IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1530 OF 2015
IN
EXECUTION APPLICATION (L) NO.2481 OF 2015
IN
ARBITRAL AWARD DATED 22ND JUNE, 2015

The Board of Control for Cricket in India .... Applicant (Ori. Respondent)

In the matter between :

M/s Rendezvous Sports World .... Original Applicant

Vs.

The Board of Control for Cricket in India .... Respondent

Mr. T.N. Subramaniyam, Senior Counsel alongwith Mr. A. Mehta, Mr. A. Saxena, Mr. I.D. Deshmukh, Ms. Prabhjyot Kaur Chhabra, Ms. Ayesha Talpade, Ms. Sahana Ramesh i/by M/s Cyril Amarchand Mangaldas, Advocate for the Applicant/ Respondent.

Mr. Darius Khambhata, Senior Counsel alongwith Mr. Rohan Rajadhyaksha i/by. Nipa Sunit Gupte, for the Petitioner.

WITH

CHAMBER SUMMONS NO.1532 OF 2015
IN
EXECUTION APPLICATION (L) NO.2482 OF 2015

IN
ARBITRAL AWARD DATED 22ND JUNE, 2015

The Board of Control for Cricket in India .... Applicant (Ori. Respondent)

In the matter between :

Kochi Cricket Private Limited .... Original Applicant

Vs.

The Board of Control for Cricket in India .... Respondent

Mr. Rafique Dada, Senior Counsel alongwith
Mr. T.N. Subramaniyam, Senior Counsel
alongwith Mr. Aditya Mehta, Mr. A. Saxena,
Mr. I.D. Deshmukh, Ms. Prabhjyot Kaur Chhabra,
Ms. Ayesha Talpade, Ms. Sahana Ramesh
i/by M/s Cyril Amarchand Mangaldas for the Applicant.

Mr. Navroz Seervai alongwith Mr. Rohan Rajadhyaksha,
Ms. R. Barot, Mr. A. Iyer, Mr. A. Nimbalkar
i/by AZB & Partners for the Petitioner.

WITH
CHAMBER SUMMONS (L) NO.66 OF 2016
IN
EXECUTION APPLICATION (L) NO.2748 OF 2015
IN
AWARD DATED 28TH JANUARY, 2015

AS AMENDED ON 16TH FEBRUARY, 2015

Arup Deb and Others .... Applicants
(Ori. Judgment-debtors)

In the matter between

Global Asia Venture Company .... Decree Holder
Vs.
Arup Deb & Others .... Judgment-debtors

Mr. Sharon Jagtiani alongwith Mr. Prateek Bagaria,
Mr. S. Rathod i/by Nishith Desai Associations
Advocate for the Applicant.

Mr. Gaurav Joshi, Senior Counsel alongwith Mr. R. Panchmatia,
Mr. P. Jehangir, Mr. A. Agarwal, Mr. M. Kanoria,
Ms. Aastha Arora, Ms. Natasha K. i/by Khaitan & Co.
Advocate for the Respondent.

Coram : Smt. R.P. SondurBaldota, J.
Date : 14th June, 2016.

P.C.

1 This is a common order on the above three Chamber Summonses seeking dismissal of the applications for execution of Arbitral awards on the ground that the same are misconceived and not maintainable. The applicant in the first two Chamber Summonses and the judgment debtor in the concerned execution applications is the Board of Control for Cricket in India ("BCCI" for short). It has filed applications under Section 34 of the Arbitration and Conciliation Act ("Arbitration Act" for short) to challenge the very arbitral awards.

The applicants in the third Chamber Summons are the judgment debtors under the arbitral award dtd 28th January, 2015 and the respondent thereto is the award holder.

2 The first Chamber Summons No.1530 of 2015 arises out of the arbitral award dtd. 22nd June, 2015 made in favour of M/s Rendezvous Sports World ("RSW" for short) in the sum of Rs.1,53,34,00,000/- along with interest and costs of the arbitral proceedings of Rs.50,00,000/-. The second Chamber Summons No. 1532 of 2015 arises out of the arbitral award of the same date i.e. 22nd June, 2015 made in favour of Kochi Cricket Private Limited ("KCPL" for short) in the sum of Rs.3,84,83,71,842/- along with interest and costs of the arbitral proceedings of 72,00,000/-. The third Chamber Summons arises out of the arbitral award dtd. 28th January, 2015 as amended on 16th February, 2015 between Global Asia Venture Company and Reach (Cargo Movers) Pvt. Ltd. and others.

3 On 16th September, 2015, the BCCI challenged both the awards by filing Arbitration Petition (L) No. 1844 of 2015 against RSW and Arbitration Petition (L) No. 1843 of 2015 against KCPL and sent intimations dtd. 21st September, 2015 to them of filing of the petitions. The service of the arbitration petitions was however done on 4th December, 2015. Reach Cargo has filed Arbitration Petition No. 1220 of 2015, which was admitted on 19th October, 2015. In the meantime i.e. on 23rd October, 2015, the Arbitration and Conciliation (Amendment) Ordinance, 2015 (No.9 of 2015) (Arbitration

Ordinance) was promulgated by the President of India. It was published in the official Gazette on 23rd October, 2015 and came into force from that date. On 17th December, 2015 and 23rd December, 2015, the Arbitration and Conciliation (Amendment) Bill, 2015 (Bill) was passed by the Lok Sabha and Rajya Sabha respectively. The Bill received assent of the President of India on 31st December, 2015 and was notified as the Arbitration and Conciliation (Amendment) Act, 2015 ("Amending Act" for short) on 1st January, 2016.

4 One of the major amendments to the Arbitration Act is amendment to Section 36. By the amendment, the entire Section 36 stands repealed and replaced by a new Section 36. Section 36 as it stood prior to the amendment and as it stands today read as follows:

Pre-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.

Post-amendment:

36 ENFORCEMENT :-

(1) Where the time for making an application to set aside arbitral award under Section 34 has expired, then, subject to 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 application shall not by itself render the award unenforceable, unless the Court grants an order of stay of operation of said arbitral award in accordance with the provisions of sub-section (3), on separate application made for that purpose.
>
> (3) Upon filing of an application, under sub-section (2) for stay of operation of the arbitral award, the Court may subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:
>
> Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of Code of Civil Procedure, 1908.

In the affidavit-in-support of the Chamber Summons, the BCCI contends that, the applications under Section 34 of the Arbitration Act to challenge the two arbitral awards having been filed by it, prior to promulgation of the Arbitration Ordinance, the same would be governed by Section 36 of the Arbitration Act, prior to it's amendment. Therefore, the two arbitral awards will become enforceable against it, only if and when, the petitions under Section 34 are refused and not otherwise. According to it, a substantive right has accrued to it under Section 34 read with Section 36 of the Pre-amendment Arbitration Act of protection against execution of the awards during pendency of the applications under Section 34. Denial of this protection would result into grave and irreparable injury to it.

The Chamber Summonses are contested by RSW and KPCL contending that the applications under Section 34 of the Arbitration Act filed by BCCI would be governed by the Arbitration Act as amended by the Arbitration Ordinance.

5 If the Amended Act is held applicable, after expiry of three months from the date of the arbitral award, it becomes enforceable in accordance with provisions of the Civil Procedure Code, irrespective of whether a challenge has been filed under section 34 of the Act or not. Section 36(2) of the Amended Act requires the judgement-debtor to move a separate application, specifically seeking stay of operation of the award in case it wishes to seek a stay of the execution proceedings. Under section 36(3), if the Court is inclined to grant stay of operation of the award, it has to record reasons in writing and also have due regard to the provisions for grant of stay of a money decree under the Civil Procedure Code. On the other hand if the Amendment Act is held not applicable, the judgement-debtor will continue to enjoy the protection against execution during the pendency of the application under section 34 of the Arbitration Act.

6 The learned counsel appearing for both the sides to the Chamber Summonses advanced extensive submissions on the question whether the amendment under the Amendment Act to Section 36 of the Arbitration Act, applies to the petitions under Section 34 of the Act, already filed and pending as on the date of the amendment. But thereafter it was felt that since the question of law

under consideration, has wider implications and since there are other similar applications pending for consideration of the court, it would be only appropriate to give an opportunity to the Counsel and parties in person concerned, in similar applications, a hearing on the question of law. Therefore, the hearing of the Chambers Summonses was postponed and the office was directed to notify on the board of the Cause List, the question of law under consideration for the benefit of the members of Bar. Pursuant to that notice, the parties to Chamber Summons (L) No. 2336 of 2015 in Execution Application (L) No. 2748 of 2015, in Award dtd. 28th January, 2015, as amended on 16th February, 2015, appeared through their Counsel and made submissions on the question. Mr. Gaurav Joshi, the learned Senior Counsel appeared for the Respondent and Mr. Sharon Jagtiani for the Applicant in the Chamber Summons.

7 The Arbitration Ordinance did not contain any saving section. Consequently the initial submissions on the Chambers Summonses were essentially based upon the general propositions as regards the nature of the statutory amendments i.e. whether prospective or retrospective. However, when the Arbitration Ordinance was converted into Arbitration Amendment Act, with insertion of Section 26 as the saving section, further submissions had to be advanced in the matter, on interpretation and effect of Section 26 of the Amending Act. Accordingly, further submissions of all the counsel were heard.

8 The Saving Section 26 of the Amending Act reads as follows: :

> "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".

Section 26 is seen to consist of two parts. The first part provides that nothing contained in the Amendment Act shall apply "to the arbitral proceedings commenced in accordance with Section 21 of the Principal Act" before the commencement of the Amendment Act i.e. prior to 23rd October, 2015, unless the parties agree otherwise. The second part provides that the Amendment Act shall apply "in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act" i.e. 23rd October, 2015. The term "arbitral proceedings" has a specific meaning and duration under the Arbitration Act, since the date of commencement of the proceedings and the date of termination of the proceedings have been specifically provided for. Under Section 21 of the Arbitration Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of particular dispute commenced on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Section 32(1) of the Arbitration Act provides that the arbitral proceedings shall be terminated by the final award or by an order of arbitral Tribunal under Sub-Section 2. Therefore, the term "arbitral proceedings" would not include post-award proceedings i.e.

proceedings for enforcement of the arbitral award or proceedings to challenge the arbitral award, which arise only after the award is made. It would also not include the proceedings prior to the commencement of arbitral proceedings. There is no dispute between the parties as regards the specific meaning of the term arbitral proceedings under the Arbitration Act.

9 The two parts of saving section 26 use different expressions to describe the proceedings to which they are meant to apply. The description in the first part is "to arbitral proceedings" and the description used in the second part is "in relation to arbitral proceedings." As regards the construction, interpretation and meaning of the phrase used in the second part there is and there can be no dispute between the parties. Besides, that has been the specific subject of discussion of the Apex Court in it's decision in Thyssen Stahlunion Gmbh vs. Steel Authority of India Ltd. reported in (1999) 9 SCC, page 334 case, when the identical phrase used in Section 85(2)(a) of the Arbitration Act was discussed. At para-22.2 of the decision, the Apex Court interprets the phrase in following words :-

> 22 For the reasons to follow, we hold:
> 1.....
> 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 thereof and also appeal arising thereunder."

10 The first part of saving Section 26 uses the phrase "to arbitral proceedings" which will have to be interpreted differently. It carries a restrictive meaning i.e. the proceedings before the arbitral tribunal, which proceedings get terminated with passing of the final award. There is no dispute between the parties about this restrictive meaning also. The dispute is about the effect of the use of the restrictive phrase or expression. According to the applicants award-debtors, the use of the restrictive phrase renders the saving Section 26 non-exhaustive and therefore aid of Section 6 of the General Clauses Act has to be taken. Whereas according to the respondents- award holders, the use of restrictive phrase is not on account an inadvertent omission or lapse, but it is a deliberate and intentional omission so as to deliberately keep certain matters i.e. the proceedings post- final award, outside the saving from application of the Amendment Act. In that circumstance, by necessary implication, the saving Section becomes exhaustive i.e. it takes within it's fold all different types of proceedings arising out of the Arbitration Act.

11 Mr. Dada submitted that, since the first part of Section 26 of the Amendment Act does not provide for the post-award proceedings, the section is necessarily non-exhaustive. In such circumstances, according to him, Section 6 of the General Clauses Act becomes applicable. The relevant provision of Section 6 of the General Clauses Act 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) .....
> (b) .....
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
>
> (d) .....
>
> (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
>
> and any such investigation, legal proceedings 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."

12 Mr. Dada argued that the decision of the Apex Court in Commissioner of Income Tax, U.P. vs. M/s Shah Sadiq and Sons, reported in (1987) 3 Supreme Court Cases, page 516 is authority for the proposition that a savings provision is not exhaustive of the rights that are saved and just because a right is not expressly saved by the saving provision, it does not mean that such right stands extinguished. A non-exhaustive savings clause leaves it to Section 6 of the General Clauses Act to determine which additional rights are

saved. According to him, unless a repealing statute expressly extinguishes a vested right or expressly affects a pending legal proceedings under the repealed statute, the accrued vested right, or legal proceeding is not affected. Since neither part of the Section 26 expressly deals with post-award proceedings and appeals arising therefrom in respect of arbitration proceedings commenced prior to 23rd October, 2015, the general law in relation to repeal would be applicable.

13 Mr. Dada, while acknowledging the position that Section 6 of the General Clauses Act provides for "Effect of repeal" and the fact that the Arbitration Amendment Act, does not repeal the Arbitration Act, submitted that the same should not affect applicability of Section 6 of the General Clauses Act to Section 26. He argued that, by Section 19 of the Amendment Act, there is substitution of Section 36 of the unamended Act by Section 36 of the amended Act. The substitution of the Section would amount to, according to him, repeal of Section 36 and partial repeal of the Arbitration Act. On the subject of partial repeal of a statute, Mr. Dada relies upon decisions of the Apex Court in the case of (i) G. Ekambarappa and Others Vs. Excess Profits Tax Officer, Bellary, reported in AIR 1967 Supreme Court page 1541 and (ii) The State of Tamil Nadu and Others Vs. K. Shyam Sunder and Others reported in (2011) 8 Supreme Court Cases, page 327. In the facts of *Ekambarappa's* case, the appellants carried on business in partnership in Bellary Town and the partners were also residents of Bellary Town during the period the firm was carrying on business.

Later, the firm stood dissolved. The Bellary District was a part of old Madras State which was a "Part-A" State under the Constitution of India till its merger with the Mysore State on 1st October, 1953 which was a part "B State". When the Excess Profits Tax Act was first promulgated, it was extended to the territory of former British India. After the Constitution came into force, the Act was adapted so as to extend the operation of the Act to the whole of India, except, "Part-B" States by Adaptation of Laws Order, 1950. The result of the adaptation was that, all the provisions of The Excess Profits Tax Act, stood repealed so far as the District of Bellary was concerned w.e.f. 31st December, 1956. It was contended on behalf of the appellants before the Apex Court that, it was not a case of repeal of The Excess of Profits Tax Act, 1940 and that the Adaptation of Laws Order, 1956 only modified the provisions of Section 1(2) of the Act and the effect of modification was that, the provisions of the Act, was no longer applicable to Bellary District which was comprised in the territory of "Part-B" State of Mysore. The Apex Court, rejected the contention opining that, there was no justification for the argument put forth. The result of the Adaptation of the 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. Thus, there was revocation or abrogation of the Act which amounted to repeal and Section 6 of the General Clauses Act, applied even in the case of a partial repeal or repeal of part of Act. In *Shyam Sundar's* case, the Apex Court referred to its earlier decision in State of Rajasthan V/s. Mangilal Pindwal,reported in (1996) 5 Supreme Court Cases page 60 to observe

that substitution of a provision results in repeal of the earlier provision and its replacement by the new provision.

14 Applying the principle in the above two decisions of the Apex Court, Mr. Dada submits that, substitution or replacement of Section 36 of the Arbitration Act, by the Arbitration Amendment Act amounts to repeal of Section 36 and therefore the provision of Section 6 of the General Clauses Act, which operates in the situation of repeal of a Statute, becomes effective and applicable.

15 In view of the two clear decisions cited and even otherwise, I am inclined to agree with Mr. Dada that, substitution of Section 36 of the Arbitration Act by Section 36 of the Arbitration Amendment Act, amounts to repeal of Section 36 and part repeal of the Arbitration Act. However, that by itself will not be sufficient to attract the provision of Section 6 of the General Clauses Act to it since it becomes applicable only in the absence of a different intention appearing in the repealing Act. In other words, if the provision inadvertently or erroneously leaves something unattended to, the general provision of the General Clauses Act needs to be resorted to. If the Saving Section is seen to take within it's fold, all types of proceedings either expressly or by necessary implication, there can be no resort to the General Clauses Act.

16 Mr. N.H. Seervai, the learned Senior Counsel appearing for KCPL submitted on the other hand, that, the Saving Section 26 of

the Amending Act, in fact is very clear and complete in itself and does not need aid of the General Clauses Act. According to him, on a bare reading of Section 26 of the Amending Act, it is *ex-facie* clear that the provisions of substituted Section of 36 of the Arbitration Act are applicable in cases where a petition under Section 34 of the Arbitration Act has been filed before 23rd October, 2015. He refers to the use of the phrase "to the arbitral proceedings" in the first part of Section 26 in contradistinction to use of the phrase "in relation to arbitral proceedings" in the second part. He argued that, this language deliberately employed by Section 26 of the Amendment Act would mean that it is only the arbitral proceedings, themselves i.e. the proceedings before the Arbitrator, which have commenced prior to 23rd October, 2015, that have been kept out of the applicability of the amendments made by the Amending Act to the Arbitration Act. Therefore, by necessary implication, the amendments made will apply to the proceedings other than the arbitral proceedings under the Arbitration Act, even though the said proceedings may have commenced prior to 23rd October, 2015. This submission was adopted by Mr. Darius Khambhata, the learned Senior Counsel for RSW and Mr. Sharon Jagtiani for respondent in the third Chamber Summons.

17 The decision of Shah Sadiq's case relied upon by Mr. Dada arose out of repeal of Income Tax Act, 1922 by Income Tax Act, 1961. In the facts of that case, the assessee, a registered firm, suffered losses in Assessment Years 1960-61 and 1961-62 but made profit in 1962-63

in speculation business. In the assessment proceedings for 1962-63, the assessee claimed that the losses suffered in the previous years should be set off against the profit made in the succeeding year in view of Section 24(2) of the 1922 Act. The ITO rejected the claim by applying Section 75(2) of the 1961 Act. The 1961 Act, which came into operation on 1st April, 1962 did not provide for such a right. It provided an entirely new scheme under Section 75. The decision of the ITO was carried further to the higher courts. The Apex Court held that "the right given to the assessee for the year 1961-62 under Section 24(2) of 1922 Act was an accrued right and a vested right. It could have taken away expressly or by necessary implications. This was not done so by Section 297, the savings Section of 1961 Act. Thus the savings clause under Section 297 of the 1961 Act was held not exhaustive of the rights which were saved or which survived the repeal of the statute under which, such rights had accrued. The Apex Court held that whatever rights are expressly saved by the "saving" provisions stand saved. But that does not mean that the rights that are not saved by the savings provisions are extinguished or stand ipso facto terminated. The rights which are accrued are saved unless they are taken away expressly. Section 6 (c) of the General Clauses Act saves accrued rights unless they are taken away by the repealing statute.

18 The Apex Court in *Shah Sadiq's* case does not lay down an absolute proposition that a right or legal proceedings must be expressly saved or taken away by the saving provision. At para 15 of

the decision, the Apex Court held that in the case before it, the savings provision in the repealing statute was not exhaustive of the rights, which are saved and which survive repeal of the statute under which such rights had accrued. It does not rule out the possibility of repeal by necessary implication. In fact this is recognised also by Section 6 of the General Clauses Act, which is applicable only when "a different intention" does not appear from the Act. It is, therefore necessary, to see whether a different intention can be said to appear from the section of not saving the post-award proceedings filed prior to 23rd October, 2015.

19 The first test to determine that, would be the language of the section. The intention of the legislature is primarily to be gathered from the language used. The statute must be read as it is. This means attention must be paid to what has been said as also to what has not been said. Whether the omission in the first part is conscious and deliberate or whether it is inadvertent, unintentional, erroneous is to be seen. Unless indicated otherwise, the language of the provision i.e. use of a specific word or phrase or expression must be held to be deliberate and conscious. The Legislature must be presumed to know what it is doing and transacting it's business correctly. Therefore, use of restrictive phrase in the first part in contradistinction to the use of wider phrase in the second part of Section 26 must be held to be intentional and with specific purpose i.e. to restrict the saving to "arbitral proceedings" and anything that falls outside "arbitral proceedings" is not saved.

20 The decision in *Thyssen's* case has been referred to by both sides for interpreting the phrase "in relation to". In order to correctly appreciate the decision, it is necessary to notice the facts of that case. Thyssen had filed a petition in Delhi High Court under Sections 14 and 17 of the Arbitration Act, 1940 for making award rule of the court. Upon receiving notice of the petition, the respondent, Steel Authority of India had filed objections to the award under Section 30 of the Act. Thyssen later changed the stand and filed an application for execution of the award under the new Arbitration Act, 1996. By then, the time limit to set aside the award under the new Act had elapsed. The ground taken by Thyssen was that the Arbitration proceedings had been terminated with the making of the award on 24th September, 1997 and therefore the new Arbitration Act, 1996 was applicable for enforcement of the award. The respondent opposed the maintainability of the Execution Application. In these facts, the Apex Court was required to consider the question "whether the award would be governed by the new Act for it's enforcement or whether provisions of the old Act would apply. For that purpose, the Apex Court considered Section 85 of the new Act, which was for repeal and savings. It noticed that the relevant Section 85(2)(a) of the new Act is in two limbs: (i) 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 (ii) a new Act shall apply in relation to arbitral proceedings which commenced on/or after the new Act came into force. It further bifurcated the first limb

into (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. It then interpreted the expression "in relation to" in following terms :

> "**23.** .....The expression "in relation to" is of the widest import as held by various decisions of this Court in *Daypack Systems (P) Ltd. (1988) 2 SCC 299, Mansukhlal Dhanraj Jain (1995) 2 SCC 665, Dharajamal Gobindram, AIR 1961 SC 1285 and Navin Chemicals Mfg, (1993) 4 SCC 320.* This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act".

It held that in this view of the matter, Section 6 of the General Clauses Act would be inapplicable. The other relevant factor that had weighed with the Apex Court while interpreting Section 85 2(a) was that, the two Acts i.e. the old Arbitration Act, 1940 and the new Arbitration Act, 1996 were vastly different from each other. There was a total regime change from the old Act and it's substitution with the new Act.

The total regime change would present serious practical difficulties in relation to the arbitral proceedings commenced under the old Act. The observations of the Apex Court in this regards are :

> **27.** "But then if the construction of the new Act leads to inconvenient and unjust results, the concept of a purposive approach has to be shed. Multiple and complex problems would arise if the award given under the old Act is said to be enforced under the new Act. Both the Acts are vastly different to each other. It has been rightly contended that when arbitration proceedings are held under the old Act, the parties and the arbitrator keep in view the provisions of that Act for the enforcement of the award. As noted above, under the old Act, there is no requirement for the arbitrator to give reasons for the award. That is not mandatory under the new Act. Section 27 of the old Act provides that the arbitrator or umpire may, if they think fit, make an interim award, unless of course a different intention appears from the arbitration agreement. An interim award is also an award and can be enforced in the same way as the final award. It would certainly be a paradoxical situation it 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."

21 Mr. Seervai while making extensive submissions on *Thyssen's* case has relied upon decision of Madras High Court in New Tirupur Area Development Corporation vs. Hindustan Construction Company Ltd. (A. No.7674 of 2015 in O.P. No.931 of 2015 – judgment dated January 27, 2016) ("New Tirupur"), with a submission that Madras High Court has, in it's decision highlighted the difference between the language of Section 85(2)(a) of the Arbitration Act and the saving Section 26 of the Amending Act. According to him, the discussion in *Thyssen's* case also supports his arguments as regards the meaning to be given to the phrase "to arbitral proceedings".

22 In the *New Tirupur's* case, the petitioner after filing the Arbitration Petition had filed an application for stay of the impugned award in view of Section 36(2) of the Arbitration Ordinance. Later he took a stand that by virtue of introduction of Section 26 in the Amendment Act, which was also deemed to have come into force on 23rd October, 2015. Section 36(2) of the Arbitration Ordinance, which stipulated a condition of filing a separate application for stay has been taken away. According to the petitioner, the unamended provision of Section 36 of the Principal Act alone was applicable to the case on hand. The Madras High Court considered Section 26 of the Amendment Act, in comparison with Section 85(2)(a) of the Arbitration Act, several decisions cited before it and held as follows:

> "58 In Section 85(2) of the Principal Act, 1996, the positive legislature intent is to apply the provisions of the said enactments (Repealed), "in relation to arbitral proceedings" which commenced before 1996 Act, is

> clear. The expression, "in relation to" is incorporated in Section 85(2) of the Principal Act, 1996. In contrast, Section 26 of the Amendment Act, deemed to have come into effect from 23rd October, 2015, the expression "in relation to" has been deleted. The Legislature has also not incorporated the words, "Court proceedings" in Section 26 of the Amendment Act".
>
> and
>
> "67 When the legislature has expressly omitted the words in relation to arbitration proceedings in Section 26 of the Act, there is no scope for the Court to innovate or take upon the task of amending or altering the statutory provision. The structure and scope of the Arbitration and Conciliation Act, 1996 (Principal Act), has been amended, by incorporating new provisions by way of substitution and deletion".

23 The observations of the Apex Court in *Thyssen's* case on the possibility of use of the word "to" in the place of the words "in relation to" can be reversed and applied to the facts of the present case without disturbing the underlying principle. If the legislature desired to give wider scope to the first part of the Saving Section 26, it would have used the same expression as in the second part i.e. "in relation to" instead of "it". In the circumstances by the necessary implication, the Section becomes exhaustive i.e. it covers within it's fold all the different proceedings arising out of the Arbitration Act.

24 The deliberate intention of omission can be inferred, also from the context of introduction of Section 26 in the Amending Act and the context of the amendments to Section 36 of the Arbitration

Act. It is significant to note that Report No. 246 of the Law Commission of India that recommended amendments to the Arbitration Act had recommended introduction of Section 85(A) tilted "Transitory Provisions" to the Arbitration Act. Section 85(A) had provided for prospective application of the Amending Act with three exceptions which exceptions read as follows :

> "(a) the provisions of section 6-A shall apply to all pending proceedings and arbitrations.
> Explanation : It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.
>
> (b) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.
>
> (c) the provisions of second proviso to section 24 shall apply to all pending arbitrations."

The Legislature had consciously dropped this recommendation from the Arbitration Ordinance. As rightly pointed out by Mr. Seervai had Section 85(A) been included in the Amending Ordinance or the Amending Act the amended Section 36 may not have been made applicable to post-award proceedings. Even when later, a saving provision came to be introduced in the Amending Act it was not in terms of recommended Section 85(A) but in the form of Section 26. In stead of almost all pervasive saving clause at recommended Section 85(A) a limited or restricted saving clauses at Section 26 is introduced. This would mean that the omission of all proceedings

except "arbitral proceedings" from the first part of Saving Section 26 is conscious and deliberate which implies that the amended provisions would apply to such proceedings.

25 The second context is the context of amendments to Section 36 itself. The original Section 36 imposed a disability upon a successful award-holder from enforcing the award during the pendency of the applications under Section 34 of the Arbitration Act. This prevented the award-holder from enjoying the fruits of his success merely because the unsuccessful award-debtor filed an application to challenge the award. As pointed out by Mr. Khambhata, this position of law was adversely commented on by the Supreme Court in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540 in the following words :

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

This criticism was taken note of by the Law Commission at paras 43, 44 and 45 of it's 246th report.

"43 Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition under section 34 has expired or after the section 34 petition has been dismissed. In other words, the pendency of a section 34 petition renders an arbitral award unenforceable. The Supreme Court, in National Aluminium Co. Ltd. v. Pressteel & Fabrications, (2004) 1 SCC 540 held that by virtue of section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order under section 42, the Bombay High Court in Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai 2013(1) Arb LR 512 (Bom) applied the same principle to the powers of a Court under section 9 of the Act as well. Admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor."

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

> 45 In order to rectify this mischief, certain amendments have been suggested by the Commission to section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application under section 34."

The above object of the amendments to Section 36 can be fulfilled only by holding the Saving Section 26 exhaustive.

26 Mr. Dada argued that Section 34 of the Arbitration Act is akin to a right of appeal and therefore it is continuation of the arbitral proceedings. According to him legal pursuit of the remedy of arbitration all the way upto the appeal is one singular proceeding. The right to file application to challenge the award under Section 34 and the limits on enforceability of the award under Section 36 of the unamended Arbitration Act form a package of rights. This package of right became available to BCCI on the date of commencement of the arbitral proceedings under Section 21 of the Arbitration Act. That was several years prior to 23rd October, 2015 when the unamended Arbitration Act was applicable. Therefore the amended Section 36 cannot be applicable to the applications of BCCI.

27 Mr. Dada seeks to draw support for the above submission from the decisions of the Apex Court in Garikapati v. Subbiah Choudhry and ors. reported in AIR 1957 S. C. 540, para 23 of the decision relied upon by Mr. Dada reads as under :

> "From the decisions cited above the following principles clearly emerge :

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceedings.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

28 In *Garikapati's* case, suit had been filed against the appellant on 22nd April, 1949. By the order dated 14th November, 1950, the suit was dismissed. The plaintiff preferred an appeal against the order of dismissal. The appeal was allowed and the suit was decreed. The application for leave to appeal to the Apex Court was dismissed on the ground, *inter-alia*, that the value of the property was only Rs.11,400/- and did not come up to the amount of

Rs.20,000/-. In his application before the Apex Court, the appellant contended that the order being one of reversal of the judgment and the value of the property being above Rs.10,000/- he was entitled, as a matter of right, to go up to the Apex Court on Appeal in view of Clause-39 of the Letters Patent, 1865 relating to the High Courts of the three Presidency towns. Under that clause, an appeal could be taken to His Majesty in Council from any final judgment, decree or order of the High Court made on appeal or in exercise of its original jurisdiction by a majority of the full number of Judges of the said High Court or of any Division Court provided, in either case, the sum or matter at issue was of the amount or value of not less than 10,000 rupees or that such judgment, decree or order involved, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees. The appellant had contended that, as on the date of the institution of the suit, he had acquired a vested right to appeal to the Federal Court, which had since then been replaced by the Supreme Court. This vested right of appeal is a substantive right and could be taken away only by a subsequent enactment, if it so provides expressly or by necessary intentment and not otherwise. The Apex Court held that, the legal pursuit of a remedy, Suit, Appeal and Second Appeal are really but steps in a series of proceedings, all connected by an intrinsic unity and are to be regarded as one legal proceeding. In the facts of that case, the Apex Court noted that the Constitution of India by Article 395 repealed the Government of India Act and thereby abolished the Federal Court. It, however, continued the Abolition of

Privy Council Jurisdiction Act, 1949, which directed that the Federal Court in addition to its other powers, would have the appellate powers exercised by the Privy Council. The adaptation order modified Sections 109 and 110 of the Code of Civil Procedure, *inter-alia*, by raising the valuation of Rs.10,000/- to Rs.20,000/-. The provision, however, by virtue of Clause-20 of the order, did not affect any right, privilege, obligation or liability already acquired, accrued or incurred under any existing law. The Apex Court, held that the true implications of these provisions was that the pre-existing right of appeal to the Federal Court for the appellant before it, continued to exist and the old law which created that right of appeal also continues to exist to support the continuation of that right and the Federal Court having been abolished, the Supreme Court was substituted by the Federal Court as the machinery for the purpose of giving effect to the exercise of that right of appeal.

29 The second decision cited by Mr. Dada is in Videocon International Limited Versus. Securities and Exchange Board of India, reported in (2015) 4 Supreme Court Cases page 33**.** In the facts of that decision, an amendment was made to Section 15-Z of the Securities and Exchange Board of India Act, 1992 with effect from 29th October, 2002 whereby, (i) the forum of appeal against orders of the Securities Appellate Tribunal was changed from the High Court to the Supreme Court; and (ii) the questions on which such appeals could be filed was changed from any question of fact or law to any question of law. The High Court held that the amended Section 15-Z would not

apply to appeals already filed prior to 29th October, 2002 but all appeals filed in the High Court after that date were not maintainable. The two questions considered by the Apex Court in the decision cited were, (i) whether an order passed by the Securities Appellate Tribunal prior to 29th October, 2002 would be appealable under the unamended Section 15-Z before the High Court or under the amended Section 15-Z before the Supreme Court; and (ii)whether the date on which the appeals had been filed in the High Court was a relevant consideration. The Apex Court held therein that, an appellate remedy is available under different packages. It can be availed of only when it is expressly conferred. When such a right is conferred, its parameters are also laid down. A right of appeal may be absolute, i.e. without any limitations or it may be a limited right. At para-39 of the decision, the Apex Court further held:

> "As illustrated above, an appellate remedy is available in different packages. What falls within the parameters of the package at the initial stage of the lis or dispute, constitutes the vested substantive right of the litigant concerned. An aggrieved party, is entitled to pursue such a vested substantive right, as and when, an adverse judgment or order is passed. Such a vested substantive right can be taken away by an amend-ment, only when the amended provision, expressly or by necessary intendment, so provides. Failing which, such a vested substantive right can be availed of, irrespective of the law which prevails, at the date when the order impugned is passed, or the date when the appeal is preferred. For, it has repeatedly been declared by this Court, that the legal pursuit of a remedy, suit, appeal and second appeal, are steps in a

> singular proceeding. All these steps, are connected by an intrinsic unity, and are regarded as one legal proceeding".

Then in the facts of that case, the Apex Court held that, the amendment to Section 15-Z of SEBI Act, having reduced the appellate package adversely affected the vested appellate right of the litigant concerned. The right of appeal being a vested right, the appellate package as was available at the commencement of the proceedings would continue to vest in the parties engaged in the lis till the eventual culmination of the proceedings. When a lis commences, all rights and obligations of the parties get crystallised on that date and the mandate of the General Clauses Act simply ensures that pending proceedings under the unamended provision shall remain unaffected.

30 The third decision cited by Mr. Dada and also by Mr. Subramaniyam for BCCI is of the Apex Court in Snehadeep Structures Private Limited V. Maharashtra Small-Scale Industries Development Corporation Ltd., reported in (2010) 3 Supreme Court Cases, page 34, in which the issue was with respect to the interpretation of the term "appeal" in Section 7 of the Interest on Delayed Payments to Small-Scale and Ancillary Industrial Undertakings Act ("The Interest Act" for short). The said Section provided that while preferring an appeal against a decree, award or other order in favour of a small scale or ancillary industrial undertaking, the appellant was required to deposit 75% of the amount payable in terms of such decree, award or other order. An award-debtor (the award-holder being a small scale or

ancillary industrial undertaking) filed and application under Section 34 of the 1996 Act, which application was dismissed by the Single Judge on account of non-compliance with requirement of deposit of 75% on the basis that the term 'appeal' in the said Section was wide enough to include an application under Section 34 of the 1996 Act. The Division Bench held to the contrary and reserved the order passed by the Single Judge. After exhaustively examining a number of precedents, the Hon'ble Supreme Court observed at para 36 as follows:

> "On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re-agitation of entire matrix of facts and law. We have already seen in Abhyankar that even an order passed by virtue of limited power of revision under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned counsel for the respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/ decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council".

31 Mr. Khambhata submitted in reply that the argument advanced that the application under Section 34 of the Arbitration Act is akin to an appeal under Code of Civil Procedure cannot be accepted in view of the direct decision to the contrary of the Apex Court in J.G. Engineers Private Limited Versus. Union of India and Another, reported in (2011) 5 Supreme Court Cases page 758. By that decision while considering the scope of the provision of Section 34 of the Arbitration Act, the Apex Court held that, "A civil court examining the validity of an arbitral award under Section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an Arbitral Tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in Sections 34(2)(a)(i) to (v) or Sections 34(2)(b)(i) and (ii), or Section 28(1)(a) or 28(3) read with Section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are "excepted matters" excluded from the scope of arbitration, would violate Sections 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate Section 34(2)(b)(ii) read with Section 28(3) of the Act.

32 According to Mr. Khambhata, interpretation of the term "appeal" in The Interest Act in *Snehadeep's* case to include application under Section 34 of the Arbitration Act was clearly a purposive interpretation of the term in the context of the object of that Act. Relying upon the decision of the Apex Court in S. Mohan Lal

vs. R. Kondiah, reported in (1979) 2 Supreme Court Cases, 616, he argued that reference to the provisions of the statute to interpret the same expression used in another statute is not a sound principle of construction unless the two Acts in which the same word is used are cognate Act. The relevant observations at para 3 of the decision cited read as follows:

> "3 .... It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act; more so if the two Acts in which the same word is used are not cognate Acts. Neither the meaning, nor the definition of the term in one statute affords a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally. On the other hand, it is a sound, and, indeed, a well-known principle of construction that meaning of words and expressions used in an Act must take their colour from the context in which they appear."

33 In my considered opinion, neither the decision in *Garikapati's* case which purely involves the meaning and interpretation of the term "appeal" under Code of Civil Procedure nor the decision in *Videocon's* case, which involved the term appeal in the Securities and Exchange Board of India is relevant or of assistance in the facts of the present case. The decision in *Snehadeep's* case also, though considered application of Section 7 of The Interest Act to an application under Section 34 of the Arbitration Act does not lay down a general proposition that an application under Section 34 is an appeal. Careful reading of the decision in fact indicates otherwise.

The Apex Court has expressly stated therein that it was not considering the meaning of the term appeal under the Arbitration Act. At para 40 it says :

> "Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act".

It reiterates at para 43 that the word appeal appearing in Section 7 of the Interest Act need not be necessarily interpreted within the meaning of that word in Code of Civil Procedure. This view gets fortified by the reasons stated by the Apex Court at paras 46 and 47, which read as under :

> "46 Further, if the word "appeal" is not construed as including an application under Section 34 of the Arbitration Act, we are afraid that it would render the term "award" redundant and the requirement of predeposit a total nullity with respect to all cases where a small-scale industry undertaking preferred arbitral proceedings, prior to the incorporation of the reference procedure in 1908. Arbitration necessarily has to result in an award. The only way of challenging an award in a court, in accordance with Section 5 read with the opening clause of Section 34 is by filing an application under the latter section. If such challenge is not construed as an "appeal", the requirement of predeposit of interest before the buyer challenging an

> award passed against him, becomes a total nullity. The fact that an order passed on such application/ challenge under Section 34 is appealable under Section 37 is of no consequence. As the learned counsel for the appellant Company rightly argued, such appeal is filed against an order passed by the court under Section 34, not against an award passed against the buyer and in favour of the small-scale industry undertaking. In all cases where the small-scale industry undertaking enters into arbitration proceedings to obtain payment of interest, if we limit the requirement of predeposit to appeal under Section 37, therefore, we will be rendering the term "award" a nullity, which we are not empowered to do.
>
> 47 The requirement of predeposit of interest is introduced as a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award, just as in cases of a decree or order. Presumably, the legislative intent behind Section 7 was to target buyers, who, only with the end of pushing off the ultimate event of payment to the small-scale industry undertaking, institute challenges against the award/ decree / order passed against them. Such buyers cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires predeposit of 75% interest even when appeal is preferred against an award, as distinguished from an order or decree."

34 Thus the only decision that operates in the field is the direct decision in *J.G. Engineer's* case, which holds that a Civil Court examining the validity of an arbitral award under Section 34 of the Arbitration Act; exercises supervisory and not appellate jurisdiction. There are several distinguishing factors between an application under Section 34 of the Arbitration Act and an appeal under Code of Civil

Procedure. In arbitral reference, unlike in civil matters there is total freedom available to the parties as regards the choice of the process of adjudication of dispute. The choice is as regards the forum, as well as the strength of the forum. The parties can further choose the place of adjudication, the time of adjudication and the procedure for adjudication. In arbitral proceedings the parties can represent themselves or be represented by anyone of their choice. With this extent of freedom of choice available, the parties are ordinarily expected to accept, the decision of the forum of their choice. Therefore, the Arbitration Act provides for a very restricted challenge to the arbitral award in a civil Court. A glance at the grounds of challenge specified in Section 34 of the Arbitration Act is sufficient to note that each ground goes to the root of the matter. While exercising the jurisdiction under Section 34 the civil court cannot correct the errors of the arbitrator in the award or remit the award for reconsideration or modify the award or set aside part of the award. The jurisdiction of the civil court is only to set aside the award provided any of the grounds specified in Section 34 is established. The emphasis in the section is to maintain the award. Hence the general approach of a civil court expected is to uphold the arbitral award. This view gets support from the following observations in the decision of the Apex Court in Union of India Vs. A.L. Rallia Ram, reported in AIR 1963 Supreme Court page 1685 relied upon by Mr. Khambhata.

> "The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right, the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement."

Unlike the application under Section 34 of Arbitration Act, the court of appeal under Civil Procedure Code has power to pass any decree, make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. It can modify the decree, remit it entirely or in part for reconsideration and set it aside in whole or in part. The appellate court can frame additional issues. It can accept additional evidence as provided in the Civil Procedure Code. In view of such extensive power of the Court of appeal and the scope of enquiry the original decree or order gets merged in the appellate decision. The arbitral award does not get merged in the Court's judgement under Section 34 of the Arbitration Act.

35 Mr. Dada sought to submit that in the present case, the question is not whether an application under Section 34 of the 1996 Act is an 'appeal' under the Act but whether the legal pursuit of the remedy of arbitration by way of (i) arbitral proceedings before an arbitral tribunal; (ii) an application under Section 34 of the 1996 Act to set aside the arbitral award passed by the arbitral tribunal; and (iii) an appeal under Section 37 of the 1996 Act against the order of the

Court under Section 34; can be regarded as steps in one 'singular proceeding'. According to him the sole remedy available to a party who is aggrieved by arbitral award is to file an application under Section 34 of the Act. It has to be treated as a continuation of the arbitral proceedings and hence a package of rights is available to the litigant of arbitral proceeding, application under Section 34 of Arbitration Act and appeal under Section 37 of the Arbitration Act.

36 In my considered opinion, it is not possible to agree with Mr. Dada that, an application under Section 34 of the Arbitration Act is a continuation of the arbitral proceedings. As provided in the Arbitration Act itself, the arbitral proceedings terminate on passing of the final award. The challenge to the arbitral award provided for in the Act is minimal. The only order that can be passed on the challenge under Section 34 is either of upholding the Award as it is or of setting it aside in its entirety, except where parts of the award are separable. The continuation of the proceedings and the package of rights available could at the highest be for the proceedings under Section 34 and Section 37 of the Arbitration Act. Section 36 which is about enforceability of the arbitral award cannot go along with the application for challenge to the arbitral award so as to form a package of rights.

37 Mr. Seervai submitted that, on a bare reading of the substituted Section 36 of the Arbitration Act, it is clear that the said provision is applicable to cases where a petition under Section 34 of

the Arbitration Act has been filed before 23rd October, 2015 and pending as on that date. According to him, this contention is ex-facie borne out by the language of the substituted Section 36 itself i.e. de-hors reference to Saving Section 26 of the Amending Act. He points out that the language of Section 36(2) of the Amended Act uses the phrase "has been filed" by way of description to the application under Section 34 of the Arbitration Act, to provide that such an application shall not by itself render, that award unenforceable, unless the Court grants an order of stay of the operation of arbitral award. The verb "has been" used in the section is in "present perfect tense" and as such would be applicable to the proceedings already filed and pending in Court." Mr. Seervai argues that the meaning and scope of words "has been" was considered by the Apex Court in it's decision in The State of Bombay (now Maharashtra) vs. Vishnu Ramchandra, reported in AIR 1961 Supreme Court, page 307. By that decision, the verb "has been" is held to be in the present perfect tense describing past actions.

38 In it's decision in *Vishnu Ramchandra's* case, the Apex Court was considering whether Section 57 of the Bombay Police Act, 1951 was retrospective in it's operation. Section 57 empowered the Commissioner of Police, the District Magistrate or a specially empowered Sub-Divisional Magistrate to direct a person to remove himself to outside the local limits of jurisdiction of the said authorities, by such route and within such time as prescribed and not to return to the area from where the person was directed to remove himself. This order of externment could be passed if the authority

had reason to believe that such externed person was likely to engage himself in the commission of an offence similar to that for which he was convicted. Language used in Section 57 was if a person "has been convicted" of the enumerated offence under Indian Penal Code, an order of externment could be passed. It was contended before the Apex Court that the legislature had used the present participle "has been" and not the past participle in the opening portion of the Section and this indicated that the section was intended to be used only where a person was convicted subsequent to coming into force of the Act. The Apex Court noted that Section 57 of the Bombay Police Act does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons who have been convicted of the offences of a particular kind. The Section only enables the authorities to take note of their convictions and to put them outside the area of their activities so that the public may be protected against the repetition of such activities. In that circumstance, it held that the verb "has been" is in "present perfect tense" and may mean either "shall have been" or "shall be". Looking to the scheme of the enactment as a whole and particularly the other portions of it, it was manifest that the former meaning is intended and the verb "has been" describes past actions. It is used to express a hypothesis without regard to time.

39 Mr. Subramaniyam, submitted in reply that the use of verb "has been" will not necessarily be determinative of the fact whether the amendment be applicable to pending proceedings. In

this connection, he relied upon the following observations of Queen's Bench Division in the case of In re ATHLUMNEY Ex parte WILSON reported in 2Q.B page 547 :-

> "No doubt the words "where a debt has been proved under the principal act" are capable of such a meaning. But this form of words is often used to refer, not to a past time which preceded the enactment, but to a time which is made past by anticipation a time which will have become a past time only when the event occurs on which the statute is to operate. In former times draftsmen would have used the words "where a debt shall have been proved," but in modern Acts the past tense is frequently used where no retrospective operation can be intended.

These observations are required to be appreciated in the facts of the decision cited. The Queens Bench Division was considering, The Bankruptcy Act, 1890 which provided that, where a debt, including interest "has been proved" on a debtor's interest, such interest shall for the purposes of be calculated at a rate not exceeding 5% p.a. without prejudice to the right of the creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts have been paid in full. In the facts of the case, the Queens Bench Division noted that, the enactment did not merely affect procedure. If the section was construed retrospectively, it would postpone the creditor's right to dividend beyond 5% and would pro-tanto deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred. Therefore, retrospective force was not given to the section. In the

facts of the case on hand, there is no such deprival of vested right of action to BCCI.

40 The other decision cited Mr. Subramaniyam on use of the verb "has been" is the decision of the Apex Court in the case of The Workmen of M/s. Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Versus. The Management and Others, reported in (1973) 1 Supreme Court Cases page 813. In that decision the apex court was considering section 11A incorporated in the Industrial Disputes Act, 1947 by the Industrial Disputes Amendment Act, 1971. Section 11A provided, for the powers of the Labour Court, Tribunals and National Tribunals to give appropriate reliefs in case of discharge or dismissal of workmen. It provided that, where an industrial dispute relating to dismissal of a workman "has been referred" to a Labour Court etc. for adjudication, if the Court is satisfied that the order of dismissal is not justified, it may set aside the order of dismissal and direct reinstatement. It was contended that, the words in the section clearly show that, it applies only to disputes in respect of which a reference is made after the section has come into force and that the expression only signifies that on the happening of a particular event, namely a reference made in future the powers given to the Court can be exercised. The Apex Court held that, the question whether the expression relates to past or future events, is to be gathered from the context in which they appear, as well as, the scheme of the particular legislation. Further, at para-59 it observes :

> "The words 'has been referred' in Section 11-A are no doubt capable of being interpreted as making the section applicable to references made even prior to December 15, 1971. But is the section so expressed as to plainly make it applicable to such references ? In our opinion, there is no such indication in the section. In the first place, as we have already pointed out, the section itself has been brought into effect only some time after the Act had been passed. The proviso to Section 11-A, which is as much part of the section, refers to "in any proceeding under this section". Those words are very significant. There cannot be a "proceedings under this section", before the section itself has come into force. A proceeding under that section can only be on or after December 15, 1971. That also gives an indication that Section 11-A applies only to disputes which are referred for adjudication after the section has come into force."

Bare reading of the observations quoted above, is sufficient to know that the special circumstance of the proviso to Section 11-A, was determinative of the meaning given to the words "has been referred". There is no such special circumstance available in the facts of the case herein.

41 I find substance in the submission advanced by Mr. Seervai particularly in view of the object and purpose of amendments to Section 36 of the Act. Plain literal meaning, will have to be given to the provision in the absence of any special circumstance available to a party under the provision and use of verb "has been" must be held to be in present perfect tense. If use of verb "has been" is held to be in "present perfect tense", Section 36 of the Arbitration Act will be applicable not only to cases where a petition under Section 34 of the

Arbitration Act is filed after 23rd October, 2015 but also to cases where a petition has been filed before 23rd October, 2015. In other words, all the applications under Section 34 pending in the court for consideration will attract Section 36(2) of the Amended Act.

42 The contention of BCCI is that, it has a vested and accrued right as an award-debtor, to have the validity of the arbitral award, adjudicated by the Court, before the same can be enforced. This claim is disputed by the award holders, according to whom BCCI never had any right, let alone, a vested or accrued right under Section 36 of unamended Arbitration Act, against the enforcement of arbitral awards. According to BCCI, its accrued right is saved by Section 6 of the General Clauses Act. The argument of vested right, therefore, in fact, goes along with the application of Section 6 of the General Clauses Act. It has already been held hereinabove that, two other conditions under Section 6 of the General Clauses Act, namely the saving clause being non-exhaustive and absence of different intention appearing in the saving section are not satisfied. Section 26 of the Amending Act is exhaustive as by necessary implication, the proceedings other than "arbitral proceedings" are covered by the first part of Section 36 of the Amended Act. Nonetheless, considering the exhaustive submissions advanced, it will be only appropriate to see whether any right is accrued or vested in BCCI under Section 36 of the unamended Arbitration Act against enforcement of arbitral awards.

43 Before adverting to several decisions, cited on behalf of both the sides, it would be convenient to look into the two relevant provisions, both pre-amendment and post-amendment, for what is available thereunder to the award-holder and award-debtor. A reference to the Arbitration Act,l 1940 is also inevitable.

44 Under Arbitration Act, 1940 before an award could be made enforceable, the intervention of Court was essential. First, an award had to be filed in Court under Section 14 of the 1940 Act with the record of proceedings that had been filed before the Arbitrator. Then the Court had to be satisfied under Section 17 of the 1940 Act that a judgment in terms of the award could be given including disposing of any challenges under Section 30 of the 1940 Act. It was only after this process was complete and a judgment given that, a decree in terms of the award followed. The award then became executable as a decree of the Court. This position changed under the Arbitration and Conciliation Act, 1996. With the enactment of Section 35 thereunder, an arbitral award on it's passing became final and binding on the parties. There was no requirement to file the award or the proceedings in Court. The compulsory judicial scrutiny of the award, before it became enforceable, was done away with. It's judicial scrutiny is only on the award-debtor filing application under Section 34 and is limited to the grounds stated therein. The enforceability of the award was, however, postponed under the pre-amendment Section 36, to 3 months after passing of the award or until after refusal of the application to challenge the award, if filed, by

the award-debtor. In other words, the moment an application under Section 34 was filed, there was automatic suspension of the execution of the arbitral award. As already noted earlier, such automatic suspension of execution was strongly disapproved by the Apex Court in *Nalco's* case which led to the amendments to Section 36. By the amendments, the effect of automatic suspension has been removed. The award-debtor, has to file an application for stay of execution of the award. Now, the question to be considered is, whether the pre-amendment Section 36 created any right, vested or accrued or even otherwise in favour of the award-debtor. The Apex Court in Purbanchal Cables & Conductors Pvt. Ltd V/s. Assam State Electricity Board, reported in AIR 2012 SC 3167 has noted the definition of vested right as, rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person, or persons as present interest. Mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights."

45 Mr. Dada submitted that, Section 34 of the Arbitration Act, vests a substantive right in the award-debtor to have the validity of the arbitral award tested before a Court of law. Further, on filing an application under the Original Section 34 within the time limit stipulated therein, the Original Section 36, conferred upon the applicant, the privilege of not having the arbitral award under challenge executed/enforced against the applicant, unless and until, the said application was dismissed. This privilege accrued to the

applicant immediately upon the application under the Original Section 34 being filed. Per-contra, Mr. Khambhata and Mr. Seervai submitted that, original Section 36 cast only a shadow or an impediment on the enforceability of an arbitral award and imposed a disability on a successful claimant from being able to enjoy the fruits of his success by enforcing the arbitral award merely because a petition was filed under Section 34. It is their argument that, this shadow or impediment created by original Section 36, can never be termed a "right" let alone as an "accrued" or "vested" right and at the highest, it can be termed as an "existing right".

46 Mr. Dada, referred to the decision of the Delhi High Court dated 8th December, 2015 in O.M.P. No. 408 of 2007 (viz. Ministry of Defence, Government of India v. Cenrex SP. Z.O.O. & Ors.), to submit that, applicability of the Amendment Act to the applications already filed under the unamended Section 34, has already been considered therein. The observations relied upon by Mr. Dada, read as under :-

> "The argument urged on behalf of the respondent no.1 to decide the case as per the amended Section 34 of the Act has no merits because Section 6 of the General Clauses Act, 1897 provides that an Act (or an Ordinance for that matter) does not have retrospective operation unless so provided and vested rights are not deemed to be taken away by means of the amending or the repealing Act. Once the objections are filed under a wider provision as existing of Section 34 of the Act when objections were filed, such vested rights to have the Award set aside on the basis of Section 34 which existed on the date of filing of the objection, petition cannot be taken away by holding that by the 2015

> amendment Ordinance such a vested right has been impliedly taken away. Section 6 of the General Clauses Act talks of vested rights being protected and therefore unless such rights are expressly or by necessary implications taken away, it cannot be held that an amending Act will have a retrospective application to the pending litigation. I do not find any express or implied retrospective operation of the newly amended Section 34 of the Act so that this Court should hold that even pending litigations under Section 34 of the Act should not be governed by the said provision as applicable on the date of filing but should be decided on the basis of the Section 34 of the Act as existing after passing of the 2015 amendment Ordinance. Reliance placed upon a provision of Section 85A which has not been introduced by the Legislature cannot assist the respondent no.1 to claim retrospective operation of amended Section 34 of the Act."

This decision is seen to relate only to the continued applicability of the original Section 34 to the applications filed under that Section prior to commencement of the Amending Act. It does not consider the effect of amendments to Section 36.

47 Mr. Khambhata submitted that, a mere right to take advantage of the old law in a repealed statute that exists on the date of Repealing or Amending Act is not a vested or accrued right. He refers to the decision of the Apex Court in Lalji Raja and Sons vs. Firm Hansraj Nathuram, reported in 1971(1) Supreme Court Cases, page 721. In the facts of that case, the decree holders who had obtained the decree in the court at Bankura, West Bengal had applied for its transfer for execution to Morena in the then state of Madhya Bharat

for execution. On transfer of the decree when the execution proceedings commenced in the court at Morena, the judgment-debtor resisted on the ground that the Court had no jurisdiction to execute the same as the decree was of foreign court and that the same had been passed *ex-parte*. This contention was accepted by the court and execution petition dismissed. Later the Code of Civil Procedure (Amendment Act) came into force as a result of which the Code of Civil Procedure was extended to the state of Madhya Bharat as well as various other places. The decree-holders then appealed against the order of the execution application. It was contended on behalf of the judgment debtors that when the decree was passed, they had a right to resist it in the court at Morena in view of the provisions of Indian Code of Civil Procedure then in force and the same was a vested right. It was further contended that the right was preserved by the Saving Section of the Code of Civil Procedure (Amendment Act), 1950. While rejecting the contention, the Apex Court held that:

> "It is difficult to consider the non-executability of the decree in Madhya Bharat as a vested right of the judgment-debtors. The non-executability, in question pertains to the jurisdiction of certain courts and not to the rights of the judgment-debtors. Further the relevant provisions of the Civil Procedure Code in force in Madhya Bharat did not confer the right claimed by the judgment debtors. All that has happened in view of the extension of 'the Code' to the whole of India in 1951 is that the decree which could have been executed only by courts in British India are now made executable in the whole of India. The change made is one relating to procedure and jurisdiction. Even before 'the Code' was extended to

> Madhya Bharat the decree in question could have been executed either against the person of the judgment-debtors if they had happened to come to British India or against any of their properties situate in British India. The execution of the decree within the State of Madhya Bharat was not permissible because the arm of 'the Code' did not reach Madhya Bharat. It was the invalidity of the order transferring the decree to the Morena Court that stood in the way of the decree-holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgtment-debtors. Even if the judgment-debtors had not objected to the execution of the decree, the same could not have been executed by the court at Morena on the previous occasion as that court was not properly seized of the execution proceedings. By the extension of 'the Code' to Madhya Bharat, want of jurisdiction on the part of the Morena Court was remedied and that court is now made competent to execute the decree."

48 The second decision cited by Mr. Khambhata, of the Constitution Bench of the Apex Court, in Bansidhar and Others vs. State of Rajasthan and Others, reported in (1989) 2 Supreme Court Cases, page 557, arose out of the right of State of Rajasthan to take over, certain surplus or excess land, under Rajasthan Tenancy Act, 1955 after the commencement of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973. The Apex Court considered the question whether the proceedings before it involved any "rights accrued" or "obligation incurred" so as to attract old law to them to support initiation or continuation to the proceedings against the landholders after the repeal. It was contended that even if the provisions of the old Act were held to have been saved, it could not be

said that there was any right accrued in favour of the State or any liability incurred by the landholders in the matter of determination of "ceiling area" so as to attract to their cases, the provisions of the old law. It was sought to be emphasized before the court that the excess land would vest in the state only after completion of the proceedings and upon the landholder signifying his choice as to the identity of the land to be surrendered. The Apex Court while rejecting the application as regards the right claimed by the landholders observed as follows:

> "30 For purposes of these clauses the "right" must be "accrued" and not merely an inchoate one. The distinction between what is and what is not a right preserved by Section 6 of the General Clauses Act, it is said, is often one of great fineness. What is unaffected by the repeal is a right 'acquired' or 'accrued' under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right."

49 Mr. Seervai submitted that the question as to whether inexecutability arising from disability imposed by law on a decree-holder from being able to execute the decree against judgment-debtor provides a vested or accrued right to the judgment-debtor, not to have the decree executed against him, on account of change in law has already been considered by the Apex Court in it's decision in Narhari Shivram Shet Narvekar Vs. Pannalal Umediaram, reported in (1976) 3 Supreme Court Cases, page 203. In that decision, the Apex Court was considering whether a decree of the Bombay High court of the year 1960, which was held to be inexecutable in Goa by the executing court at Panjim in the year 1965 could be executed after Code of Civil

Procedure was extended to Goa in the year 1967. Contention was raised before Goa High Court that the inexecutability of the decree on account of disability imposed by the law on the decreeholder granted a vested right to the judgment-debtor not to have the decree executed against him, when the law changed and removed the disability against execution. The Apex Court negatived the propositions with the following observations at paras 10 and 11 of its decision :

> "10 As regards the argument of the learned counsel for the appellant that the executability of the decree was a vested right which could not be taken away by the applicability of the Code of Civil Procedure to Goa during the pendency of the appeal, the decision of this court in *Lalji Raja & Sons' case (supra*) is a clear authority against the proposition adumbrated by the learned counsel for the appellant. In that case, this court appears to have considered this point in all its comprehensive aspects and was of the opinion that the executability of the decree could not be considered to be a vested right. In this connection, this Court made the following observations:
>
> > "Therefore, the question for decision is whether the non-executability of the decree in the Morena court under the law in force in Madhya Bharat before the extension of 'the Code' can be said to be a right accrued under the repealed law. We do not think that even by straining the language of the provision, it can be said that the non- executability of a decree within a particular territory can be considered as a privilege. All that has happened in view of the extension of 'the Code' to the whole of India in 1951 is that the decree which could have been executed only by courts in British India are now made executable in the whole of India. The

> change made is one relating to procedure and jurisdiction..... It was the invalidity of the order transferring the decree to the Morena court that stood in the way of the decree holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgment-debtors..... By the extension of 'the Code' to Madhya Bharat, want of jurisdiction on the part of the Morena court was remedied and that court is now made competent to execute the decree."

"11 It was then argued that as the Code of Civil Procedure was not applicable to Goa at the time when the Bombay High Court passed the order transferring the decree to the Goa court, the order of transfer was absolutely without jurisdiction. We are, however, unable to agree with this contention. To begin with, as the decree was passed by the Bombay High Court. Section 38 of the Code of Civil Procedure would clearly apply because the decree passed by the Bombay High Court was not a foreign decree. It is true that at the time when the Bombay High Court passed the order of transfer, the Code of Civil Procedure had not been applied to Goa. But that does not put the respondent/ decreeholder out of court. The decree could be transferred and was valid and executable. But because of an impediment or an infirmity, it could not be executed so long as the Code of Civil Procedure was not made applicable to Goa. Thus the only bar which stood in the way of the execution of the decree was the non-applicability of the provisions of the Code of Civil Procedure to Goa. This was, however, not an insurmountable bar or an obstacle and the bar or the obstacle disappeared the moment the Code of Civil Procedure was applied to Goa on June 15, 1966. It is common ground that this was done during the pendency of the appeal before the Additional Judicial Commissioner passed the impugned order on June 28,

> 1967. In these circumstances, therefore, it seems to us that this is a fit case in which the doctrine of eclipse would apply and the wall or the bar which separated Bombay from Goa having disappeared there was no impediment in the execution of the decree. The decree lay dormant only so far as no bridge was built between Bombay and Goa but as soon as the bridge was constructed in the shape of the application of the provisions of the Code of Civil Procedure to Goa, the decree became at once executable."

50 I find that, the two decisions cited by Mr. Khambhata are perfectly applicable to the facts of the case on hand. The remedy available to an aggrieved award-debtor is under Section 34 of the Arbitration Act. This remedy has not been taken away by the Amending Act. A vested right available to the award-debtor would be only in the matter of challenge to the arbitral award which has remained intact. Section 36 of the Arbitration Act pertains only to the enforcement of an award and its executability. The original Section 34, imposed a disability on the award-holder in executing the award during pendency of the challenge to the award. This disability provided only an interim relief against execution of the award to the award-debtor, until his challenge to the award was decided. The right to interim relief cannot be a vested or accrued substantive right. In any case, even this interim advantage is not completely taken away. The disability imposed on the award-holder under original Section 36 was absolute. The award was simply not executable during pendency of the challenge to it. Under the amended Section 36, this disability has been only made relative. Firstly, what was available earlier on a

platter has to be now asked for. Secondly, grant of it can be conditional.

51 Extensive arguments have been advanced on the effect of the amendment to Section 36 of the Arbitration Act. Is the effect prospective or it is retrospective. BCCI obviously contended that, the amendment is prospective in nature and hence applicable only to such applications under Section 34 as filed after 23rd October, 2015. The argument on behalf of KPCL and RSW is two-fold. Firstly, that the application of the amendment to the pending matters would be prospective in nature. If the first argument is not acceptable, the second argument is that, it is retrospective in nature. The further arguments to support the retrospective effect are (i)the amendment is curative and (ii)the amendment is in respect of procedural matters.

52 Mr. Dada, argued that the amendment to Section 36 affects the substantive right of an award-debtor and hence it must take prospective effect. He refers to the decision of the Apex Court in Thirumala Chemicals Ltd. V/s. Union of India and Ors. reported in (2011) 6 SCC page 739 to support his submission. In that decision, the question considered was, whether the Appellate Tribunal constituted under the Foreign Exchange Management Act ("FEMA" for short) was right in dismissing an appeal preferred under Section 19(1) of FEMA by applying the first proviso to Section 52(2) and Foreign Exchange Regulation Act, 1973 ("FERA" for short) holding that, it had no power to condone the delay beyond 90 days. Although

the cause of action had arisen when FERA was in force, show cause notices and impugned notices were issued, when FEMA was imposed and appeals were also preferred under Section 19(1) of FEMA. The Apex Court, in that decision considered, the distinction between substantive and procedural law at paras-23 to 27. The same reads as under :-

> "23. Substantive law refers to a body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural laws establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always act prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.
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> 24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.
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> 25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in *Garikapati Veeraya v. N. Subbiah Choudhry, reported in AIR 1957 SC 540*, *New India Insurance Co. Ltd v. Shanti Misra,reported in (1975)*

> *2 SCC page 840*, *Hitendra Vishnu Thakur v. State of Maharashtra, reported in (1994) 4 SCC page 602*, *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar, reported in (1999) 8 SCC page 16* and *Shyam Sunder v. Ram Kumar, reported in (2001) 8 SCC page 24*, has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.
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> 26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.
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> 27. Rights of appeal conferred under Section 19(1) of FEMA is therefore a substantive right. The procedure for filing an appeal under sub-section (2) of Section 19 as also the proviso to sub-section (2) of Section 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights."

53 The reliance on this decision is based on the argument that, original Section 34 and original Section 36 together constitute a right of an award-debtor to have the validity of an arbitral award examined and upheld by the Court before the award becomes enforceable. Hence, it constitutes substantive accrued vested right.

In other words, there is a package of rights available under Section 34 and Section 36 to the award-debtor. This argument has already been negatived. Besides, it is also seen above that, the vested right of the award-debtor under Section 34 of the Arbitration Act is unaffected by the amendment to Section 36 of the Arbitration Act. Hence, the decision cited cannot help BCCI.

54 The second decision cited by Mr. Dada is of *Messers* Hoosein Kasam Dada (India) Ltd., v. The State of Madhya Pradesh & Others, reported in A.I.R. 1953, Supreme Court, page 221 to submit that the right of appeal is not merely a matter of procedure, but it is a matter substantive right. This right of appeal becomes vested in a party when proceedings are first initiated and/or before a decision is given by inferior court. Such vested right cannot be taken away by express enactment or necessary intendment. As regards the right of BCCI to file an application under Section 34 of the Arbitration Act to challenge the arbitral award, there is no dispute whatsoever that the same would be vested right or an accrued right, since that is the only provision available to an award-debtor to challenge the arbitral award. That right is already seen to be entirely different from enforceability of the arbitral award.

55 Mr. Seervai submitted that there is a fundamental error in the submissions on behalf of the BCCI namely the application of the amended Section 36 of the Arbitration Act to the applications filed under Section 34 of the Arbitration Act before 23rd October, 2015

constitutes a retrospective operation of that provision. According to him, the application of the amended Section 36 in fact constitutes a prospective operation of the provision. Mr. Seervai argued that as already seen above original Section 36 of the Arbitration Act cast a shadow or an impediment on the enforceability of the arbitral award and imposed a disability on the successful claimant as regards enforcement of the award. Even under the original section, the shadow cast on the arbitral award would be removed by the period of limitation for filing petition under Section 34 of the Arbitration Act expiring or dismissal of the petition filed under Section 34 of the Arbitration. Under the Amended Section 34 of the Arbitration Act, the shadow or impediment on the enforceability of the arbitral award has been removed to enable a successful claimant to enforce the arbitral award, unless the award-debtor obtains an order of interim stay from the Court under Section 36(3) of the Arbitration Act. The lifting of this shadow or impediment, on the enforceability of the arbitral award operates only in future i.e. after 23rd October, 2015 on the basis of an existing state of affairs, even if the award was passed or the petition under Section 34 of the Arbitration Act was filed before 23rd October, 2015. Therefore, the Amended Section 36 of the Arbitration Act cannot be said to operate retrospectively, its operation is prospective in nature.

56 Mr. Seervai takes support from the following para in Bennion on Statutory Interpretation (Fifth Ed.), at page 317, on the effect of the amendments :

> "It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law. However, the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences on it".

57 Mr. Seervai next relies upon the following three English decisions in support of his submissions :-

1 In the Queen v. The Inhabitants of St. Mary Whitechapel (1848) 12 QBR 120, Lord Denman C.J.

2 In West v. Gwynne [1911] 2 Ch. D.1 Cozens-Hardy M.R.

3 In Re A Solicitor's Clerk [1957] 1 W.L.R. 1219

The facts of the first decision cited were that a pauper was residing in the concerned parish alongwith her husband at the time of his death, which happened on 6th June, 1846. The parish obtained an order for her removal and served notice of chargeability. On 3rd September in the same year, the pauper and her children were removed from the residence. But before the actual removal took place, Statute No. 9 & 10 Vict. c.66 was passed. Section 2 of Stat. 9 and 10 Vict c.66 provided "that no woman residing in any parish with her husband at the time of his death shall be removed, nor shall any warrant be granted for her removal, from such parish, for twelve

calendar months next after his death, if she so long continue a widow." An appeal was preferred against the order of removal. The pauper had continued to be a widow thereby satisfying the conditions irremovability within the period of one year. During the hearing of the appeal, since the widow was already removed, question of construction of the statute arose namely whether the statute was to be construed retrospectively. Lord Demnan CJ considered the effect of the statute observed as follows:

> "In this case a valid order of removal was made before the passing of the statute; and the removal took place after that time. The pauper had become a widow on the 6th June 1846, before the passing of the Act, and was removed on the 3rd of September, 1846. The sessions confirmed the order of removal, subject to two questions, of which we take the effect, and not the precise terms.
>
> First: was the pauper irremoveable by stat. 9 and 10 Vict. c.66, s.2, which enacted that no woman residing in any parish with her husband at the time of his death shall be removed, nor shall any warrant be granted for her removal, from such parish for twelve months next after his death if she so long continue a widow? If was said that the operation of the statute was confined to persons who had become widows after the Act passed, and that the presumption against a retrospective statute being intended supported this construction; but we have before shewn that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing. The clause is general, to prevent all removals of the widows described therein after the passing of the Act; the description of the widow does not at all

> refer to the time when she became widow; and we are therefore of opinion that the pauper was irremovable at the time she was removed".

58 In *West v. Gwynne's* case, in the year 1892 the Registry with the intent to prevent in future the exaction of a fine by the lessor for giving the lessee a licence to assign and so Section 3 of the Conveyancing and Law of Property Act, 1892, was enacted. The question was raised, whether the operation of this Section, must not, by construction be restricted to cases where the lease was granted after the commencement of the Act. Cozens-Hardy M.R. L.J. observed in the decision as under :-

> "It was forcibly argued by Mr. Hughes that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. "Retrospective operation" is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Sect.46 of the Settled Estates Act, 1877, above referred to, is a good example of this. Sect. 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest."

In his concurring judgment, Buckley L.J. observed as follows :-

> "During the argument the words "retrospective" and "retroactive" have been repeatedly used, and the question has been stated to be whether s.3 of the

> Conveyancing Act, 1892, is retrospective. To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."
>
> AND
>
> There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning."

59 In the third decision in In re A SOLICITOR'S CLERK, reported in [1957] 1 W.L.R. Queen's Bench Division page 1219, the Court was concerned with the question, as to whether the disqualification added in the year 1956 by which a person was disqualified from acting as a solicitor's clerk if he was convicted of larceny, embezzlement or fraudulent conversion of any property irrespective of whether it belonged to his employee or one of his clients could be applied to a person who was convicted of larceny in the year 1953 i.e. before the disqualification was added. The Court

followed the decision in *West and Gwynne's* case to observe as follows :-

> "But in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past."

60 The Constitution Bench of the Apex Court, in Trimbak Damodhar Raipurkar vs. Assaram Hiraman Patil & Others, reported in 1962 Supp. (1) SCR page 700 referred with approval the judgment in *West v. Gwynne's* case to observe that it is relevant to distinguish between an existing right and the vested right. Whereas the Statute operates in future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. In *Trimbak's* case, by the amendments to Bombay Tenancy and Agricultural Lands Act, the tenancy of the ordinary tenants as distinct from protected tenants could not be terminated on the expiry of their tenancy except by giving one year's notice and that too on the ground that the lands were required by the landlords for *bonafide* personal cultivation and that the income of the said lands would be the main source of the income of the landlord. The relevant

averments about grounds had to be made by the landlords in issuing the notice to the tenants for terminating their tenancy. Mr. Dada countered that the analogy sought to be drawn by on behalf of KCPL and RSW between issuance of notice of termination by the landlord and filing of an application under Section 34 of the Arbitration Act is inappropriate. As the nature of rights accruing upon issuance of notice to the tenants cannot be equated with the nature of rights accruing upon the filing of proceedings in court. According to him, the analogy would have been appropriate if the Amendment Act had been passed after making of the arbitral award but before filing of an application under Section 34.

61 The decisions in *West V/s. Gwyne's* case and *Trimbak's* case has been referred with approval by the Apex Court in one of it's latest decisions also. In P. Susheela V/s. University Grants Commission reported in (2015) 8 SCC page 129, the Apex Court was considering applicability of the Regulation promulgated by University Grants Commission prescribing minimum qualifications as eligibility condition for recruitment and appointment of Lecturers in Universities/Colleges/Institutions. While distinguishing between existing right and vested right, the Apex Court held that, merely because the regulation laid down additional eligibility condition, it does not mean that any vested right of the appellants was affected, nor does it mean that the regulation is, retrospective in operation. A vested right would arise only if the appellant had actually been appointed to the post. Till then, there was no vested right and the

only right was to be considered for the post. The condition therefore was, prospective in action as it would apply only at the stage of appointment.

62 In yet another decision, the Apex Court, in similar situation, has referred with approval, the decision in *West V/s. Gwyne's* case. In New India Sugar Works V/s. State of Uttar Pradesh & Others reported in (1981) 2 SCC page 293, it was considering order of U.P. Government imposing levy on 50% of sugar produced by manufacturers. It was submitted that, the order could not have any retrospective operation so as to apply to the stock of sugar manufactured prior to the date of the order and would apply only to the sugar produced after coming into force of the impugned notification. The Apex Court rejected the submission and held that once the Notification for imposing the levy was made, it will naturally apply to the stock of sugar which was with the manufacturers irrespective of the fact that it was manufactured before or after the order. The reasons stated therefor at para-2 of the decision, read as under :-

> "So far as this argument is concerned we find no substance in the same because it is not a question of retrospectivity of the stature but its actual working. Once the notification imposing the levy was made it will obviously apply to stock of *Khandsari* produced by the petitioners either before or after the order. This principle has been clearly laid down by the Constitution Bench of this Court in the case of *Trimbak Damodhar Raipurkar v. Assaram Hiraman Patil, 1962 Supp 1 SCR 700*, where Gajendragadkar, J. speaking for the court regarding the scope of a Rent

Act and amendment in Rent Act observed as follows :

> In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included."

63 The observations of the Buckley L.J. in *West vs. Gwynne's*, which have been quoted with approval in many of the decisions of the Apex Court, bring forth with complete clarity, the retrospective and prospective effect of operation of a Statute. It is said that, retrospective operation is one matter and interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act would be retrospective. In that case, it is effective on a date prior to the date on which the Act is made applicable. When it is applied to the existing matters, it's effect is necessarily prospective. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law. The further relevant observations of Buckley L.J are : "As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section, I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning."

64 Coming to the facts of the present case, in view of the above position in law, application of amended Section 36 to the existing matters i.e. the applications under Section 34 of the Arbitration Act, that are pending as on 23rd October, 2015 is giving prospective effect to the amendment and not retrospective effect. The most relevant consideration for applying it to the existing matters is the nature, ambit and scope of the Amending Act. Under the original Section 36, filing of an application under Section 34 had the effect of casting shadow upon the executability of the award. This act of the award-debtor disabled the award-holder from executing the award in his favour irrespective of the merit in the challenge. In this circumstance, there could be no question of any right accruing to the award-debtor by filing the application under Section 34. The Amended Section 36 lifts the shadow over the right of the award-holder. His disability gets removed. At the same time, the application under Section 34 of the award-debtor remains intact. The removal of disability is not complete. It is partial. The provision enables the award-debtor to apply to the Court for make the award inexecutable pending his application. His right to apply for interim relief during the pendency of the application under Section 34 is not affected in any way. In this way in fact the Amending Act brings in balance between the rights and liabilities of both the sides. The ambit and scope of the Amended Section 36, is to cure the defect by removing the imbalance. Thus the application of the provision on the petitions under Section 34 pending on 23rd October, 2015, is prospective. It

makes no difference if the application under Section 34 filed by the award-debtor was prior to 23rd October, 2015. Removal of shadow over the rights of the award-holder cannot be said to be prejudicial to the award-debtor. He has to now only file an application for interim reliefs, which may or may not, be subject to imposition of condition.

65 Now that effect of the operation of the amended Section 36, is held to be prospective, there is in fact no need to consider the alternate argument of justifying retrospective operation, on the ground of the amendment being curative and procedural. In any case, that the amending provision is curative cannot be disputed at all. This is evident from the observations of the Apex Court in Nalco's case indicating the defects in the Original Section 36, the imbalance caused by it and the mischief done by it. There can also be no doubt that, it is procedural in nature as it concerns only the procedural aspect of the challenge to the arbitral award. It was sought to be argued that, application of the amendment to the existing matters would bring in anomaly or absurdity or produce impracticable results. The submission would have been of some substance if the Amended Section 36 were not to provide for an application to be made by the award-debtor for interim reliefs.

66 For the reasons stated above, the Chamber Summonses are dismissed. The parties shall bear their respective costs.

(Smt. R.P. SondurBaldota, J.)