THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.01.2017

\+ **FAO (OS) No.221/2016**

ARDEE INFRASTRUCTURE PVT. LTD ... Appellant

versus

MS. ANURADHA BHATIA ... Respondent

WITH

\+ **FAO (OS) No.222/2016**

ARDEE INFRASTRUCTURE PVT. LTD ... Appellant

versus

YASHPAL & SONS ... Respondents

Advocates who appeared in these cases:-

For the Appellants : Mr Rajiv Nayar, Senior Advocate with Mr Saurabh Seth, Mr Ashok Chhabra and Mohd. Umar Iqbal Khan

For the Respondents : Mr Kirti Uppal, Senior Advocate with Ms Aastha Dhawan

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J

1. These appeals are taken up together as they arise out of the common order dated 31.05.2016 passed in, *inter alia*, OMP Nos. 7 & 8 of 2016

which were petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'). Those petitions had been filed against an award dated 13.10.2015. The petitions were filed on 04.01.2016.

2. The appellants are aggrieved by the impugned order because the learned single Judge has directed the appellants to deposit a sum of Rs 2.70 crores without prejudice to the rights and contentions of the parties and subject to the deposit being made, it was directed that notice may be treated as issued to the respondents on the objections filed by the petitioners under Section 34 of the said Act. It was also directed that in case the amount was not deposited by the petitioners, the objections filed by them under Section 34 of the said Act would be treated as dismissed.

3. The controversy is with regard to the application of the amended provisions of the said Act. The amendments to, *inter alia*, Sections 34 and 36 of the said Act were brought about by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as 'the Amending Act') with retrospective effect from 23.10.2015. It is the case of the petitioners that the petitions under Section 34 of the said Act would be governed by the unamended provisions of, *inter alia*, Sections 34 and 36 and, therefore, the

petitioners would have the right of an automatic stay on the filing of the petitions under Section 34 of the said Act. On the other hand, the respondents argue that the amended provisions would apply and, therefore, there would be no question of any automatic stay and that it was well within the powers of the learned single Judge to have required the petitioners to make a deposit of Rs 2.7 crores and to direct that in case such a deposit was not made, the petitions under Section 34 of the said Act would be liable to be dismissed.

4. We may point out that the notice invoking the arbitration clause was given by the respondents on 07.06.2011. The statement of claim was filed in February 2013 and an interim award was made on 10.07.2014. The final award was made by the arbitral tribunal on 13.10.2015. The petitions under Section 34 objecting to the award were, as mentioned earlier, filed on 04.01.2016. In the meanwhile, the amendments to, *inter alia*, Sections 34 and 36 were introduced by the Amending Act with retrospective effect from 23.10.2015. Section 26 of the Amending Act, on which the controversy mainly hinges, reads as under:-

> "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of

this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

5. At this juncture, it would be necessary to also set down the differences in Section 36 of the said Act, pre and post-amendment:-

Pre-amendment	Post-amendment
36. Enforcement. – Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.	36. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court. (2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

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

6. There is no dispute with the proposition that if the pre-amendment provisions of Section 36 of the said Act were to apply, the very filing and pendency of a petition under Section 34 would, in effect, operate as a stay of the enforcement of the award. This has been materially changed by virtue of the amendment brought about in Section 36 of the said Act. The post-amendment scenario is that where an application to set aside an arbitral award is filed under Section 34 before a court, the filing of such an

application would not by itself render the award non-enforceable unless the court granted an order of stay of operation of the arbitral award in accordance with the provisions of Section 36(3) on a separate application made for that purpose. Sub-section (3) of Section 36 stipulates that upon the filing of an application for stay of operation of the arbitral award, it would be open to the court, subject to such conditions, as it may deem fit, to grant stay of operation of the award for the reasons to be recorded in writing. The proviso thereto requires the court, while considering the application for grant of stay in the case of an arbitral award for payment of money, to have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

7. According to the learned counsel for the petitioners, this change in law with regard to the enforcement of an award under Section 36 of the said Act tends to take away vested rights. Therefore, the provisions of Section 6 of the General Clauses Act, 1897 would be applicable. Section 6 of the General Clauses Act, 1897 reads as under:-

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

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

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

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

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

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

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

8. It was submitted in the context of Section 6 of the General Clauses Act that a repeal of an enactment would not affect any right acquired or accrued under the repealed enactment, unless a different intention appears in the repealing Act. It was contended that Section 26 of the Amending Act does not express any intention of retrospective application prior to 23.10.2015. It was further submitted that under the old provision, there was no requirement for a party objecting to the award and seeking the setting aside of the award to separately ask for stay of the award. The mere filing of the petition under Section 34 of the said Act entailed an automatic stay

of the enforcement of the award. That vested right of automatic stay is no longer available under the new Section 36. This, according to the learned counsel for the petitioners, would operate only prospectively, that is, to arbitral proceedings commenced after 23.10.2015 and not to arbitrations commenced prior to 23.10.2015.

9. It was further contended on the strength of the Supreme Court decision in the case of ***Hitendra Vishnu Thakur and Others etc. etc. v. State of Maharashtra and Others*****: 1994 (4) SCC 602** that a statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment. Furthermore, the law relating to forum and limitation is procedural in nature, whereas the law relating to action and right of appeal, even though remedial, is substantive in nature. This, according to the learned counsel for the petitioners, would cover petitions under Section 34 of the said Act.

10. The Supreme Court decision in ***Jose Da Costa and Another v. Bascora Sadasiva Sinai Narcornim and Others*****: 1976 (2) SCC 917** was also referred to by the learned counsel for the petitioners to contend that the provisions which touch a right in existence at the time of passing of a

statute, are not to be applied retrospectively in the absence of express enactment or necessary intendment.

11. Reliance was also placed on ***Thirumalai Chemicals Limited v. Union of India and Others*****: 2011 (6) SCC 739**, wherein it was held that though it may be true that amendments to procedural laws can be applied retrospectively, procedural statutes which affect the rights of the parties, cannot be applied retrospectively.

12. In this backdrop, it was submitted by the learned counsel for the petitioners that substantive rights of the petitioners have been affected by the amendments brought about by the Amending Act. For instance, the new provision of Section 34 restricts the scope for challenge to an award as compared to the earlier provisions of Section 34. Secondly, the new Section 36 takes away the right of automatic stay which existed under the old Section 36. This is so as now a party has to seek a stay by way of an application under Section 36(2) of the new provisions and conditions could be imposed on the parties even where the court grants a stay of the enforcement of the award.

13. It was next contended by the learned counsel for the petitioners that Section 26 of the Amending Act does not indicate any intention of retrospective application of the amended provisions.

14. On behalf of the respondents, it was contended that Section 26 of the Amending Act needs to be compared with Section 85(2)(a) of the said Act. The following table sets out the two provisions:-

Comparison of Section 26 of the Amendment Act, 2015 and Section 85(2)(a)of the 1996 Act

Section 26 under the 2015 Act	**Section 85(2)(a) under the 1996 Act**
"Nothing contained in this Act shall apply **to the arbitral proceedings** commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in **relation to arbitral proceedings** commenced on or after the date of commencement of this Act."	"(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."

(Underlining added)

15. It was contended that from a comparison of the two provisions, it is clear that the first part of Section 26 of the Amending Act uses the word "to" instead of "in relation to" and the expression "in relation to" is used

only in the second part, whereas under Section 85(2)(a) of the said Act, the expression "in relation to" is used in both parts. A reference was made to the Supreme Court decision in ***Thyssen Stahlunion Gmbh v. Steel Authority of India Limited*****: 1999 (9) SCC 334**. It was submitted that the meaning of the expression "in relation to" was examined in the said decision in the context of Section 85(2)(a) by the Supreme Court. The Supreme Court examined the applicability of the provisions of the Arbitration Act, 1940 which had been repealed in relation to arbitration proceedings which had commenced prior to the enactment of the said Act (i.e., the 1996 Act). The conclusions arrived at by the Supreme Court were as under:-

> "22. For the reasons to follow, we hold:
>
> 1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).
>
> 2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act

for the award becoming a decree under Section 17[1] thereof and also appeal arising thereunder.

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

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

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

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

[1] "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."

> 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]."
>
> (underlining added)

16. The Supreme Court further examined the provisions of Section 85(2)(a) of the said Act in the following manner:-

> "**23.** Section 85(2)(a) of the new Act is in two limbs: (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of the widest import as held by various decisions of this Court in Doypack Systems (P) Ltd.[2], Mansukhlal Dhanraj Jain[3], Dhanrajamal Gobindram[4] and Navin Chemicals Mfg[5]. This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first

[2] 1988 (2) SCC 299
[3] 1995 (2) SCC 665
[4] AIR 1961 SC 1285
[5] 1993 (4) SCC 320

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

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

xxxxx xxxxx xxxxx xxxxx xxxxx

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

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

xxxxx xxxxx xxxxx xxxxx xxxxx

32. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not

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

> proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well."
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> (underlining added)

17. It was contended on behalf of the respondents that a Division Bench of the Calcutta High Court in ***Tufan Chatterjee v. Rangan Dhar*****: AIR 2016 Cal 213** and the Madras High Court in ***New Tirupur Area Development Corporation Limited v. Hindustan Construction Company Limited***: [*Application No.7674/2015 in O.P. 931/2015*] have held that since Section 26 of the Amending Act uses the expression "to arbitral proceedings" instead of "in relation to arbitral proceedings", the legislative intent was to limit its scope and, therefore, the said Section 26 could not be extended to include post-arbitral proceedings (including court proceedings). It was submitted that the crucial difference is in the words "in relation to" in Section 85(2)(a) of the said Act which are missing from the first part of Section 26 of the Amending Act. It was submitted that the Supreme Court in the decision in ***Thirumalai*** *(supra)* was also relied upon by the Calcutta High Court and the Madras High Court in the aforesaid judgments. It was, therefore, submitted that since the first part of Section 26 of the Amending Act uses the phrase "to arbitral proceedings" as distinct from the expression

"in relation to arbitral proceedings" used in Section 85(2)(a) of the said Act, it would, therefore, have a restrictive meaning.

18. It was also contended that the aid to Section 6 of the General Clauses Act ought not to be resorted to because of the use of the restrictive phrase in Section 26. This implies that the legislature deliberately and intentionally kept the post-arbitral proceedings outside the application of the first part of Section 26 of the Amending Act. It was also contended that the remedy available to a party under Section 34 has not been taken away by the Amending Act and there are only slight changes to Section 34. It was submitted that the only vested right was with regard to the challenge to an arbitral award which has remained intact. Section 36 relates to the enforcement of the award. Even under the unamended provisions, the party in whose favour the award was made was entitled for enforcement of the award after the expiry of the period mentioned in Section 34 or after the dismissal of a petition under Section 34. It was contended that the disability of the party in favour of whom the award was made in executing the award during the pendency of the petition under Section 34 under the unamended provision only provided an interim relief and the same cannot be said to be a vested or accrued substantive right. It was further contended

that, in any event, the interim relief has not been completely taken away and only the stay of enforcement of an award has been made a subject matter of an order of the court in place of an automatic stay.

19. For all these reasons, it was contended by the learned counsel for the respondents that no interference with the impugned order was called for and the appeals ought to be dismissed.

20. In rejoinder, it was submitted by the learned counsel for the appellants that the decision of the Calcutta High Court in ***Tufan Chatterjee*** *(supra)* sought to bifurcate the words contained in Section 26 of the Amending Act inasmuch as it distinguished the terms "to arbitration proceedings" and "in relation to arbitration proceedings" to contend that the former means only proceedings before the arbitral tribunal, whereas the latter refers to all proceedings including court proceedings post the award. It was contended that if this interpretation was to be accepted, it would lead to serious contradictions, especially in the interplay between Sections 9 and 17, where the court proceedings (in relation to arbitral proceedings which commenced before the amendment) would be under Section 9 of the new regime, and the arbitral proceedings (which commenced before the amendment) would have to be under the old regime (including Section 17).

It was, therefore, contended that it would certainly not be the intention of the Legislature to have the arbitral tribunal and the courts apply different standards in relation to the same proceedings.

21. Consequently, it was submitted that insofar as the petitions under Section 34 of the said Act, which have been filed in the present matters, are concerned, they ought to be governed by the unamended provisions.

22. Let us now analyse Section 26 of the Amending Act. It is comprised of two parts. The first part stipulates that nothing contained in the Amending Act shall apply to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the principal Act before the commencement of the Amending Act (i.e., on 23.10.2015), unless, of course, the parties otherwise agree. The second part makes it clear that the Amending Act and, consequently, the amendments brought about by it in the said Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amending Act. It is, therefore, clear that Section 26 bifurcates cases on the basis of the commencement of the arbitral proceedings being 'prior' or 'on or after' the date of commencement of the Amending Act. In other words, the date of commencement of the Amending Act, that is, 23.10.2015, is what separates

the two parts of Section 26. Insofar as the second part is concerned, there is and can be no confusion inasmuch as the Amending Act and consequently, the amendments brought about by it in the said Act, would clearly apply in relation to arbitral proceedings which commence on or after the date of commencement of the Amending Act (i.e., 23.10.2015). In other words, in cases of any arbitral proceedings which commence on or after 23.10.2015, the amendments would apply to the entire gamut of such proceedings.

23. An issue has been raised (and, was the subject matter of debate before us) as to whether there was any difference in the expressions "to the arbitral proceedings" and "in relation to arbitral proceedings" appearing in the two parts of Section 26 of the Amending Act. It was contended on behalf of the respondents that the expression "in relation to arbitral proceedings" was referable to the entire gamut of arbitration culminating in the enforcement of the award and that the expression related not only to proceedings before the arbitral tribunal, but also to the proceedings emanating therefrom before the court. This was contended on the basis of the Supreme Court decision in ***Thyssen Stahlunion*** *(supra)*. It was also contended on the strength of an observation in the said decision that if it was not so, only the word "to" could have sufficed. It may be recalled that

in that decision, Section 85(2)(a) of the said Act had come up for interpretation. That provision also comprised of two parts. But, in both parts, the expression used was "in relation to arbitral proceedings". In that context, the Supreme Court had observed that the expression "in relation to" did not admit of a restrictive meaning and that the first limb of Section 85(2)(a) was not a limited saving clause as it saved not only the proceedings pending at the time of commencement of the Arbitration and Conciliation Act, 1996, but also the provisions of the Arbitration Act, 1940 for enforcement of the award under that Act (i.e., the 1940 Act). It was contended on behalf of the respondents that in Section 26 of the Amending Act, while the expression "in relation to arbitral proceedings" is used in the second part, in the first part the expression employed is "to the arbitral proceedings". It was, therefore, contended that the first part of Section 26 which saved the unamended provisions of the said Act only had reference to arbitral proceedings, i.e., proceedings before an arbitral tribunal and not to any other proceedings emanating from or related to such arbitral proceedings, including proceedings before court.

24. It is to be seen as to whether the two limbs of Section 26, if interpreted in the manner suggested by the respondents, exhaust all the

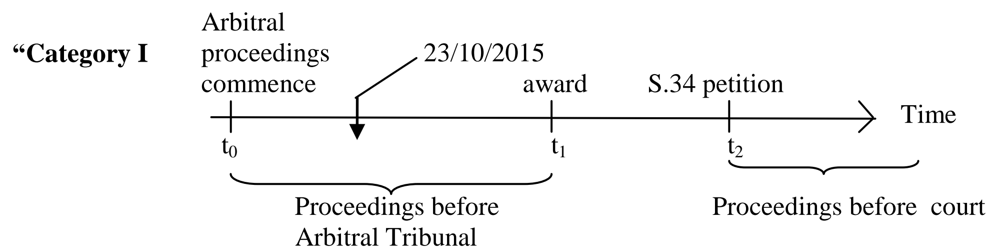
categories of cases. To put it differently, does Section 26 of the Amending Act deal with all types of cases, which could fall for consideration under the said Act. It is clear that insofar as the second limb of Section 26 is concerned, it takes within its fold every type of situation, which may arise in relation to arbitral proceedings, including both proceedings before the arbitral tribunal and court proceedings in relation thereto or connected therewith. Therefore, insofar as the second limb is concerned, there is no dispute that for all arbitration proceedings commenced on or after 23.10.2015, the Amending Act would apply and, therefore, the amended provisions of the said Act would be applicable.

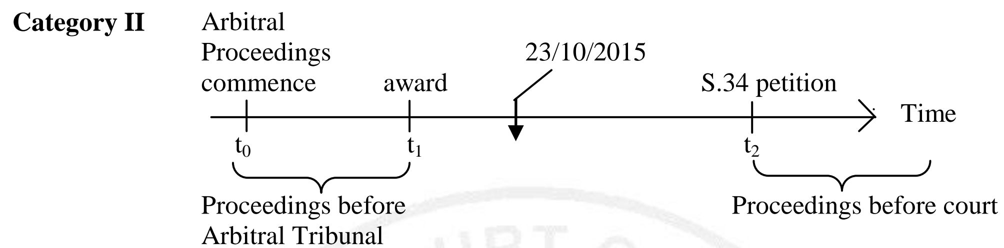
25. This leaves us to consider the first part of Section 26. This part saves the application of the unamended provisions of the said Act to arbitral proceedings.

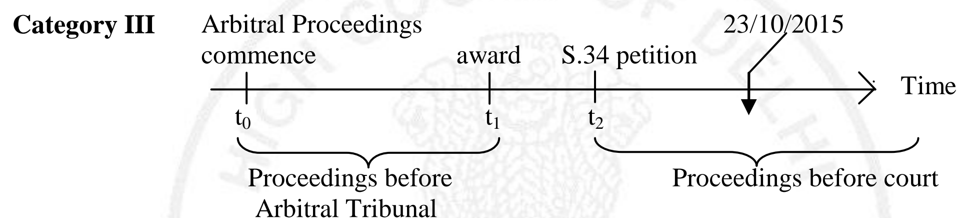
26. Let us assume, for the time being, that the expression "arbitral proceedings" covers only those proceedings which are pending before the arbitral tribunal and not to other proceedings which may be pending before court or are in the process of being instituted in court. If this interpretation were to be accepted, then it would be clear that those situations, where arbitral proceedings commenced prior to 23.10.2015, but were not pending

before the arbitral tribunals, would have no reference either in the first part or the second part of Section 26 of the Amending Act.

27. To illustrate, all the arbitral proceedings, which commenced in accordance with the provisions of Section 21 of the said Act prior to 23.10.2015, can be classified into three categories. The first category being where the arbitral proceedings commenced prior to 23.10.2015 and were pending before an arbitral tribunal on 23.10.2015; the second category would be of those cases where arbitral proceedings commenced prior to 23.10.2015 and the award was also made prior to 23.10.2015, but the petition under Section 34 seeking the setting aside of the award was made after 23.10.2015; the third category would be comprised of those cases where the arbitral proceedings commenced prior to 23.10.2015 and not only the award was made prior to 23.10.2015, but the petition under Section 34 had also been instituted before court prior to 23.10.2015. The three categories can be graphically represented as follows:-







t_0 = date on which arbitral proceedings commence

t_1 = date of award

t_2 = date of filing of petition under Section 34 of the said Act

23.10.2015 = date on which amending act commenced."

28. Given the three categories of cases, if the interpretation of the respondents is accepted, then the first part of Section 26 would only deal with the first category. In other words, there would be nothing in Section 26 of the Amending Act which pertained to the second and third categories of cases.

29. In such a situation, it would have to be considered, independent of Section 26 of the Amending Act, as to whether the amended provisions applied to the said second and third category of cases. In this regard, we may note the observations of the Supreme Court in ***Thyssen*** *(supra)* where, after, considering several earlier decisions, the Supreme Court observed in paragraph 32 (which we have already extracted above) that the principles enunciated in the judgments show as to when a right accrues to a party under a repealed Act. The Supreme Court observed that it is not necessary that for the right to accrue, legal proceedings must be pending when the new Act comes into force. Furthermore, and more importantly, the Supreme Court observed that to have the award enforced when arbitral proceedings commenced under the old Act under that very Act was certainly an accrued right. In other words, all the aspects of enforceability of an award entail an accrued right both in the person in whose favour the award is made and against whom the award is pronounced. It will also be noticed that the Supreme Court made it clear that for the right to accrue, there is no necessity that legal proceedings must be pending when the new Act comes into force. This exactly covers the situation as obtaining in the second category of cases, where the arbitral proceedings were commenced prior to 23.10.2015 and the award was also made prior to 23.10.2015, but

the petition under Section 34 had not yet been filed. This is the same situation as in the present case. Thus, the pendency of any legal proceedings or otherwise would not come in the way of determining as to whether the right had accrued under the unamended provisions or not. We have already noted that the Supreme Court in ***Thyssen*** *(supra)* observed that the right to have the award enforced (which also comprises of the negative right of the award debtor to not have it enforced till his objections under Section 34 of the said Act are heard and decided) is certainly an accrued right. Given the fact that the amended Section 36 takes away the right of an automatic stay of enforcement of an award, it is clear that the amendment introduced in Section 36 by virtue of the Amending Act would definitely impinge upon the accrued right of the party against whom the award is given after the arbitral proceedings have been held under the unamended provisions. Since an accrued right is affected, unless a contrary intention appears in the amending statute, the amendments would have to be treated as prospective in operation. Prospective from the standpoint of commencement of the arbitral proceedings.

30. Now, if the argument of the respondents is to be accepted that the first limb of Section 26 applies only to arbitral proceedings in the sense of

proceedings before arbitral tribunals and not to court proceedings, then, it is obvious that Section 26 is silent with regard to the second and third categories of cases to which we have already referred above. In other words, in respect of these categories, no contrary intention of retrospectivity is evinced upon a reading of Section 26 of the Amending Act. Therefore, even if we take the argument of the respondents to be correct, the result would still be the same and, that is, that in respect of all the arbitral proceedings commenced prior to 23.10.2015, the unamended provisions of the said Act would continue to operate till the enforcement of the award.

31. We may also notice that in case the argument of the respondents is to be accepted that where arbitral proceedings commenced prior to 23.10.2015, the unamended provisions would be saved only in respect of the proceedings before the arbitral tribunal and would not extend to court proceedings, the same would result in serious anomalies. This is so because the Amending Act has sought to bring about amendments in Section 9 as well as Section 17 of the said Act. While Section 9 pertains to interim measures which may be directed by the court prior, during arbitral proceedings or after the making of the award, Section 17 deals with the

interim measures which may be ordered by an arbitral tribunal. If the interpretation of the respondents is to be accepted, then, in respect of arbitral proceedings commenced prior to 23.10.2015, the amended provisions would apply to proceedings under Section 9 of the said Act, but not to Section 17 thereof. This would result in a serious anomaly.

32. On the other hand, if the expression "to the arbitral proceedings" used in the first limb of Section 26 is given the same expansive meaning as the expression "in relation to arbitration proceedings" as appearing in the second limb of Section 26, then, the matter becomes very simple and does not result in any anomaly. All the arbitral proceedings (and here we mean the entire gamut, including the court proceedings in relation to proceedings before the arbitral tribunal), which commenced in accordance with the provisions of Section 21 of the said Act prior to 23.10.2015, would be governed, subject to an agreement between the parties to the contrary, by the unamended provisions and all those, in terms of the second part of Section 26, which commenced on or after 23.10.2015 would be governed by the amended provisions.

33. In view of the above analysis and discussion, we regret our inability to agree with the view taken by the Calcutta High Court in ***Tufan***

Chatterjee *(supra)*. It must be reiterated that in the said Calcutta High Court decision, the second and third categories of cases mentioned above was not considered at all. Consequently, the arguments of the respondents based on the reasoning adopted in ***Tufan Chatterjee*** *(supra)* cannot be accepted.

34. The conclusions that we can draw from the above analysis and discussion are:-

1) Section 26 of the Amending Act, if a narrow view of the expression "to the arbitral proceedings" is to be taken, is silent on those categories of cases where the arbitral proceedings commenced prior to 23.10.2015 and where even the award was made prior to 23.10.2015, but where either a petition under Section 34 was under contemplation or was already pending on 23.10.2015;
2) In such eventuality, the amended provisions pertaining to those categories would apply only if they were merely procedural and did not affect any accrued right;
3) In the facts of the present case, the amendment to Sections 34 and 36, which pertain to the enforceability of an award, certainly affect the accrued rights of the parties;
4) As a result, the petitions filed by the appellants under Section 34 of the said Act would have to be considered under the unamended provisions of the said Act and consequently, the appellants would

be entitled to automatic stay of enforcement of the award till the disposal of the said petitions.

35. In sum, the impugned order, to the extent it imposes a condition on the appellants / petitioners to deposit a sum of Rs 2.7 crores, is set aside. There shall be no requirement of the petitioners depositing / paying a sum of Rs 2.7 crores or any other sum as the filing of the petitions under Section 34 themselves would amount to automatic stay under the unamended provisions of Sections 34 and 36 read together. The appeals are allowed to the aforesaid extent. There shall be no order as to costs.

BADAR DURREZ AHMED, J

January 06, 2017 **ASHUTOSH KUMAR, J**

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