

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

+ **O.M.P. (ENF) (COMM) 67/2018**

Reserved on: 08.10.2018
Date of decision : 20.11.2018

SHIV SINGH AMAR SINGH Decree Holder
Through Ms.Pragya Sharma, Adv.

versus

NTPC LTD Judgment Debtor
Through Mr.R.K. Joshi, Mr.Jyotinder
Kumar and Mr.Ojusya Joshi, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition has been filed under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Amending Act'), seeking enforcement of the Arbitral Award dated 25.05.2017 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Letter of Award dated 26.03.1984 whereby the respondent had awarded the work of Structural Steel Package Part II (3X500 MW Units) Karim Nagar District, Andhra Pradesh to the petitioner.

2. Counsel for the respondent has raised a preliminary objection on the maintainability of the present petition contending that the provisions of the 1996 Act and the Amending Act do not apply to the Arbitral Award and the same is governed by the Arbitration Act, 1940

(hereinafter referred to as the '1940 Act'). Counsel for the respondent submits that the arbitration proceedings had commenced with the invocation of the Arbitration Agreement by the petitioner vide its letter dated 02.03.1987. The respondent had also raised its counter claim vide letter dated 28.07.1987 and thereafter, in terms of the Arbitration Agreement between the parties, the Arbitrator was appointed by the Chairman/Managing Director of the respondent vide letter dated 06.08.1987. The arbitration proceedings, having commenced prior to the coming into force of the 1996 Act, were governed by the provisions of the 1940 Act and therefore, the Award is not enforceable till it is made a rule of the Court in accordance with Section 17 of the 1940 Act. He further contends that even after coming into force of the 1996 Act, the parties continued the arbitration proceedings in accordance with the 1940 Act and in this regard, he has placed reliance on the record of proceedings dated 15.10.2008, 28.04.2010, 25.11.2010, 15.04.2013, 14.05.2014, 15.10.2015 and 19.12.2016, wherein the parties had agreed to extend the time for making of the Award in terms of Section 28(2) of the Arbitration Act, 1940.

3. On the other hand, counsel for the petitioner submits that the Arbitration Agreement between the parties as contained in Clause 56 of the General Conditions of Contract (GCC) provides for the provisions of the Arbitration Act, 1940 'or any statutory modification or re-enactment thereof' 'for the time being in force' to apply to the arbitration proceedings. He further submits that the Amending Act would therefore apply in terms of the Arbitration Agreement between the parties. Relying upon the Judgment of the Supreme Court in ***Board of Control for Cricket***

in India vs. Kochi Cricket Pvt. Ltd. & Ors. MANU/SC/0256/2018, he submits that even otherwise, in view of Section 26 of the Amending Act, as interpreted by the Supreme Court, the Award having been passed after coming into force of the Amending Act and the present proceedings also having been initiated thereafter, the provisions of the 1996 Act as amended by the Amending Act shall apply to the present petition and the Arbitral Award is enforceable under Section 36 of the 1996 Act as amended.

4. I have heard the counsels for the parties.

5. The 1996 Act brought about a major shift from the 1940 Act regarding the enforcement of the Arbitral Award. In the 1940 Act, the Arbitral Award had to be filed in Court upon the request of a party or direction of the Court under Section 14 of the said Act. Section 17 of the 1940 Act further provided for the Court to pronounce the judgment according to the Award and upon the judgment so pronounced, a decree was to follow. It is only the decree passed by the Court under Section 17 of the 1940 Act that could be enforced. Therefore, the Award by itself was not enforceable as a decree unless the Court had passed a judgment thereon in exercise of its powers under Section 17 of the 1940 Act.

6. In 1996 Act, a major shift was brought about in terms of Section 36 of the Act, which made the Arbitral Award enforceable as a decree of the Court upon the expiry of the time for making an application to set aside the Arbitral Award under Section 34 of the Act or where, such application having been filed, the same is dismissed/refused by the Court. Therefore, unless the Award was challenged within the time prescribed under Section 34(3) of the 1996 Act, the Award would automatically

become enforceable as a decree of the Court after the expiry of the period prescribed in Section 34(3) of the 1996 Act.

7. The Amending Act has brought about a further change by providing that mere filing of a challenge under Section 34 of the 1996 Act would not make such Arbitral Award unenforceable and therefore, the party challenging the Arbitral Award has to obtain an order of stay on the operation of such Arbitral Award in accordance with sub-sections 2 and 3 of Section 36 of the Act as amended.

8. Having noticed the difference in the enforcement procedure, the importance of the question as to which Act would apply to the present proceedings has become apparent.

9. As the arbitration proceedings commenced when the Arbitration Act, 1940 was in operation, the said Act would certainly apply to the arbitration proceedings.

10. Section 85 of the 1996 Act contains the repeal and savings provision for the Act and reads as under:-

*“85. **Repeal and savings.**- (1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.*

(2) Notwithstanding such repeal,-

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not

repugnant to this Act, be deemed respectively to have been made or issued under this Act.

11. The above said provision came up for consideration in the context of the application of the 1940 Act vis-à-vis the 1996 Act to the arbitration proceedings commenced under the 1940 Act in various judgments before the Supreme Court. In ***Thyssen Stahlunion GmbH vs. Steel Authority of India Ltd.*** (1999) 9 SCC 334, the Supreme Court having considered various provisions of the two Acts, including Section 85 of the 1996 Act, held as under:-

“22. For the reasons to follow, we hold:

- 1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).*
- 2. The phrase “in relation to arbitral proceedings” cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 [“17. Judgment in terms of award.—Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award.”] thereof and also appeal arising thereunder.*

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

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

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

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

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

23. Section 85(2)(a) of the new Act is in two limbs: (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act

came into force. The first limb can further be bifurcated into two: (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression “in relation to” is of the widest import as held by various decisions of this Court in *Doypack Systems (P) Ltd.* [(1988) 2 SCC 299], *Mansukhlal Dhanraj Jain* [(1995) 2 SCC 665], *Dhanrajamal Gobindram* [AIR 1961 SC 1285 : (1961) 3 SCR 1020] 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.

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

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

29. Enforcement of the award, therefore, has to be examined on the touchstone of the proceedings held under the old Act.” (Emphasis supplied)

12. In **N.S.Nayak & Sons vs. State of Goa** (2003) 6 SCC 56, the Supreme Court explained its judgment in **Thyssen Stahlunion GmbH** (supra) as under:

“8. Further, the part of the arbitration clause which is quoted above also provides that the provisions of the Arbitration Act, 1940 which were for the time being in force were to apply to the arbitral proceedings between the parties. It nowhere provides that once the arbitral proceedings have commenced under the old Act, they should be conducted under the new Act as soon as the new Act comes into operation. Hence, in the proceedings where the award is passed under the old Act, the remedy of filing appeal or petition for setting aside the said award would be as per the provisions of the old Act.

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13. As stated in paragraph 22, Conclusion 1 without any reservation provides that the provisions of the old Act shall apply in relation to the arbitral proceedings which have commenced before coming into force of the new Act. Conclusion 2, in our view, is required to be read in context with Conclusion 1, that is to say, the phrase “in relation to arbitral proceedings” cannot be given a narrow meaning to mean only pendency of the 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. Hence, Conclusions 1 and 2 are to be read together which unambiguously reiterate that once the arbitral proceedings have started under the old Act, the old Act would apply for the award becoming a decree and also for appeal arising thereunder.

14. Conclusion 3 only reiterates what is provided in various sections of the Arbitration Act, which gives option to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. The phrase “unless otherwise agreed by the parties” used in various sections, namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a) etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. Reason being, the arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the

statutory provisions and parties have no right to change the same. It is also settled law that the right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in the new Act. In the present cases, the appeals were pending before the High Court under the provisions of the old Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said Act. Hence, there is no substance in the submission made by the learned counsel for the appellant.

15. Learned counsel for the appellant however relied upon paragraph 35 of Thyssen case [(1999) 9 SCC 334] . In our view, it nowhere lays down anything contrary to what we have stated above. Relevant portion of the said discussion is as under: (SCC p. 376)

“The expression ‘unless otherwise agreed’ as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of Rani Constructions in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Constructions that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions ‘unless otherwise agreed’ and ‘law in force’ it does give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. That agreement can be entered

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

16. 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 proceeding, which was being conducted as per the procedure prescribed under the old Act, the parties have option of changing the procedure.”

(Emphasis supplied)

13. In ***Milkfood Ltd. vs. GMC Ice Cream (P) Ltd.*** (2004) 7 SCC 288, the Supreme Court considered its Judgment in ***Thyssen Stahlunion GmbH*** (supra) and ***N.S. Nayak*** (supra) and held as under:

“70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstante clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of

the 1996 Act wherefor also necessity of reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression “commencement of arbitration proceedings” must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from Shetty's Constructions [(1998) 5 SCC 599] are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore.”

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“Arbitration clause-effect of

81. It inter alia reads:

“... All such arbitration proceedings shall be in accordance with and subject to the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment.”

82. In Thyssen [(1999) 9 SCC 334] the Court held that the parties can agree to the applicability of the new Act even before the same came into force. Relevant findings of this Court are: (SCC p. 342, para 3)

“3. In the case of Thyssen Stahlunion GMBH [(1999) 9 SCC 334] the contract for sale and purchase of prime cold-rolled mild steel sheets in coils contains arbitration agreement. The relevant clauses are as under:

‘12. Legal interpretation

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

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

13. Settlement of disputes

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

83. The Court proceeded on the basis that such a change in the procedure before the arbitrator is permissible if the parties agree that the new Act be applicable to the arbitral proceeding when the same is pending before the arbitrator. We are not concerned in the present case with the situation where the parties agree to change in the procedure before the arbitrator. In fact, they did not and, as noticed at the first opportunity, the appellant filed an application for a direction or clarification that the proceeding under the 1940 Act would apply.

84. In Delhi Transport Corpn. [(2003) 6 SCC 36] factually it was held: (SCC p. 39, para 5)

“The conduct of the arbitration proceedings and the participation of the parties therein shows that the parties acted under the 1996 Act. Even the arbitrator proceeded

on that understanding and gave his award in pursuance of the 1996 Act.”

85. The Court, thus, proceeded on the basis that such a course was permissible in terms of sub-clause (d) of clause 25 of the agreement which was in the following terms: (SCC p. 39, para 4)

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

86. It is one thing to say that the parties agree to take recourse to the procedure of the 1996 Act relying on or on the basis of tenor of the agreement as regards applicability of the statutory modification or re-enactment of the 1940 Act but it is another thing to say, as has been held by the High Court, that the same by itself is a pointer to the fact that the appellant had agreed thereto. If the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act in September 1995, the question of adopting a different procedure laid down under the 1996 Act would not arise.

87. It is not a case where like Delhi Transport Corpn. [(2003) 6 SCC 36] the parties went for arbitration with a clear understanding and belief that the proceedings were being conducted under the 1996 Act. Therein the appointment of the arbitrator was made under the new Act; the parties participated in the arbitration proceedings with the understanding and belief that the proceedings are governed under the 1996 Act. In the award itself the arbitrator noted that “both parties submitted claims before me under the Arbitration and Conciliation Act, 1996” and he purported to have made his award in terms thereof. In that situation sub-para (3) of para 22 of Thyssen [(1999) 9 SCC 334] was held to be applicable. Shah, J. who was a party in Thyssen [(1999) 9 SCC 334] as also Delhi Transport Corpn. [(2003) 6 SCC 36] in N.S. Nayak [(2003) 6 SCC 56] , however,

noticed the distinctive features in Thyssen [(1999) 9 SCC 334] and while supplying the requisite emphasis thereon observed: (SCC p. 60, para 8)

“8. Further, the part of the arbitration clause which is quoted above also provides that the provisions of the Arbitration Act, 1940 which were for the time being in force were to apply to the arbitral proceedings between the parties. It nowhere provides that once the arbitral proceedings have commenced under the old Act, they should be conducted under the new Act as soon as the new Act comes into operation. Hence, in the proceedings where the award is passed under the old Act, the remedy of filing appeal or petition for setting aside the said award would be as per the provisions of the old Act.”

It was further observed: (SCC pp. 63-64, para 14)

“14. Conclusion 3 only reiterates what is provided in various sections of the Arbitration Act, which gives option to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. The phrase ‘unless otherwise agreed by the parties’ used in various sections, namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a), etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. Reason being, the arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It is also settled law that the right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in the new Act. In the present cases, the

appeals were pending before the High Court under the provisions of the old Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said Act. Hence, there is no substance in the submission made by the learned counsel for the appellant.”

88. Referring to the relevant portion of the discussion in Thyssen[(1999) 9 SCC 334] the learned Judge held: (SCC p. 64, para 16)

“16. 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 proceeding, which was being conducted as per the procedure prescribed under the old Act, the parties have option of changing the procedure.

89. In N.S. Nayak [(2003) 6 SCC 56] also having regard to the fact that the arbitrator was appointed prior to 21-8-1996, the old Act was held to be applicable.

Conclusion

90. For the reasons aforementioned, we are of the view that in this case, the 1940 Act shall apply and not the 1996 Act.....”

(Emphasis Supplied)

14. A reading of the above judgments clearly leads to the conclusion that as the arbitration proceedings in the present case had commenced prior to coming into force of the 1996 Act, the provisions of 1940 Act

shall apply to such proceedings and the Award cannot be enforced unless it is made a rule of the Court under Section 17 of the 1940 Act.

15. As noted above, the counsel for the petitioner has placed reliance on clause 56 of the GCC to contend that the parties had agreed that the subsequent legislation, that is, the 1996 Act or the Amending Act, shall apply to the arbitration proceedings. Clause 56 of the GCC, so far as is relevant to the present proceedings is reproduced hereunder:

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

16. Similar contractual provision had come up for interpretation before the Supreme Court in *N.S. Nayak* (supra) and *Milkfood Ltd.* (supra). It was held that unless the parties expressly agree to the application of the 1996 Act to the arbitral proceedings commenced under the 1940 Act, the proceedings and the subsequent challenge thereto shall be governed by the 1940 Act. The clause itself cannot make the 1996 Act applicable to such proceedings.

17. In the present case also, the record of proceedings held before the Arbitrator on 15.10.2008, 28.04.2010, 25.11.2010, 15.04.2013, 14.05.2014, 15.10.2015 and 19.12.2016 clearly shows that the parties, even after coming into force of the 1996 Act and infact, also of the Amending Act, continued the arbitration proceedings under the 1940 Act by granting extension to the Arbitral Tribunal in terms of Section 28(2)

of the Arbitration Act, 1940. Therefore, reliance of the counsel for the petitioner on clause 56 of the GCC is totally ill-founded.

18. Counsel for the petitioner has also relied upon the Judgment of the Supreme Court in **BCCI** (supra) to contend that the Supreme Court has held that the amended provisions of Section 36 of the 1996 Act would apply even where the arbitration proceedings had commenced prior to the coming into force of the Amending Act. He submits that the said ratio would apply even if it is held that the arbitration proceedings were governed by the 1940 Act.

19. I am unable to agree with the submission of the counsel for the petitioner.

20. Section 26 of the Amending Act, which came up for interpretation before the Supreme Court in the case of **BCCI** (supra), is reproduced hereinunder:

“Section 26. Act not to apply to pending arbitral proceedings.

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.”

21. Interpreting the above provision, the Supreme Court held as under:-

“25.... The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after

the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

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39. From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by “enforcement” in Section 36. On the one hand, it has been argued that “enforcement” is nothing but “execution”, and on the other hand, it has been argued that “enforcement” and “execution” are different concepts, “enforcement” being substantive and “execution” being procedural in nature.

40. It is clear that the scheme of the 1996 Act is materially different from the scheme of the 1940 Act. Under Section 17 of the 1940 Act, once an award was delivered, the Court had to pronounce judgment in accordance with the award, following which a decree would be drawn up, which would then be executable under the Code of Civil Procedure. Under Section 36 of the 1996 Act, the Court does not have to deliver judgment in terms of the award, which is then followed by a decree, which is the formal expression of the adjudication between the parties. Under Section 36 of the 1996 Act, the award is deemed to be a decree and shall be enforced under the Code of Civil Procedure as such.

41. This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and order LXI, Rule 5 of the Code of Civil Procedure and would,

therefore, be a provision dealing with the execution of arbitral awards.

42. Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

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45. Being a procedural provision, it is obvious that the context of Section 36 is that the expression “has been” would refer to Section 34 petitions filed before the commencement of the Amendment Act and would be one pointer to the fact that the said Section would indeed apply, in its substituted form, even to such petitions.

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*46. In 2004, this Court’s judgment in **National Aluminium Co.** (supra) had recommended that Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the Section should be amended at the earliest to bring about the required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.”*

22. From the above, it is clear that in **BCCI** (supra), the Court was not considering a situation where the arbitration proceedings were governed by the 1940 Act. The Court was considering a situation where the

arbitration proceedings had commenced under the 1996 Act and the question as to whether the amended Section 36 would apply to even the petitions under Section 34 of the 1996 Act pending on the date of the amendment.

23. I may also note that the Amending Act did not make any amendment to Section 85 of the 1996 Act. Therefore, the very applicability of the 1996 Act would be governed by Section 85 of the 1996 Act, as interpreted by the Supreme Court in the above referred Judgments in *Thyssen Stahlunion GmbH, N.S.Nayak and Milkfood Ltd.* (supra).

24. Section 36 of the 1996 Act as amended by the Amending Act, reads as under:

“36. Enforcement.- (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).”
(Emphasis supplied)

25. A reading of the above provision would clearly show that Section 36 of the Act would become applicable only where the time for making of an application to set aside the Arbitral Award under Section 34 has expired and no such application is filed, or where such application has been filed within time and there is no stay granted by the Court on the enforcement of the Award. Where the provisions of the 1940 Act are applicable, Section 34 of the 1996 Act would have no application and the party aggrieved with the Arbitral Award is not required to challenge the same under Section 34 of the said Act. The award would become enforceable only when the Court pronounces a judgment thereon under Section 17 of the Arbitration Act, 1940. Therefore, Section 36 of the 1996 Act (as Amended) and the Judgment of the Supreme Court in **BCCI** (supra) would have no application.

26. In view of the above, the present petition is not maintainable and is dismissed, with no order as to costs.

NAVIN CHAWLA, J

NOVEMBER 20, 2018
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