Citation

1999 AIR 3923, 1999(3)Suppl.SCR461 , 1999(9)SCC334 , 1999(6)SCALE441 , 1999(8)JT66

Judgment

CASE NO.:

Appeal (civil) 6036 of 1998

PETITIONER:

THYSSEN STAHLUNION GMBH ETC.

RESPONDENT:

STEEL AUTHORITY OF INDIA LTD.

DATE OF JUDGMENT: 07/10/1999

BENCH:

D.P. WADHWA & M.B. SHAH

JUDGMENT:

JUDGMENT

1999 Supp(3) SCR 461

The Judgment of the Court was delivered by D.P. WADHWA, J. The Facts :

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) the Foreign Awards (Recognition and Enforcement) Act, 1961 (the `Foreign Awards Act' for short).

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

"55. Repeal and saving (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Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act 1961 (45 of 1961) are hereby repealed.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."

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. Relevant clauses are as under:

"CLAUSE 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.

CLAUSE 13 : SETTLEMENT OF DISPUTES

All disputes of 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.

Disputes and differences having arisen, the arbitration proceedings commenced on September 14, 1995 under the old Act. On this date request for arbitration was made to the ICC under the arbitration clause in the contract. Mr. Cecil Abraham of the Malaysian Bar was appointed sole arbitrator on November 15, 1995. Terms of reference in the arbitration were finalised on May 13, 1996. Hearing before the sole arbitrator took place from January 7, 1997 till January 28, 1997, Award was given on September 24, 1997. By this time on January 25, 1996 the new Act had come into force.

On October 13, 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 court (Arbitration Suit No, 352-A/97). While these proceedings were pending in the High Court, Thyssen, on February 12, 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. 47/98). The ground taken was that the arbitration proceedings had been terminated with the making of the award on September 24, 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 learned single Judge of the Delhi High Court by judgment dated September 21, 1998 held that proceedings would be governed by the old Act. Thyssen Stahlunion GMBH feeling aggrieved filed this appeal (CA 6036/98).

In the case of Western Shipbreaking Corporation (CA No. 4928 of 1997) under Memorandum of Agreement dated November 4, 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."

Arbitration proceedings in this case were held in United Kingdom prior to the enforcement of the new Act. The award was made on February 25, 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?

A learned single Judge of the Gujarat High Court by impugned Judgment dated April 21, 1997 held that the new Act would be applicable. Western Shipbreaking Corporation is aggrieved and filed appeal against that judgment (CA 4928/97).

In the case of M/s. Rani Constructions Pvt. 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."

Disputes having arisen, these were referred to the sole arbitrator on December 4, 1993. The arbitrator gave his award on February 23, 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 it is old or 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."

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 they have necessarily to agree only after the new Act comes into force.

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

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 Construction and the Foreign Awards Act in the case of Western Shipbreaking Corporation. We would, however, refer to these arguments in brief insofar

we consider these to be relevant to decide the issues before us.

The Submissions:

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 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

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). Act for enforcement of the award as when award was given 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.

3. 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 , of the new Act as well.

In the Statement of Objects

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.

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 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 Reasons4, the objectives behind introduction of the New

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in

1980;

AND WHEREAS the General Assembly of the United Nations has recom-mended 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:-" 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 worldwide 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. 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., [1999] 2 SCC 479 the question that arose for consideration was whether under Section 9 of the new Act court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed. Under this Section 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 :

"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 19% Act (new Act) have to be

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

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

(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. 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. and Others,[1998] 1 SCC 305.

In Sumitomo Heavy Industries Ltd. `s case (supra) under the arbitration agreement between the parties proceedings were to be held at London in accordance with the provisions of International Chamber of Commerce and the rules made thereunder as amended from time to time. Award was made on June 27, 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, un-enforceable and liable to be set aside under the provisions of the Arbitration Act, 1940. This petition of the ONGC was allowed by the High Court. It was noticed that during the course of preliminary hearing in the

Queens Bench Division, Commercial Court, in London, Potter, J. had observed that one of the aspects of the case for consideration was :

"(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 :

"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.

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 to 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

coming into force of new Act would yet be governed under the old Act, can be answered only if any vested right accrued to the party. Vested rights accrued when proceedings for enforcement of the award are taken and not I 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. The Minister for Lands, (1895) AC 425 PC, which was followed by this Court in Hungerford Investment Trust Limited v. Haridas Mundhra and Others, [1972] 3 SCR 690. Reference may also be made to another decision of this Court in D.C. Bhatia and Others v. Union of India and Another, [1995] 1 SCC 104.

In Abbott v. The Minister for Lands, (1895) AC 425 PC 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 a "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 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 any one 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 "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 sec. 2(b) was sufficient' to reserve to him the right for which he contends, he would have to overcome further difficulties. That enactment only render's "rights accrued" unaffected by the repeal "subject to any express provisions of this Act in relation thereto".

This Court in Hungerford Investment Trust Limited v. Hondas Mundhra and Others, [1972] 3 SCR 690 followed decision of Privy Council in Abbott v. The Minister for Lands, (1895) AC 425 PC holding that the mere right to

take advantage of provisions of an Act is not an accrued right.

In D.C. Bhatia and Others v. Union of India and Another, [1995] 1 SCC 104 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. Delhi Rent Control Act was amended with effect from December 1, 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. 3,500. This Court while upholding the constitutional validity of the provisions as contained in Section 3(c) of Delhi Rent Control Act observed 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. 3,500 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 tenants had acquired valuable property rights and they could neither be evicted nor the rent could 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 :

"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 the Amendment Act No. 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. 3,500 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, (1830) 6 Bing 576 : 130 ER 1403 : (ER p1405)

"The effect of repealing a statute is to obliterate it as completely from records of the 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 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 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 for setting aside of the arbitral award under Section 34 has been been dealt with. This Court in Oil and Natural Gas Commission v. Western Company of North America, [1987] 1 SCR 1024 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. Claim of the respondents that they had acquired vested right to

challenged 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) of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976.

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

5 "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."

6 36. Enforcement - Where the lime 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 Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.

7. "(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;" the new Act comes into force. There is, however, 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 Sir Dinshaw Manekji Patit v. G.B. Badkas & Others, AIR (1969) Bombay 151 for the expression "for the time being in force" and also construction of the similar expression in Devkumarsingji Kasturchandji v. Stale of Madhya Pradesh and Others, AIR (1967) M.P. 268. In Sir Dinshaw Manekji Patit's case 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."

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 Edition) Vol. IV page 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, (1861) 31 LJ Ch 867 and (1862) 32 LJ Ch 32; Coles v. Pack, (1869) LR 5 CP 65. See also Re Gunter's Settlement Trust, (1949) Ch 502."

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 said Section 19 arose.

In Devkumarsingji Kasturchandji v. State of Madhya Pradesh & Ors., AIR (1967) M.P. 268 (DB) 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. 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 and refers to indefinite state of facts which will arise in future and which may vary from time to time.

2. Section 28 of the Contract Act does not bar the agreement

8 "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, 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 contact 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 reference to arbitration." 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. 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. 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.

At this stage itself we may also note the submissions made by Mr. Krishnan Venugopal, counsel appearing for M/s. Clareheaven Ltd. (CA 4928/97) in support of the decision of the High Court holding that for enforcement of

the foreign award new Act would apply :

1. Section 85(2)(a) of the new Act cannot save the operation of the Foreign Awards Act. On 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. 4928/97 to challenge the foreign award under the Foreign Awards Act, 1961. Reference in this connection was made to a decision of this Court in M.S. Shivananda v. Karnataka State Road Transport Corporation & Ors., [1980] 1 SCC 149. In that case this Court said as under :

"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 re-create 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 Mukherjee, J. in Slate of Punjab v. Mohar Singh, [1955] 1 SCR 893, `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.

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 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 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 new Act had come into force for enforcement of the foreign award. Reference was made to two English decisions in Abbott v. The Minister for Lands, (1895) AC 425 and Hamilton Gel! v. White, (1922) 2 KB 422.

In Hamilton Cell v. White, (1922) 2 KB 422 (Court of Appeal) facts are plainly stated in the head note, 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 the notice to quite is treated as an unreasonable disturbance within s. 11 of the Agricultural Holdings Act, 1908, and the tenant is entitled to compensation upon the terms and subject to the con-ditions 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 quite 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, s. 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 has 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 LJ said :-

"In my opinion the tenant had acquired a right under s. 11 of the Act of 1908. This is not like the case which was cited to us Abbot v. Minister for Lands, (1895) AC 425 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 LJ said :-

"The conditions imposed by s. 11 were conditions, not of the acquisition of the right, but of its enforcement. Sec. 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 s. 11 he was entitled to have that claim investigated by an arbitrator."

Atkin LJ 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 repeating 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 quite. 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 (1895) A.C. 425, 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 decision of this Court in Lalji Raja & Sons v. Firm Hansraj Nathuram, [1971] 1 SCC 721 and of the House of Lords decision in the case of Kuwait Minister of Public Works v. Sir Frederick Snow and Partners, (1984) All ER 733.

In Lalji Raja & Sons v. Finn Hansraj Nathuram, [1971] 1 SCC 721 this Court relying on the decision of the House of Lords in Abbott v. Minister for Lands, (1895) AC 425 said 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, (1922) 2 KB 422 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 upon happening of one or the other of the events specified in statute."

In Kuwait Minister of Public Works v. Sir Frederick Snow & Partners (a firm) and Others, (1984) 1 All ER 733 (House of Lords) 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 Kuwaiti arbitrator on September 15, 1973. The award required payment by the English firm to the Government of the State of Kuwait an amount well over 3.5 Million. Proceedings to enforce the award were initiated in England on March 23, 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. New York Convention came into being on June 10, 1958. United Kingdom became party to the Convention on December 23, 1975 and the 1975 Act was passed to give effect to the New York Convention. Kuwait became party to the Convention on July 27, 1978. On April 12, 1979 an Order in Council was made declaring Kuwait a party to the Convention. Now the award was made before Kuwait had become 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 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 to 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 s. 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, [1993] 4 SCC 320.

In Navin Chemicals Mfg. & Trading Co. Ltd's case (supra) 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 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 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.

Mr. Dipankar Gupta, senior advocate, appearing for the SAIL (in CA No. 6036/98) 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 arbitrator and holding of ar-bitration proceedings and the making of award is different in the old Act and in the new Act, Under the old Act, arbitrator is not required to give reasons unless the agreement between the parties so envisages. Under the new Act, however, arbitrator has to give reasons. This one illustration is advanced to show that when arbitration proceedings have started before 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, arbitrator is conscious of Section 30 of the old Act which gives grounds for setting aside the awards. 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 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 M/s. Doypack Systems Pvt. Ltd. v. Union of India & Ors., [1988] 2 SCC 299; Mansukhlal Dhanraj Jain & Ors. v. Eknath Vithal Ogale, [1995] 2 SCC 665 and M/s. Dhanrajamal Gobindram v. M/s. Shamji Kalidas & Co., [1961] 3 SCR 1020.

In M/s. Doypack Systems Pvt. Ltd.'s case [1988] 2 SCC 299 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:

"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, movable and immovable, including lands, buildings, workshops, stores.....investments

and book debts pertaining to the textile undertakings and all rights and interest 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, Volume 17, page 693.

50. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context, set State Wakf Board v. Abdul Azeez, AIR (1968) Mad. 79 at 81 paras 8 and 10), following and approving Nitai Charan Bagchi v. Suresh Chandra Paul, (66 Cal WN 767), Shyam Lal v. M. Shayamlal, AIR (1933) All 649 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 pages 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 and Others v. Eknath Vithal Ogale, [1995] 2 SCC 665 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 license fee or charges or rent thereof, irrespective of the value of the subject-matter of such suits or proceedings."

It also referred to its earlier decision in M/s, Doypack Systems Pvt. Ltd. v. Union of India and Others, [1988] 2 SCC 299. This Court held :

"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

possessions from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase."

From M/s. Dhanrajamal Gobindram's case [1961] 3 SCR 1020 we quote the following passage :

"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., (1942) AC 356. 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 s. 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, 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 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 Commissioner of Income Tax, U.P. v. M/s. Shah Sadiq and Sons, [1987] 3 SCC 516 and Bansidhar & Ors. v. State of Rajasthan & Ors., [1989] 2 SCC 557.

In Commissioner of Income Tax, U.P. v. M/s. Shah Sadiq and Sons, [1987] 3 SCC 516 this Court was considering Section 6 of 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 :

"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 of 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 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 and Others v. State of Rajasthan and Others, [1989] 2 SCC 557 this Court referred to the observations made in I.T. Commissioner v. Shah Sadiq and Sons, [1987] 3 SCC 516 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 or acquiring a right or liberty to apply for a right. This Court relied on its earlier decision in Lalji Raja & Sons v. Firm Hansraj Nathuram, 1971] 1 SCC 721. It also referred to observation of Lord Morris in Director of Public Works v. Ho Po Sang, (1961) 2 All ER 721, which had been quoted with approval in an earlier decision of this Court in M.S. Shivananda v. K.S.R.T.C., [1980] 1 SCC 149, 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 be or should not be given. On a repel, the former is preserved by the Interpretation Act. The latter is not." Mr, R.P. Bhatt, senior advocate appearing for Western Shipbreaking Corporation (CA No. 4928/97) 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 (UK) Arbitration Act, 1950. Proceedings began on May 15, 1995. Awards was given in England on February 25, 1996 after the new Act had come into force on January 25, 1996. As to when arbitration proceedings commence have 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 pronouncement of an Arbitration Award after the cut off date is not condition precedent for applicability of 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 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.

Mr. A.K. Ganguli, senior advocate, appeared for Himachal Pradesh State Electricity Board (CA 61/99). He supported the impugned judgment of the High Court. He drew 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 proceed-ings held

under the old Act resulting in the award. Any restricted inter-pretation 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 arbitrator would not be required to give reasons unless the arbitration agreement so provided. He said when the savings clause makes the provision of the old Act applicable to arbitral proceedings commencing before January 25, 19% 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. Expression "arbitral proceedings" in Section 85(2)(a) could not be given 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 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 integral part of the process "in relation to arbitral proceedings". Reference was also made to the meaning of expression "in relation to" and to various decisions of this Court in that connection. Provisions of Section 6 of 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 later part of Section 85(2) (a) would be entered into only after the

enforcement of the new Act and that is January 25, 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 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.

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 and Others v. State Transport Appellate Tribunal and Others, [1997] 1 SCC 650 this Court was examining the provisions of Section 217(1) and (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 :

"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 :-

"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 Board v. Santilal R. Desai, AIR (1969) SC 239 : [1969] 1 SCR 580 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."

In G. Ekambarappa & Ors. v. Excess Profits Tax Officer, Bellary, [1967] 3 SCR 864. In that case District Bellary, which belonged to Part `A' State of Madras in British India, was merged in Part `B' State of Mysore on October

1, 1953. The Excess Profits Act, 1940 applied only to British India. It ceased to apply to the Bellary after it became part of the State of Mysore. Then, after States Reorganisation Act, 1956, Mysore also became Part `A' State. However, by the Adaptation of Laws (No. 3) Order dated December 31, 1956, the Excess Profits Tax Act was to extend "to the whole of India except the territories which immediately before November 1, 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. December 21, 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 October 30, 1943 to October 30, 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 the Bellary District which comprised in the territory of Part `B' State of Mysore immediately before November 1, 1956. This Court said that there was no justification for the argument put forward on behalf of the appellants. The Court proceeded to repel 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, s. 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 -

(c) affect any right, privilege, obligation or liability acquired, ac-crued 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 s. 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 November 1, 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 s. 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 :

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 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 hut would also cover the proceedings before the Court and any proceedings which are required to be taken under the old Act for award becoming decree under Section 17 thereof and also appeal arising thereunder.

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

9. "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."

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

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

6. If narrow meaning of the phrase "in relation to arbitral proceedings" is to be accepted, it is likely to create 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).

Section 85(2) (a) of the new Act is in two limbs : (1) Provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties and (2) new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. First limb can further be bifurcated into two : (a) Provisions of old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force and (b) old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of widest import as held by various decisions of this Court in M/s. Doypack Systems Pvt. Ltd. [1988] 2 SCC 299; Mansukhlal Dhanraj Jain & Ors. [1995] 2 SCC 660; M/s. Dhanrajamal Gobindram [1961] 3 SCR 1020 and Naveen Chemicals Mfg. & Ors. [1993] 4 SCC 320. This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the word "the provisions" of the old Act. That would mean that the old Act will apply to whole gambit of arbitration culminating in the enforcement of the award. If

it 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. First limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act.

The contention that if it is accepted that the expression "in relation to" arbitral proceedings would include proceedings for the enforcement of the award as well, the second limb of Section 85(2)(a) would become superfluous. 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 MMTC Ltd. v. Sterlite Industries (India) Ltd., [1996] 6 SCC 716 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 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 December 14, 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 odd number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator. This Court upheld the validity of the arbitration agreement dated December 14, 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 January 19, 1996 which was received by the appellant on January 31, 1996. The arbitral proceedings would, therefore, commence under Section 21 of the new Act on January 31, 1996 as by that time new Act had come into force.

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 the SAIL (CA 6036/98) had acquired a right to challenge the award made under the old Act and there would be corresponding right with the Thyssen to enforce the award under the old Act.

Present day the courts tend to adopt purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act.

We have seen above this approach was adopted by this Court in MMTC Ltd.'s case [1996] 6 SCC 716. Provisions of both the Acts, old and new are very different and it has been so observed in Sundaram Finance Ltd.'s case [1999] 2 SCC 479. In that case, this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to old Act may actually lead to the misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In the case of Kuwait Minister of Public Works v. Sir Frederick Snow and Partners, (1984) 1 ALL ER 733 HL the award was given before Kuwait became party to the New York Convention recognised by Order in Council in England. 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 party to the Convention. It negatived the contention that on the date the award was given Kuwait was not party to the New York Convention.

In Pepper v. Hart, (1993) 1 All. ER 42 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 page 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 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 arbitrator or umpire may, if they think fit, make an interim award, unless of course different intention appears from the arbitration agreement. Interim award is also an award and can be enforced in the same way as the final award. It would certainly be a paradoxical situation if for the interim award, though given after the coming into force of the new Act, it would still be the old Act which would apply and for the final award, it would be the new Act. Yet another instance would be when under Section 13 of the old Act, the arbitrators or umpire have power to state a special case for the opinion of the Court on any question of law involved in the proceedings. Under sub- section (3) of Section 14 of the old Act when the Court pronounces its opinion thereon

such opinion shall be added to and shall form part of the award. From this part of the award no appeal is maintainable under Section 39 of the old Act. There is no such provision under the new Act. In Sohan Lal & Ors. v. Amin Chand and Sons & Ors., [1974] 1 SCR 453. This Court was considering the powers of 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 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 :

"We do not think that an opinion given under the first part of s. 13(b) should be added to and form part of the award. The reason why the opinion given under the latter part of s. 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 s. 39(l)(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 to the court under the first part of s.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 s,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."

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 uptill the time of the enforcement of the award. This Section 85(2)(a) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. There is a presumption that Legislature does not intend to limit or take away vested rights unless the

language clearly points to the contrary. It is correct that the new Act is a remedial statute and, therefore, Section 85(2)(a) calls for strict construction, it being a repealing provision. But then as stated above where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter.

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

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. The Minister for Lands, (1895) AC 425 PC; Hungerfort Investment Trust Ltd. v. Haridas Mundhra & Ors., [1972] 3 SCR 690 and AC, Bhatia & Ors. v. Union of India & Anr., [1995] 1 SCC 104 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.

In I.T. Commissioner v. Shah Sadiq & Sons, [1987] 3 SCC 516 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 expresslv or by necessary implication. In the case of Bansidhar & Ors. v. State of Rajasthan & Ors.,[1989] 2 SCC 557 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. Firm Hansraj Nathuram, [1971] 1 SCC 721 this Court had 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 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 (1961) 2 ALL E.R. 721 are quite apt which have been quoted elsewhere in the judgment. In M.S. Shivanda v. K.S.R.T.C., [1980] 1 SCC 149 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 Hemilton Gell v. white, [1922] 2 KB 422 Court of Appeal referred to the decision of the House of Lords in Abbott v. Minister for Lands, (1895) A.C. 425. 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 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 tenant had acquired 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 & Ors, v. State Transport Appellate Tribunal & Ors., [1997] l SCC 650 this Court said that some positive Act is required to be done for the right to accrue under enactment which is repealed. In this case reference was made to a decision of this Court in Gujarat Electricity Board v. Shantilal R. Desai, AIR (1969) SC 239 = [1969] 1 SCR 580 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 & Ors. v. Excess Profits Tax Officer, Bellary, [1967] 3 SCR 864 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 validity of the notice for assessment of proceedings after the repeal of the Act.

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 that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act, would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that Section 30 of the old Act could be substituted by Section 34 of the new Act. As a matter of fact appellant Thyssen in Civil Appeal No. 6036/98 itself understood that the old Act would apply when it approached the High Court under Sections 14 and 17 of the old Act for making the award rule of the Court. It was only later on that it changed the stand and now took the position that new Act would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the new Act had elapsed. Appellant 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 the 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 the Section 85(2) (a) would only lead to the 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.

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 concept is of "reference" while under the new Act it is "commencement". Section 2(c) 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).

In Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and Others, [1953] SCR 987, 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, law had changed and the appellate authority could exercise jurisdiction only if the appeal was ac-companied by the deposit of the assessed tax when before the amendment of the provision it only provided for deposit of 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.

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 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. We have been referred to two decisions - one of Bombay High Court and the other of 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. Expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would 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 Construction 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 respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come

into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give option to the parties to agree that new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.

Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by single Judge in Reshma Constructions v. State of Goa, (1999) 1 MLJ 462. In that case 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."

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 Sec. 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 the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Sec. 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 Sec. 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" do 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 interpretation put to the arbitration clause in the contract.

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 the clause 25, in Rani Constructions (CA 61/99) new Act will apply.

Foreign Awards Act gives the party right to enforce the foreign award under that Act. But before that right is exercised Foreign Awards Act has been repealed. It cannot, therefore, be said that any right had accrued to the party for him to claim to enforce the foreign award under the Foreign Awards Act. After the repeal of the Foreign Awards Act a foreign award can now be enforced under the new Act on the basis of the provisions contained in Part II of the new Act depending whether it is a New York Convention Award or Geneva Convention Award. It is irrespective of the fact when the

arbitral proceedings commenced in a foreign jurisdiction. Since no right has accrued Section 6 of the General Clauses Act would not apply.

In the very natural of the provisions of Foreign Awards Act it is not possible to agree to the submissions that Section 85(2)(a) of the new Act would keep that Act alive for the purpose of enforcement of a foreign award given after the date of commencement of the new Act though arbitral proceedings in foreign land had commenced prior to that. It is correct that Section 85(2)(a) uses the words "the said enactments" which would include all the three Acts, i.e., the old Act, Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937. Foreign Awards Act and even the 1937 Act contain provisions only for the enforcement of the foreign award and not for the arbitral proceedings. Arbitral proceedings and enforcement of the award are two separate stages in the whole process of arbitration. When the Foreign Awards Act does not contain any provision for arbitral proceedings it is difficult to agree to the argument that in spite of that the applicability of the Foreign Awards Act is saved by virtue of Section 85(2)(a). As a matter of fact if we examine the provisions of Foreign Awards Act and the new Act there is not much difference for the enforcement of the foreign award. Under the Foreign Awards Act when the court is satisfied that the foreign award is enforceable under that Act the court shall order the award to be filed and shall proceed to pronounce judgment accordingly and upon the judgment so pronounced a decree shall follow. Sections 7 and 8 of the Foreign Awards Act respectively prescribe the conditions for enforcement of a foreign

award and the evidence to be produced by the party applying for its enforcement. Definition of foreign award is same in both the enactments. Sections 48 and 47 of the new Act correspond to Sections 7 and 8 respectively of the Foreign Awards Act. While Section 49 of the new Act states that where the court is satisfied that the foreign award is enforceable under this Chapter (Chapter I, Part II, relating to New York Convention Awards) the award is deemed to be decree of that court. The only difference, therefore, appears to be that while under the Foreign Awards Act a decree follows, under the new Act foreign award is already stamped as the decree. Thus if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award arc juxtaposed there would appear to be hardly any difference.

Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section 85(2)(a) in so far these apply to the Foreign Awards Act and 1937 Act, would appear to be quite superfluous. Literal interpretation would render Section 85(2)(a) unworkable. Section 85(2)(a) provides for a dividing line dependent on "commencement of arbitral proceedings" which expression would necessarily refer to Section 2110 of the new Act. This Court has relied on this Section as to when arbitral proceedings commence in the case of Shetty's Construction Co. P. Ltd. v. Konkan Railway

Construction, [1998] 5 SCC 599. Section 2(2) read with Section 2(7) and Section 21 falling in Part-I of the new Act make it clear that

10. 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."

11. "2(2) This Part shall apply where the place of arbitration is in India."

12. "2(7) An arbitral award made under this Part shall be considered as a domestic award." 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 proper construction of Section 85(2)(a) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and foreign award would be enforced under the Foreign Awards Act. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act,

We, therefore, hold that the award given on September 24, 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 22nd August 1996, would be enforced under the provisions of Arbitration Act, 1940. We also hold that clause 25 containing the arbitration agreement in the case of M/s. Rani Constructions Pvt. Ltd. v. Himachal Pradesh State Electricity Board, Civil Appeal No. 61 of 1999 does admit of 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 Corporation v. M/s. Clareheaven Ltd., (Civil Appeal No. 492S 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 Himachal Pradesh High Court in Civil Suit No. 52 of 1996.

Accordingly Civil Appeal 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.

C.A. No. 6036/98 and C.A. No. 4928/97 dismissed.

C.A. No. 61/99 allowed.