

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28.04.2017/01.05.2017

Pronounced on: 18.05.2017

+ **FAO (OS) (COMM) 92/2017**

NBCC (INDIA) LTD.

..... Appellant

Through : Ms. Ginny. J. Rautray and Ms. Bhawna Pal, Advocates.

versus

M/S. SHARMA ENTERPRISES

..... Respondent

Through : Ms. Anusuya Salwan, Ms. Renuka Arora and Ms. Nikita Salwan, Advocates.

+ **EFA (OS) (COMM) 6/2017, CAV.420/2017, C.M. APPL.15886/2017 & 15887/2017**

M/S. NBCC (INDIA) LTD.

..... Appellant

Through : Ms. Bhawna Pal, Advocate.

versus

M/S. SHARMA ENTERPRISES

..... Respondent

Through : Sh. Abhishek Pundir, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. The present judgment seeks to dispose of the two common appeals in FAO (OS) (COMM) 92/2017 and EFA (OS) (COMM) 6/2017. Judgment in FAO (OS) (COMM) 92/2017 was reserved by an order of this Court dated

28.04.2017. Subsequently, by consent of the parties, by an order dated 01.05.2017, this Court reserved judgment in EFA (OS) (COMM) 6/2017 along with the main appeal, i.e. FAO (OS) (COMM) 92/2017.

2. The appellant (hereinafter “NBCC”) is aggrieved by an order of the learned single judge, who held, by the impugned judgment, that its application under Section 14 of the Arbitration Act, 1940 (hereafter “the old Act”) challenging an award was not maintainable.

3. NBCC was awarded a contract for the construction of a railway station-cum-commercial complex at Vashi, Navi Mumbai, by IRCON, the principal employer. In turn, NBCC issued notice inviting tenders for the work and the respondent, Sharma Enterprises (hereinafter “Sharma”) emerged as the successful bidder. Sharma was issued a letter of intent followed by a letter of award whereby it was awarded the work of mobilizing the work site.

4. On 08.06.1992, NBCC served a notice on Sharma in terms of Clause 60.1 of the General Conditions of Contract (‘GCC’). NBCC then issued a 48-hour notice upon Sharma for termination of the work, which was followed by a number of letters sent by it to Sharma. Finally, by its letter dated 22.09.1992, NBCC terminated the contract. Sharma filed a petition under Section 20 of the old Act seeking reference of the disputes to arbitration. In the meanwhile, the Chairman-cum-Managing Director of NBCC appointed one Mr. Daljeet Singh as sole arbitrator, referring both the claims (of Sharma) and the appellant’s counter-claims for arbitration. By an order, dated 02.12.1997, however, the High Court set aside the appointment of Mr. Daljeet Singh and Justice G.C. Jain (Retd.) was appointed as sole arbitrator in his place. The counterclaims of the Appellant were not referred

to the arbitrator. Later, since Justice G.C. Jain expired, NBCC applied for appointment of an arbitrator. By order dated 09.09.1998, this court appointed Justice Satpal as the arbitrator. On appeal, by an order dated 09.07.1999, the Division Bench of the High Court set aside the order dated 02.12.1997 as well as the order of 09.09.1998. The Division Bench held that Mr. Daljeet Singh's appointment was valid and he would proceed to adjudicate upon the claims as well as the counterclaims. Against this order, a special leave petition was preferred to the Supreme Court. The Court set aside the order of the Division Bench, by an order dated 18.10.2000. Thereafter, NBCC filed an application, dated 15.09.2001 before Justice Satpal to take on record the Appellant's counterclaims. However, that application was dismissed on 16.03.2002. Thereafter NBCC requested its Chairman-cum-Managing Director for the appointment of an arbitrator and Sh. A.K. Gupta was appointed as the sole arbitrator -for adjudicating NBCC's counterclaims.

5. Against this appointment, Sharma filed OMP No. 144/2003 under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ("1996 Act") contending that the arbitrator had become *de facto* or *de jure* unable to perform his functions. NBCC in response contended that the proceedings under Sections 14 and 15 of the 1996 Act were not maintainable and any objections of Sharma could be raised before the arbitral tribunal under Section 16 of the 1996 Act. On 12.09.2005, Justice Satpal made and published an award over Sharma's claims. Thereafter, Sharma filed C.S. (OS) 259/ 2006 under Sections 14 and 17 of the 1940 Act seeking a direction to the said arbitrator, Justice Satpal to file the award. On 13.02.2006, the High Court in CS(OS) 259/2006 directed Justice Satpal to file the arbitral award as well as the arbitration proceedings. Thereafter, the award was filed

by Justice Satpal in the High Court. This award was challenged by the Appellant in CS(OS) 1420/2006 under Sections 30 and 33 of 1940 Act.

6. OMP No. 144/2003, under Sections 14 and 15 of the 1996 Act, (by which Sharma had challenged the arbitrator's functioning on the ground that he had become *functus officio*) was, in the meanwhile, dismissed by a learned single judge of this court, by order dated 20.08.2008 upholding NBCC's plea that the objections could be raised before the arbitral tribunal under Section 16 of the 1996 Act. Against this order, Sharma went to the Supreme Court, seeking special leave. The Supreme Court observed that since the NBCC's counterclaims were not entertained by Justice Satpal, by an order dated 03.08.2011, (with the consent of both parties), it appointed Justice R.C. Chopra (Retd.) as the arbitrator to decide the dispute after considering the claim and counterclaim of both the parties. By this order, Justice Satpal's award was set aside and the appointment of Sh. A.K. Gupta was also cancelled. Owing to this order of the Supreme Court, the proceedings in CS(OS) No. 1420/2006 filed under Sections 30 and 33 of the 1940 Act, were rendered infructuous.

7. On 28.07.2016, Justice R.C. Chopra (Retd.) passed the arbitral award. Thereafter, NBCC filed a petition under Section 14 of the 1940 Act for filing of the award passed by the arbitrator before the court. The High Court issued notice to the arbitrator, by an order dated 22.11.2016, to file the award and the entire arbitral record. On 19.12.2016, Sharma filed an execution petition under Section 36 of the 1996 Act, which was listed on 23.12.2016. Noticing that NBCC's petition under Section 14 of the 1940 Act was already listed before another learned single judge, the execution petition under Section 36 of the 1996 Act was also listed before the same judge for orders. On

16.03.2017, the learned single judge ruled that NBCC's petition under Section 14 of the 1940 Act was not maintainable and that the 1996 Act would apply to the present arbitral proceedings. Against this order of the learned single judge, the present appeal has been filed before this Court.

Contentions

8. NBCC urges and its counsel, Ms. Ginny Rautray contends that the learned single judge erred in finding that the 1996 Act would be applicable to the arbitral proceedings conducted by Justice R.C. Chopra (Retd.). It is contended by Ms. Rautray that all arbitration proceedings before, and by extension the present one as well, were conducted under the old Act. It was pointed out that the arbitral proceedings conducted by Justice Satpal were admittedly under the old Act; that there is no dispute between the parties on this, can be evinced from the fact that both NBCC (under Sections 30 and 33) as well as the Respondent (under Sections 14 and 17) had filed petitions in respect of those arbitral proceedings under the old Act itself. NBCC relied on the Supreme Court's order appointing RC Chopra as the arbitrator, where it had noted that,

“However, we make it clear that the learned Arbitrator shall proceed from the last step taken by Justice Satpal before writing the award and the proceedings already conducted shall be retained so that the parties are not required to give fresh evidence all over again in regard to the claim.”

9. NBCC urged that inasmuch that it was clear and uncontested that the arbitral proceedings conducted by Justice Satpal were under the 1940 Act, and since Justice R.C. Chopra (Retd.) was to proceed *from the last step taken by Justice Satpal*, it was evident that the proceedings conducted or rather

concluded by Justice R.C. Chopra (Retd.) was also under the old Act. It was argued that the learned single judge fell into error by relying on the fact that NBCC had objected to OMP No. 144/2003, (a petition filed under the 1996 Act by Sharma), on the ground that those contentions could be urged before the arbitral tribunal relying on Section 16 of the 1996 Act. The counsel said that the mere reference to Section 16 of the 1996 Act by way of argument *ipso facto* did not result in an implied admission of applicability of the 1996 Act to the entire arbitral proceedings. It was further urged that the learned single judge also erred in not noticing that Sharma itself had approached the court in relation to the arbitral proceedings conducted by Justice Satpal, under the 1940 Act and, therefore, it would not be open for it to now contend that the 1996 Act would be applicable to the subsequent arbitration conducted by Justice R.C. Chopra (Retd.).

10. Sharma argues, on the other hand, that the impugned order did not call for any interference. It was urged that the proceedings before the Supreme Court, which ultimately led to the appointment of Justice R.C. Chopra (Retd.) originated from an application filed under Sections 14 and 15 of the new Act. Clearly, therefore, the order of the Supreme Court too was in exercise of jurisdiction under the Act. Accordingly, the entire arbitral proceedings conducted before the arbitrator were also under the new Act. It was moreover argued that NBCC had recognized that the 1996 Act would be applicable, when in response to Sharma's petition under Sections 14 and 15 of the 1996 Act, instead of raising any preliminary objection to the applicability of the 1996 Act, it urged that Sharma's objections could be addressed by the tribunal under Section 16 of the 1996 Act. This was an admission on applicability of the 1996 Act.

Reasoning and Findings

11. The question that requires decision in these appeals is whether provisions of the 1996 Act or of the old Act apply to the arbitration proceedings conducted by Justice R.C. Chopra (Retd.). The new Act came into force on 22.08.1996 repealing the old Act. Section 85 is a repealing provision; Section 85 (2) provides a consensual saving provision:

“(2) Notwithstanding such repeal-

- (a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;*
- (b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.”*

12. Under Section 85(2)(a), therefore, if arbitral proceedings commenced on or after the entry into force of the 1996 Act, then the 1996 Act would mandatorily apply to such proceedings. However, if the proceedings commenced before the 1996 Act came into force, then provisions of the 1940 Act would apply, *unless* the parties agree to the application of the 1996 Act, even for those proceedings which commenced prior to the entry into force of the 1996 Act. In sum, the position that emerges is that in respect of arbitral proceedings that started after the new law came into force, the 1996 Act would mandatorily apply. But, for proceedings that commenced when the old law was in force, while the old Act applied, parties had a choice- to apply the provisions of the 1996 Act as well to such proceedings. To determine

which Act would apply, therefore, it must first be ascertained as to when the arbitral proceedings have commenced.

13. Section 21 of the 1996 Act states when arbitral proceedings in respect of a particular dispute can be said to have commenced. Section 21 states-

“Unless otherwise agreed by the parties, the arbitral proceedings, in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

14. Therefore, for the purposes of Section 85(2)(a), the commencement of arbitral proceedings will be in accordance with the rule laid down in Section 21. In the present case, concededly, the disputes between the parties arose in 1992, which is when Sharma Enterprises by its letter, dated 20.06.1992 invoked the arbitration clause in the agreement and requested NBCC to appoint an arbitrator. Thereafter, Sharma filed a petition too under Section 20 of the 1940 Act for filing the arbitration agreement in court, in accordance with the provisions of the 1940 Act. In fact, the Chairman-cum-Managing Director of NBCC appointed Sh. Daljeet Singh as the sole arbitrator on 27.01.1993 to decide on both the claims of Sharma Enterprises, as well as the counterclaims of NBCC. On this issue, learned single judge of this court by order, dated 20.08.2008 in OMP 144/2003, also noted that both the claims of Sharma as well as the counter-claims of NBCC were raised in 1993 itself. Thus, having reference to Section 21 of the 1996 Act, it is clear that the arbitral proceedings, both in respect of the claims of the Respondent and the counterclaims of NBCC, commenced before the entry into force of the new Act.

15. Once it is found that the arbitral proceedings in respect of the dispute commenced before the entry into force of the 1996 Act, ordinarily the old Act would apply to them. Nonetheless, having regard to Section 85(2)(a), the parties have the option to agree to the application of the 1996 Act in respect of such proceedings. The Supreme Court interpreted Section 85(2)(a), in ***Thyssen Stahlunion GmbH v. Steel Authority of India Limited***, AIR 1999 SC 3923. The Court in that case held-

“Section 85(2)(a) of the new Act is in two limbs: (1) Provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties and (2) new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. First limb can further be bifurcated into two : (a) Provisions of old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force and (b) old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of widest import as held by various decisions of this Court in M/s. Doypack Systems Pvt. Ltd. 1988(36)ELT201(SC) ; Mansukhlal Dhanraj Jain & On. [1995] 2 SCC 660; M/s. Dhanrajamal Gobindram [1961] 3 SCR 1029 and Naveen Chemicals Mfg. and Ors. 1993 ECR 1(SC) . This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the word "the provisions" of the old Act. That would mean that the old Act will apply to whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. First limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement

of the new Act but also the provisions of the old Act for enforcement of the award under that Act. [...]

Section 85(2)(a) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act uptill the time of the enforcement of the award. This Section 85(2)(a) prevents the accrued right under the old Act from being affected. [...]

Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. [...]

Expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Construction in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Construction that parties could anticipate that the new enactment may come into operation at the time the disputes arise. [...]

There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force it does give option to the parties to agree that new Act would apply to the pending

arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.”

16. **Thyssen (supra)** thus is an authority for the rule that parties can agree to the application of the 1996 Act, even where the arbitral proceedings commenced before it came into force and that such “agreement” can also be entered into between the parties. In the circumstances of that case, the Supreme Court had found that in fact the parties had agreed to the application of the 1996 Act, even though the arbitral proceedings had begun before the coming into force of the said Act. In finding the evidence of such an “agreement” between the parties to apply the provisions of the new Act, the Court in that case had recourse to the terms of the clause in the contract which contained the arbitration agreement. The particular arbitration clause in that case read-

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

17. In so holding, the Supreme Court laid emphasis on the words “*statutory modification or re-enactment thereof*” and “*for the time being in force shall apply*”, which in the Court’s opinion showed the requisite agreement between the parties as required under Section 85(2)(a), to apply the provisions of the 1996 Act.

18. *Thyssen (supra)* was considered by the Supreme Court in *N.S. Nayak and Sons v. State of Goa*, (2003) 6 SCC 56. In *N.S. Nayak (supra)*, while interpreting *Thyssen (supra)*, the Court noted-

“The aforesaid discussion only deals with the contention that parties could not have agreed to the application of the New Act till they had the knowledge about the provisions thereof and, therefore, the agreement to the effect that to the arbitral proceedings, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof would be applicable, is not valid. The Court negated the said contention by interpreting the expression ‘unless otherwise agreed’. The Court held that such agreement could be entered into even before coming into force of the New Act. However, it nowhere lays down that in a pending arbitral proceedings, which was being conducted as per the procedure prescribed under the Old Act, the parties have option of changing the procedure.”

19. Here, it would be useful to reproduce the arbitration clause in the agreement in the present case, and contrast it with the clause that came up for consideration in *Thyssen (supra)* before the Supreme Court. The relevant part of the arbitration clause in the present contract is extracted below:

“Subject as aforesaid, Arbitration, Act, 1940 and the Rules thereunder and any statutory modification there of shall apply to the Arbitration proceedings under this Clause.”

20. At first flush, it can be seen that there are two important omissions in the clause in the present case when compared to the one in *Thyssen (supra)*. These are the phrases “*or re-enactment thereof*” and “*for the time being in force*”. The Supreme Court specially emphasized on these two phrases in *Thyssen (supra)* in coming to its conclusion that the parties intended for the 1996 Act to apply. Critically, however, those two expressions are absent in

the arbitration clause in the present case. The lack of these two phrases in the clause becomes significant, when having regard to this Court's decision in ***Vijay Industries & Projects Ltd. v. National Thermal Corp. Ltd. (2003) 2 ArbLR 493 (Del)***, where the arbitration clause in question was similar to the one at hand. There the clause read- *"The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India."* This Court while interpreting this clause in the light of the ruling in ***Thyssen (supra)*** (in this decision referred to as the ***Rani Construction*** case), held-

"We find it difficult to accept this because the expression in question would have to be read ejusdem generis and word "thereof" used therein leaves no scope for doubt that any statutory modification refers to the modification if any made or carried out in the Arbitration Act of 1940. By no stretch of imagination could it be over-stretched to include the New Arbitration Act. It is also noteworthy that the arbitration clause in Rani Construction case contains the additional word "re-enactment" which is missing in the Arbitration Clause in the present case and which makes it different."

21. Once it is established that the arbitration agreement between the parties did not evidence the intention of the parties to be governed by the 1996 Act, a conclusion that the learned single judge in the impugned order has also reached, the surviving question is whether by conduct, the parties in the present case nevertheless agreed to the application of the 1996 Act. In this context, at the outset what should be resolved is the kind of conduct required from the parties in order to suggest that the parties were at *consensus ad idem* with respect to the application of the 1996 Act, even

though the arbitral proceedings commenced before the entry into force of the said Act, having regard to Section 85(2)(a). A similar question came up before a Division Bench of the Kerala High Court in *M. Nanikutty v. T.C. Mukunda*, 2016 (2) KLJ 157 while interpreting Section 85(2)(a) of the 1996 Act. The Court in that case held-

“The question to be considered is, whether there is an agreement among the parties to have the proceedings pursued in terms of the 'new Act'. It is true that the interlocutory applications were filed with reference to the provisions of the 'new Act'. But, that by itself is not sufficient to hold that there was an agreement from the other side to have the matter pursued under the 'new Act'. Had it not been the case, there would not have been any need, necessity or occasion for the respondents to have filed the objections with reference to the provisions of the 'old Act' and also to have filed a petition under Section 17 of the 'old Act'. If at all any agreement is there to be governed by the provisions of the 'new Act', it is a positive aspect which has to be pleaded and established by the party who is attempting for the same.”

22. It is, therefore, clear from *Nanikutty (supra)* that for the purposes of Section 85(2)(a), where arbitral proceedings commence before the entry into force of the 1996 Act, for that law to nonetheless apply, there would have to be an “agreement” between the parties which would require a positive act, that has to be specifically pleaded and established by the party seeking to contend that the new Act would be applicable. The requirement of the agreement to be governed by the provisions of the new Act being “a positive aspect” necessarily would not be satisfied by some sort of tacit conduct on the part of the parties to the dispute, on the lines of an absence of protest to the invocation of the 1996 Act at some stage in the arbitral proceedings.

23. Section 85(2)(a) and the question of an agreement between the parties to be governed by the new Act, also came up before a Division Bench of this Court in ***D.D.A. v. Bhai Sardar Singh, 2004 (3) ArbLR 465 (Del)***. In that case, the Court stated-

“Treating the expression "any re-enactment thereof" in this Arbitration clause to be covered by the expression "unless otherwise agreed to by the parties" occurring in Section 85(2)(a) of the new Act, it was still to be seen whether this attracted an automatic application of the new Act even though Arbitration proceedings had commenced under the old Act. Even if this clause was to be read between the lines, it nowhere attracts the application of the new Act to pending Arbitration proceeding straightaway. Nor does it exclude the application of the provisions of the old Act to such proceedings per se. All it says is that the Act of 1940 or any statutory modifications made in it or any re-enactment thereof along with the rules made there under and for the time being in force would apply to Arbitration proceedings. The word "or" and the expression "for the time being in force" occurring in the Arbitration clause are significant. The word "or" gives option to the parties on the application of the law to the proceedings which could be Act of 1940 or any modification in it or for that matter any re-enacted law and the expression "for the time being in force" makes it clear that provisions of that Act would apply to the Arbitration proceedings which are in force when these proceedings are commenced. If these are started when the old Act and rules made there under were in force, it is that Act and the rules which would apply and if these are commenced when the new Act came into force, it would be the new Act that would apply. However, if the parties wanted to apply re-enacted law /new Act to pending Arbitration proceedings under the old Act, they had to take step further and invoke the option of application of new Act in terms of the Arbitration clause. Unless they do so, the old Act would continue to apply to such proceedings. This is in harmony and consonance with the terms of Section 85(2)(a) which keeps the old Act alive and provides that its provisions

would apply in relation to Arbitral proceedings which commenced before the new Act came into force, unless otherwise agreed to by the parties. Therefore, on a harmonious interpretation of the terms of this Arbitration clause and the provisions of Section 85(2)(a) of the new Act, it becomes easy to conclude that though the expression "any re-enactment thereof" in the Arbitration clause in this case could be said to be falling within the expression "unless otherwise agreed to by the parties" appearing in Section 85(2)(a) of the new Act, yet this nowhere provides or mandates that the re-enacted law/new Act would automatically apply to pending Arbitration proceedings or that the old Act would automatically evaporate in thin air and the rights accrued to the parties under it would also vanish with it. The new Act would, of course, apply to these proceedings if the parties act further and invoke this to govern the proceedings from that point."

24. Clearly, therefore, it is essential that in respect of arbitrations, which started before the 1996 Act, for that law to apply, the parties must take a positive step and specifically *invoke* the provisions of the 1996 Act. In *Bhai Sardar (supra)*, the Division Bench noted that the parties would have to take an *act further* and take a *step further*, in order to evidence their agreement that the arbitral proceedings would be governed by the provisions of the 1996 Act. On a combined reading of the Kerala High Court's decision in *Nanikutty (supra)* and this Court's decision in *Bhai Sardar (supra)*, it is clear that Section 85(2)(a) contemplates an express agreement between the parties or in the least, a positive step *further* that clearly shows that the parties were *ad idem* as to the application of the 1996 Act. In other words, the conclusion that the 1996 Act was intended by the parties to apply to the arbitral proceedings that had commenced prior to its entry into force, cannot be one that the Court can lightly reach; it is certainly not based on probabilities and

surmises. That being the legal position, it would be apposite now to turn towards the facts in the present case.

25. In this case, clearly the arbitral proceedings in respect of the dispute, both with regards to the claim and the counterclaims, commenced before the entry into force of the 1996 Act. Undeniably, the proceedings before Justice Satpal were conducted under the 1940 Act, established by the fact that after he published his award on 12.09.2005, the Respondent filed under Sections 14 and 17 of the 1940 Act for filing the award in court. NBCC also challenged the said award under Sections 30 and 33 of the 1940 Act. It is clear, however, as was also noted by the Supreme Court in its order dated 03.08.2011, that NBCC's counterclaims were neither entertained nor decided by Justice Satpal. With respect to the NBCC's counterclaims, its Chairman-cum-Managing Director appointed Shri AK Gupta as the sole arbitrator for its counterclaims against Sharma. Against this Sharma filed OMP No. 144/2003 under Sections 14 and 15 of the 1996 Act. In response to these proceedings, NBCC stated that any objections of the Respondent could be raised before the arbitral tribunal under Section 16 of the 1996 Act. In this rather peculiar set of facts, what is clear is that both NBCC and Sharma were under the belief that the proceedings with respect to Sharma's original claim, before Justice Satpal, were under the 1940 Act, and at the same time, both parties seemed to harbour the belief that the proceedings with respect to the counterclaims of the Appellant were under the 1996 Act.

26. In these circumstances, therefore, what has to be decided is the effect of the decision of the Supreme Court whereby Justice R.C. Chopra (Retd.) was appointed for finally disposing of the entire matter, taking into account both the claims and counterclaims of the parties.

27. This Court discerns that the proceedings before the Supreme Court were not on the merits of the case and did not address the contentions with respect to Sections 14 and 15 of the 1996 Act, though the appeal had reached the court, from an order under those provisions of the 1996 Act. Undeniably, there is no discussion of any substantive issues nor a mention of provisions of the 1996 Act in the order of the Supreme Court, though the matter had arose from Sharma's petition filed under the 1996 Act. What appears to have resulted is that having regard to the prolonged spate of litigations between the parties concerning several arbitral proceedings in relation to the same dispute, the Supreme Court thought it apt to decisively appoint an arbitrator to dispose of the entire matter conclusively. Now while the appointment of the arbitrator by the Supreme Court was in 2011, well after the 1996 Act came into force, it is well-settled that the change in composition of an arbitral tribunal or the appointment of a new arbitrator in the place of the previous arbitrator, would not be relevant with respect to deciding the date of commencement of the arbitral proceedings. By virtue of Section 21, the arbitral proceedings would still have commenced on the date on which a request for that dispute to be referred to arbitration is received by the other party, which as we have noted earlier, was as far back as in 1993. On this point, the Supreme Court in *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*, (2004) 7 SCC 288, noted-

“It may be true that before the High Court apart from Shri H.L. Agrawal, Shri Uday Sinha also came to be appointed; but the change in the constitution of the arbitral tribunal is irrelevant for the purpose of determining the question as to when the arbitration proceeding commenced within the meaning of Section 21 of the 1996 Act. The purported reference of the dispute to the arbitrator was merely a reference to new arbitral

tribunal which concept is separate and distinct from that of commencement of arbitration proceeding.”

28. *Milkfood (supra)*, therefore, clarifies that the date of commencement of the arbitral proceedings remains unchanged, i.e. in the present case, the arbitral proceedings in respect of the entire dispute, commenced before the entry into force of the 1996 Act. That said, what must be seen is whether merely because the consent order passed by the Supreme Court was passed in a petition which originated under the 1996 Act, could it be said that the parties had agreed to the application of the 1996 Act to govern the arbitral proceedings. In the opinion of this Court, it is difficult to hold so. While it is true that in respect of OMP No. 144/2003, which ultimately reached the Supreme Court and resulted in the order under question, both the NBCC and Sharma had raised claims under the 1996 Act, it is equally true that the said suit was filed in respect of NBCC’s counterclaims. With respect to Sharma’s claims, addressed by Justice Satpal in his award, both parties had raised claims under the 1940 Act. Seen in this light, it would be difficult to ascertain how the consent order passed by the Supreme Court, by which an arbitrator was appointed for both the claims and the counterclaims, automatically evidences the *agreement* between the parties to apply the 1996 Act. While the order was undoubtedly passed in a petition that was originally filed under the 1996 Act, it is clear that the said order was passed without any reference to the merits of the case and the Court did not refer to the provisions of the 1996 Act either. This conclusion is further buttressed by the fact that the Apex Court in its order also directed that the arbitrator so appointed by it “*shall proceed from the last step taken by Justice Satpal before writing the award and the proceedings already conducted shall be*

retained so that the parties are not required to give fresh evidence all over again in regard to the claim.” Thus, the Court directed that the arbitral proceedings in relation to the Respondent’s claim be continued from the last step taken by Justice Satpal before passing the award- in arbitration proceedings that were admittedly conducted under the 1940 Act. In fact, the Supreme Court seems to have acted in exercise of its inherent powers to do complete justice between the parties and finally put the disputes between the parties to rest. For the court to find that parties *agreed* to the application of the 1996 Act for arbitral proceedings that commenced prior to the said Act’s entry into force, there must be a *positive* step taken by the parties to expressly evidence their agreement (as per the decisions cited above); that being the case, this Court finds that a mere consent order passed by the Supreme Court (without examining the merits of the contentions) on a petition under the 1996 Act, would not satisfy the threshold of *agreement* required under Section 85(2)(a). Even if there is any tacit recognition between the parties that the 1996 Act would apply, because no party objected to the applicability of the said Act before the Supreme Court, such recognition would not suffice to displace the normal rule under Section 85(2)(a), i.e. for arbitral proceedings that have commenced prior to the entry into force of the 1996 Act, the 1940 Act would be applicable. In the circumstances, the contention of the Respondent that the 1996 Act would be applicable, placing reliance on the Supreme Court’s consent order, is unmerited and has to fail.

29. There is another subsidiary, but by no means decisive aspect. This Court also notices that if it is now held at this stage that the arbitration proceedings conducted by Justice R.C. Chopra (Retd.) was under the 1996

Act, then NBCC would be left remediless and would not be able to challenge the arbitral award in a court of law. Section 34 of the 1996 Act provides-

“(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

30. Under the 1996 Act, the only remedy available after an arbitral award is passed is to file an application to set aside the award under Section 34 of the Act. However, an application for setting aside the award cannot be made later than three months after the party making the application has received the award, a period which clearly has elapsed in this case. Besides, the court under Section 34 is empowered to condone the delay in filing such an application only if extent of the delay is 30 days, but not thereafter. In this case, after the award was passed by Justice R.C. Chopra (Retd.), the Appellant filed an application under Section 14 of the 1940 Act, believing that it was the 1940 Act that was applicable to the arbitral proceedings. If at this stage, the Court holds that it was in fact the 1996 Act which was applicable, then considering that no provision analogous to Section 14 exists under the 1996 Act, and given that the only remedy against an award under the 1996 Act would lie under Section 34, which too would be barred by limitation in this case, NBCC would be denied a forum to challenge the

award or file objections to it. In fact, in this context, the Limitation Act, 1963 would also not be of any assistance to NBCC. Section 14 of the Limitation Act protects those parties who have been prosecuting a suit in a *bona fide* manner in a court which does not have jurisdiction over the suit, by not counting the period for which the suit was litigated in such a court in computation of the limitation period. However, such a provision does not exist in the Limitation Act for a *bona fide* error in filing a suit under the wrong statute. In such a situation, as in the present case, the Appellant would be barred from instituting a fresh suit under the 1996 Act, by reason of limitation. In fact, a similar situation came up before a Division Bench of this Court in ***D.D.A. v. Sh. S. Kumar*, 2008 (3) ArbLR 290 (Del)**. The Court in that case noted-

“The respondent herein raised a preliminary submission to the effect that the objections under Section 30/33 of the old Act were not applicable as the award was governed by the new Act. The learned Single Judge vide orders dated 14.8.2003 accepted this submission of the respondent holding that the new Act was applicable as the award is dated 13.7.1998 and it was rendered after the new Act came into force. The learned Single Judge, therefore, treated the objections as deemed filed under Section 34 of the new Act. However, on the ground that there was delay of 233 days and there was no power under the new Act to condone the delay of this magnitude the objections (treating the same as petition under Section 34 of the new Act) are dismissed as time-barred. [...]

In any case, we are of the view that the question as to whether the provisions of the new Act or the old Act are applicable is a legal question and there is no estoppels against law. Therefore, ignoring the aforesaid technical objections, it is necessary for the court to determine this question so that proceedings are conducted after applying the provisions of relevant law. Once it is not in dispute that provisions of old Act are applicable, the

obvious consequence would be that the learned Single Judge could not have dismissed the objections after treating the same as petition under Section 34 of the new Act and holding that it is time-barred. This order, which is contrary to law, affects the rights of the appellant prejudicially and therefore, the appellant has right to maintain this appeal and seek redressal of the grievance.”

31. In the circumstances, therefore, this Court is of the opinion that it would be contrary to law and to the interests of justice to hold that the present arbitral proceedings are governed by the 1996 Act. For the aforesaid reasons, this Court is of the view that the arbitral proceedings conducted by Justice R.C. Chopra (Retd.) and the award passed by the learned arbitrator would be governed by the old (1940) Act. Consequently, the impugned order of the learned single judge is set aside. The parties are left to bear their own costs. The appeals are allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

MAY 18, 2017