newly enforceable against him under the 1975 Act. On the contrary, the award could always have been enforced against him by one form of procedure, and the only result is that it subsequently becomes enforceable against him by a second and alternative form of procedure."

4. The expression "in relation to" cannot expand the scope of the saving clause in Section 85(2)(*a*) beyond "arbitral proceedings" to the enforcement of an award. Section 85(2)(*a*) of the new Act saves only those provisions of the old Act and the Foreign Awards Act that would apply to arbitral proceedings and not the proceedings to enforce the arbitral award. Reference in this connection may be made to a decision of this Court in *Navin Chemicals Mfg. & Trading Co. Ltd.* v. *Collector of Customs*[26].

In *Navin Chemicals Mfg. & Trading Co. Ltd. case*[26] this Court was considering the expression "the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment" appearing in Section 129-C of the Customs Act, 1962. Section 129-C of the Customs Act, 1962, in relevant part, is as under:

"129-C. *Procedure of Appellate Tribunal.*—(1) The powers and functions of Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the Members thereof.

(2) Subject to the provisions contained in sub-sections (3) and (4) a Bench shall consist of one Judicial Member and one Technical Member.

(3) Every appeal against a decision or order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment shall be heard by a Special Bench constituted by the President for

26 (1993) 4 SCC 320

hearing such appeals and such Bench shall consist of not less than two Members and shall include at least one Judicial Member and one Technical Member."

This Court held that the appeal could have been heard and decided by a member of the Appellate Tribunal, sitting singly. It said that the phrase "relation to" is, ordinarily, of a wide import but, in the context of its use in the said expression in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

17. Mr Dipankar Gupta, Senior Advocate appearing for SAIL (in CA No. 6036 of 1998) made his submissions which we record in brief:

1. There cannot be two segments: (*1*) uptil the award, and (*2*) after the award. While under Section 17 of the old Act an award has to be made into a decree, under Section 36 of the new Act it is already stamped with the decree. The dispute is, thus, between the enforcement of the award and the corrective process. Question is under which law the corrective process should take place? Section 85 of the new Act deals with transitional provisions. When an award is made under the old Act, for its enforcement provisions of the old Act have to be looked into. This is what Section 85(2)(*a*) of the new Act saves.

2. Procedure for the appointment of an arbitrator and holding of arbitration proceedings and the making of award is different in the old Act and in the new Act. Under the old Act, the arbitrator is not required to give reasons unless the agreement between the parties so envisages. Under the new Act, however, the arbitrator has to give reasons. This one illustration is advanced to show that when arbitration proceedings have started before the coming into force of the new Act, then, under the new Act, the award may not be sustainable.

3. When arbitration proceedings are held under the old Act, the arbitrator is conscious of Section 30 of the old Act which gives grounds for setting aside the award. Parties also proceed with that end in view. It is difficult to comprehend a situation where though the award is given under the old Act, its validity has to be decided under the new Act, provisions of which are vastly different than that of the old Act. It is not possible that proceedings be split into two separate segments. This is not warranted by the new Act.

4. The expression "in relation to" is significant. It is of the widest amplitude. If the legislature intended that the new Act would apply to the award given under the old Act made after the coming into force of the new Act, it would not use the expression "in relation to" but would use the word "to". The expression "in relation to" takes into account stages after the award. There is no difference between the expression "arising out" or "in relation to" or "arising out of" which are expansive expressions and also rather interchangeable. The expression "arising out of" has been used in Section 42 of the new Act. As to what these

expressions mean, reference may be made to decisions of the Supreme Court in *Doypack Systems (P) Ltd.* v. *Union of India*[27], *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*[28] and *Dhanrajamal Gobindram* v. *Shamji Kalidas and Co.*[29]

In *Doypack Systems (P) Ltd. case*[27] this Court was considering the expression "in relation to". In the context it will be appropriate to quote paras 48, 49 and 50 of the judgment, which are as under: (SCC pp. 328-29)

> "*48*. In view of the language used in the relevant provisions, it appears to us that Section 3 has two limbs: (*i*) textile undertakings; and (*ii*) right, title and interest of the company in relation to every such textile undertaking. The expression 'textile undertakings' has been defined in Section 2(*k*) to mean the six textile undertakings of the company specified therein. The definition of the said expression in Section 2(*k*) is, however, subject to the opening words of the section which provide, 'In this Act, unless the context otherwise requires'. In the context of the expression 'textile undertakings' employed in Section 3(1) of the Act, Section 4(1) provides that the textile undertakings referred to in Section 3 shall be deemed to include all assets, rights, leaseholds, powers, authorities and privileges and all property, moveable and immovable, including lands, buildings, workshops, stores ... investments and book debts pertaining to the textile undertakings and all rights and interests in or arising out of such property as are, immediately before the appointed day, in the ownership, possession, power or control of the company in relation to all six undertakings. The expression 'pertaining to', 'in relation to' and 'arising out of', used in the deeming provision, are used in the expansive sense, as per decisions of courts, meanings found in standard dictionaries, and the principles of broad and liberal interpretation in consonance with Article 39(*b*) and (*c*) of the Constitution.
>
> *49*. The words 'arising out of' have been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words 'pertaining to' and 'in relation to' have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate', see *Corpus Juris Secundum*, Vol. 17, p. 693.
>
> *50*. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject-matter.

27 (1988) 2 SCC 299
28 (1995) 2 SCC 665
29 AIR 1961 SC 1285 : (1961) 3 SCR 1020

These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, see *State Wakf Board* v. *Abdul Azeez*[30] (AIR at p. 81, paras 8 and 10), following and approving *Netai Charan Bagchi* v. *Suresh Chandra Paul*[31], *Shyam Lal* v. *M. Shayamlal*[32] and 76 *Corpus Juris Secundum* 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject-matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 *Corpus Juris Secundum* at pp. 620 and 621 where it is stated that the term 'relate' is also defined as meaning to bring into association or connection with. It has been clearly mentioned that 'relating to' has been held to be equivalent to or synonymous with as to 'concerning with' and 'pertaining to'. The expression 'pertaining to' is an expression of expansion and not of contraction."

In *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*[28] this Court was considering Section 41(1) of the Presidency Small Cause Courts Act, 1882 and the scope of the expression "relating to the recovery of possession of any immovable property" appearing in that section. Section 41(1) is as under:

"41. (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject-matter of such suits or proceedings."

It also referred to its earlier decision in *Doypack Systems (P) Ltd.* v. *Union of India*[27]. This Court held: (SCC p. 672, para 16)

"*16*. It is, therefore, obvious that the phrase 'relating to recovery of possession' as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee plaintiff would squarely be covered by the wide sweep of the said phrase."

From *Dhanrajamal Gobindram case*[29] we quote the following passage:

30 AIR 1968 Mad 79 : (1967) 1 MLJ 190
31 (1962) 66 CWN 767 : 1962 Cal LJ 183
32 AIR 1933 All 649 : ILR 55 All 775 (FB)

"We may dispose of here a supplementary argument that the dispute till now is about the legal existence of the agreement including the arbitration clause, and that this is not a dispute arising out of, or in relation to a cotton transaction. Reference was made to certain observations in *Heyman* v. *Darwins Ltd.*[33] In our opinion, the words of the bye-law 'arising out of or in relation to contracts' are sufficiently wide to comprehend matters, which can legitimately arise under Section 20. The argument is that, when a party questions the very existence of a contract, no dispute can be said to arise out of it. We think that this is not correct, and even if it were, the further words 'in relation to' are sufficiently wide to comprehend even such a case. In our opinion, this argument must also fail."

5. Distinction sought of the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act is not correct. 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". Earlier under Section 48, the word used was "to" but now under Section 85(2)(*a*), it is the expression "in relation to". There would certainly serious anomalies arise if the expression "in relation to" is given a restricted meaning.

6. It is not necessary that for the right to accrue, legal proceedings must be pending when the new Act comes into force. As to what the accrued right is, reference was made to two decisions of this Court in *CIT* v. *Shah Sadiq and Sons*[34] and *Bansidhar* v. *State of Rajasthan*[35].

In *CIT* v. *Shah Sadiq and Sons*[34] this Court was considering Section 6 of the General Clauses Act, 1897 with reference to the Income Tax Act, 1922 repealed by Section 297 of the Income Tax Act, 1961. This is how this Court dealt with the question raised before it: (SCC pp. 524-25, paras 14-15)

"*14.* Under the Income Tax Act of 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against profits made from that business in future years. The right of carrying forward and set off accrued to the assessee under the Act of 1922. A right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897.

15. In this case the 'savings' provision in the repealing statute is not exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other

33 1942 AC 356 : (1942) 1 All ER 337 (HL)
34 (1987) 3 SCC 516 : 1987 SCC (Tax) 270
35 (1989) 2 SCC 557

words, whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(*c*) of the General Clauses Act, 1897. The right to carry forward losses which had accrued under the repealed Income Tax Act of 1922 is not saved expressly by Section 297 of the Income Tax Act, 1961. But, it is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922. Section 6(*c*) saves accrued rights unless they are taken away by the repealing statute. We do not find any such taking away of the rights by Section 297 either expressly or by implication."

In *Bansidhar* v. *State of Rajasthan*[35] this Court referred to the observations made in *CIT* v. *Shah Sadiq and Sons*[34] and said a saving provision in a repealing statute is not necessarily exhaustive of the rights and obligations so saved or the rights that survive the repeal. The Court said that for the purpose of clauses (*c*) and (*e*) of Section 6 of the Rajasthan General Clauses Act, 1955 which provided, respectively, that the repeal of an enactment shall not, unless a different intention appears, "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed" or

> "affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid",

the "right" must be "accrued" and not merely an inchoate one. Distinction between what is and what is not a right preserved by Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal is a right "acquired" or "accrued" under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right. This Court relied on its earlier decision in *Lalji Raja & Sons* v. *Hansraj Nathuram*[24]. It also referred to observations of Lord Morris in *Director of Public Works* v. *Ho Po Sang*[36] which had been quoted with approval in an earlier decision of this Court in *M.S. Shivananda* v. *K.S.R.T.C.*[21] as under:

> "It may be, therefore, that under some repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. On a

36 (1961) 2 All ER 721 : (1961) 3 WLR 39 : 1961 AC 901

repeal, the former is preserved by the Interpretation Act. The latter is not."

18. Mr R.P. Bhatt, Senior Advocate appearing for Western Shipbreaking Corporation (CA No. 4928 of 1997) submitted that it would be the Foreign Awards Act that would apply and not the new Act. Mr Bhatt supported Mr Dipankar Gupta in his submissions. All the three Acts are saved by Section 85(2)(*a*). Arbitral proceedings include enforcement of award otherwise these Acts would become redundant. He said that the arbitration proceedings were governed by the laws in the U.K. under the (U.K.) Arbitration Act, 1950. Proceedings began on 15-5-1995. Award was given in England on 25-2-1996 after the new Act had come into force on 25-1-1996. As to when arbitration proceedings commence has been given in Section 21 of the new Act. Under Section 32 of the new Act, arbitral proceedings terminate by the final award. Since the proceedings had already commenced in England, Section 21 of the new Act has no application. Therefore, one has to look into the Foreign Awards Act, 1961. Mr Bhatt said that pronouncement of an Arbitration Award after the cut-off date is not a condition precedent for applicability of the saving clause under Section 85(2)(*a*). It does not use the words "arbitral award passed before" in place of "arbitral proceedings which commenced before". Thus what is saved is applicability of all the provisions of the old Acts where the arbitral proceedings have commenced before the cut-off date and it is further clarified in the second portion of the saving clause viz., Section 85(2)(*a*) of the new Act that the new Act will apply where the arbitral proceedings have commenced after the cut-off date.

19. Mr A.K. Ganguli, Senior Advocate appeared for the Himachal Pradesh State Electricity Board (CA No. 61 of 1999). He supported the impugned judgment of the High Court. He drew a distinction between the various provisions of the old Act and the new Act and said that the enforcement of the award under the new Act would not be compatible with the arbitration proceedings held under the old Act resulting in the award. Any restricted interpretation to the expression "arbitral proceedings" appearing in Section 85(2)(*a*) would lead to several anomalies. One such instance was that under the old Act the arbitrator would not be required to give reasons unless the arbitration agreement so provided. He said that when the saving clause makes the provision of the old Act applicable to arbitral proceedings commencing before 25-1-1996 without there being any further condition, the legislative intent was clear that the old Act would apply to the enforcement of the award under that Act. He said such interpretation, apart from being in conformity with the legislative intent, would also be in consonance with justice, equity and fair play. The expression "arbitral proceedings" in Section 85(2)(*a*) could not be given a restricted meaning of being confined merely to the conduct of the proceedings by the arbitrator and excluding the enforcement of the award from the purview of the old Act. Mr Ganguli said that it was not disputed that provisions of the new Act were vastly different than that of the old Act. He said that use of the expression "provisions" in Section 85(2)(*a*) would include all provisions of the old Act,

insofar as they have a nexus with the arbitral award. Enforcement of the award is an integral part of the process "in relation to arbitral proceedings". Reference was also made to the meaning of the expression "in relation to" and to various decisions of this Court in that connection. Provisions of Section 6 of the General Clauses Act were also invoked to contend that provisions of the old Act were saved which included provisions for enforcement of the award under the old Act. Lastly, Mr Ganguli submitted that the agreement contemplated in the latter part of Section 85(2)(*a*) would be entered into only after the enforcement of the new Act and that is 25-1-1996. Any agreement if entered into before this date would be void and would be hit by Section 28 of the Contract Act and as rightly held so by the High Court. Accordingly, Mr Ganguli said that the clause in the arbitration agreement where the parties agreed that provisions of the old Act or any statutory modification or re-enactment thereof "for the time being in force" would have no meaning insofar as applicability of the new Act to the enforcement of the award is concerned. Parties could not agree to a provision in advance without knowing what that provision would be.

20. Reference may yet be made to two more decisions of this Court on the question of effect of repeal of an enactment and as to what is right accrued. In *Gajraj Singh* v. *STAT*[37] this Court was examining the provisions of Sections 217(1), (2)(*a*), (*b*) and (4) of the Motor Vehicles Act, 1988, which contained repeal and saving provisions of the Motor Vehicles Act, 1939. The Court examined various judgments of this Court and treatises on the rules of interpretation and said: (SCC p. 664, para 22)

> "22. Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances."

On the question on the right acquired or accrued the Court observed: (SCC p. 672, para 42)

> "*42*. There is a distinction between right acquired or accrued, and privilege, hope and expectation to get a right, as rightly pointed out by the High Court in the impugned judgment. A right to apply for renewal and to get a favourable order would not be deemed to be a right accrued unless some positive acts are done, before repeal of Act 4 of 1939 or corresponding law to secure that right of renewal. In *Gujarat Electricity*

37 (1997) 1 SCC 650

Board v. *Shantilal R. Desai*[38] this Court had pointed out that before Section 71 of the Electricity (Supply) Act, 1948 was amended, the appellant had issued a notice under Section 7 thereof, exercising the option to purchase the undertaking. It was held that a right to purchase the electrical undertaking which had accrued to the Electricity Board was saved by Section 6 of the GC Act."

21. In *G. Ekambarappa* v. *Excess Profits Tax Officer*[39] District Bellary, which belonged to Part 'A' State of Madras in British India, was merged in Part 'B' State of Mysore on 1-10-1953. The Excess Profits Act, 1940 applied only to British India. It ceased to apply to Bellary after it became part of the State of Mysore. Then, after the States Reorganisation Act, 1956, Mysore also became Part 'A' State. However, by the Adaptation of Laws (No. 3) Order dated 31-12-1956, the Excess Profits Tax Act was to extend "to the whole of India except the territories which immediately before 1-11-1956 were comprised in Part 'B' States". The result of adaptation was that all the provisions of the Excess Profits Tax Act, 1940 stood repealed so far as the District of Bellary was concerned w.e.f. 21-12-1956. Excess Profits Tax Officer issued a notice under Section 15 of the Excess Profits Tax Act to the appellants in 1960 in respect of the period from 30-10-1943 to 30-10-1944. It was contended by them that it was not a case of repeal of that Act and so the provisions of Section 6 of the General Clauses Act could not be invoked to sustain the validity of the notices. It was argued that so far as the Excess Profits Tax Act was concerned, the Adaptation Laws Order, 1956 did not repeal that Act as such and the effect of the modification was that the provisions of the Act were no longer applicable to Bellary District which comprised in the territory of Part 'B' State of Mysore immediately before 1-11-1956. This Court said that there was no justification for the argument put forward on behalf of the appellants. The Court proceeded to repeal this argument as under:

> "The result of the Adaptation of Laws Order, 1956 so far as the Act was concerned, was that the provisions of that Act were no longer applicable or in force in Bellary District. To put it differently, the Act was repealed so far as the area of Bellary District was concerned. Repeal of an Act means revocation or abrogation of the Act and, in our opinion, Section 6 of the General Clauses Act applies even in the case of a partial repeal or repeal of part of an Act. Section 6 of the General Clauses Act states:
>
> > '*Effect of repeal.*—Where this Act or any Central Act or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—
> >
> > * * *

38 AIR 1969 SC 239 : (1969) 1 SCR 580

39 AIR 1967 SC 1541 : (1967) 3 SCR 864

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

* * *'

Section 3(19) of the General Clauses Act defines an 'enactment' as including 'a regulation and also as including any provision contained in any Act or in any such regulation as aforesaid.

The argument was also stressed on behalf of the appellants that even if Section 6(*c*) of the General Clauses Act was applicable there was no 'liability incurred or accrued' as there was no assessment of escaped profits before 1-11-1956 when the adaptation was made. We do not think there is any substance in this argument. The liability of the appellants to tax arose immediately at the end of the chargeable accounting period and not merely at the time when it is quantified by assessment proceedings. It follows, therefore, that the notice issued under Section 15 of the Act was legally valid and the appellants representing the original partners of the firm continued to be liable to be proceeded against under that section for the profits which had escaped taxation."

The conclusions

22. For the reasons to follow, we hold:

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17[40] thereof and also appeal arising thereunder.

3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

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

5. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force.

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

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

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.*[27], *Mansukhlal Dhanraj Jain*[28], *Dhanrajamal Gobindram*[29] and *Navin Chemicals Mfg.*[26] 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.

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

Act. Reference in this connection be made to a decision of this Court in *M.M.T.C. Ltd.* v. *Sterlite Industries (India) Ltd.*[41] where this Court held that validity of an arbitration agreement did not depend on the number of arbitrators specified in Section 7 of the new Act and that the number of arbitrators is dealt with separately under Section 10 of that Act which is a part of the machinery provision for working of the arbitration agreement. In this case the question which came up for decision was the effect of the new Act on the arbitration agreement made prior to the commencement of the new Act which provided for appointment of one arbitrator by each of the parties who shall appoint an umpire before proceeding with the reference. The agreement was entered into on 14-12-1993 before the coming into force of the new Act. Section 10 of the new Act provides that parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Further, failing the determination of an odd number of arbitrators, the Arbitral Tribunal shall consist of a sole arbitrator. This Court upheld the validity of the arbitration agreement dated 14-12-1993 and directed the Chief Justice of the High Court concerned to appoint the third arbitrator under Section 11(4)(*b*) of the new Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator. In this case it may be noticed that the respondent had invoked arbitration clause in the agreement by letter dated 19-1-1996 which was received by the appellant on 31-1-1996. The arbitral proceedings would, therefore, commence under Section 21 of the new Act on 31-1-1996 as by that time the new Act had come into force.

25. In this view of the matter, Section 6 of the General Clauses Act would be inapplicable. It is, therefore, not necessary for us to examine if any right to enforce the award under the old Act accrued to a party when arbitral proceedings had commenced before the coming into force of the new Act and SAIL (CA No. 6036 of 1998) had acquired a right to challenge the award made under the old Act and there would be a corresponding right with Thyssen to enforce the award under the old Act.

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*[41]. Provisions of both the Acts, old and new, are very different and it has been so observed in *Sundaram Finance Ltd. case*[5]. 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*[25] the award was given before Kuwait became a party to the New York Convention recognised by an Order in Council in England. The

41 (1996) 6 SCC 716

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.

27. In *Pepper* v. *Hart*[42] the House of Lords for the first time accepted the principle that Judges could refer to the parliamentary debates in order to ascertain the meaning of an Act of Parliament. Lord Griffiths said (at p. 50):

> "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

But then if the construction of the new Act leads to inconvenient and unjust results, the concept of a purposive approach has to be shed. Multiple and complex problems would arise if the award given under the old Act is said to be enforced under the new Act. Both the Acts are vastly different to each other. It has been rightly contended that when arbitration proceedings are held under the old Act, the parties and the arbitrator keep in view the provisions of that Act for the enforcement of the award. As noted above, under the old Act, there is no requirement for the arbitrator to give reasons for the award. That is not mandatory under the new Act. Section 27 of the old Act provides that the arbitrator or umpire may, if they think fit, make an interim award, unless of course a different intention appears from the arbitration agreement. An interim award is also an award and can be enforced in the same way as the final award. It would certainly be a paradoxical situation if for the interim award, though given after the coming into force of the new Act, it would still be the old Act which would apply and for the final award, it would be the new Act. Yet another instance would be when under Section 13 of the old Act, the arbitrators or umpire have power to state a special case for the opinion of the court on any question of law involved in the proceedings. Under sub-section (3) of Section 14 of the old Act when the court pronounces its opinion thereon such opinion shall be added to and shall form part of the award. From this part of the award no appeal is maintainable under Section 39 of the old Act. There is no such provision under the new Act. In *Sohan Lal* v. *Amin Chand and Sons*[43] this Court was considering the powers of an arbitrator under Section 13 of the old Act. Clause (*b*) of Section 13 provided that arbitrators or umpire shall have power to state a special case for the opinion of the court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court. Section 14 of the old Act provides for the award to be signed and filed. Under sub-section (3) of Section 14 where the arbitrators or

42 (1993) 1 All ER 42 : 1993 AC 593 : (1992) 3 WLR 1032 (HL)

43 (1973) 2 SCC 608 : (1974) 1 SCR 453

umpire state a special case under clause (*b*) of Section 13, the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award. This Court said: (SCC p. 615, para 21)

> "We do not think that an opinion given under the first part of Section 13(*b*) should be added to and form part of the award. The reason why the opinion given under the latter part of Section 13(*b*) should be added to and becomes part of the award is because the arbitrators have stated the award wholly or in part in the form of a special case of such question for the opinion of the court. This view is further strengthened by the circumstance that under Section 39(1)(*ii*), an appeal is provided only against an order on an award stated in the form of a special case. The reason why an appeal is provided for in such a case is that the opinion of the court has to be added to and form part of the award and it therefore becomes a decision of the court, notwithstanding the fact that it is incorporated in the award. There is no provision for an appeal against an opinion given by the court on a special case stated by court under the first part of Section 13(*b*) or against the decision to state a special case for the opinion of the court for the reason that the opinion is not a decision. Nor is it to be incorporated in the award. If, as a matter of fact, the opinion given by the court on a special case stated under first part of Section 13(*b*) is binding on the arbitrators and has to be incorporated in the award, there was no reason why the legislature should not have provided for an appeal against the opinion or against the reference which led to the opinion. The scheme of the Act shows that the legislature wanted to provide for an appeal only when there is to be a decision by the court binding on the parties, not when it tenders an opinion which is not binding on the arbitrators and which is not to be incorporated in the award. It might be that the arbitrator may choose to act upon the opinion. But that is not for the reason that it is a binding determination or a decision. We have, therefore, no hesitation in holding that the appeals are incompetent."

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

29. Enforcement of the award, therefore, has to be examined on the touchstone of the proceedings held under the old Act.

30. Various decisions have been cited before us to show as to what is a mere right and what is right accrued or acquired. We have to examine this question with reference to the provisions of Section 6 of the General Clauses Act if it could be said that when the arbitral proceedings have commenced under the old Act, a party has acquired a right to have the award given thereafter enforced under the old Act. The question that arises for consideration is if a right has accrued to the party or it is merely an inchoate right. The three cases referred to, namely, *Abbott* v. *Minister for Lands*[7], *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*[8] and *D.C. Bhatia* v. *Union of India*[9] show that something more is required for vested right to accrue. Right did exist but then nothing was done to show that any act was done or advantage taken of the enactment under which the right existed till it was repealed. An Act gave the right and the new Act which repealed the old Act took away that right. Mere right to take advantage of the provision of an Act is not a right accrued.

31. In *CIT* v. *Shah Sadiq & Sons*[34] this Court said that right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. In the case of *Bansidhar* v. *State of Rajasthan*[35] this Court had said that what is unaffected by the repeal is a right "acquired" or "accrued" under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right. In the case of *Lalji Raja Sons* v. *Hansraj Nathuram*[24] this Court had said that: (SCC Headnote)

> "[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'."

We think the observations of Lord Morris in *Director of Public Works* v. *Ho Po Sang*[36] are quite apt which have been quoted elsewhere in the judgment. In *M.S. Shivananda* v. *K.S.R.T.C.*[21] this Court again said that if the right created by the statute is of an enduring character and has vested in the person, the right cannot be taken away because the statute by which it was created has expired. In *Hamilton Gell* v. *White*[23] the Court of Appeal referred to the decision of the House of Lords in *Abbott* v. *Minister for Lands*[7]. In the case before it, the Court said that under the old Act (the Agricultural Holdings Act, 1908) which was repealed by the Agricultural Holdings Act, 1914 a necessary event had happened under which the tenant "acquired a right" which would accrue when he was quitting his holding to receive compensation from the landlord. The event which occurred was the notice by the landlord to quit to the tenant in view of a sale of the holding. While Section 11 of the 1908 Act treated this as unreasonable disturbance to the tenant entitling him to compensation, the latter Act of 1914 repealed Section

11. The Court held that in spite of the repeal of Section 11 the tenant had acquired the right to claim compensation inasmuch as notice to quit was given to him when Section 11 of the old Act was in operation. In *Gajraj Singh* v. *STAT*[37] this Court said that some positive act is required to be done for the right to accrue under an enactment which is repealed. In this case reference was made to a decision of this Court in *Gujarat Electricity Board* v. *Shantilal R. Desai*[38] where the Court had pointed out that before Section 71 of the Electricity (Supply) Act, 1948 was amended, the appellant had issued a notice under Section 7 thereof, exercising the option to purchase the undertaking. It was held that a right to purchase the electrical undertaking, which had accrued to the Electricity Board, was saved by Section 6 of the General Clauses Act. In the case of *G. Ekambarappa* v. *Excess Profits Tax Officer*[39] there was repeal of an enactment levying tax. No assessment had been made by the time the Act was repealed and there could, therefore, be no liability. Nevertheless, this Court said that liability to tax arose immediately at the end of the accounting period when the Act was in force though the liability had not been quantified by assessment proceedings. The Court upheld the validity of the notice for assessment of proceedings after the repeal of the Act.

32. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036 of 1998 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the court. It was only later on that it changed the stand and now took the position that the new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. The appellant itself led the respondent SAIL in believing that the old Act would apply. SAIL had filed objections to the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by Thyssen under Sections 14 and 17 of the old Act. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. We, therefore, cannot adopt a construction

which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on Section 85(2)(*a*) would only lead to confusion and hardship. This construction put by us is consistent with the wording of Section 85(2)(*a*) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well.

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*).

34. In *Hoosein Kasam Dada (India) Ltd.* v. *State of M.P.*[44] this Court said that pre-existing right of appeal is not destroyed by the amendment if the amendment is not retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. In this case, the law had changed and the appellate authority could exercise jurisdiction only if the appeal was accompanied by deposit of the assessed tax when before the amendment of the provision it only provided for deposit of the admitted tax. The Court said that any requirement for deposit of the assessed tax overlooks the fact of existence of the old law for the purpose of supporting the pre-existing right where appeal could be filed only on depositing the admitted amount of tax. The law interpreted by this Court in this judgment, it seems, is to what Civil Procedure Code (Amendment) Act provided by clause (*m*) of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976.

35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(*a*) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of *Rani Constructions* (Civil Appeal No. 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at

44 AIR 1953 SC 221 : 1953 SCR 987

the relevant time when arbitration proceedings are held. We have been referred to two decisions — one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. The expression "unless otherwise agreed" as appearing in Section 85(2)(*a*) of the new Act would clearly apply in the case of *Rani Constructions* in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Constructions that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after the coming into force of the new Act.

36. Mr Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by a Single Judge in *Reshma Constructions* v. *State of Goa*[45]. In that case the arbitration clause in the contract provided as under:

> "Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may be brought about in such law. This is how the High Court considered the issue before it:

> "Considering the scheme of the Act, harmonious reading of the said provision contained in sub-section (2) of Section 85 thereof would disclose that the reference 'otherwise agreed' necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that

45 (1999) 1 Mah LJ 462

the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Section 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be followed — other in terms of the new Act or the old Act — is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference 'otherwise agreed by the parties' in Section 85(2)(*c*) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression 'otherwise agreed' does not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act."

We agree with the High Court on the interpretation put to the arbitration clause in the contract.

38. Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that. Thus construing clause 25, in *Rani Constructions* (CA No. 61 of 1999) the new Act will apply.

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

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

41. Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section 85(2)(*a*) insofar these apply to the Foreign Awards Act and the 1937 Act, would appear to be quite superfluous. A literal interpretation would render Section 85(2)(*a*) unworkable. Section 85(2)(*a*) provides for a dividing line dependent on "commencement of arbitral proceedings" which expression would necessarily refer to Section 21[46] of the new Act. This Court

46 "21. *Commencement of arbitral proceedings.*—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

has relied on this section as to when arbitral proceedings commence in the case of *Shetty's Constructions Co. (P) Ltd.* v. *Konkan Rly. Construction*[47]. Section 2(2)[48] read with Section 2(7)[49] and Section 21 falling in Part I of the new Act make it clear that these provisions would apply when the place of arbitration is in India, i.e., only in domestic proceedings. There is no corresponding provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as "date of commencement" in those foreign proceedings. We would, therefore, hold that on a proper construction of Section 85(2)(*a*) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and the foreign award would be enforced under the Foreign Awards Act. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act.

42. We, therefore, hold that the award given on 24-9-1997 in the case of *Thyssen Stahlunion GMBH* v. *Steel Authority of India Ltd.* (Civil Appeal No. 6036 of 1998) when the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996, would be enforced under the provisions of the Arbitration Act, 1940. We also hold that clause 25 containing the arbitration agreement in the case of *Rani Constructions (P) Ltd.* v. *H.P. SEB* (Civil Appeal No. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the Arbitration and Conciliation Act, 1996. We further hold that the foreign award given in the case of *Western Shipbreaking Corpn.* v. *Clareheaven Ltd.* (Civil Appeal No. 4928 of 1997) would be governed by the provisions of the Arbitration and Conciliation Act, 1996. Thus we affirm the decisions of the Delhi High Court in Execution Petition No. 47 of 1998 and of the Gujarat High Court in Civil Revision Application No. 99 of 1997, and set aside that of the Himachal Pradesh High Court in Civil Suit No. 52 of 1996.

43. Accordingly Civil Appeals Nos. 6036 of 1998 and 4928 of 1997 are dismissed, while Civil Appeal No. 61 of 1999 is allowed. Parties shall bear their own costs.

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47 (1998) 5 SCC 599

48 "2. (2) This Part shall apply where the place of arbitration is in India."

49 "2. (7) An arbitral award made under this Part shall be considered as a domestic award."

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(BEFORE D.P. WADHWA AND M.B. SHAH, JJ.)

THYSSEN STAHLUNION GMBH .. Appellant;

Versus

STEEL AUTHORITY OF INDIA LTD. .. Respondent.

Civil Appeals No. 6036 of 1998† with No. 4928 of 1997
and No. 61 of 1999, decided on October 7, 1999

A. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Applicability of Arbitration Act, 1940 notwithstanding its repeal — Where arbitration proceedings commenced before coming into force of 1996 Act but award rendered after commencement thereof, held, award would be enforced under provisions of the 1940 Act — General Clauses Act, 1897, S. 6 — If applicable**

B. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Once arbitral proceedings commenced under the 1940 Act, right to enforcement of the award would be a "right accrued" — For such right to accrue any legal proceedings for enforcement need not be pending under the 1940 Act at the time when the 1996 Act came into force — Statute Law — Repeal and saving provision — General Clauses Act, 1897, S. 6 — Applicability of**

C. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Expression "in relation to arbitral proceedings which commenced on or after this Act came into force" — Import of — Comprehends not only proceedings for arbitration but also proceedings for enforcement of award rendered in the arbitration pending at the time of commencement of the new Act — If a narrow meaning is given to the expression, it would create confusion and inconvenience — S. 48 of Arbitration Act, 1940 not relevant to interpret S. 85(2)(a) of new Act**

D. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Parties can agree to applicability of the 1996 Act even before the 1996 Act came into force and when the 1940 Act was still in force — That would not be in restraint of legal proceedings under Contract Act, 1872, S. 28 Exception I — So parties could agree that the law "for the time being in force", which means law as existing at the relevant time when arbitration proceedings, held, would apply — Arbitration proceedings include enforcement of the award also — Words and Phrases**

E. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Applicability of Arbitration Act, 1940 — Parties cannot agree to be governed by the old Act once the 1996 Act came into force and the proceedings had not commenced, though the arbitration agreement was under the old Act**

F. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Foreign award given after coming into force of the 1996 Act can be enforced only under Part II of the new 1996 Act, there being no vested right to have the same enforced under Foreign Awards (Recognition and Enforcement) Act, 1961 — This is irrespective of the fact when the arbitral proceedings commenced in the foreign jurisdiction — Besides S. 6 of General Clauses Act, 1897 not applicable**

† From the Judgment and Order dated 21-9-1998 of the Delhi High Court in EP No. 47 of 1998

G. **Arbitration and Conciliation Act, 1996 — S. 85(2)(a) — Object and interpretation of — Ingredients analysed**

H. **Statute Law — Repealing and saving provision — Saving of the rights accrued under the Act — When arbitral proceedings commenced under the old (repealed) Act, right to have the award rendered in the said proceedings enforced under that Act is an accrued right — General Clauses Act, S. 6**

I. **Interpretation of Statutes — Subsidiary rules — Remedial statute — Strict construction of, if leads to inconvenient result construction which does not lead to such result would be preferable**

J. **Statute Law — Repeal and saving provision — Saving provision under the new Act preserving the existing right accrued under the old Act — Presumption that legislature does not intend to limit or take away vested rights unless language clearly indicates to the contrary**

In the case of *Thyssen Stahlunion GMBH* (CA No. 6036 of 1998) the contract for sale and purchase of prime cold rolled mild steel sheets in coils contained an arbitration agreement. Disputes and differences having arisen, the arbitration proceedings commenced on 14-9-1995 under the Arbitration Act, 1940. On this date request for arbitration was made to ICC under the arbitration clause in the contract. Award was given on 24-9-1997. By this time on 25-1-1996 the Arbitration and Conciliation Act, 1996 had come into force. On 13-10-1997 Thyssen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of the court. While these proceedings were pending in the High Court, Thyssen, on 12-2-1998, filed an application under Section 151 CPC for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act. The ground taken was that the arbitration proceedings had been terminated with the making of the award on 24-9-1997 and, therefore, the new Act was applicable for enforcement of the award. The respondent Steel Authority of India Ltd. (SAIL) opposed the maintainability of the execution petition. SAIL also filed objections to the award on various grounds under the old Act. The question which arose for consideration is:

> Whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply?

A Single Judge of the High Court held that proceedings would be governed by the old Act. Thyssen Stahlunion GMBH feeling aggrieved filed this appeal (CA No. 6036 of 1998) before the Supreme Court.

In the case of *Western Shipbreaking Corpn.* (CA No. 4928 of 1997) under memorandum of agreement dated 4-11-1994 M/s Clareheaven Ltd. agreed to sell to Western Shipbreaking Corporation a ship *M.V. Kaldera*. Clause (19) of the memorandum of agreement contained arbitration clause. Arbitration proceedings in this case were held in the United Kingdom prior to the enforcement of the new Act. The award was made on 25-2-1996 in London. The question which arose for consideration was: Whether the award was governed by the provisions of the new Act for its enforcement or by the Foreign Awards Act? A Single Judge of the High Court held that the new Act would be applicable. Western Shipbreaking Corporation filed appeal against that judgment before the Supreme Court (CA No. 4928 of 1997).

In the case of *Rani Constructions (P) Ltd.* (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal

Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, was as under:

> "Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

Disputes having arisen, these were referred to the sole arbitrator on 4-12-1993. The arbitrator gave his award on 23-2-1996 after the new Act had come into force. On account of difference of opinion in two judgments of the Himachal Pradesh High Court, both rendered by Single Judges, as to whether the old or the new Act will apply, a learned Single Judge of the High Court referred the question that when clause (*a*) of Section 85(2) of the new Act uses the expression "unless otherwise agreed by the parties" can the parties agree for the applicability of the new Act before the new Act came into force or have they necessarily to agree only after the new Act came into force? The Division Bench of the High Court by the impugned judgment dated 16-7-1998 held that clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996". (Paras 9 to 12)

Dismissing CAs Nos. 6036 of 1998 and 4928 of 1997 while allowing CA No. 61 of 1999, the Supreme Court

Held:

The award given on 24-9-1997 in the case of *Thyssen Stahlunion GMBH* v. *Steel Authority of India Ltd.* (Civil Appeal No. 6036 of 1998) when the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996, would be enforceable under the provisions of the Arbitration Act, 1940. Clause 25 containing the arbitration agreement in the case of *Rani Constructions (P) Ltd.* v. *H.P. SEB* (Civil Appeal No. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the Arbitration and Conciliation Act, 1996. The foreign award given in the case of *Western Shipbreaking Corpn.* v. *Clareheaven Ltd.* (Civil Appeal No. 4928 of 1997) would be governed by the provisions of the Arbitration and Conciliation Act, 1996. Thus the decisions of the Delhi High Court in Execution Petition No. 47 of 1998 and of the Gujarat High Court in Civil Revision Application No. 99 of 1997 are affirmed and the decision of the Himachal Pradesh High Court in Civil Suit No. 52 of 1996 is set aside. (Para 42)

The provisions of the old Arbitration Act, 1940 shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Arbitration and Conciliation Act, 1996. So the enforcement of the award has to be examined on the touchstone of the proceedings held under the old Act. (Para 29)

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.
(Para 23)

a The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder. The contention that if it is accepted that the expression "in relation to arbitral proceedings" would b include proceedings for the enforcement of the award as well, the second limb of Section 85(2)(*a*) would become superfluous and cannot be accepted.
(Paras 22 and 24)

M.M.T.C. Ltd. v. *Sterlite Industries (India) Ltd.*, (1996) 6 SCC 716; *Navin Chemicals Mfg. & Trading Co. Ltd.* v. *Collector of Customs*, (1993) 4 SCC 320; *Doypack Systems (P) Ltd.* v. *Union of India*, (1988) 2 SCC 299; *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*, (1995) 2 SCC 665, *relied on*

c In this view of the matter, Section 6 of the General Clauses Act would be inapplicable. It is, therefore, not necessary to examine if any right to enforce the award under the old Act accrued to a party when arbitral proceedings had commenced before the coming into force of the new Act and SAIL (CA No. 6036 of 1998) had acquired a right to challenge the award made under the old Act and there would be a corresponding right with Thyssen to enforce the award d under the old Act. (Para 25)

Section 85(2)(*a*) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act up till the time of the enforcement of the award. Thus Section 85(2)(*a*) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. Once the arbitral proceedings have commenced, it cannot be stated that e the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force. (Paras 28 and 22)

Sumitomo Heavy Industries Ltd. v. *ONGC Ltd.*, (1998) 1 SCC 305; *Abbott* v. *Minister for* f *Lands*, 1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC); *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*, (1972) 3 SCC 684 : (1972) 3 SCR 690; *CIT* v. *Shah Sadiq and Sons*, (1987) 3 SCC 516 : 1987 SCC (Tax) 270; *Bansidhar* v. *State of Rajasthan*, (1989) 2 SCC 557; *Lalji Raja & Sons* v. *Hansraj Nathuram*, (1971) 1 SCC 721; *M.S. Shivananda* v. *Karnataka SRTC*, (1980) 1 SCC 149 : 1980 SCC (L&S) 131; *Hamilton Gell* v. *White*, (1922) 2 KB 422 : 127 LT 728 (CA); *Gajraj Singh* v. *STAT*, (1997) 1 SCC 650; *Gujarat Electricity Board* v. *Shantilal R. Desai*, AIR 1969 SC 239 : (1969) 1 SCR 580; *Sohan Lal* v. *Amin Chand and Sons*, (1973) 2 SCC 608 : (1974) 1 SCR 453, *relied* g *on*

Director of Public Works v. *Ho Po Sang*, (1961) 2 All ER 721 : (1961) 3 WLR 39 : 1961 AC 901, *relied on*

Oil and Natural Gas Commission v. *Western Co. of North America*, (1987) 1 SCC 496 : (1987) 1 SCR 1024, *cited*

If a narrow meaning of the phrase "in relation to arbitral proceedings" is to h be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Acts.

Challenge of award can be with reference to the conduct of arbitral proceedings. (Paras 22 and 27)

Sohan Lal v. *Amin Chand and Sons*, (1973) 2 SCC 608 : (1974) 1 SCR 453, *relied on*

Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036 of 1998 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the court. It was only later on that it changed the stand and now took the position that the new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. The appellant itself led the respondent SAIL in believing that the old Act would apply. SAIL had filed objections to the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by Thyssen under Sections 14 and 17 of the old Act. Numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. Therefore, a construction cannot be adopted which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. It would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction of Section 85(2)(*a*) would only lead to confusion and hardship. This construction is consistent with the wording of Section 85(2)(*a*) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well. (Para 32)

There is a presumption that the legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. It is correct that the new Act is a remedial statute and, therefore, Section 85(2)(*a*) calls for a strict construction, it being a repealing provision. But then where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter. (Paras 28, 26 and 27)

M.M.T.C. Ltd. v. *Sterlite Industries (India) Ltd.*, (1996) 6 SCC 716; *Pepper* v. *Hart*, (1993) 1 All ER 42 : 1993 AC 593 : (1992) 3 WLR 1032 (HL); *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners*, (1984) 1 All ER 733 (HL), *relied on*

Therefore, it is not necessary to consider difference in the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act. However, it has to be noted 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*). (Para 33)

Hoosein Kasam Dada (India) Ltd. v. *State of M.P.*, AIR 1953 SC 221 : 1953 SCR 987, *relied on*

a In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they could so agree even before the coming into force of the new Act. There is nothing in the language of Section 85(2)(*a*) which barred the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings b under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of *Rani Constructions* (Civil Appeal No. 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. The expression for the time being in force not only refers c to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. The expression "unless otherwise agreed" as appearing in Section 85(2)(*a*) of the new Act would clearly apply in the case of *Rani Constructions* in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. d Parties could anticipate that the new enactment may come into operation at the time the disputes arise. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give an option to the parties e to agree that the new Act would apply to the pending arbitration proceedings.

(Paras 22 and 35)

Reshma Constructions v. *State of Goa*, (1999) 1 Mah LJ 462, *approved*

Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 does not render illegal a contract by which the parties agree that any future dispute shall be f referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at g that time would apply, there cannot be any objection to that. Thus construing clause 25, in *Rani Constructions* (CA No. 61 of 1999) the new Act will apply.

(Para 38)

The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act came into force. (Para 22)

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

(Para 22)

The Foreign Awards Act gave the party the right to enforce the foreign award under that Act. But before that right could be exercised the Foreign Awards Act had been repealed. It cannot, therefore, be said that any right had accrued to the party for him to claim to enforce the foreign award under the Foreign Awards Act. After the repeal of the Foreign Awards Act a foreign award can now be enforced under the new Act on the basis of the provisions contained in Part II of the new Act depending whether it is a New York Convention award or a Geneva Convention award. It is irrespective of the fact when the arbitral proceedings commenced in a foreign jurisdiction. Since no right has accrued Section 6 of the General Clauses Act would not apply. (Para 39)

In the very nature of the provisions of the Foreign Awards Act it is not possible to agree to the submissions that Section 85(2)(*a*) of the new Act would keep that Act alive for the purpose of enforcement of a foreign award given after the date of commencement of the new Act though arbitral proceedings in a foreign land had commenced prior to that. However, if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award are juxtaposed there would appear to be hardly any difference. (Para 40)

Shetty's Constructions Co. (P) Ltd. v. *Konkan Rly. Construction*, (1998) 5 SCC 599, *referred to*

Sundaram Finance Ltd. v. *NEPC India Ltd.*, (1999) 2 SCC 479; *D.C. Bhatia* v. *Union of India*, (1995) 1 SCC 104; *Kay* v. *Goodwin*, (1830) 6 Bing 576 : 130 ER 1403, 1405; *Dinshaw Manekji Petit* v. *G.B. Badkas*, AIR 1969 Bom 151 : 70 Bom LR 632; *Devkumarsinghji Kasturchandji* v. *State of M.P.*, AIR 1967 MP 268 : 1967 MPLJ 47 (DB); *Ellison* v. *Thomas*, (1861) 31 LJ Ch 867 *and* (1862) 32 LJ Ch 32 : 7 LT 342; *Coles* v. *Pack*, (1869) 5 CP 65 : 39 LJCP 63; *Gunter's Settlement Trusts, Re*, 1949 Ch 502 : (1949) 1 All ER 680; *State of Punjab* v. *Mohar Singh*, AIR 1955 SC 84 : (1955) 1 SCR 893; *Dhanrajamal Gobindram* v. *Shamji Kalidas and Co.*, AIR 1961 SC 1285 : (1961) 3 SCR 1020; *State Wakf Board* v. *Abdul Azeez*, AIR 1968 Mad 79 : (1967) 1 MLJ 190; *Netai Charan Bagchi* v. *Suresh Chandra Paul*, (1962) 66 CWN 767 : 1962 Cal LJ 183; *Shyam Lal* v. *M. Shayamlal*, AIR 1933 All 649 : ILR 55 All 775 (FB); *Heyman* v. *Darwins Ltd.*, 1942 AC 356 : (1942) 1 All ER 337 (HL); *G. Ekambarappa* v. *Excess Profits Tax Officer*, AIR 1967 SC 1541 : (1967) 3 SCR 864, *referred to*

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14. (1987) 1 SCC 496 : (1987) 1 SCR 1024, *Oil and Natural Gas Commission* v. *Western Co. of North America* 352*a*
15. (1984) 1 All ER 733 (HL), *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners* 357*f*, 358*a*, 370*g-h*
16. (1980) 1 SCC 149 : 1980 SCC (L&S) 131, *M.S. Shivananda* v. *Karnataka SRTC* 355*a*, 364*f-g*, 373*f*
17. (1973) 2 SCC 608 : (1974) 1 SCR 453, *Sohan Lal* v. *Amin Chand and Sons* 371*g*
18. (1972) 3 SCC 684 : (1972) 3 SCR 690, *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra* 349*d-e*, 350*c*, 373*b-c*
19. (1971) 1 SCC 721, *Lalji Raja & Sons* v. *Hansraj Nathuram* 357*e-f*, 357*f*, 364*f*, 373*e*
20. AIR 1969 SC 239 : (1969) 1 SCR 580, *Gujarat Electricity Board* v. *Shantilal R. Desai* 366*h*, 374*a-b*
21. AIR 1969 Bom 151 : 70 Bom LR 632, *Dinshaw Manekji Petit* v. *G.B. Badkas* 352*e*, 352*f*
22. AIR 1968 Mad 79 : (1967) 1 MLJ 190, *State Wakf Board* v. *Abdul Azeez* 362*a*
23. AIR 1967 SC 1541 : (1967) 3 SCR 864, *G. Ekambarappa* v. *Excess Profits Tax Officer* 367*a-b*, 374*b-c*
24. AIR 1967 MP 268 : 1967 MPLJ 47 (DB), *Devkumarsinghji Kasturchandji* v. *State of M.P.* 352*e-f*, 353*c-d*
25. (1962) 66 CWN 767 : 1962 Cal LJ 183, *Netai Charan Bagchi* v. *Suresh Chandra Paul* 362*a*
26. (1961) 2 All ER 721 : (1961) 3 WLR 39 : 1961 AC 901, *Director of Public Works* v. *Ho Po Sang* 364*f*, 373*f*
27. AIR 1961 SC 1285 : (1961) 3 SCR 1020, *Dhanrajamal Gobindram* v. *Shamji Kalidas and Co.* 361*a*, 362*g-h*, 369*e-f*
28. AIR 1955 SC 84 : (1955) 1 SCR 893, *State of Punjab* v. *Mohar Singh* 355*b-c*
29. AIR 1953 SC 221 : 1953 SCR 987, *Hoosein Kasam Dada (India) Ltd.* v. *State of M.P.* 375*d*
30. 1949 Ch 502 : (1949) 1 All ER 680, *Gunter's Settlement Trusts, Re* 353*b-c*
31. 1942 AC 356 : (1942) 1 All ER 337 (HL), *Heyman* v. *Darwins Ltd.* 363*a-b*
32. AIR 1933 All 649 : ILR 55 All 775 (FB), *Shyam Lal* v. *M. Shayamlal* 362*a-b*
33. (1922) 2 KB 422 : 127 LT 728 (CA), *Hamilton Gell* v. *White* 355*f-g*, 355*g*, 357*g*, 373*f-g*
34. 1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC), *Abbott* v. *Minister for Lands* 349*d-e*, 349*e*, 350*c-d*, 355*f-g*, 356*e*, 357*c*, 357*f-g*, 373*b*, 373*g*
35. (1869) 5 CP 65 : 39 LJCP 63, *Coles* v. *Pack* 353*b*
36. (1861) 31 LJ Ch 867 *and* (1862) 32 LJ Ch 32 : 7 LT 342, *Ellison* v. *Thomas* 353*b*
37. (1830) 6 Bing 576 : 130 ER 1403, 1405, *Kay* v. *Goodwin* 351*c*

The Judgment of the Court was delivered by

D.P. WADHWA, J.—

The facts

1. These three appeals raise three different questions relating to the construction and interpretation of Section 85 of the Arbitration and Conciliation Act, 1996 ("the new Act" for short) which contains repeal and saving provision of the three Acts, namely, the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 ("the old Act" for short) and the Foreign Awards (Recognition and Enforcement) Act, 1961 ("the Foreign Awards Act" for short).

2. This Section 85 of the new Act we reproduce at the outset:

"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."

3. In the case of *Thyssen Stahlunion GMBH* (CA No. 6036 of 1998) the contract for sale and purchase of prime cold rolled mild steel sheets in coils contains arbitration agreement. The relevant clauses are as under:

"12. Legal interpretation

12.1 This contract shall be governed and construed in accordance with the laws of India for the time being in force.

12.2 To interpret all commercial terms and abbreviations used herein which have not been otherwise defined, the rules of 'INCOTERMS 1990' shall be applied.

13. *Settlement of disputes*

All disputes or differences whatsoever between the parties hereto arising out of or relating to the construction, meaning or operation or effect of this contract or the breach thereof shall unless amicably settled between the parties hereto, be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), Paris, France by a sole arbitrator appointed by the Chairman of the Arbitral Tribunal of the Court of Arbitration of ICC and the award made in pursuance thereof shall be binding on both the parties. The venue for the arbitration proceedings shall be New Delhi, India."

4. Disputes and differences having arisen, the arbitration proceedings commenced on 14-9-1995 under the old Act. On this date request for arbitration was made to ICC under the arbitration clause in the contract. Mr Cecil Abraham of the Malaysian Bar was appointed sole arbitrator on 15-11-1995. Terms of reference in the arbitration were finalised on 13-5-1996. Hearing before the sole arbitrator took place from 7-1-1997 till 28-1-1997. Award was given on 24-9-1997. By this time on 25-1-1996 the new Act had come into force. On 13-10-1997 Thyssen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of the court (Arbitration Suit No. 352-A of 1997). While these proceedings were pending in the High Court, Thyssen, on 12-2-1998, filed an application under Section 151 of the Code of Civil Procedure for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act (Execution Petition No. 47 of 1998). The ground taken was that the arbitration proceedings had been terminated with the making of the award on 24-9-1997 and, therefore, the new Act was applicable for enforcement of the award. The respondent Steel Authority of India Ltd. (SAIL) opposed the maintainability of the execution petition. SAIL also filed objections to the award on various grounds under the old Act. The question which arose for consideration is:

> Whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply?

5. A learned Single Judge of the Delhi High Court by judgment dated 21-9-1998 held that proceedings would be governed by the old Act. Thyssen Stahlunion GMBH feeling aggrieved filed this appeal (CA No. 6036 of 1998).

6. In the case of *Western Shipbreaking Corpn.* (CA No. 4928 of 1997) under memorandum of agreement dated 4-11-1994 M/s Clareheaven Ltd. agreed to sell to Western Shipbreaking Corporation a ship *M.V. Kaldera*. Clause (19) of the memorandum of agreement contained arbitration clause which is as under:

> "If any dispute should arise in connection with the interpretation in fulfilment of this contract, same shall be decided by arbitration in the city of London, U.K. with English law to apply and shall be referred to a single arbitrator to be appointed by the parties hereto. If the parties cannot agree on the appointment of the single arbitrator, the dispute shall be settled by three arbitrators, each party appointing one arbitrator the third being appointed by London Maritime Arbitration (*sic*) Association in London.
>
> If one party fails to appoint an arbitrator either or by way of substitution for two weeks after the other party having appointed his arbitrator, has sent the party making default notice by mail, cable or telex to make the appointment, London Maritime Arbitration (*sic*) Association

shall after application from the party having appointed his arbitrator also appoint on behalf of the party making default.

The award rendered by the arbitrators shall be final binding upon the parties and may if necessary be enforced by any court or any other competent authority in the same manner as a document in the court of justice."

7. Arbitration proceedings in this case were held in the United Kingdom prior to the enforcement of the new Act. The award was made on 25-2-1996 in London. The question which arises for consideration is:

Whether the award is governed by the provisions of the new Act for its enforcement or by the Foreign Awards Act?

8. A learned Single Judge of the Gujarat High Court by the impugned judgment dated 21-4-1997 held that the new Act would be applicable. Western Shipbreaking Corporation is aggrieved and filed appeal against that judgment (CA No. 4928 of 1997).

9. In the case of *Rani Constructions (P) Ltd.* (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, is as under:

"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

10. Disputes having arisen, these were referred to the sole arbitrator on 4-12-1993. The arbitrator gave his award on 23-2-1996 after the new Act had come into force. On account of difference of opinion in two judgments of the Himachal Pradesh High Court, both rendered by Single Judges, as to whether the old or the new Act will apply, a learned Single Judge of the High Court referred the following question to a larger Bench:

"Whether the agreement referred to in Section 85(2)(*a*) of the Act of 1996 for the purpose of applicability of the said Act to the pending arbitral proceedings which had already commenced under the Act of 1940 is one necessarily to be entered into after the commencement of the Act of 1996 or any clause to that effect in an agreement already entered into between the parties before the enforcement of the Act of 1996 would be sufficient for that purpose."

11. The reference question does not appear to have been happily worded. What it means is that when clause (*a*) of Section 85(2) of the new Act uses the expression "unless otherwise agreed by the parties" can the parties agree for the applicability of the new Act before the new Act comes into force or have they necessarily to agree only after the new Act comes into force?

12. The Division Bench of the High Court by the impugned judgment dated 16-7-1998 held that clause 25 of the agreement "does not admit of interpretation that this case is governed by Act of 1996".

13. Arguments have been addressed in considerable detail for and against the application of the new Act or the old Act in the cases of *Thyssen* and *Rani Constructions* and the Foreign Awards Act in the case of *Western Shipbreaking Corpn*. We would, however, refer to these arguments in brief insofar we consider these to be relevant to decide the issues before us.

The submissions

14. Mr F.S. Nariman, who appeared for Thyssen made the following submissions:

1. Termination of arbitral proceedings by the final arbitration award and the enforcement of the award are two separate proceedings. Under Section 32[1] of the new Act arbitral proceedings shall terminate by the final award or by an order of the Arbitral Tribunal under sub-section (2) as provided therein. Thus after the arbitral proceedings are terminated and final award made, reference has to be made to the new Act for enforcement of the award as when award was given the old Act stood repealed.

2. In view of the savings provision under clause (*a*) of sub-section (2) of Section 85 of the new Act it is not necessary to refer to Section 6 of the General Clauses Act, 1897.[2]

1 "32. *Termination of proceedings.*—(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2).

(2) The Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings where—

(*a*) the claimant withdraws his claim, unless the respondent objects to the order and the Arbitral Tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(*b*) the parties agree on the termination of the proceedings, or

(*c*) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible."

2 "6. *Effect of repeal.*—Where this Act, or any Central Act or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or regulation had not been passed."

3. The new Act is based on UNCITRAL Model Law. It is a progressive Act. Objects which led to passing of the new Act should be kept in view. For this, reference may be made to the Preamble[3] of the new Act as well. In the Statement of Objects and Reasons[4], the

3 "Whereas the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

And whereas the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

And whereas the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

And whereas the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

And whereas the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

And whereas it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;

Be it enacted by Parliament in the forty-seventh year of the Republic as follows:"

4 *Statement of Objects and Reasons*

"The law on arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing world-wide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under—

(*i*) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

objectives behind introduction of the new arbitration law have been explained.

It is clearly intended that the enforcement of the award given after the new Act came into force would be governed by the new Act. Interpretation of the provisions of Section 85 has to be purposeful which advances the object of the new Act. In *Sundaram Finance Ltd.* v. *NEPC India Ltd.*[5] the question that arose for consideration was whether under Section 9 of the new Act the court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed. Under this section the court is empowered to pass interim orders before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement. During the course of discussion this Court referred to the Statement of Objects and Reasons which led to the promulgation of the new Act and said: (SCC p. 483, para 9)

> "9. The 1996 Act (new Act) is very different from the Arbitration Act, 1940 (old Act). The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of the 1996 Act (new Act) have to be interpreted being uninfluenced by the principles underlying the 1940 Act (old Act). In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act."

4. Law governing arbitration proceedings can be different than that governing the award. In this connection reference may be made to a decision of this Court in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.*[6]

> (*ii*) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
>
> (*iii*) to provide that the Arbitral Tribunal gives reasons for its arbitral award;
>
> (*iv*) to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction;
>
> (*v*) to minimise the supervisory role of courts in the arbitral process;
>
> (*vi*) to permit an Arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
>
> (*vii*) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
>
> (*viii*) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal; and
>
> (*ix*) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.
>
> 5. The Bill seeks to achieve the above objects."

5 (1999) 2 SCC 479

6 (1998) 1 SCC 305

In *Sumitomo Heavy Industries Ltd. case*[6] under the arbitration agreement between the parties proceedings were to be held at London in accordance with the provisions of the International Chamber of Commerce and the rules made thereunder as amended from time to time. Award was made on 27-6-1995. ONGC Ltd. filed a petition in the High Court at Bombay praying that the respondent be directed under Section 14 of the old Act to file the award in that Court. It was contended by ONGC that the award was invalid, unenforceable and liable to be set aside under the provisions of the Arbitration Act, 1940. This petition of ONGC was allowed by the High Court. It was noticed that during the course of preliminary hearing in the Queen's Bench Division, Commercial Court, in London, Potter, J. had observed that one of the aspects of the case for consideration was: (SCC p. 310, para 5)

> "(*4*) The curial law, i.e., the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract."

Decision of the Bombay High Court was challenged in this Court. This Court said that the central issue in the appeal was as to what was the area of operation of the curial law and went on to observe as under: (SCC pp. 313-14, paras 11-12)

> "*11*. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.
>
> *12*. The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd (in *Law and Practice of Commercial Arbitration in England*, 2nd Edn.) aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is '*functus officio*' (p. 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced. The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not

governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration."

5. Section 85 of the new Act provides for a limited repeal. This section be contrasted with Section 48 of the old Act, which is as under:

> "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."

This departure from the language used in Section 48 of the old Act is deliberate and has to be given effect to while considering the scope of Section 85 of the new Act.

6. Assuming that Section 6 of the General Clauses Act applies, the question whether a party gets a right at the time when the arbitration proceedings commenced under the old Act and that the award given after the coming into force of the new Act would yet be governed under the old Act, can be answered only if any vested right accrued to the party. Vested rights accrue when proceedings for enforcement of the award are taken and not before that. Right to take advantage of an enactment is not a vested right. One cannot have mere abstract right but only accrued right. Until award is made no party has an accrued right. Till the award is made nobody knows his rights. In this connection reference may be made to a decision of the Privy Council in *Abbott* v. *Minister for Lands*[7] which was followed by this Court in *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*[8]. Reference may also be made to another decision of this Court in *D.C. Bhatia* v. *Union of India*[9].

In *Abbott* v. *Minister for Lands*[7] the Court said that "the mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a 'right accrued' within the meaning of the usual saving clause". The appellant had contended that under the repealed enactment he had a right to make the additional conditional purchase, and this was an "accrued right" at the time the Crown Lands Act of 1884 was passed and that notwithstanding the repeal it remained unaffected by such repeal. The 1884 Act had repealed the earlier Crown Lands Act of 1861. The Board observed:

> "It has been very common in the case of repealing statute to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.
>
> It may be, as Windeyer, J. observes, that the power to take advantage of an enactment may without impropriety be termed a

7 1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC)
8 (1972) 3 SCC 684 : (1972) 3 SCR 690
9 (1995) 1 SCC 104

'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed'. They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment.

Even if the appellant could establish that the language of Section 2(*b*) was sufficient to reserve to him the right for which he contends, he would have to overcome further difficulties. That enactment only renders 'rights accrued' unaffected by the repeal 'subject to any express provisions of this Act in relation thereto'."

This Court in *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*[8] followed the decision of the Privy Council in *Abbott* v. *Minister for Lands*[7] holding that the mere right to take advantage of provisions of an Act is not an accrued right.

In *D.C. Bhatia* v. *Union of India*[9] the question which arose for consideration before this Court related to the interpretation and constitutional validity of Section 3(*c*) of the Delhi Rent Control Act. The Delhi Rent Control Act was amended with effect from 1-12-1988 when Section 3(*c*) was introduced which provided that the provisions of that Act will not apply to any property at a monthly rent exceeding Rs 3500. This Court while upholding the constitutional validity of the provisions as contained in Section 3(*c*) of the Delhi Rent Control Act observed (at SCC p. 124, para 57) that

"we are unable to uphold the contention that the tenants had acquired a vested right in the properties occupied by them under the statute. We are of the view that the provisions of Section 3(*c*) will also apply to the premises which had already been let out at the monthly rent in excess of Rs 3500 when the amendment made in 1988 came into force".

One of the contentions raised by the tenants was that they had acquired vested rights which could not be disturbed unless the amending Act contained specific provisions to that effect. They said that under the existing law the tenants had acquired valuable property rights and they could neither be evicted nor could the rent be enhanced and that even a suit could not be brought against a tenant on the expiry of the lease. This Court repealed the contention and said: (SCC pp. 122-23, paras 52-53)

"52. We are unable to uphold this contention for a number of reasons. Prior to the enactment of the Rent Control Act by the various State Legislatures, the legal relationship between the landlord and tenant was governed by the provisions of the Transfer

of Property Act. Delhi Rent Control Act provided protection to the tenants from drastic enhancement of rent by the landlord as well as eviction, except on certain specific grounds. The legislature by Amendment Act 57 of 1988 has partially repealed the Delhi Rent Control Act. This is a case of express repeal. By amending Act the legislature has withdrawn the protection hitherto enjoyed by the tenants who were paying Rs 3500 or above as monthly rent. If the tenants were sought to be evicted prior to the amendment of the Act, they could have taken advantage of the provisions of the Act to resist such eviction by the landlord. But this was nothing more than a right to take advantage of the enactment. The tenant enjoyed statutory protection as long as the statute remained in force and was applicable to him. If the statute ceases to be operative, the tenant cannot claim to continue to have the old statutory protection. It was observed by Tindal, C.J., in the case of *Kay* v. *Goodwin*[10]: (ER p. 1405)

> 'The effect of repealing a statute is to obliterate it as completely from the records of Parliament as if it had never been passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law.'

53. The provisions of a repealed statute cannot be relied upon after it has been repealed. But, what has been acquired under the repealed Act cannot be disturbed. But, if any new or further step is needed to be taken under the Act, that cannot be taken even after the Act is repealed."

7. The expression "in relation to" appearing in Section 85(2)(*a*) of the new Act refers to stage of arbitration proceedings under the old Act. Reference is made to various provisions of the new Act employing the words "arbitral proceedings" or "arbitral proceedings and award" to stress that in the new Act there are different stages in the process of arbitration. Section 42[11] of the new Act uses the expression "arising out of that agreement and the arbitral proceedings". There is a difference between the expressions "arising out of" and that "relating to".

8. Section 36[12] of the new Act is a deeming provision which provides for the enforcement of the award as if it is a decree of a civil court under the Civil Procedure Code. This stage comes after application

10 (1830) 6 Bing 576 : 130 ER 1403, 1405

11 "42. *Jurisdiction.*—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court."

12 "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."

for setting aside of the arbitral award under Section 34 has been dealt with. This Court in *Oil and Natural Gas Commission* v. *Western Co. of North America*[13] while dealing with the old Act said that till an award is transformed into a judgment and decree under Section 17 of the Arbitration Act, 1940, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made rule of the court upon the judgment and decree and in terms of the award being passed.

9. The claim of the respondents that they had acquired vested right to challenge the award under the old Act in view of Section 6 of the General Clauses Act is also incorrect. In this connection reference be made to Section 100 of the Code of Civil Procedure, which was amended by Section 37 of the Code of Civil Procedure (Amendment) Act, 1976. Now, by Section 100 provisions of second appeal were made more stringent. But then the right which a party had acquired before the amendment came into operation was saved specifically by clause (*m*)[14] of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976.

15. Mr S.G. Desai, learned counsel appearing for Rani Constructions supported Mr Nariman in his submissions. He also said that the expression "in relation to" appearing in Section 85(2)(*a*) refers to different stages of arbitration proceedings under the old Act and does not cover the proceedings after the award is given. We summarise his submissions as well:

1. Parties can agree to the applicability of the new Act even before the new Act comes into force. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitration proceedings though under an agreement under the old Act commence after the coming into force of the new Act. Reference may be made to *Dinshaw Manekji Petit* v. *G.B. Badkas*[15] for the expression "for the time being in force" and also construction of a similar expression in *Devkumarsinghji Kasturchandji* v. *State of M.P.*[16] In *Dinshaw Manekji Petit case*[15] the question before the High Court was the scope of the expression "in any law for the time being in force" as appearing in clause (*g*) of Section 19(1) of the Defence of India Act, 1939. This clause is as under:

> "(*g*) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

13 (1987) 1 SCC 496 : (1987) 1 SCR 1024

14 "97. (*m*) the provisions of Section 100 of the principal Act, as substituted by Section 37 of this Act, shall not apply to or affect any appeal from an appellate decree or order which had been admitted, before the commencement of the said Section 37, after hearing under Rule 11 of Order XLI, and every such admitted appeal shall be dealt with as if the said Section 37 had not come into force;"

15 AIR 1969 Bom 151 : 70 Bom LR 632

16 AIR 1967 MP 268 : 1967 MPLJ 47 (DB)

The learned Single Judge of the High Court considered the expression "law for the time being in force" and said that the natural import of the words "for the time being" indicate indefinite future state of thing, and in this connection reference was made to *Stroud's Judicial Dictionary* (3rd Edn.), Vol. IV, p. 3030 which is as follows:

> "The phrase 'for the time being' may, according to its context, mean the time present, or denote a single period of time; but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time (*Ellison* v. *Thomas*[17]; *Coles* v. *Pack*[18]). See also *Gunter's Settlement Trusts, Re*[19]."

The High Court said that in their ordinary sense, the words "law for the time being in force" referred not only to the law in force at the time of the passing of the Defence of India Act but also to any law that may be passed subsequently and which is in force at the time when the question of applicability of such law to arbitrations held under the said Section 19 arose.

In *Devkumarsinghji Kasturchandji* v. *State of M.P.*[16] Section 132(1) and Section 135 of the Madhya Pradesh Municipal Corporation Act, 1956 empowered the Municipal Corporation to impose a tax on lands and buildings which the Corporation did under the exercise of that power. The State Legislature enacted a law called the Madhya Pradesh Nagriya Sthavar Sampati Kar Adhiniyam, 1964 which provided for the levy of tax on lands and buildings in the urban areas in the State of Madhya Pradesh. Sub-section (3) of Section 4 of the Madhya Pradesh Corporation Act provided that the tax levied and payable under that Act shall be in addition to any other tax for the time being payable under any other enactment for the time being in force in respect of the land or the building or portion thereof. The Act of 1964 was challenged and one of the grounds of challenge was that the State Legislature having delegated its power to impose tax on lands and buildings in favour of the Municipal Corporation and municipalities under the Municipal Corporation Act, 1956 and the M.P. Municipalities Act, 1961 and the local authorities having imposed a tax on lands and buildings, the State Legislature had no power to levy tax on lands and buildings. The Court said that the expression "any other enactment for the time being in force" did not mean an enactment which was already in force at the time the Corporation imposed a tax under Section 132 of the Municipal Corporation Act but meant any legislation enacted whether before or after the imposition of the tax by the Corporation. The Court said that the general sense of the words "for the time being" is that of time indefinite

17 (1861) 31 LJ Ch 867 *and* (1862) 32 LJ Ch 32 : 7 LT 342
18 (1869) 5 CP 65 : 39 LJCP 63
19 1949 Ch 502 : (1949) 1 All ER 680

and refers to indefinite state of facts which will arise in future and which may vary from time to time.

2. Section 28[20] of the Contract Act does not bar the agreement between the parties if they wish that arbitration proceedings be governed by any enactment relating to arbitration that may be in force at the relevant time.

3. The expression "unless otherwise agreed" used in Section 85(2)(*a*) of the new Act would clearly apply to the case (Civil Appeal No. 61 of 1999). Parties were clear in their mind that the old Act or any other statutory modification or re-enactment of that Act would govern the arbitration. Parties can anticipate that the new enactment may come into operation at the time the disputes arise. It cannot be said that such an agreement is in restraint of legal proceedings. Agreement can be entered into even before or after the new Act comes into force.

4. There is no right in procedure. Right to challenge the award is still there in the new Act though now in the restricted form. It cannot be said that any prejudice has been caused to a party when it has to challenge the award under the new Act. The High Court was wrong that the arbitration clause was hit by Section 28 of the Contract Act and that the agreement for the application of the new Act has to be entered into only after the coming into force of the new Act.

16. At this stage itself we may also note the submissions made by Mr Krishnan Venugopal, counsel appearing for M/s Clareheaven Ltd. (CA No. 4928 of 1997) in support of the decision of the High Court holding that for enforcement of the foreign award the new Act would apply:

1. Section 85(2)(*a*) of the new Act cannot save the operation of the Foreign Awards Act. On a true construction of clause (*a*) it will have no application to the Foreign Awards Act, 1961. There is no accrued right in favour of the appellant in CA No. 4928 of 1997 to challenge the foreign award under the Foreign Awards Act, 1961. Reference in this connection

20 "28. *Agreements in restraint of legal proceedings void.*—Every agreement,—

(*a*) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(*b*) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent.

Exception 1.—Saving of contract to refer to arbitration dispute that may arise.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.—Saving of contract to refer questions that have already arisen.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration."

was made to a decision of this Court in *M.S. Shivananda* v. *Karnataka SRTC*[21]. In that case this Court said as under: (SCC p. 155, paras 12-13)

> "*12.* In considering the effect of an expiration of a temporary Act, it would be unsafe to lay down any inflexible rule. It certainly requires very clear and unmistakable language in a subsequent Act of the legislature to revive or recreate an expired right. If, however, the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. In order to see whether the rights and liabilities under the repealed Ordinance have been put to an end by the Act, 'the line of enquiry would be not whether', in the words of Mukherjea, J. in *State of Punjab* v. *Mohar Singh*[22], 'the new Act expressly keeps alive old rights and liabilities under the repealed Ordinance but whether it manifests an intention to destroy them'. Another line of approach may be to see as to how far the new Act is retrospective in operation.
>
> *13.* It is settled both on principle and authority, that the mere right existing under the repealed Ordinance, to take advantage of the provisions of the repealed Ordinance, is not a right accrued. Sub-section (2) of Section 31 of the Act was not intended to preserve abstract rights conferred by the repealed Ordinance. The legislature had the competence to so restructure the Ordinance as to meet the exigencies of the situation obtaining after the taking over of the contract carriage services. It could re-enact the Ordinance according to its original terms, or amend or alter its provisions."

Provisions of the Foreign Awards Act, 1961 cannot be put into operation as that Act has been repealed. In this eventuality, Section 6 of the General Clauses Act would apply. But then Western Shipbreaking Corporation did not acquire any vested right to enforce the foreign award under the Foreign Awards Act and as such Section 6 of the General Clauses Act by implication is inapplicable.

2. Western Shipbreaking Corporation did not acquire any vested right as by the time the foreign award was made the new Act had come into force for enforcement of the foreign award. Reference was made to two English decisions in *Abbott* v. *Minister for Lands*[7] and *Hamilton Gell* v. *White*[23].

In *Hamilton Gell* v. *White*[23] facts are plainly stated in the headnote, which we quote:

> "In September 1920, the landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit. By the Agricultural Holdings Act, 1914, when the tenancy of a holding is determined by a notice to quit given in view of a sale of the holding

21 (1980) 1 SCC 149 : 1980 SCC (L&S) 131

22 AIR 1955 SC 84 : (1955) 1 SCR 893

23 (1922) 2 KB 422 : 127 LT 728 (CA)

the notice to quit is treated as an unreasonable disturbance within Section 11 of the Agricultural Holdings Act, 1908, and the tenant is entitled to compensation upon the terms and subject to the conditions of that section. One of the conditions of the tenant's right to compensation under that section was that he should within two months after the receipt of the notice to quit give the landlord notice of his intention to claim compensation, and another condition was that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of his intention to claim compensation within the time so limited; but before the tenancy had expired, and therefore before he could satisfy the second condition, Section 11 of the Act of 1908 was repealed. He subsequently made his claim within the three months limited by the section."

The question was if the tenant had acquired any right for him to maintain the claim. For that purpose the Court was considering the provisions of Section 38 of the English Interpretation Act, 1889, which provides:

"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears the repeal shall not ... affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

Bankes, L.J. said:

"In my opinion the tenant had acquired a right under Section 11 of the Act of 1908. This is not like the case which was cited to us (*Abbott* v. *Minister for Lands*[7]) in argument where the tenant's right depended upon some act of his own. Here it depends upon the act of the landlord — namely, the giving of a notice to quit in view of a sale — in which event the section itself confers a right to compensation subject to the tenant complying with the conditions therein specified, and so far as it was possible to comply with them down to the time when the section was repealed he did in fact comply with them. For these reasons I think the question must be answered in the affirmative...."

Scrutton, L.J. said:

"The conditions imposed by Section 11 were conditions, not of the acquisition of the right, but of its enforcement. Section 38 says that repeal of an Act shall not (*c*) 'affect any right ... acquired ... under any enactment so repealed', or (*e*) 'affect any investigation, legal proceeding, or remedy in respect of any such right'. As soon as the tenant had given notice of his intention to claim compensation under Section 11 he was entitled to have that claim investigated by an arbitrator."

Atkin, L.J. said:

> "It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has 'acquired a right', which would 'accrue' when he has quitted his holding, to receive compensation. A case was cited in support of the landlord's contention: *Abbott* v. *Minister for Lands*[7] where the question was whether a man who had purchased certain land was entitled to exercise a right to make additional purchases of adjoining land under the powers conferred by a repealed Act, the repealing Act containing the usual saving clause. The Privy Council held that he was not. They said (*1*) that 'the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a "right accrued" within the meaning of the enactment'. I think that bears out the proposition that I have stated above. The result is that the tenant in this case has acquired a right to claim compensation under the Act of 1908 on his quitting his holding, and therefore the second question asked by the arbitrator should be answered in the affirmative."

3. There can be no accrued right to have a decree or an award enforced under a particular procedure that has been repealed by statute. Reference was made to a decision of this Court in *Lalji Raja & Sons* v. *Hansraj Nathuram*[24] and to the House of Lords' decision in the case of *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners*[25].

In *Lalji Raja & Sons* v. *Hansraj Nathuram*[24] this Court relying on the decision of the House of Lords in *Abbott* v. *Minister for Lands*[7] said (at SCC p. 728, para 16) that

> "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".

Further relying on another decision in *Hamilton Gell* v. *White*[23] the Court said 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

24 (1971) 1 SCC 721

25 (1984) 1 All ER 733 (HL)

upon happening of one or the other of the events specified in statute". (SCC Headnote)

In *Kuwait Minister of Public Works* v. *Sir Frederick Snow & Partners (a firm)*[25] there was a contract between the parties entered into sometime in 1958 relating to the construction of an international airport in Kuwait. Parties to the contract were the Government of the State of Kuwait and an English firm of civil engineering consultants (English firm). Disputes having arisen award was given by a Kuwaiti arbitrator on 15-9-1973. The award required payment by the English firm to the Government of the State of Kuwait of an amount well over 3.5 million. Proceedings to enforce the award were initiated in England on 23-3-1979. In 1975 an Act with the title "An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" came into force. The award was a foreign award or a convention award. The New York Convention came into being on 10-6-1958. The United Kingdom became a party to the Convention on 23-12-1975 and the 1975 Act was passed to give effect to the New York Convention. Kuwait became a party to the Convention on 27-7-1978. On 12-4-1979 an Order in Council was made declaring Kuwait a party to the Convention. Now the award was made before Kuwait had become a party to the Convention but when proceedings were initiated to enforce the award Kuwait had done so. It was contended by the English firm that the foreign arbitral award could only qualify as a convention award for the purpose of the 1975 Act if the State in which it was made was already a party to the Convention at the date of the award. Accordingly it was contended that the award was not a convention award and could not be enforced by the State of Kuwait against the English firm. The plea of the English firm was negatived. It was held that the award was maintainable if the State in which the award was made is a party to the Convention at the date when proceedings to enforce the award began, even if it was not a party at the date when the award was made. The Court considered in all Section 3 of the 1975 Act which provided:

> "An award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention shall, subject to the following provisions of this Act, be enforceable...."

The Court said that the use of the present tense in the word "is" in the phrase "which is a party to the New York Convention" must, as a matter of the ordinary and natural interpretation of the words used, mean that the phrase relates to the time of enforcement and not to any other time. In particular, if it had been the intention of the legislature that the phrase should relate to the date of the award, then the draftsman would surely have used the words which made that intention clear such as "which is and was at the date of the award a party to the New York Convention". The Court repelling the argument of the English firm observed as under:

"The first answer is that the presumption against interpreting a statute as having retrospective effect is based on the assumption that, if retrospective effect were to be given to it, the result would be to deprive persons of accrued rights or defences. In the present case I am not persuaded that to give the 1975 Act retrospective effect in the sense which has been discussed would deprive anybody either of an accrued right or of an accrued defence. On the footing that awards made in a foreign State before that State became a party to the Convention are not convention awards for the purposes of the 1975 Act, and cannot therefore be enforced under it, the result is simply that a person wishing to enforce such an award in the United Kingdom would be obliged to bring an action on it at common law, the right to do this being expressly preserved by Section 6 of the 1975 Act. It cannot therefore be said that, if the construction of the 1975 Act which I prefer is correct, the result is to make an award, which could not previously have been enforced against a person at all, newly enforceable against him under the 1975 Act. On the contrary, the award could always have been enforced against him by one form of procedure, and the only result is that it subsequently becomes enforceable against him by a second and alternative form of procedure."

4. The expression "in relation to" cannot expand the scope of the saving clause in Section 85(2)(*a*) beyond "arbitral proceedings" to the enforcement of an award. Section 85(2)(*a*) of the new Act saves only those provisions of the old Act and the Foreign Awards Act that would apply to arbitral proceedings and not the proceedings to enforce the arbitral award. Reference in this connection may be made to a decision of this Court in *Navin Chemicals Mfg. & Trading Co. Ltd.* v. *Collector of Customs*[26].

In *Navin Chemicals Mfg. & Trading Co. Ltd. case*[26] this Court was considering the expression "the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment" appearing in Section 129-C of the Customs Act, 1962. Section 129-C of the Customs Act, 1962, in relevant part, is as under:

"129-C. *Procedure of Appellate Tribunal.*—(1) The powers and functions of Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the Members thereof.

(2) Subject to the provisions contained in sub-sections (3) and (4) a Bench shall consist of one Judicial Member and one Technical Member.

(3) Every appeal against a decision or order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment shall be heard by a Special Bench constituted by the President for

26 (1993) 4 SCC 320

hearing such appeals and such Bench shall consist of not less than two Members and shall include at least one Judicial Member and one Technical Member."

This Court held that the appeal could have been heard and decided by a member of the Appellate Tribunal, sitting singly. It said that the phrase "relation to" is, ordinarily, of a wide import but, in the context of its use in the said expression in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

17. Mr Dipankar Gupta, Senior Advocate appearing for SAIL (in CA No. 6036 of 1998) made his submissions which we record in brief:

1. There cannot be two segments: (*1*) uptil the award, and (*2*) after the award. While under Section 17 of the old Act an award has to be made into a decree, under Section 36 of the new Act it is already stamped with the decree. The dispute is, thus, between the enforcement of the award and the corrective process. Question is under which law the corrective process should take place? Section 85 of the new Act deals with transitional provisions. When an award is made under the old Act, for its enforcement provisions of the old Act have to be looked into. This is what Section 85(2)(*a*) of the new Act saves.

2. Procedure for the appointment of an arbitrator and holding of arbitration proceedings and the making of award is different in the old Act and in the new Act. Under the old Act, the arbitrator is not required to give reasons unless the agreement between the parties so envisages. Under the new Act, however, the arbitrator has to give reasons. This one illustration is advanced to show that when arbitration proceedings have started before the coming into force of the new Act, then, under the new Act, the award may not be sustainable.

3. When arbitration proceedings are held under the old Act, the arbitrator is conscious of Section 30 of the old Act which gives grounds for setting aside the award. Parties also proceed with that end in view. It is difficult to comprehend a situation where though the award is given under the old Act, its validity has to be decided under the new Act, provisions of which are vastly different than that of the old Act. It is not possible that proceedings be split into two separate segments. This is not warranted by the new Act.

4. The expression "in relation to" is significant. It is of the widest amplitude. If the legislature intended that the new Act would apply to the award given under the old Act made after the coming into force of the new Act, it would not use the expression "in relation to" but would use the word "to". The expression "in relation to" takes into account stages after the award. There is no difference between the expression "arising out" or "in relation to" or "arising out of" which are expansive expressions and also rather interchangeable. The expression "arising out of" has been used in Section 42 of the new Act. As to what these

expressions mean, reference may be made to decisions of the Supreme Court in *Doypack Systems (P) Ltd.* v. *Union of India*[27], *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*[28] and *Dhanrajamal Gobindram* v. *Shamji Kalidas and Co.*[29]

In *Doypack Systems (P) Ltd. case*[27] this Court was considering the expression "in relation to". In the context it will be appropriate to quote paras 48, 49 and 50 of the judgment, which are as under: (SCC pp. 328-29)

> "*48*. In view of the language used in the relevant provisions, it appears to us that Section 3 has two limbs: (*i*) textile undertakings; and (*ii*) right, title and interest of the company in relation to every such textile undertaking. The expression 'textile undertakings' has been defined in Section 2(*k*) to mean the six textile undertakings of the company specified therein. The definition of the said expression in Section 2(*k*) is, however, subject to the opening words of the section which provide, 'In this Act, unless the context otherwise requires'. In the context of the expression 'textile undertakings' employed in Section 3(1) of the Act, Section 4(1) provides that the textile undertakings referred to in Section 3 shall be deemed to include all assets, rights, leaseholds, powers, authorities and privileges and all property, moveable and immovable, including lands, buildings, workshops, stores ... investments and book debts pertaining to the textile undertakings and all rights and interests in or arising out of such property as are, immediately before the appointed day, in the ownership, possession, power or control of the company in relation to all six undertakings. The expression 'pertaining to', 'in relation to' and 'arising out of', used in the deeming provision, are used in the expansive sense, as per decisions of courts, meanings found in standard dictionaries, and the principles of broad and liberal interpretation in consonance with Article 39(*b*) and (*c*) of the Constitution.
>
> *49*. The words 'arising out of' have been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words 'pertaining to' and 'in relation to' have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate', see *Corpus Juris Secundum*, Vol. 17, p. 693.
>
> *50*. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject-matter.

27 (1988) 2 SCC 299
28 (1995) 2 SCC 665
29 AIR 1961 SC 1285 : (1961) 3 SCR 1020

These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, see *State Wakf Board* v. *Abdul Azeez*[30] (AIR at p. 81, paras 8 and 10), following and approving *Netai Charan Bagchi* v. *Suresh Chandra Paul*[31], *Shyam Lal* v. *M. Shayamlal*[32] and 76 *Corpus Juris Secundum* 621. Assuming that the investments in shares and in lands do not form part of the undertakings but are different subject-matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 *Corpus Juris Secundum* at pp. 620 and 621 where it is stated that the term 'relate' is also defined as meaning to bring into association or connection with. It has been clearly mentioned that 'relating to' has been held to be equivalent to or synonymous with as to 'concerning with' and 'pertaining to'. The expression 'pertaining to' is an expression of expansion and not of contraction."

In *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*[28] this Court was considering Section 41(1) of the Presidency Small Cause Courts Act, 1882 and the scope of the expression "relating to the recovery of possession of any immovable property" appearing in that section. Section 41(1) is as under:

"41. (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject-matter of such suits or proceedings."

It also referred to its earlier decision in *Doypack Systems (P) Ltd.* v. *Union of India*[27]. This Court held: (SCC p. 672, para 16)

"*16*. It is, therefore, obvious that the phrase 'relating to recovery of possession' as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee plaintiff would squarely be covered by the wide sweep of the said phrase."

From *Dhanrajamal Gobindram case*[29] we quote the following passage:

30 AIR 1968 Mad 79 : (1967) 1 MLJ 190
31 (1962) 66 CWN 767 : 1962 Cal LJ 183
32 AIR 1933 All 649 : ILR 55 All 775 (FB)

"We may dispose of here a supplementary argument that the dispute till now is about the legal existence of the agreement including the arbitration clause, and that this is not a dispute arising out of, or in relation to a cotton transaction. Reference was made to certain observations in *Heyman* v. *Darwins Ltd.*[33] In our opinion, the words of the bye-law 'arising out of or in relation to contracts' are sufficiently wide to comprehend matters, which can legitimately arise under Section 20. The argument is that, when a party questions the very existence of a contract, no dispute can be said to arise out of it. We think that this is not correct, and even if it were, the further words 'in relation to' are sufficiently wide to comprehend even such a case. In our opinion, this argument must also fail."

5. Distinction sought of the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act is not correct. 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". Earlier under Section 48, the word used was "to" but now under Section 85(2)(*a*), it is the expression "in relation to". There would certainly serious anomalies arise if the expression "in relation to" is given a restricted meaning.

6. It is not necessary that for the right to accrue, legal proceedings must be pending when the new Act comes into force. As to what the accrued right is, reference was made to two decisions of this Court in *CIT* v. *Shah Sadiq and Sons*[34] and *Bansidhar* v. *State of Rajasthan*[35].

In *CIT* v. *Shah Sadiq and Sons*[34] this Court was considering Section 6 of the General Clauses Act, 1897 with reference to the Income Tax Act, 1922 repealed by Section 297 of the Income Tax Act, 1961. This is how this Court dealt with the question raised before it: (SCC pp. 524-25, paras 14-15)

"*14.* Under the Income Tax Act of 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against profits made from that business in future years. The right of carrying forward and set off accrued to the assessee under the Act of 1922. A right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897.

15. In this case the 'savings' provision in the repealing statute is not exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other

33 1942 AC 356 : (1942) 1 All ER 337 (HL)
34 (1987) 3 SCC 516 : 1987 SCC (Tax) 270
35 (1989) 2 SCC 557

words, whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(*c*) of the General Clauses Act, 1897. The right to carry forward losses which had accrued under the repealed Income Tax Act of 1922 is not saved expressly by Section 297 of the Income Tax Act, 1961. But, it is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922. Section 6(*c*) saves accrued rights unless they are taken away by the repealing statute. We do not find any such taking away of the rights by Section 297 either expressly or by implication."

In *Bansidhar* v. *State of Rajasthan*[35] this Court referred to the observations made in *CIT* v. *Shah Sadiq and Sons*[34] and said a saving provision in a repealing statute is not necessarily exhaustive of the rights and obligations so saved or the rights that survive the repeal. The Court said that for the purpose of clauses (*c*) and (*e*) of Section 6 of the Rajasthan General Clauses Act, 1955 which provided, respectively, that the repeal of an enactment shall not, unless a different intention appears, "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed" or

> "affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid",

the "right" must be "accrued" and not merely an inchoate one. Distinction between what is and what is not a right preserved by Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal is a right "acquired" or "accrued" under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right. This Court relied on its earlier decision in *Lalji Raja & Sons* v. *Hansraj Nathuram*[24]. It also referred to observations of Lord Morris in *Director of Public Works* v. *Ho Po Sang*[36] which had been quoted with approval in an earlier decision of this Court in *M.S. Shivananda* v. *K.S.R.T.C.*[21] as under:

> "It may be, therefore, that under some repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. On a

36 (1961) 2 All ER 721 : (1961) 3 WLR 39 : 1961 AC 901

repeal, the former is preserved by the Interpretation Act. The latter is not."

18. Mr R.P. Bhatt, Senior Advocate appearing for Western Shipbreaking Corporation (CA No. 4928 of 1997) submitted that it would be the Foreign Awards Act that would apply and not the new Act. Mr Bhatt supported Mr Dipankar Gupta in his submissions. All the three Acts are saved by Section 85(2)(*a*). Arbitral proceedings include enforcement of award otherwise these Acts would become redundant. He said that the arbitration proceedings were governed by the laws in the U.K. under the (U.K.) Arbitration Act, 1950. Proceedings began on 15-5-1995. Award was given in England on 25-2-1996 after the new Act had come into force on 25-1-1996. As to when arbitration proceedings commence has been given in Section 21 of the new Act. Under Section 32 of the new Act, arbitral proceedings terminate by the final award. Since the proceedings had already commenced in England, Section 21 of the new Act has no application. Therefore, one has to look into the Foreign Awards Act, 1961. Mr Bhatt said that pronouncement of an Arbitration Award after the cut-off date is not a condition precedent for applicability of the saving clause under Section 85(2)(*a*). It does not use the words "arbitral award passed before" in place of "arbitral proceedings which commenced before". Thus what is saved is applicability of all the provisions of the old Acts where the arbitral proceedings have commenced before the cut-off date and it is further clarified in the second portion of the saving clause viz., Section 85(2)(*a*) of the new Act that the new Act will apply where the arbitral proceedings have commenced after the cut-off date.

19. Mr A.K. Ganguli, Senior Advocate appeared for the Himachal Pradesh State Electricity Board (CA No. 61 of 1999). He supported the impugned judgment of the High Court. He drew a distinction between the various provisions of the old Act and the new Act and said that the enforcement of the award under the new Act would not be compatible with the arbitration proceedings held under the old Act resulting in the award. Any restricted interpretation to the expression "arbitral proceedings" appearing in Section 85(2)(*a*) would lead to several anomalies. One such instance was that under the old Act the arbitrator would not be required to give reasons unless the arbitration agreement so provided. He said that when the saving clause makes the provision of the old Act applicable to arbitral proceedings commencing before 25-1-1996 without there being any further condition, the legislative intent was clear that the old Act would apply to the enforcement of the award under that Act. He said such interpretation, apart from being in conformity with the legislative intent, would also be in consonance with justice, equity and fair play. The expression "arbitral proceedings" in Section 85(2)(*a*) could not be given a restricted meaning of being confined merely to the conduct of the proceedings by the arbitrator and excluding the enforcement of the award from the purview of the old Act. Mr Ganguli said that it was not disputed that provisions of the new Act were vastly different than that of the old Act. He said that use of the expression "provisions" in Section 85(2)(*a*) would include all provisions of the old Act,

insofar as they have a nexus with the arbitral award. Enforcement of the award is an integral part of the process "in relation to arbitral proceedings". Reference was also made to the meaning of the expression "in relation to" and to various decisions of this Court in that connection. Provisions of Section 6 of the General Clauses Act were also invoked to contend that provisions of the old Act were saved which included provisions for enforcement of the award under the old Act. Lastly, Mr Ganguli submitted that the agreement contemplated in the latter part of Section 85(2)(*a*) would be entered into only after the enforcement of the new Act and that is 25-1-1996. Any agreement if entered into before this date would be void and would be hit by Section 28 of the Contract Act and as rightly held so by the High Court. Accordingly, Mr Ganguli said that the clause in the arbitration agreement where the parties agreed that provisions of the old Act or any statutory modification or re-enactment thereof "for the time being in force" would have no meaning insofar as applicability of the new Act to the enforcement of the award is concerned. Parties could not agree to a provision in advance without knowing what that provision would be.

20. Reference may yet be made to two more decisions of this Court on the question of effect of repeal of an enactment and as to what is right accrued. In *Gajraj Singh* v. *STAT*[37] this Court was examining the provisions of Sections 217(1), (2)(*a*), (*b*) and (4) of the Motor Vehicles Act, 1988, which contained repeal and saving provisions of the Motor Vehicles Act, 1939. The Court examined various judgments of this Court and treatises on the rules of interpretation and said: (SCC p. 664, para 22)

> "22. Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances."

On the question on the right acquired or accrued the Court observed: (SCC p. 672, para 42)

> "42. There is a distinction between right acquired or accrued, and privilege, hope and expectation to get a right, as rightly pointed out by the High Court in the impugned judgment. A right to apply for renewal and to get a favourable order would not be deemed to be a right accrued unless some positive acts are done, before repeal of Act 4 of 1939 or corresponding law to secure that right of renewal. In *Gujarat Electricity*

37 (1997) 1 SCC 650

Board v. *Shantilal R. Desai*[38] this Court had pointed out that before Section 71 of the Electricity (Supply) Act, 1948 was amended, the appellant had issued a notice under Section 7 thereof, exercising the option to purchase the undertaking. It was held that a right to purchase the electrical undertaking which had accrued to the Electricity Board was saved by Section 6 of the GC Act."

21. In *G. Ekambarappa* v. *Excess Profits Tax Officer*[39] District Bellary, which belonged to Part 'A' State of Madras in British India, was merged in Part 'B' State of Mysore on 1-10-1953. The Excess Profits Act, 1940 applied only to British India. It ceased to apply to Bellary after it became part of the State of Mysore. Then, after the States Reorganisation Act, 1956, Mysore also became Part 'A' State. However, by the Adaptation of Laws (No. 3) Order dated 31-12-1956, the Excess Profits Tax Act was to extend "to the whole of India except the territories which immediately before 1-11-1956 were comprised in Part 'B' States". The result of adaptation was that all the provisions of the Excess Profits Tax Act, 1940 stood repealed so far as the District of Bellary was concerned w.e.f. 21-12-1956. Excess Profits Tax Officer issued a notice under Section 15 of the Excess Profits Tax Act to the appellants in 1960 in respect of the period from 30-10-1943 to 30-10-1944. It was contended by them that it was not a case of repeal of that Act and so the provisions of Section 6 of the General Clauses Act could not be invoked to sustain the validity of the notices. It was argued that so far as the Excess Profits Tax Act was concerned, the Adaptation Laws Order, 1956 did not repeal that Act as such and the effect of the modification was that the provisions of the Act were no longer applicable to Bellary District which comprised in the territory of Part 'B' State of Mysore immediately before 1-11-1956. This Court said that there was no justification for the argument put forward on behalf of the appellants. The Court proceeded to repeal this argument as under:

> "The result of the Adaptation of Laws Order, 1956 so far as the Act was concerned, was that the provisions of that Act were no longer applicable or in force in Bellary District. To put it differently, the Act was repealed so far as the area of Bellary District was concerned. Repeal of an Act means revocation or abrogation of the Act and, in our opinion, Section 6 of the General Clauses Act applies even in the case of a partial repeal or repeal of part of an Act. Section 6 of the General Clauses Act states:
>
> > '*Effect of repeal.*—Where this Act or any Central Act or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—
> >
> > * * *

38 AIR 1969 SC 239 : (1969) 1 SCR 580

39 AIR 1967 SC 1541 : (1967) 3 SCR 864

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

* * *'

Section 3(19) of the General Clauses Act defines an 'enactment' as including 'a regulation and also as including any provision contained in any Act or in any such regulation as aforesaid.

The argument was also stressed on behalf of the appellants that even if Section 6(*c*) of the General Clauses Act was applicable there was no 'liability incurred or accrued' as there was no assessment of escaped profits before 1-11-1956 when the adaptation was made. We do not think there is any substance in this argument. The liability of the appellants to tax arose immediately at the end of the chargeable accounting period and not merely at the time when it is quantified by assessment proceedings. It follows, therefore, that the notice issued under Section 15 of the Act was legally valid and the appellants representing the original partners of the firm continued to be liable to be proceeded against under that section for the profits which had escaped taxation."

The conclusions

22. For the reasons to follow, we hold:

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17[40] thereof and also appeal arising thereunder.

3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

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

5. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force.

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

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

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.*[27], *Mansukhlal Dhanraj Jain*[28], *Dhanrajamal Gobindram*[29] and *Navin Chemicals Mfg.*[26] 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.

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

Act. Reference in this connection be made to a decision of this Court in *M.M.T.C. Ltd.* v. *Sterlite Industries (India) Ltd.*[41] where this Court held that validity of an arbitration agreement did not depend on the number of arbitrators specified in Section 7 of the new Act and that the number of arbitrators is dealt with separately under Section 10 of that Act which is a part of the machinery provision for working of the arbitration agreement. In this case the question which came up for decision was the effect of the new Act on the arbitration agreement made prior to the commencement of the new Act which provided for appointment of one arbitrator by each of the parties who shall appoint an umpire before proceeding with the reference. The agreement was entered into on 14-12-1993 before the coming into force of the new Act. Section 10 of the new Act provides that parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Further, failing the determination of an odd number of arbitrators, the Arbitral Tribunal shall consist of a sole arbitrator. This Court upheld the validity of the arbitration agreement dated 14-12-1993 and directed the Chief Justice of the High Court concerned to appoint the third arbitrator under Section 11(4)(*b*) of the new Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator. In this case it may be noticed that the respondent had invoked arbitration clause in the agreement by letter dated 19-1-1996 which was received by the appellant on 31-1-1996. The arbitral proceedings would, therefore, commence under Section 21 of the new Act on 31-1-1996 as by that time the new Act had come into force.

25. In this view of the matter, Section 6 of the General Clauses Act would be inapplicable. It is, therefore, not necessary for us to examine if any right to enforce the award under the old Act accrued to a party when arbitral proceedings had commenced before the coming into force of the new Act and SAIL (CA No. 6036 of 1998) had acquired a right to challenge the award made under the old Act and there would be a corresponding right with Thyssen to enforce the award under the old Act.

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*[41]. Provisions of both the Acts, old and new, are very different and it has been so observed in *Sundaram Finance Ltd. case*[5]. 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*[25] the award was given before Kuwait became a party to the New York Convention recognised by an Order in Council in England. The

41 (1996) 6 SCC 716

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.

27. In *Pepper* v. *Hart*[42] the House of Lords for the first time accepted the principle that Judges could refer to the parliamentary debates in order to ascertain the meaning of an Act of Parliament. Lord Griffiths said (at p. 50):

> "The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

But then if the construction of the new Act leads to inconvenient and unjust results, the concept of a purposive approach has to be shed. Multiple and complex problems would arise if the award given under the old Act is said to be enforced under the new Act. Both the Acts are vastly different to each other. It has been rightly contended that when arbitration proceedings are held under the old Act, the parties and the arbitrator keep in view the provisions of that Act for the enforcement of the award. As noted above, under the old Act, there is no requirement for the arbitrator to give reasons for the award. That is not mandatory under the new Act. Section 27 of the old Act provides that the arbitrator or umpire may, if they think fit, make an interim award, unless of course a different intention appears from the arbitration agreement. An interim award is also an award and can be enforced in the same way as the final award. It would certainly be a paradoxical situation if for the interim award, though given after the coming into force of the new Act, it would still be the old Act which would apply and for the final award, it would be the new Act. Yet another instance would be when under Section 13 of the old Act, the arbitrators or umpire have power to state a special case for the opinion of the court on any question of law involved in the proceedings. Under sub-section (3) of Section 14 of the old Act when the court pronounces its opinion thereon such opinion shall be added to and shall form part of the award. From this part of the award no appeal is maintainable under Section 39 of the old Act. There is no such provision under the new Act. In *Sohan Lal* v. *Amin Chand and Sons*[43] this Court was considering the powers of an arbitrator under Section 13 of the old Act. Clause (*b*) of Section 13 provided that arbitrators or umpire shall have power to state a special case for the opinion of the court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court. Section 14 of the old Act provides for the award to be signed and filed. Under sub-section (3) of Section 14 where the arbitrators or

42 (1993) 1 All ER 42 : 1993 AC 593 : (1992) 3 WLR 1032 (HL)

43 (1973) 2 SCC 608 : (1974) 1 SCR 453

umpire state a special case under clause (*b*) of Section 13, the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award. This Court said: (SCC p. 615, para 21)

> "We do not think that an opinion given under the first part of Section 13(*b*) should be added to and form part of the award. The reason why the opinion given under the latter part of Section 13(*b*) should be added to and becomes part of the award is because the arbitrators have stated the award wholly or in part in the form of a special case of such question for the opinion of the court. This view is further strengthened by the circumstance that under Section 39(1)(*ii*), an appeal is provided only against an order on an award stated in the form of a special case. The reason why an appeal is provided for in such a case is that the opinion of the court has to be added to and form part of the award and it therefore becomes a decision of the court, notwithstanding the fact that it is incorporated in the award. There is no provision for an appeal against an opinion given by the court on a special case stated by court under the first part of Section 13(*b*) or against the decision to state a special case for the opinion of the court for the reason that the opinion is not a decision. Nor is it to be incorporated in the award. If, as a matter of fact, the opinion given by the court on a special case stated under first part of Section 13(*b*) is binding on the arbitrators and has to be incorporated in the award, there was no reason why the legislature should not have provided for an appeal against the opinion or against the reference which led to the opinion. The scheme of the Act shows that the legislature wanted to provide for an appeal only when there is to be a decision by the court binding on the parties, not when it tenders an opinion which is not binding on the arbitrators and which is not to be incorporated in the award. It might be that the arbitrator may choose to act upon the opinion. But that is not for the reason that it is a binding determination or a decision. We have, therefore, no hesitation in holding that the appeals are incompetent."

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

29. Enforcement of the award, therefore, has to be examined on the touchstone of the proceedings held under the old Act.

30. Various decisions have been cited before us to show as to what is a mere right and what is right accrued or acquired. We have to examine this question with reference to the provisions of Section 6 of the General Clauses Act if it could be said that when the arbitral proceedings have commenced under the old Act, a party has acquired a right to have the award given thereafter enforced under the old Act. The question that arises for consideration is if a right has accrued to the party or it is merely an inchoate right. The three cases referred to, namely, *Abbott* v. *Minister for Lands*[7], *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*[8] and *D.C. Bhatia* v. *Union of India*[9] show that something more is required for vested right to accrue. Right did exist but then nothing was done to show that any act was done or advantage taken of the enactment under which the right existed till it was repealed. An Act gave the right and the new Act which repealed the old Act took away that right. Mere right to take advantage of the provision of an Act is not a right accrued.

31. In *CIT* v. *Shah Sadiq & Sons*[34] this Court said that right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. In the case of *Bansidhar* v. *State of Rajasthan*[35] this Court had said that what is unaffected by the repeal is a right "acquired" or "accrued" under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right. In the case of *Lalji Raja Sons* v. *Hansraj Nathuram*[24] this Court had said that: (SCC Headnote)

> "[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'."

We think the observations of Lord Morris in *Director of Public Works* v. *Ho Po Sang*[36] are quite apt which have been quoted elsewhere in the judgment. In *M.S. Shivananda* v. *K.S.R.T.C.*[21] this Court again said that if the right created by the statute is of an enduring character and has vested in the person, the right cannot be taken away because the statute by which it was created has expired. In *Hamilton Gell* v. *White*[23] the Court of Appeal referred to the decision of the House of Lords in *Abbott* v. *Minister for Lands*[7]. In the case before it, the Court said that under the old Act (the Agricultural Holdings Act, 1908) which was repealed by the Agricultural Holdings Act, 1914 a necessary event had happened under which the tenant "acquired a right" which would accrue when he was quitting his holding to receive compensation from the landlord. The event which occurred was the notice by the landlord to quit to the tenant in view of a sale of the holding. While Section 11 of the 1908 Act treated this as unreasonable disturbance to the tenant entitling him to compensation, the latter Act of 1914 repealed Section

11. The Court held that in spite of the repeal of Section 11 the tenant had acquired the right to claim compensation inasmuch as notice to quit was given to him when Section 11 of the old Act was in operation. In *Gajraj Singh* v. *STAT*[37] this Court said that some positive act is required to be done for the right to accrue under an enactment which is repealed. In this case reference was made to a decision of this Court in *Gujarat Electricity Board* v. *Shantilal R. Desai*[38] where the Court had pointed out that before Section 71 of the Electricity (Supply) Act, 1948 was amended, the appellant had issued a notice under Section 7 thereof, exercising the option to purchase the undertaking. It was held that a right to purchase the electrical undertaking, which had accrued to the Electricity Board, was saved by Section 6 of the General Clauses Act. In the case of *G. Ekambarappa* v. *Excess Profits Tax Officer*[39] there was repeal of an enactment levying tax. No assessment had been made by the time the Act was repealed and there could, therefore, be no liability. Nevertheless, this Court said that liability to tax arose immediately at the end of the accounting period when the Act was in force though the liability had not been quantified by assessment proceedings. The Court upheld the validity of the notice for assessment of proceedings after the repeal of the Act.

32. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the party against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., the arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036 of 1998 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the court. It was only later on that it changed the stand and now took the position that the new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. The appellant itself led the respondent SAIL in believing that the old Act would apply. SAIL had filed objections to the award under Section 30 of the old Act after notice for filing of the award was received by it on the application filed by Thyssen under Sections 14 and 17 of the old Act. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the old Act. We, therefore, cannot adopt a construction

which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on Section 85(2)(*a*) would only lead to confusion and hardship. This construction put by us is consistent with the wording of Section 85(2)(*a*) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well.

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*).

34. In *Hoosein Kasam Dada (India) Ltd.* v. *State of M.P.*[44] this Court said that pre-existing right of appeal is not destroyed by the amendment if the amendment is not retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. In this case, the law had changed and the appellate authority could exercise jurisdiction only if the appeal was accompanied by deposit of the assessed tax when before the amendment of the provision it only provided for deposit of the admitted tax. The Court said that any requirement for deposit of the assessed tax overlooks the fact of existence of the old law for the purpose of supporting the pre-existing right where appeal could be filed only on depositing the admitted amount of tax. The law interpreted by this Court in this judgment, it seems, is to what Civil Procedure Code (Amendment) Act provided by clause (*m*) of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976.

35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(*a*) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of *Rani Constructions* (Civil Appeal No. 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at

44 AIR 1953 SC 221 : 1953 SCR 987

the relevant time when arbitration proceedings are held. We have been referred to two decisions — one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. The expression "unless otherwise agreed" as appearing in Section 85(2)(*a*) of the new Act would clearly apply in the case of *Rani Constructions* in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Constructions that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after the coming into force of the new Act.

36. Mr Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by a Single Judge in *Reshma Constructions* v. *State of Goa*[45]. In that case the arbitration clause in the contract provided as under:

> "Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may be brought about in such law. This is how the High Court considered the issue before it:

> "Considering the scheme of the Act, harmonious reading of the said provision contained in sub-section (2) of Section 85 thereof would disclose that the reference 'otherwise agreed' necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that

45 (1999) 1 Mah LJ 462

the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Section 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be followed — other in terms of the new Act or the old Act — is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference 'otherwise agreed by the parties' in Section 85(2)(*c*) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression 'otherwise agreed' does not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act."

We agree with the High Court on the interpretation put to the arbitration clause in the contract.

38. Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that. Thus construing clause 25, in *Rani Constructions* (CA No. 61 of 1999) the new Act will apply.

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

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

41. Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section 85(2)(*a*) insofar these apply to the Foreign Awards Act and the 1937 Act, would appear to be quite superfluous. A literal interpretation would render Section 85(2)(*a*) unworkable. Section 85(2)(*a*) provides for a dividing line dependent on "commencement of arbitral proceedings" which expression would necessarily refer to Section 21[46] of the new Act. This Court

46 "21. *Commencement of arbitral proceedings.*—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

has relied on this section as to when arbitral proceedings commence in the case of *Shetty's Constructions Co. (P) Ltd.* v. *Konkan Rly. Construction*[47]. Section 2(2)[48] read with Section 2(7)[49] and Section 21 falling in Part I of the new Act make it clear that these provisions would apply when the place of arbitration is in India, i.e., only in domestic proceedings. There is no corresponding provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as "date of commencement" in those foreign proceedings. We would, therefore, hold that on a proper construction of Section 85(2)(*a*) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and the foreign award would be enforced under the Foreign Awards Act. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act.

42. We, therefore, hold that the award given on 24-9-1997 in the case of *Thyssen Stahlunion GMBH* v. *Steel Authority of India Ltd.* (Civil Appeal No. 6036 of 1998) when the arbitral proceedings commenced before the Arbitration and Conciliation Act, 1996 came into force on 25-1-1996, would be enforced under the provisions of the Arbitration Act, 1940. We also hold that clause 25 containing the arbitration agreement in the case of *Rani Constructions (P) Ltd.* v. *H.P. SEB* (Civil Appeal No. 61 of 1999) does admit of the interpretation that the case is governed by the provisions of the Arbitration and Conciliation Act, 1996. We further hold that the foreign award given in the case of *Western Shipbreaking Corpn.* v. *Clareheaven Ltd.* (Civil Appeal No. 4928 of 1997) would be governed by the provisions of the Arbitration and Conciliation Act, 1996. Thus we affirm the decisions of the Delhi High Court in Execution Petition No. 47 of 1998 and of the Gujarat High Court in Civil Revision Application No. 99 of 1997, and set aside that of the Himachal Pradesh High Court in Civil Suit No. 52 of 1996.

43. Accordingly Civil Appeals Nos. 6036 of 1998 and 4928 of 1997 are dismissed, while Civil Appeal No. 61 of 1999 is allowed. Parties shall bear their own costs.

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47 (1998) 5 SCC 599

48 "2. (2) This Part shall apply where the place of arbitration is in India."

49 "2. (7) An arbitral award made under this Part shall be considered as a domestic award."