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MILKFOOD LTD.

v.

M/S. GMC ICE CREAM (P) LTD.

APRIL 5, 2004

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[V.N. KHARE, CJ., S.B. SINHA AND S.H. KAPADIA, JJ.]

Arbitration Act, 1940; Sections 3, 8, 33, 34, 37(3)/Arbitration and Conciliation Act, 1996; Sections 21, 43 (1) & (2) and 85/Limitation Act, 1963.

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Agreement between the Supplier and the Manufacturer—Arbitration Clause—Dispute—Suit for permanent injunction filed by the manufacturer—Application for stay of suit filed by the supplier—Allowing the application, trial Court stayed the suit directing to refer the dispute to Arbitrator—Appeal dismissed by first appellate Court—On revision, High Court referred the dispute to Arbitral Tribunal—Arbitration proceedings initiated by Tribunal as per provisions of 1996 Act—Challenged by the supplier on ground that 1940 Act was applicable—Rejected by the Tribunal holding that 1996 Act was rightly applied—High Court holding that since the disputes were referred to arbitration when new Act already came into force and both the parties gave clear consent to refer the matter to Arbitrator, new Act could be applied.

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Held Per majority:

Commencement of arbitration proceeding depends upon terms of the agreement/various factors/purposes it seeks to achieve—Issuance of notice is necessary under both the Acts for invoking provision of law for arbitration of dispute—Notice has to be interpreted broadly—A Notice of Arbitration is the first essential step towards making of appointment of Arbitrator/Arbitrators—Their appointment by the Court not mandatory—Service of Notice by one party to another for appointment of an Arbitrator indicative of deemed commencement of arbitration proceeding for the purpose of limitation—Hence, notice for appointment of an Arbitrator/Arbitrators would be relevant for determining commencement of the arbitration proceeding—However, change in constitution of the arbitral Tribunal irrelevant—Repealing provisions under the 1996 Act makes 1940 Act applicable in respect of the arbitral proceeding commenced before the new Act came into force—Since arbitral proceedings already commenced, procedure laid down under the old Act would be

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applicable—However, since the proceeding before the Arbitrators not stayed and they had entered into the reference, proceedings need not be re-opened—Arbitrators may proceed to give award—Parties may proceed in terms of the old Act after filing of the Award in the Court. A

Arbitration agreement—Invoking of—It may be invoked by a party to a dispute not exclusively by claimant. B

Commencement of an arbitration proceeding—Meaning of—Section 21 must be read with Section 85(2)(a) of the New Act to construe its meaning—construing so service of notice for appointment of Arbitrator/Arbitrators determines the commencement of arbitral proceeding. C

Words and Phrases:

'Commencement of an arbitration proceeding' and 'Commencement of proceeding before an Arbitrator'—Distinction between—Discussed.

Held: Per minority: D

Construction of transitional provisions under Section 85(2)(a) of the new Act must depend upon its own terms—Not to be construed on the basis of provision under Section 21 of the Act—Notice to concur is an essential step—However, date of constitution of arbitral tribunal and charging them with authority would determine commencement of arbitral proceedings—Since for all practical purposes arbitration proceeding commenced when the 1996 Act came into force, the proceedings would be governed by the provisions of the 1996 Act. E

Words and Phrases:

'Reference' as under Section 48 of the 1940 Act, vis-a-vis 'commencement' as per Section, 85(2)(a) of 1996 Act—Meaning of in the context of Section 21 of the 1996 Act—Discussed. F

The question which arose for consideration in these appeals was as to whether the provisions of Arbitration Act, 1940 or the Arbitration and Conciliation Act, 1996 would apply to the facts and circumstances of the cases and in this connection interpretation of certain provisions of the Acts was also required to be examined by this Court. G

It was contended by the appellant-supplier that since the notice H

- A** appointing the arbitrators had been served upon the respondent and in terms thereof arbitration proceeding commenced before the new Act came into force, the 1940 Act would be applicable; and that meaning of the expression “initiation of the proceedings” in the 1996 Act as understood in common parlance should be applied.
- B** Respondent-manufacturer submitted that since the arbitrators had already entered into the reference, this Court could not interfere with the impugned judgment in exercise of its jurisdiction under Article 136 of the Constitution of India; that an arbitration proceeding must be held to be initiated when a claim petition is filed by the claimant before the arbitrator;
- C** that for the purpose of determining the point of time of commencement of arbitration proceeding, the Tribunal must be constituted; that the arbitration proceedings commence when the arbitrator enters into reference; that in any event arbitration proceeding commenced when the dispute was referred by the High Court and not prior thereto; that in terms of clause 20 of the agreement new Act would apply; and that Section 37 of
- D** the 1940 Act defines commencement of the proceeding for the purpose of period of limitation and not for any other purpose.

Allowing the main appeal and dismissing the connected appeals, the Court

E HELD: *Per Sinha, J., (for himself and CJI):*

- F** 1.1 The expression “shall be deemed to be commenced” under Section 37(3) of the Arbitration Act, 1940 indicates that Sub-section (3) deals with two modes of notional or fictional commencement as distinguished from factual commencement. It is, thus, possible to conceive cases where an arbitration can be said to have commenced under circumstances not contemplated by the Sub-section. Too much stress also cannot be laid on Rule 3 of the First Schedule of the 1940 Act in interpreting Sub-section (3) of Section 37 of the Act. The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even
- G** Section 43(1) of the Arbitration and Conciliation Act, 1996 provides that the Limitation Act shall apply to the arbitration as it applies to proceedings in Court. Sub-section (2) thereof provides that for the purpose of the said Section and the Limitation Act an arbitration shall be deemed to have commenced on the date referred to in Section 21 of the 1996 Act. For the
- H** purpose of applying the provisions of Chapter II of the 1940 Act or for

the purpose of Section 21 of the 1996 Act, it is necessary to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute. A notice upon the arbitrator so as to enable him to enter into a reference or to make an award within the stipulated period has nothing to do with the notice served by a party to an agreement to another invoking the arbitration clause and by appointing an arbitrator. For the purpose of the Limitation Act an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator. Issuance of notice is required to be interpreted broadly not only for the purpose of limitation but also for other purposes. [872-B-F; 872-H; 873-A-B; 876-E]

Motilal Chamaria v. Lal Chand Dugar, AIR (1960) Calcutta 6, approved.

Allianz Versicherungs AG v. Fortuna Co. Inc., (1999) 2 All ER 625; *Vosnoc Ltd. v. Transglobal Projects Ltd.*, (1998) 1 WLR 101 and *Nea Agrex v. Baltic Shipping*, [1976] 2 Lloyd's Rep. 47, referred to.

Arbitration and Dispute Resolution Practice by Bernstein, Fourth Edition, p.80; *Russell on Arbitration*, 22nd Edition, p.166, referred to.

1.2. The date when arbitration proceedings commence would depend upon various factors and the purposes which it seeks to achieve. It may be for the purpose of attracting the Limitation Act or for the purpose of time bar clauses or for the rules applicable therefor. [873-C]

International Tank and Pipe S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C., [1975] Lloyd's Rep. 8, referred to.

1.3. The date of commencement of an arbitration also affects the position under the conflict of laws when the proper law of the contract is one law and the law of the arbitral procedure is another, for then, up to the date of commencement of the arbitration proceedings, the law of the contract must govern, and the law of the procedure will only govern thereafter. [873-D]

Charles M. Willie & Co. (Shipping) Ltd. v. Ocean Laser Shipping Ltd., (1999) 1 Lloyd's Rep. 225 and *Nea Agrex S.A. v. Baltic Shipping Co. Ltd.*, (1976) 2 Lloyd's Re. 47, referred to.

1.4. 'Commencement of an arbitration proceeding' and

- A 'commencement of a proceeding before an arbitrator' are two different expressions and carry different meanings. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the 1940 Act. If the provisions of the 1940 Act applies, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common parlance meaning as given to the expression 'commencement of an arbitration' which admittedly for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regard the procedure under the one Act or the other is required to be followed. It is only in that limited sense the expression 'commencement of an arbitration' qua 'a notice of arbitration' assumes significance. Sub-section (1) of Section 85 of the 1996 Act repealed the 1940 Act. Sub-section (2) of Section 85, however, notwithstanding such repeal makes the 1940 Act applicable in relation to arbitral proceedings which commenced before the said Act came into force. Section 21 although may be construed to be laying down a provision for the purpose of the 1996 Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding. [878-C-G; 879-D-F]

Shetty's Constructions Co. Pvt. Ltd. v. Konkan Railway Construction and Anr., [1998] 5 SCC 599, relied on.

- G *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, [2001] 6 SCC 356 and *Rani Constructions (P) Ltd. v. H.P. SEB*, C.A. No. 61 of 1999, referred to.

Thyssen Stahlunion GMBH v. Steel Authority of India Ltd., [1999] 9 SCC 334, distinguished.

- H 1.5. The Court has 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 fact 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 commences only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. A court of law must not lose sight of the doctrine of 'stare decisis'.

A view which has been holding the field for a long time should not be disturbed only because another view is possible. [889-A-B; D]

Shetty's Constructions Co. Pvt. Ltd. v. Konkan Railway Construction and Anr., [1998] 5 SCC 599, relied on.

1.6. This Court has repeatedly applied the meaning given to the expression 'commencement of the arbitral proceeding' as contained in Section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof. Following the same meaning in the present case, it can be said that the date of service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding. However, 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 proceedings. [889-E; G-H; 890-A]

2.1. The different intention of the Parliament found by this Court in the case of *Thyssen* evidently has no application in the domestic award although it has application in relation to a foreign award. However, *Thyssen* itself is an authority for the proposition that in relation to a domestic arbitration proceeding, commencement thereof shall coincide with service of request/notice. [883-F-G]

State of West Bengal v. Amritlal Chatterjee, JT (2003) Supp. 1 SC 308 = [2003] 10 SCC 572 and *Shetty's Constructions Co. Pvt. Ltd. v. Konkan Railway Construction and Anr.*, [1998] 5 SCC 599, relied on.

A *Secretary to the Government of Orissa and Anr. v. Sarbeswar Rout*, [1989] 4 SCC 578; *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors.*, [1998] 1 SCC 305 and *Jupiter Chit Fund (P) Ltd. v. Shiv Narain Mehta (Dead) by Lrs. and Ors.*, [2000] 3 SCC 364, referred to.

B *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334, distinguished.

2.2. The Court while taking recourse to the interpretative process must notice the scheme of the concerned legislations for the purpose of finding out the purport of the expression—‘commencement of arbitration proceeding’. In terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it applies to proceedings in Court. So far as the Arbitral Proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion whereafter only the arbitration proceedings commence. Such commencement of arbitration proceedings although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply.

[886-G-H; 887-A-B]

2.3. Before a suit is stayed in terms of Section 34 of the 1940 Act the Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do so for the proper conduct of the arbitration. The Court while passing an order in terms of Section 34 of the 1940 Act must satisfy that there exists a ‘dispute’ between the parties within the meaning of the provisions of arbitration agreement and such dispute should be referred to arbitration in accordance with the arbitration agreement. Although the Court itself does not make a reference to an arbitrator but the very purposes for which the suit is stayed is that the parties may take recourse to the provisions contained in the arbitration agreement. [887-D-F]

G *Bhailal Manilal v. Amratlal Lallubhai Shah*, AIR (1963) Guj 141 and *Dinabandhu v. Durga Prasad Jana*, AIR (1919) Cal 479 and *State of West Bengal v. A.K. Ghosh*, AIR (1975) Cal 227, approved.

H *Arbitration and Conciliation Act, 1996 by P. Chandrasekhara Rao*, referred to.

3.1. In the instant case there had been a dispute between the parties. Only as a result of the dispute and on an apprehension consequent thereupon the suit for injunction was filed. The question is required to be gone into even in the suit as to which of the parties thereto was in breach of the contract. Such a dispute necessarily fell within the purview of the arbitration agreement. The arbitration agreement can be invoked by a party to a dispute and not only by a person who has a claim against the other. The arbitration agreement was invoked by the appellant, pursuant whereto or in furtherance whereof the proceeding of the suit was stayed and the matter was directed to be referred to the arbitrator. The arbitrator, having regard to the scope and purport of the reference would be entitled to determine the dispute. It is irrelevant as to whether the appellant had any monetary claim against the respondent or not. The arbitrators and consequently Single Judge of the High Court posed a wrong question unto themselves that no defendant will save limitation for the claimant or the plaintiff and, thus, misdirected themselves in law. Subsequent reference to the two arbitrators nominated by the parties although changed constitution of the arbitral tribunal but the same would not be indicative of the commencement of the arbitral proceeding which must be construed having regard to Section 21 of the 1996 Act. [890-B-F]

3.2. The arbitrators did not hold that the notice was not served upon the respondent but merely proceeded on the basis that the same would be relevant for the purpose of determining the question as to when the arbitral proceeding shall commence. In fact it does not appear that such a question was raised either before the arbitrators or before the High Court. The respondent, therefore, cannot be permitted to raise the same before this Court for the first time. [892-F]

3.3. In the present case, the parties did not agree to any change in the procedure before the arbitrator and at the first opportunity the appellant filed an application for a direction or clarification that the proceeding under the 1940 Act would apply. If the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act, the question of adopting a different procedure laid down under the 1996 Act would not arise. Hence, the 1940 Act shall apply and not the 1996 Act. However, the arbitrators had already entered into the reference and proceedings before them were not stayed but only making of the award was stayed. Thus, in the peculiar facts and circumstances of this case, although the old Act would apply, the entire arbitral proceedings need

A not be reopened and the arbitrators may proceed to give their award. The award shall be filed in the court having jurisdiction whereafter the parties may proceed in terms of the old Act. This order has been passed in the interest of justice and in the peculiar facts and circumstances of this case. However, High Court has rightly held that the letters patent appeal was not maintainable. [893-G; 894-D; 896-C-F]

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N.S. Nayak & Sons etc. v. State of Goa etc., [2003] 6 SCC 56, relied on.

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Delhi Transport Corporation Ltd. v. Rose Advertising, [2003] 6 SCC 36 and *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334, distinguished.

Per KAPADIA, J. (dissenting):

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1.1. Arbitral proceedings in respect of a dispute commences on the date on which request to refer such dispute to arbitration is received by the respondent, unless otherwise agreed by the parties. [902-E]

Russell on Arbitration, XXII Ed. P. 165, referred to.

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1.2. In the present matter one is concerned with transitional provision as under Section 85(2)(a) of the 1996 Act which enacts as to how the statute will operate on the facts and circumstances existing on the date it comes into force and, therefore, the construction of such a provision must depend upon its own terms and not on the basis of Section 21 of the Act. One cannot confine the concept of 'commencement' under Section 85(2)(a) only to Section 21 of the 1996 Act.

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There was no single conclusive test to determine commencement. In a case, where it was necessary to consider whether one party had taken sufficient steps for setting arbitration in motion, the court has to consider the date of setting up of arbitral tribunal. In the matter involving the scope of reference the test of the state of dispute was relevant. Therefore, the expression "commencement of arbitration proceedings' had different meanings in various contexts. Although notice to concur is an essential step, arbitration proceedings cannot be said to have commenced in practical sense till tribunal charged with authority stood duly constituted.

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[903-C; 903-E; 904-H; 905-A-B]

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N.S. Nayak and Ors. v. State of Goa, [2003] 6 SCC 56, relied on.

Thyssen Stahlunion GMBH v. Steel Authority of India Ltd., [1999] 9 A SCC 334, referred to.

Charles M. Willie & Co. (Shipping) Ltd. v. Ocean Laser Shipping Ltd., (1999) 1 Lloyd's Rep. 225, referred to.

Principles of Statutory Interpretation by G.P. Singh 8th Ed. P. 188, B referred to.

Commercial Arbitration" (2nd Edition, p. 169) by Mustill & Boyd, referred to.

1.3. The question in the present case concerns interpretation of C transitional provisions; that Section 85(2)(a) of the 1996 Act emphasizes the concept of "commencement" whereas Section 48 of the 1940 Act emphasized the concept of "reference"; that Section 85(2)(a) provides for implied repeal; that the scheme of 1940 Act is different from the 1996 Act; that the word "reference" in Section 48 of the old Act had different D meanings in different contexts. Hence, while interpreting Section 85(2)(a) in the context of the question raised in this appeal, one cannot only rely on Section 21 of the 1996 Act. The parties entered into an agreement on 7.4.1992 which contained an arbitration clause. Before entering upon the reference under the clause, the arbitration proceedings were to be E governed by the provisions of the Arbitration Act, 1940 or under any statutory re-enactment. On the strength of the agreement, the respondent filed a title suit for injunction and in the said suit, the appellant applied for stay under Section 34 of the 1940 Act. Suffice it to state that on 6.5.1997, when the matter came up before the High Court, the parties F agreed that all disputes between them may be referred to arbitrators chosen by the parties as per the agreement. A consent order was accordingly passed on that day by the High Court referring the dispute to the arbitrators. Hence, for all practical purposes, the arbitration G commenced on the same day, by which time the 1996 Act had come into force. In the circumstances, the majority decision of the arbitrators that the proceedings in the present case would be governed by the provisions of the 1996 Act cannot be found fault with. [907-C-D; 907-F-H; 908-A]

Delhi Transport Corporation Ltd. v. Rose Advertising, [2003] 6 SCC 36 and *Union of India v. Mohindra Supply Company*, AIR (1962) SC 256, relied on.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9672 of 2003.

From the Judgment and Order dated 13.10.98 of the Delhi High Court in O.M.P. No. 94 of 1998.

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C.A. Nos. 9673-74 of 2003.

Harish N. Salve, B.K. Sood and Ms. Indra Sawhney for the Appellant.

C R.K. Jain, Chandra Shekhar, Neeraj Shekhar and Ambhoj Kumar Sinha for the Respondent.

The Judgments of the Court were delivered by

D **S.B. SINHA, J.** Interpretation of certain provisions of the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996 (for short 'the 1940 Act' and 'the 1996 Act' respectively) is in question in these appeals which arise out of a judgment and order dated 13.10.1998 passed by a learned Single Judge of the Delhi High Court in O.M.P. No. 94 of 1998 and a judgment dated 17.2.2003 passed by a five-Judge Bench of the said Court in L.P.A. No.492 of 2002 holding that the said appeal was not maintainable.

E **FACTUAL BACKGROUND :**

F The parties hereto entered into an agreement on or about 7.4.1992 in terms whereof the first respondent herein was to manufacture and pack in its factory a wide range of ice cream for and on behalf of the appellant. The said agreement was to remain valid for a period of five years. Admittedly, the said contract contained an arbitration agreement being clause 20 thereof which is as under :

G "In case of any dispute or any difference arising at any time between the Company and the Manufacturer as to the construction, meaning or effect of this Agreement or any clause or thing contained therein or the rights and liabilities of the Company or the Manufacturer hereunder in relation to the premises, shall be referred to a single arbitrator, in case the parties can agree upon one, and failing such Agreement, to two arbitrators one to be appointed by either party and in case of disagreement between the two arbitrators aforesaid and in

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so far as and to the extent that they disagree to, an umpire to be appointed by the said two arbitrators before they enter upon the reference. A

All such arbitration proceedings shall be in accordance with and subject to the provisions of the Arbitration Act, 1940, or any statutory modification or reenactment." B

The contention of the appellant was that the first respondent herein did not fulfill its contractual obligations. It was also contended and two Demand Drafts sent by it for a sum of Rs. Five lakhs each which were required to be sent in the year 1992 were in fact sent on 7.5.1995 and the same were returned. C

The contention of the first respondent, on the other hand, was that in terms of the agreement between the parties that an additional plant as per the specifications thereof for manufacture of ice cream was installed; but despite the same the appellant failed to supply the base materials for packing ice cream. D

The first respondent herein apprehending that the appellant herein would cause disturbance in the manufacture and supply of ice cream filed a suit in the Court of Munsif 1st, Gaya which was marked as Title Suit No.40 of 1995, wherein a decree for permanent injunction restraining the appellant from causing any disturbance in manufacture and supply of ice cream according to specifications given by the appellant was sought for. The appellant herein, however, having regard to the arbitration agreement entered into by and between the parties filed an application under Section 34 of the Arbitration Act, 1940 for stay of the suit. By reason of an order dated 3.8.1995, the learned Munsif allowed the said application filed by the appellant herein and directed stay of the suit holding that it was a fit case in which the application under Section 34 of the Act should be allowed. It was further directed : E F

"On the request the application dated 17.7.95 filed on behalf of defendant nos. 1 to 3 is allowed. I stay the further proceeding of the suit and in the meantime, the matter be referred to the arbitration. Put up on 4.9.1995." G

Pursuant to or in furtherance of the said direction, the appellant herein sent a notice on 14.9.1995 to the first respondent herein and its Managing Director appointing Shri H.L. Agrawal, a former Chief Justice of the Orissa High Court as its arbitrator. It was further stated therein that if the respondents H

A intend to agree to appoint Shri H.L. Agrawal as arbitrator to settle the dispute, it may give its consent thereto forthwith failing which it may also appoint its arbitrator in terms of clause 20 of the agreement so that the dispute be settled at the earliest.

B Some controversy as regard service of the said notice on the respondent has been raised which would be dealt with a little later.

C To complete the narration of facts, we may notice that the said order dated 3.8.1995 was appealed against by the first respondent before the 2nd Additional District Judge, Gaya and by an order dated 13.3.1996, the 2nd Additional District Judge, Gaya in Misc. Appeal No.7 of 1995 (30/95) dismissed the same. Aggrieved by and dissatisfied with the said judgment and order the first respondent herein filed a revision application before the Patna High Court which was marked as C.R. No.1020 of 1996. The said civil revision application was disposed of by an order dated 6.5.1997 in the following terms :

D “Before this court parties have agreed that the dispute between them may be referred, as per the agreement to Arbitrators chosen by the parties. The plaintiff had chosen Shri Ujday Sinha, a retired judge of this court and Senior Advocate of the Supreme Court, while the defendants have chosen Shri Hari Lal Agrawal, Senior Advocate of the Supreme Court, a former judge of this Court and Chief Justice of Orissa High Court as Arbitrators. The dispute between the parties is referred to arbitrator.

E I hope that the learned Arbitrators will dispose of the arbitration proceedings within three months of entering into the reference.

F Let a copy of this order be sent to both Shri Hari Lal Agarwal at his address Nageshwar Colony, Boring Road, Patna-1 and Shri Uday Sinha at his Patna address 308, Patliputra Colony, Patna.”

G It would appear that by reason of the said order merely the constitution of the arbitral Tribunal had been changed but the dispute sought to be resolved in the arbitration proceedings was not formulated therein. The appellant appointed Respondent No.4, Shri Agrawal, whereas the first respondent appointed Respondent No.3, Shri Uday Sinha, as their arbitrators. Respondent No.2, Shri A.B. Rohtagi was appointed by the learned arbitrators as the third arbitrator, which according to the appellant, was without its knowledge and consent.

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The appellánt having found that the learned arbitrators were proceeding under the 1996 Act filed an application seeking directions and the clarifications raising a contention that the provisions of the 1940 Act were applicable. The matter was heard by the learned Arbitrators and by an order dated 6.4.1998, the majority of the arbitrators held that the 1996 Act shall apply holding :

“the consent order dated 6.5.1997 is the beginning of the arbitral proceedings. Anything said or done before that date is of no consequence. Therefore the new Act applies. This is our conclusion.”

One of the learned arbitrators Shri H.L. Agrawal, however, in his dissenting opinion held :

“I do not agree with him that an Arbitration commences when the dispute is referred to the arbitrator and he enters upon the reference.

Section 37(3) of the old Act categorically lays down that “when one party serves on the other, a notice requiring the other to appoint an Arbitrator”, an Arbitration is deemed to commence. It does not mandate the notice only by the claimant. The notice may be by either of the parties. In my considered opinion, the notice dated 14.4.1995 issued by the Respondent to the claimant triggered off the commencement of the arbitration proceedings. Nothing has been shown that there was any agreement between the parties to the contrary. There cannot be one commencement for the limitation purposes and another for an arbitration proceedings.”

Questioning the said order of the learned arbitrators, an application was filed by the appellánt herein purported to be under Section 33 of the 1940 Act in the High Court of Delhi which was marked as O.M.P. No.94 of 1998. A learned Single Judge of the High Court held :

“(a) According to Section 21 of the Arbitration and Conciliation Act, 1996, unless otherwise agreed by the parties, the arbitral proceedings commences on the date which a request for that dispute is referred to arbitration. The Act postulates a notice by a claimant to the respondent calling upon him to appoint an arbitrator for the settlement and it cannot be the other way round. No respondent would ask for the appointment of an arbitrator when he has no dispute to refer (unless the respondent would be a counter claimant). In case he has disputes to refer, then the respondent would become the claimant. The majority order correctly held that no defendant will save limitation for the

A claimant or the plaintiff. In view of this finding, the notice dated 14.9.1995 cannot be construed as a notice calling upon to initiate the arbitration proceedings.

B (b) The agreement dated 7th April, 1992 contemplates that such arbitration proceedings shall be in accordance with and subject to the provisions of the Arbitration Act, 1940 or any statutory modification or reenactment. In 1992, when the agreement was entered into - the parties could not visualise the 1996 Act but in the relevant clause 20 of the agreement, foundation of any statutory modification or reenactment has been laid down. When the parties by consent before C the High Court agree to refer the dispute to the arbitration, in that event parties have to be governed by 1996 Act. This conclusion is consistent even with the underlying intention of the parties according to clause 20 of the Agreement.

D (c) Logically, it has to be concluded that the arbitration proceedings begin when the disputes are referred for the arbitration. In the instant case, the disputes were referred for arbitration by the order of the High Court only on 6.5.1997. The parties have therefore, to be governed by the provisions of 1996 Act.

E (d) The petitioner was aware of the third arbitration from the very beginning and it has to be assumed that the petitioner by necessary implication gave consent for referring the disputes to the arbitration. All this happened after the 1996 Act came into force, therefore, only the 1996 Act has to be made applicable in this case.

F (e) The most vital and important circumstance of this case is that on 6.5.1997, both the parties gave a clear consent to refer this matter to the arbitration before the High Court of Patna.

G The parties by agreement gave a good bye to all other proceedings and on 6.5.97, agreed for reference of their disputes to the arbitrator. The sanctity of the undertaking given to the court by the parties has to be maintained. No one can be permitted to breach or flout the undertaking in this manner.”

An appeal preferred thereagainst was dismissed by a five-Judge Bench, as being not maintainable.

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SUBMISSIONS :

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Mr. Harish Salve, learned Senior Counsel appearing on behalf of the appellant, would submit that having regard to the fact that the notice appointing arbitrator had been served upon the respondent in terms whereof the arbitration proceedings commenced and in that view of the matter the 1940 Act shall be applicable in the instant case. Referring to Sections 21 and 85 of the 1996 Act, Mr. Salve would urge that there are well-known expressions in the arbitral proceedings, being “commencement of the arbitration proceedings”, “continuance of arbitration proceedings”, “entering into reference” which in different contexts would carry different meanings. The Parliament, however, in the 1996 Act having chosen to use the expression ‘initiation of the proceedings’, the meaning thereof as is understood in common parlance should be applied. Strong reliance in this connection has been placed on a decision of the *Queen’s Bench Division Bench in Charles M. Willie & Co. (Shipping) Ltd. v. Ocean Laser Shipping Ltd.*, (1999) 1 Lloyd’s Rep.225.

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Mr. Salve would submit that there appears to be some conflict in the decision of the two-Judge Bench of this Court as regards construction of the arbitration agreement, as contained in clause 20 thereof, referred to hereinbefore *vis-a-vis* the applicability of the 1996 Act. In this connection, our attention has been drawn to a decision of this Court in *N.S. Nayak & Sons etc. v. State of Goa etc.*, [2003] 6 SCC 56 wherein allegedly a different note has been struck from an earlier view expressed in *Delhi Transport Corporation Ltd. v. Rose Advertising*, [2003] 6 SCC 36.

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Mr. R.K. Jain, learned senior counsel appearing on behalf of the respondent, on the other hand, would urge that having regard to the purport and object of the 1996 Act, as also in view of the fact that the arbitrators had already entered into the reference, this Court may not interfere with the impugned judgment in exercise of its jurisdiction under Article 136 of the Constitution of India. Strong reliance in this behalf has been placed on *Chandra Singh and Ors. v. State of Rajasthan and Anr.*, [2003] 6 SCC 545. The learned counsel would next contend that a proceeding commences in the court of law when a plaint is filed and if the said analogy is applied, an arbitration proceeding must be held to be initiated when a claim petition is filed by the claimant before the arbitrator as before a proceeding is initiated before a court or tribunal, the existence thereof would be a condition precedent for initiation of proceeding.

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A The learned counsel would urge that for the purpose of determining the point of time 'when an arbitration proceeding commences', the arbitral tribunal must be constituted. Reliance in this connection has been placed on *Secretary to the Government of Orissa and Anr. v. Sarbeswar Rout*, [1989] 4 SCC 578.

B The learned counsel would further submit that an arbitrator enters into a reference when he applies his mind to the disputes and differences between the parties and not prior thereto. Alternatively, it was submitted that the proceeding commences when the arbitrator enters into reference. Reliance in this behalf has been placed on *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors.*, [1998] 1 SCC 305.

C It was argued that in any event the starting point for the purpose of commencement of arbitration proceedings would be when the dispute was referred by the High Court i.e. on 6.5.1997 and not prior thereto.

D Mr. Jain would further urge that in any event, as the parties had agreed in terms of clause 20 of the contract that 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 thereof, they must be deemed to have agreed that the new Act shall apply. Strong reliance has been placed on *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334, *Delhi Transport Corporation Ltd.*, (supra) and *N.S. Nayak* (supra).

E Mr. Jain would also urge that the decision of this Court in *N.S. Nayak* (supra) cannot be said to have struck a different note from its earlier decision. Section 37 of the 1940 Act, the learned counsel would contend, being for the purpose of commencement of the period of limitation, the same will have no application whatsoever for the purpose of determining the question as to whether the 1940 Act will apply or the 1996 Act.

Analysis of the relevant statutory provisions :

G Section 37(3) of the 1940 Act provides that the arbitration proceeding commences when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator.

Section 21 of the 1996 Act is as under :

H "21. Commencement of arbitral proceedings:-Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be

referred to arbitration is received by the respondent.”

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We may notice that Section 14 of the English Arbitration Act 1996 deals with commencement of arbitral proceedings. Sub-section (1) of Section 14 provides that the parties are free to agree when arbitral proceedings are to be regarded as commenced for the purpose of this Part and for the purposes of the Limitation Act. Section 14(3) provides that in the absence of such agreement, the provisions contained in sub-sections (3) to (5) shall apply. Both the 1940 Act and the English Arbitration Act place emphasis on service of the notice by one party on the other party or parties requiring him or them to submit the matter to arbitration rather than receipt of the request by the respondent from the claimant to refer the dispute to arbitration. Commencement of an arbitration proceeding for certain purposes is of significance. Arbitration proceedings under the 1940 Act may be initiated with the intervention of the court or without its intervention. When arbitration proceeding is initiated without intervention of a Court, Chapter II thereof would apply. When there exists an arbitration agreement the resolution of disputes and differences between the parties are to be made in terms thereof. For the purpose of invocation of the arbitration agreement, a party thereto subject to the provisions of the arbitration agreement may appoint an arbitrator or request the noticee to appoint an arbitrator in terms thereof. In the event, an arbitrator is appointed by a party, which is not opposed by the other side, the arbitrator may enter into the reference and proceed to resolve the disputes and differences between the parties. However, when despite service of notice, as envisaged in sub-section (1) of Section 8 of the 1940 Act, the appointment is not made within fifteen clear days after service of notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be. By reason of sub-section (2) of Section 8 of the 1940 Act, a legal fiction has been introduced to the effect that such an appointment by the court shall be treated to be an appointment made by consent of all parties. Section 8, therefore, implies that where an appointment is not made with the intervention of the court but with the consent of the parties, the initiation of the arbitration proceedings would begin from the service of notice. Section 37 of the 1940 Act provides that all the provisions of the Indian Limitation Act, 1908 shall apply to arbitrations and for the purpose of the said section as also the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator or where the agreement provides that the reference shall be to a person named or

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A designated in the agreement, requiring that the difference be submitted to the person so named or designated.

Section 37(3) of the Arbitration Act, 1940 is not exhaustive. The expression “shall be deemed to be commenced” indicates that sub-section (3) deals with two modes of notional or fictional commencement as distinguished from factual commencement. It is, thus, possible to conceive cases where an arbitration can be said to have commenced under circumstances not contemplated by the sub-section. Too much stress also cannot be laid on Rule 3 of the First Schedule of the 1940 Act in interpreting Sub-Section (3) of Section 37 of the Act. (See *Motilal Chamaria v. Lal Chand Dugar*, AIR (1960) Calcutta 6).

The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to the arbitration as it applies to proceedings in court. Sub-section (2) thereof provides that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21.

Article 21 of the Model Law which was modelled on Article 3 of the UNCITRAL Arbitration Rules had been adopted for the purpose of drafting Section 21 of the 1996 Act. Section 3 of the 1996 Act provides for as to when a request can be said to have been received by the respondent. Thus, whether for the purpose of applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute.

Section 3 of the 1940 Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. The First Schedule, therefore, contains implied conditions of arbitration agreements which are applicable to the reference and not for any other purpose. Clause (3) of the First Schedule envisages that the arbitrators shall make their award within four months after entering on the reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. A notice upon the arbitrator so as to enable him to enter into a reference or

to make an award within the stipulated period, therefore, has nothing to do with the notice served by a party to an agreement to another invoking the arbitration clause and by appointing an arbitrator. A

For the purpose of the Limitation Act an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator. This indeed is relatable to the other purposes also, as, for example, see Section 29(2) of English Arbitration Act, 1950. B

The date when arbitration proceeding commences would depend upon various factors and the purposes which it seeks to achieve. It may be for the purpose of attracting the Limitation Act or for the purpose of time bar clauses or for the rules applicable therefor, as, for example, the rules of the International Chambers of Commerce. C

The date of commencement of an arbitration also affects the position under the conflict of laws when the proper law of the contract is one law and the law of the arbitral procedure is another, for then, up to the date of commencement of the arbitration proceedings, the law of the contract must govern, and the law of the procedure will only govern thereafter. (See International Tank and Pipe *S.A.K. v. Kuwait Aviation Fuelling Co. K.S.C.*, [1975] Lloyd's Rep. 8) D

Section 14(3) & (5) of the English Arbitration Act, 1996 would also show that commencement of arbitral proceedings is not only for the purpose of limitation but also for the purpose of considering a case when the parties by their contract agree that the arbitration must be commenced within a specified time, failing which the right to arbitration, or indeed the claim itself, is apt to be barred. Determination of time elements in an arbitration is provided for in Section 21 of the 1996 Act clearly indicating as to when such arbitration has officially begun. E F

Charles M. Willie & Co. (supra) :

On November 21, 1990 Willie received a letter from Holman Fenwick & Willan ("HFW") solicitors to Roussos enquiring about an engine stoppage in January, 1988. Correspondence developed in which Roussos alleged that Willie had been in breach of the MOA because at the time of delivery the vessel was suffering from average damage affecting class which led to engine breakdown in May, 1987 and January, 1988 (and again after delivery) and H

A which had not been reported to class. Swinnerton Ashley Claydon ("SAC") were involved in that correspondence as solicitors to Willie.

On March. 12, 1992 HFW telexed SAC to invite Willie to agree on the appointment of a single arbitrator but in the event on Apr. 3, 1992 HFW appointed Mr. Kazantzis as Roussos' arbitrator and on Apr. 6, 1992 Mr.

B Newcomb was appointed as Willie's arbitrator.

On May. 20, 1992 HFW telexed Mr. Kazantzis with copies to Mr. Newcomb and SAC stating *inter alia* :

C We refer to our correspondence...appointing you as arbitrator on behalf of G Roussos Sons SA...

We should be grateful if...you would also accept appointment as arbitrator again in respect of all disputes arising under the...MOA with Charles M Willie and Co (Shipping) Limited on behalf of Ocean Laser Shipping Ltd.

D By letter dated May 21, 1992 to Mr. Kazantzis with copies to HFW and Mr. Newcomb. SAC disputed the validity of the appointment on behalf of Ocean Laser and stated *inter alia* that Willie had no contract and consequently there was no agreement to arbitrate, with Ocean Laser. SAC's reaction to the appointment by Ocean Laser of Mr. Kazantzis went answered.

E On Nov. 5, 1993 Roussos and Ocean Laser served points of claim on Willie. SAC protested in their letter that -

F ...neither we nor our clients had any idea as to the identity of Ocean Laser and...there was no agreement to arbitrate with that company...no explanation is offered in the points of claim as to the alleged involvement of Ocean Laser and we can see no basis at all for this party to be included as a claimant...

HFW responded to that letter by a letter dated Nov. 12, 1993 which stated *inter alia* :

G ...The Memorandum of Agreement states...that G Roussos Sons SA...or company to be nominated hereafter called the "Buyer" have today bought Motor Vessel "CELTIC AMBASSADOR".

H For this reason we appointed Mr. Kazantzis as our Clients' Arbitrator both on behalf of G Roussos Sons SA and on behalf of Ocean Laser Shipping

Limited. The points of Claim further provide that the first claimant i.e. G A
Roussos Sons SA on its own behalf and/or on behalf of Ocean Laser Shipping
Limited as Buyers agreed to purchase the vessel...

Justice Rix following the decision in *Nea Agrex S.A. v. Baltic Shipping Co. Ltd.*, [1976] 2 Lloyd's Re. 47 and while pointing out the difference B
between Section 27(3) of the 1939 Act and Section 34(3) of the 1980 Act on
the one hand and the UNCITRAL Model Law and the English Law, on the
other as regard difference in approach between them insofar as in terms of
the English law something more must be done than to request that the matter
be referred to arbitration, held :

"I shall consider the facts relevant to that submission below. For the C
moment, I express the view that even a direct application of the 1980
Act, and a fortiori an application by way of analogy, does not exclude
the possibility of showing that arbitration has been commenced by
means other than a notice requiring appointment or agreement of an D
arbitrator. I asked Mr. Nolan when an arbitration which no one would
dispute was under way had been commenced in the absence of such
a notice. His answer was to say that arbitration had commenced at
latest when the respondent appointed or agreed in the appointment of
an arbitrator; but not because of the Limitation Act, but because the
respondent was then estopped from denying that he had submitted E
the relevant dispute to arbitration or from disputing the tribunal's
jurisdiction on the ground of the absence of a Limitation Act notice.
For my part, I would prefer a more direct approach and say that a
claimant had commenced arbitration, at any rate in a two or three
arbitrator situation, by appointing his own arbitrator. On the authority
of *Tradax Eport S.A. v. Volkswagenwerk A.G.*, [1970] 1 Lloyd's Rep. F
62; [1970] 1 Q.B. 537 such appointment requires the consent of the
arbitrator to act as such and in addition notification of his appointment
to the respondent. In my view such notification can be regarded as an
implied request to the respondent to appoint his own arbitrator, just
as Lord Denning had said that "I require the difference between us G
to be submitted to arbitration" should be regarded as such a request:
indeed the hypothesis under consideration appears as a fortiori case.
But whether that be so or not, where the claimant has actually
completed the appointment of his own arbitrator by notifying the
respondent party, I do not see why such an appointment should not
be regarded as in every sense a commencement of arbitration. H

A Under the 1939 Act the language was “shall be deemed to be
commenced” and under the 1980 Act this phrase had become “shall
B be treated as being commenced”. I have suggested above that the
alteration appears to be an attempt to get away from a word which
had led to a difference of views in *Nea Agrex*, but that it is difficult
to say what the effect of the change was intended to be. I am inclined
C to think that this language still allows an arbitration to be commenced
in other ways. The implication is that the arbitration shall be treated
as being commenced, even if it had not in fact been commenced. In
ordinary language one would not or at least might not regard the
mere request to another party to appoint his arbitrator as marking the
D commencement of an arbitration. Hence the need for statutory language
making it so. But I do not see why the appointment of a claimant’s
arbitrator has to be “treated” as the commencement of an arbitration,
when it is, in my judgment, simply that. It seems to me, however, that
I do not have to decide the point. But if the view I have just expressed
is wrong, then it would to my mind amply demonstrate why it is
E necessary to permit what Lord Denning and Lord Justice Goff called
an implied request: a rule for the commencement of arbitration which
could not encompass the notification to a respondent that a claimant
had appointed his own arbitrator would seem to me to be lacking in
realism.”

E Requirement of the law :

Issuance of notice is required to be interpreted broadly not only for the
purpose of limitation but also for other purposes [See *Allianz Versicherungs
AG v. Fortuna Co. Inc.*, (1999) 2 All ER 625 and *Vosnoc Ltd. v. Transglobal
F Projects Ltd.*, (1998) 1 WLR 101].

In Bernstein’s Handbook of Arbitration and Dispute Resolution Practice,
Fourth Edition under the heading ‘When are arbitral proceedings commenced?’
at page 80, it is stated:

G “2-196 Party autonomy and the default provisions: In accordance
with the principle of party autonomy, the parties are free to agree on
what is to be regarded as commencing arbitral proceedings. If there
is no such agreement, then there are specific requirements in the Act.
A little more is needed than simply for the claimant to serve a request
for arbitration on the respondent. The relevant section of the Act is

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s.14. Its effect is as follows:

- (a) Where the tribunal is named or designated in the arbitration agreement, a written notice by party A to party B requiring the latter to submit to the named or designated person a particular matter or dispute starts arbitral proceedings in connection with that matter or dispute.
- (b) Where the tribunal is to be appointed by the parties, the arbitral proceedings in respect of a matter or dispute commence when Party A serves on Party B a written notice requiring the latter to appoint an arbitrator or agree on the appointment of an arbitrator in respect of the matter or dispute.
- (c) Finally, where the tribunal is to be appointed by a third party, arbitral proceedings commence in respect of a dispute or matter where Party A or Party B requests the third party to make an appointment in respect of that dispute or matter."

The learned author referring to the decision of *Nea Agrex v. Baltic Shipping*, [1976] 2 Lloyd's Rep. 47 states:

"2-200. Well prior to the enacting of the Act, the Court of Appeal heard the case of *Nea Agrex v. Baltic Shipping (The "Agios Lazaros")*, [1976] 2 Lloyd's Rep. 47. The notice simply stated "please advise your proposals in order to settle this matter, or name your arbitrators". It thus offered arbitration as an option, and as it happened the relevant arbitration clause called for arbitration by a sole arbitrator and not by a panel of three. By various routs, all three judges concluded that the notice was a good notice. Effectively, the court looked at the underlying intention of the party serving the notice.

2-201. The "Agios Lazaros" exemplifies the appropriate approach for a court that is addressing this matter under the Act. It is therefore suggested that it will continue to be referred to, even though it has been said that in construing s. 14 reference should only be made to the cases that precede the Act in situations where the Act does not cover the point, or such reference is otherwise necessary."

The author hoped that Section 14 of the English Arbitration Act, 1996 has not introduced a more restrictive regime than that which obtained under the old legislation.

A In Russell on Arbitration, 22nd edition, page 166, the law is stated in the following terms:

B “5-027: Notice of arbitration pursuant to section 14. The “notice” referred to in section 14(3) to (5) of the Arbitration Act 1996 must be in writing and its contents must comply with the requirements for commencing arbitration set out in the subsections. The requirements of section 14 will be interpreted broadly and flexibly. Prior to the Arbitration Act 1996 there were a number of cases which addressed the form of notice to be given in order to commence arbitration for the purposes of section 34(3) of the Limitation Act. This line of authority has been superseded by section 14.”

C ‘Commencement of an arbitration proceeding’ and ‘commencement of a proceeding before an arbitrator’ are two different expressions and carry different meanings.

D A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons charged with authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedures required therefor. If the provisions of the 1940 Act applies, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act.

F Having regard to the provisions contained in Section 21 of the 1996 Act as also the common parlance meaning is given to the expression ‘commencement of an arbitration’ which admittedly for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regards the procedure under the one Act or the other is required to be followed.

G It is only in that limited sense the expression ‘commencement of an arbitration’ qua ‘a notice of arbitration’ assumes significance.

Section 21 *vis-a-vis* Section 85(2)(a) of 1996 Act :

H The importance of the expression ‘commencement of the arbitration proceeding’ arises having regard to Section 85 of the 1996 Act, which reads

thus :

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

(2) Notwithstanding such repeal, -

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

Sub-section (1) of Section 85 of the 1996 Act repealed the 1940 Act (10 of 1940). Sub-section (2), however, notwithstanding such repeal makes the 1940 Act applicable in relation to arbitral proceedings which commenced before the said Act came into force.

Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding.

Case laws on the point :

In *Shety's Constructions Co. Pvt. Ltd. v. Konkan Railway Construction and Anr.*, [1998] 5 SCC 599, it was held :

“A mere look at sub-section (2)(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment

A shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 26-1-1996. The question therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to Section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26-1-1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act. As seen from the aforementioned factual matrix, it at once becomes obvious that the demand for referring the disputes for arbitration was made by the petitioners in all these cases months before 26-1-1996, in March and April 1995 and in fact thereafter all the four arbitration suits were filed on 24-8-1995. These suits were obviously filed prior to 26-1-1996 and hence they had to be decided under the old Act of 1940. This preliminary objection, therefore, is answered by holding that these four suits will be governed by the Arbitration Act, 1940 and that is how the High Court in the impugned judgments has impliedly treated them.”

In *Thyssen Stahlunion GmbH* (supra), this Court was concerned with the enforcement of a valid award. Therein it was categorically held :

F “...It is not necessary that for the right to accrue that legal proceedings must be pending when the new Act comes into force. To have the award enforced when arbitral proceedings commenced under the old Act under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the old Act though given after the coming into force of the new Act. would be quite grave if it is debarred from challenging the award under the provisions of the old Act. Structure of both the Acts is different. When arbitral proceedings commenced under the old Act it would be in the mind of everybody, i.e., arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the old Act. Nobody at that time could have thought that

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Section 30 of the old Act could be substituted by Section 34 of the new Act..." A

Having said so, this Court in relation to a foreign award made in terms of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act struck a different note, stating :

"...When the Foreign Awards Act does not contain any provision for arbitral proceedings it is difficult to agree to the argument that in spite of that the applicability of the Foreign Awards Act is saved by virtue of Section 85(2)(a). As a matter of fact if we examine the provisions of the Foreign Awards Act and the new Act there is not much difference for the enforcement of the foreign award. Under the Foreign Awards Act when the court is satisfied that the foreign award is enforceable under that Act the court shall order the award to be filed and shall proceed to pronounce judgment accordingly and upon the judgment so pronounced a decree shall follow. Sections 7 and 8 of the Foreign Awards Act respectively prescribe the conditions for enforcement of a foreign award and the evidence to be produced by the party applying for its enforcement. The definition of foreign award is the same in both the enactments. Sections 48 and 47 of the new Act correspond to Sections 7 and 8 respectively of the Foreign Awards Act. While Section 49 of the new Act states that where the court is satisfied that the foreign award is enforceable under this Chapter (Chapter I, Part II, relating to New York Convention Awards) the award is deemed to be a decree of that court. The only difference, therefore, appears to be that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus if provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award are juxtaposed there would appear to be hardly any difference. B C D E F

Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have taken place in a foreign country. The provisions of Section 85(2)(a) in so far these apply to the Foreign Awards Act and 1937 Act, would appear to be quite superfluous. Literal interpretation would render Section 85(2)(a) unworkable. Section 85(2)(a) provides for a dividing line dependent G H

A on “commencement of arbitral proceedings” which expression would necessarily refer to Section 21 [21. Commencement of arbitral proceedings. - Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.] of the new Act. This Court has relied on

B this Section as to when arbitral proceedings commence in the case of *Shetty's Construction Co. P. Ltd. v. Konkan Railway Construction*, [1998] 5 SCC 599. Section 2(2). This Part shall apply where the place of arbitration is in India.] read with Section 2(7) [2(7) An arbitral award made under this Part shall be considered as a domestic award.] and Section 21 falling in Part-I of the new Act makes it clear that these provisions would apply when the place of arbitration is in India, i.e., only in domestic proceedings. There is no corresponding provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as “date of commencement” in those foreign proceedings. We would, therefore,

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

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In *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, [2001] 6 SCC 356,

F a distinction was again made between enforceability of a foreign award and a domestic arbitration stating Section 85(2)(a) provides for a dividing line dependent on ‘commencement of arbitral proceedings’ which expression would necessarily refer to Section 21 of the new Act. This Court noticed the decision in *Rani Constructions (P) Ltd. v. H.P. SEB*, C.A. No. 61 of 1999, wherein it was held:

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“41. Again a bare reading of the Foreign Awards Act and the Arbitration (Protocol and Convention) Act, 1937 would show that these two enactments are concerned only with recognition and enforcement of the foreign awards and do not contain provisions for the conduct of arbitral proceedings which would, of necessity, have

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taken place in a foreign country. The provisions of Section 85(2)(a) insofar these apply to the Foreign Awards Act and the 1937 Act, would appear to be quite superfluous. A literal interpretation would render Section 85(2)(a) unworkable. Section 85(2)(a) provides for a dividing line *dependent on 'commencement of arbitral proceedings' which expression would necessarily refer to Section 21 of the new Act.* This Court has relied on this section as to when arbitral proceedings commence in the case of *Shetty's Constructions Co. (P) Ltd. v. Konkan Rly. Construction*, [1998] 5 SCC 599. Section 2(2) read with Section 2(7) and Section 21 falling in Part I of the new Act makes it clear that these provisions would apply when the place of arbitration is in India i.e. only in domestic proceedings. There is no correspondent provision anywhere in the new Act with reference to foreign arbitral proceedings to hold as to what is to be treated as 'date of commencement' in those foreign proceedings. We would, therefore, hold that on a proper construction of Section 85(2)(a) the provision of this sub-section must be confined to the old Act only. Once having held so it could be said that Section 6 of the General Clauses Act would come into play and the foreign award would be enforced under the Foreign Awards Act. But then it is quite apparent that a different intention does appear that there is no right that could be said to have been acquired by a party when arbitral proceedings are held in a place resulting in a foreign award to have that award enforced under the Foreign Awards Act."

Thyssen (supra) is itself an authority for the proposition that where a foreign award is to be executed which is itself a decree, there Section 85(2)(a) will have no application whereas it will have in relation to a domestic arbitration proceedings.

The different intention of the Parliament found by the Bench in *Thyssen* (supra), evidently has no application in the domestic award although it has application in relation to a foreign award. *Thyssen* (supra), therefore, itself is an authority for the proposition that in relation to a domestic arbitration proceeding, commencement thereof shall coincide with service of request/ notice.

It may be true that in *Thyssen* (supra), this Court held that the parties may consent to the procedure laid down under the 1996 Act even before the same came into force but we intend to deal with this aspect of the matter separately.

A The question was clearly answered by a Bench of this Court in which two of us were parties in *State of West Bengal v. Anrillal Chatterjee*, JT [2003] Supp. 1 SC 308 = [2003] 10 SCC 572. This Court followed Shetty Construction and held that Thyssen (*supra*) has no application stating :

B “*Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, [1999] 9 SCC 334 which was passionately relied upon by the learned Senior Counsel for the appellant, has, in our view, no application to the facts of the present case. The Bench concluded : (SCC p.368, para 22)

C 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 (Arbitration and Conciliation Act, 1996).

D 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.”

E There cannot be any doubt that invoking the arbitration clause by a party and appointment of arbitrator pursuant thereto and in furtherance thereof are proceedings which are required to be taken under the 1940 Act. Such steps are necessary in terms of Chapter II thereof as is evident from the fact that even in terms of sub-section (1) of Section 20 of the Act, an application thereunder would be maintainable by a person who does not intend to proceed under chapter II praying for filing of arbitration agreement in court.”

F Noticing that in *Thyssen* (*supra*) this Court was concerned with the enforcement of a foreign award and despite noticing paras 41 and 42 thereof that in respect of a foreign award, the purpose of making an award rule of court i.e. a decree has been dispensed with, rejecting the contention raised therein that the words “in relation to arbitral proceedings” which commenced for the purpose of the 1940 Act must be given the same meaning as contained in Rule 3 of the First Schedule appended thereto, it was held :

H “The said rule was enacted for a different purpose. The words

employed therein are "entering on the reference". In *Hari Shankar Lal v. Shambhunath Prasad and Ors.*, [1962] 2 SCR 720 whereupon Mr. Ray relied upon, a four-judge bench of this Court held that the words "entering on the reference" occurring in the said rule are not synonymous with the words "to act" which are more comprehensive and of a wider import. A

Rule 3 of the First Schedule to the 1940 Act imposes a duty on the arbitrators to make their award within one or other of the three alternative periods mentioned therein." B

This Court in *Amritlal Chatterjee* (supra) categorically held that Rule 3 of the First Schedule gives a cause of action for removal or appointment of a new arbitrator in terms of Sections 11 and 12 of the 1940 Act stating : C

"...The words "commencement of the arbitration proceedings" have not been defined in the 1940 Act. They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof." D

Furthermore, section 85(2)(a) of the new Act may have to be construed keeping in view the provisions contained in section 21 of the new Act." E

Keeping in mind the aforementioned principle, we may notice the other decisions of this Court cited at the Bar. E

In *Fertilizer Corporation of India Limited v. M/s Domestic Engineering Installation*, AIR (1970) Allahabad 31, the Allahabad High Court was concerned with three different courses open to a court while passing an order under Section 20(4) of the 1940 Act. The question which precisely arose therein was as to whether the plaintiff could be permitted to contend that the arbitrator named in the agreement had since then incapacitated himself from acting as an arbitrator between the parties and that, therefore, the plaintiff had the right to urge that reference be not made to the arbitrator named in the agreement. F G

On the other hand, when a suit is stayed, the parties are required to refer their disputes in terms of Chapter II of the Act. The procedure, laid down in Chapter III has, thus, no application in such a case.

In *Sarbeswar Rout* (supra), this Court was concerned with award of H

- A interest *pendente lite* which was not permissible, though interest for the period prior to the commencement of arbitration proceeding was permissible where the Interest Act, 1978 applied. Drawing an analogy of commencement of legal provisions *vis-a-vis* applicability of the provisions of the Interest Act, this Court said for the said purpose filing of a plaint would be the date on which the suit would be instituted for the purpose of grant of interest. There is no reason as to why a different approach shall be applied in an arbitration proceeding. It was held that as soon as the arbitrator indicates his willingness to act as such, the proceeding must be held to have commenced.

- C In *Sumitomo Heavy Industries Ltd.* (supra), this Court was concerned with a case where the parties to the contract belonged to two different countries. Considering the applicability of the curial law *vis-a-vis* the law of the country governing the arbitration agreement, this Court was called upon to determine the question as to when a proceeding before the arbitrator commences. This Court answered the same saying that the proceeding before the arbitrator commences when he enters upon the reference and conclude with making of the award.

- E In *Jupitor Chit Fund (P) Ltd. v. Shiv Narain Mehta (Dead)* by Lrs. and Ors. [2000] 3 SCC 364, this Court was concerned with the construction of sub-section (5) of Section 37 of the 1940 Act as in that case no notice was issued to the respondent by the appellant. It was held that for the purpose of applicability of sub-section (5) of Section 37 of the Act fictional meaning given to the phrase "commencement of an arbitration" as contained in sub-section (3) thereof shall have to be applied. As no notice had been served the court held that the reference to the arbitration itself was not proper and, thus, the period of limitation for filing the suit should not be excluded.

- F Applicability of 1940 Act or 1996 Act :

- G Commencement of Arbitration proceeding for the purpose of limitation or otherwise is of great significance. If a proceeding commences, the same becomes relevant for many purposes including that of limitation. When the Parliament enacted the 1940 Act, it was not in its contemplation that 56 years later it would re-enact the same. The Court, therefore, while taking recourse to the interpretative process must notice the scheme of the concerned legislations for the purpose of finding out the purport of the expression - 'commencement of arbitration proceeding'. In terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it applies to H proceedings in court. For the purpose of invoking the doctrine of *lis pendens*,

section 14 of the Limitation Act, 1963 and for other purposes presentation of A
 plaint would be the date when a legal proceeding starts. So far as the Arbitral
 Proceeding is concerned, service of notice in terms of Chapter II of the 1940
 Act shall set the ball in motion whereafter only the arbitration proceeding
 commences. Such commencement of arbitration proceeding although in terms B
 of Section 37 of the Act is, for the purpose of limitation but it in effect and
 substance will also be the purpose for determining as to whether the 1940
 Act or the 1996 Act would apply. It is relevant to note that it is not mandatory
 to approach the court for appointment of an arbitrator in terms of Sub-Section
 (2) of Section 8 of the 1940 Act. If the other party thereto does not concur
 to the arbitrator already appointed or nominate his own arbitrator in a given
 case, it is legally permissible for the arbitrator so nominated by one party to C
 proceed with the reference and make an award in accordance with law.
 However, in terms of Sub-Section (2) of Section 8 only a legal fiction has
 been created in terms whereof an arbitrator appointed by the Court shall be
 deemed to have been nominated by both the parties to the arbitration
 proceedings. D

Section 34 of the Arbitration Act, 1940 speaks of power to stay legal
 proceeding where there is an arbitration agreement. Before a suit is stayed in
 terms of Section 34 of the Act the Court must be satisfied that there is no
 sufficient reason why the matter should not be referred to arbitration in
 accordance with the arbitration agreement and that the applicant was at the E
 time when the proceedings commenced were and still remains ready and
 willing to do so for the proper conduct of the arbitration. The Court, therefore,
 while passing an order in terms of Section 34 of the Act must satisfy that
 there exists a 'dispute' between the parties within the meaning of the provisions
 of arbitration agreement and such dispute should be referred to arbitration in
 accordance with the arbitration agreement. Although under Section 34 of the F
 1940 Act, the Court itself does not make a reference to an arbitrator but the
 very purpose for which the suit is stayed is that the parties may take recourse
 to the provisions contained in the arbitration agreement. A reference is made
 to the arbitrator in terms of the arbitration agreement to make a reference.
 (See *Bhailal Manilal v. Amratlal Lallubhai Shah*, AIR (1963) Guj 141,
Dinabandhu v. Durga Prasad Jana, AIR (1919) Cal 479. G

Once a suit is stayed by the Court the other provisions of the Arbitration
 Act may be taken recourse to by the parties. (See *State of West Bengal v.*
A.K. Ghosh, AIR (1975) Cal 227).

THE UNCITRAL Model Rules of Arbitration *vis-a-vis* provision of H

A Section 14 of the English Arbitration Act, 1996 must be construed having regard to the decisions of the English Courts as also this Court which addressed the form of notice to be given in order to commence the arbitration for the purpose of Section 34(3) of the Limitation Act. By reason of Section 14, merely the form of notice and strict adherence thereto has become redundant, as now in terms of section 14 of the Arbitration Act there is otherwise no

B specific requirement as to the form of notice subject to any contract operating in the field. [See Paras 5-020, 5-027 and 5-028 of Russel on Arbitration, 22nd Edn.]. Section 21 of the 1996 Act must be construed accordingly. It defines the moment of the commencement of arbitral proceedings. In the Arbitration and Conciliation Act, 1996 by P. Chandrasekhara Rao, it is stated:

C “Section 21 defines the moment of the commencement of arbitral proceedings. It gives freedom to the parties to agree on the date of commencement of arbitral proceedings. For instance, in the case of arbitration administered by an arbitration institution, they may agree to abide by the arbitration rules of that institution for determining the

D point of time at which the arbitral proceedings can be said to have commenced. 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. Section 3 is relevant on the question as to when a request can be said to have been received by the respondent.

E The request made to the respondent should clearly indicate that the claimant seeks arbitration of the dispute:

F Section 21 is of direct relevance in connection with the running of periods of limitation under Section 43 and the savings provision in section 85(2)(a).”

G 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 be 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 not 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

H 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 fact 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 commences 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 Construction (supra) 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.

While interpreting a judgment this Court must pin point its attention to the ratio thereof. A court of law must not lose sight of the doctrine of '*stare decisis*'. A view which has been holding the field for a long time should not be disturbed only because another view is possible.

Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression 'commencement of the arbitral proceeding' as contained in Section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceedings.

In this case, the learned Munsif by an order dated 7.8.1995 i.e. before the 1996 Act came into force not only stayed further proceedings of the suit but also directed that in the meanwhile the matter be referred to arbitration. The matter was referred to arbitration as soon as the notice dated 14.9.1995 was issued and served on the other side.

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

A separate and distinct from that of commencement of arbitration proceeding.

Was it necessary that the appellant must be the claimant :

The learned Single Judge of the High Court has proceeded on the premise that the appellant was not a claimant. The parties were *ad idem* that there had been a dispute between them. Only as a result of the dispute and on an apprehension consequent thereupon the suit for injunction was filed. The question is required to be gone into even in the suit as to which of the parties thereto was in breach of the contract. Such a dispute necessarily fell within the purview of the arbitration agreement. The arbitration agreement can be invoked by a party to a dispute and not only by a person who has a claim against the other. The law does not say that only a party who has a monetary claim may invoke the arbitration agreement. The arbitration agreement was invoked by the appellant by filing an application under Section 34 of the Arbitration Act pursuant whereto or in furtherance whereof the proceeding of the suit was stayed and the matter was directed to be referred to the arbitrator.

The question as to whether in the facts and circumstances of this case an order for permanent injunction should be granted or not was itself a dispute within the meaning of the arbitration agreement. Evidently the stand of the appellant was that such an injunction should not be granted. The arbitrator, having regard to the scope and purport of the reference would be entitled to determine the said dispute. It is, therefore, irrelevant as to whether the appellant had any monetary claim against the respondent or not. The arbitrators and consequently the learned Single Judge, therefore, posed a wrong question unto themselves that no defendant will save limitation for the claimant or the plaintiff and, thus, misdirected themselves in law. Subsequent reference to the two arbitrators nominated by the parties although changed constitution of the arbitral tribunal but the same, it will bear repetition to state, would not be indicative of the commencement of the arbitral proceeding which must be construed having regard to Section 21 of the 1996 Act. Furthermore, having regard to Section 21 of the 1996 Act, the meaning to the expression 'commencement of the arbitration proceeding' as contained in Section 21 must be interpreted in the same manner.

Service of Notice :

Mr. Jain had raised a question that the notice dated 14.9.1995 had not been served before the arbitrators. The appellant in its application for direction/

clarification before the arbitrators, *inter alia*, contended :

- “10. It is submitted that appointment of Ld. Arbitrators as such is in pursuance of said orders only and, therefore, the disputes referred in August, 1995 as such have come up for adjudication before Ld. Arbitrators. A
11. The Arbitration & Conciliation Act, 1996 came into being w.e.f. 25th January 1996, by which date orders referring dispute between the parties already stood passed. B
12. It is submitted that in view of the said facts and circumstances; it is the respectful submission of Second Party that while deciding the disputes, the provisions of Indian Arbitration Act, 1940 alone would be applicable and proceedings shall not be governed by the provisions of Indian Arbitration & Conciliation Act, 1996. C
13. The present application has been made by the Second Party at the first available opportunity before even submitting reply to the copy of statement of claim, with a view that no prejudice should be caused to any party during the course of arbitration proceedings.” D

The statements made in paras 10 and 11 had been traversed by the respondent thus :

- “6. That the submissions made in para nos.10 and 11 of the petition under reply are not tenable and have been made to delay the proceedings. The new Act is applicable as the old one is repealed and only the arbitration proceeding, which commenced before the coming of the new Act was saved.” E F

The contention of the appellant to the effect that the appointment of the learned arbitrators had been made in pursuance of the order of the learned Munsif has, therefore, not been disputed. The majority of the learned Arbitrators held :

“The notice dated 14.9.1995 was served by the respondent, not by the claimant. Therefore this notice is worthless. It was a non-starter. The notice contemplated is a notice by a claimant to the respondent calling upon him to appoint arbitrator for the settlement of the dispute raised in the notice by the claimant. Why should a respondent appoint an arbitrator unless the arbitrator calls upon him to do so? No respondent H

A will be anxious to appoint an arbitrator unless the claimant first appoints the arbitrator. No defendant will save limitation for a plaintiff by giving notice unless he himself is a counter-claimant. It is always the claimant (a plaintiff) who gives notice for appointment of the arbitrator because he invokes the arbitration clause and has a dispute, unless the defendant respondent is also a counter claimant.

B The claimant communicates to the respondent the nature of the dispute he has with him and seeks resolution by arbitration. The notice contemplated in Section 37(3) is a notice of a claim. From the notice it must be clear that a claim is being made by the claimant against the respondent. The claim must be set out in the notice in sufficient detail so that the respondent knows what is being claimed against him and can prepare his response. Like a plaint in a suit. We must treat "cause of arbitration" in the same way as a "cause of action" would be treated if the proceedings were in a court of law.

D In the notice relied upon the respondent has not enumerated any dispute. And if he has none why should he appoint an arbitrator unless the claimant calls upon him to do so.

E The date on which the request for the dispute to be referred to arbitration is received by the respondent from the claimant is the date on which arbitration commences in respect of that particular dispute for purposes of Section 37(3) (See Section 22 and Section 43(2) of the new Act)."

F The arbitrators, therefore, have also not held that notice dated 14.9.1995 was not served upon the respondent but merely proceeded on the basis that the same would be relevant for the purpose of determining the question as to when the arbitral proceeding shall commence. In fact, it does not appear that such a question was raised either before the arbitrators or before the High Court . The respondent, therefore, cannot be permitted to raise the same before us for the first time.

G Arbitration clause - effect of :

It *inter alia* reads :

H "...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."

In *Thyssen* (supra), 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 :

“In the case of Thyssen Stahlunion GMBH (CA No. 6036 of 1998) the contract for sale and purchase of prime cold rolled mild steel sheets in coils contains arbitration agreement. Relevant Clauses are as under :

“CLAUSE 12 : LEGAL INTERPRETATION

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

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

CLAUSE 13 : SETTLEMENT OF DISPUTES

All disputes 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.”

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.

In *Delhi Transport Corporation* (supra), factually it was held :

“...The conduct of the arbitration proceedings and the participation of

A 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...”

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 :

B “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.”

C 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 regard applicability of the statutory modification or reenactment 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.

D It is not a case where like *Delhi Transport Corporation Limited* (supra) E , 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 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 F Conciliation Act, 1996” and he purported to have made its award in terms thereof. In that situation sub-para 3 of para 22 of *Thyssen* (supra) was held to be applicable. Shah, J. who was a party in *Thyssen* (supra) as also *Delhi Transport Corporation* (supra) in *N.S. Nayak* (supra), however, noticed the distinctive features in *Thyssen* (supra) and while supplying the requisite G emphasis thereon observed :

H “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.” A

It was further observed :

“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 appellants.” B
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Referring to the relevant portion of the discussions in Thyssen (supra), the learned Judge held :

“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 G
H

A 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."*

B (emphasis supplied)

In *NS Nayak* (supra) 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 :

C For the reasons aforementioned, we are of the view that in this case, the 1940 Act shall apply and not the 1996 Act. However, it is accepted at the Bar that the learned arbitrators had already entered into the reference. The proceedings before the arbitrators were not stayed. Only making of the award was stayed. In that view of the matter, in the peculiar facts and circumstances of this case, we are of the opinion that although the old Act would apply, the entire arbitral proceedings need not be reopened and the arbitrators may proceed to give their award. The award shall be filed in the court having jurisdiction whereafter the parties may proceed in terms of the old Act. We hope and trust that the award shall be made and all the legal proceedings shall come to an end at an early date and preferably within a period of four months from the date of communication of this order. This order has been passed in the interest of justice and in the peculiar facts and circumstances of this case.

F We are, however, of the opinion that the High Court of Delhi has rightly held that the letters patent appeal was not maintainable. Civil Appeal No. 9672 of 2003 is, therefore, allowed and Civil Appeal Nos.9673-74 of 2003 are dismissed. No costs.

G **KAPADIA, J.** The question for consideration in the present appeals is - as to whether the Arbitration Act, 1940 (hereinafter referred to as "the 1940 Act") would apply in the facts and circumstances of the case or whether the case will have to be dealt with under the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act")?

G Briefly, the facts of the case are as follows. The parties hereto entered into an agreement on 7.4.1992 in terms whereof the first respondent herein was to manufacture and pack in its factory a wide range of ice cream for and

on behalf of the appellant. The agreement was to remain valid for five years. Admittedly, the contract contained an arbitration agreement being clause 20 thereof which is as under: A

“In the case of any dispute or any difference arising at any time between the Company and the Manufacturer as to the construction, meaning or effect of this Agreement or any clause or thing contained therein or the rights and liabilities of the Company or the Manufacturer hereunder in relation to the premises, shall be referred to a single arbitrator, in case the parties can agree upon one, and failing such Agreement, to two arbitrators one to be appointed by either party and in case of disagreement between the two arbitrators aforesaid and in so far as and to the extent that they disagree to, an umpire to be appointed by the said two arbitrators before they enter upon the reference. B C

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.” D

On the strength of this agreement dated 7.4.1992, the respondent herein filed title suit No.40 of 1995 on 20.5.1995 for an injunction restraining the appellant herein from disturbing manufacture and supply of ice cream. In the said suit, the appellant applied for stay of suit vide application dated 17.7.1995 under section 34 of the 1940 Act. By order dated 3.8.1995, the trial Court stayed the suit. Being aggrieved, the respondent herein filed an application before Additional District Judge, Gaya, which was dismissed on 13.3.1996. Aggrieved, the respondent herein carried the matter in revision to the High Court which was disposed of on 6.5.1997 in terms of the following order: E

“Before this court parties have agreed that the dispute between them may be referred as per the agreement to arbitrators chosen by the parties. The plaintiff has chosen Shri Uday Sinha, a retired judge of this court and Senior Advocate of the Supreme Court, while the defence have chosen Shri Hari Lal Agarwal, Senior Advocate of the Supreme Court, a former judge of this court and Chief Justice of Orissa High Court as arbitrators. The dispute between the parties is referred to arbitrators. F G

I hope that the learned Arbitrators will dispose of the arbitration proceedings within three months of the entering the reference.” H

A The above order is a consent order by which application for stay of the suit stood disposed of. Pursuant to the consent order, the arbitrators nominated by the respective parties in turn appointed an umpire. On 19.8.1997, the parties were asked to appear. The respondent was called upon to file statement of claim. An issue arose for determination at that stage as to which of the two

B Acts applied to the arbitration. On behalf of the appellant, it was submitted that application under section 34 of the 1940 Act constituted a request to refer the matter to the arbitration and consequently the request marked the commencement of the arbitration proceedings. This argument was rejected by the arbitrators on the ground that a proceeding under section 34 of the 1940 Act was essentially a defence to the suit and it did not amount to

C referring a claim to arbitration. It was further held that the arbitration commenced in the present case when the claim was referred to the arbitrators on 6.5.1997. In this connection, reliance was placed on the provisions of section 85(2)(a) of the 1996 Act. It was further held that the order dated 6.5.1997 was a consent order and consequently, the arbitration proceedings commenced only after the said order which was passed after the new Act

D came into force. At this stage, it may be pointed out that in the course of hearing before the arbitrators and before the decision could be given on the above question, the appellant herein filed an application before the arbitrators dated 7.3.1998 enclosing notice dated 14.9.1995 served by the appellant on the respondent herein whereby the appellant had appointed Mr. H.L. Aggarwal

E as their arbitrator and by which notice, the respondent herein was called upon to appoint their own arbitrator in terms of clause 20 quoted above. In the application dated 7.3.1998, the appellant submitted that in view of the above notice dated 14.9.1995, the arbitration proceedings had commenced under the 1940 Act. By majority decision, the arbitrators took the view that the said

F notice dated 14.9.1995 did not make any difference to the question of commencement of the arbitral proceedings in view of the provisions of section 85(2)(a) of the 1996 Act as there was a clear and explicit agreement between the parties recorded in the consent order dated 6.5.1997. It was held that in relation to arbitration proceedings which commenced before the 1996 Act,

G parties were free to agree as to when arbitration proceedings are to be regarded as commenced for the purposes of section 85(2)(a) of the 1996 Act and since there was such an agreement in the consent order dated 6.5.1997, the arbitration proceedings had commenced under the 1996 Act. It was further held that by order dated 6.5.1997 passed by the High Court, the arbitration was set in motion by the parties when they nominated their respective arbitrators and

H the Court ordered that the dispute between the parties be referred to the

arbitrators and that the arbitration proceedings be disposed of within three months of entering upon the reference. It was held that arbitration commenced when there was a completely constituted arbitration Tribunal to decide the dispute, which on facts took place only after the 1996 Act commenced. It was further held that the notice dated 14.9.1995 served by the appellant was a non-starter and that such a notice did not commence arbitral proceedings in terms of section 85(2) of the 1996 Act. Consequently, by majority decision, it was held that the consent order dated 6.5.1997 marked the commencement of the arbitral proceedings and, therefore, the 1996 Act was applicable.

One of the learned arbitrators, Mr. H.L. Aggarwal in his dissenting opinion held that the arbitration proceedings commenced in the present case when the notice dated 14.9.1995 was issued by the appellant to the respondent. In this connection, he placed reliance on section 37(3) of the 1940 Act. Questioning the majority decision of the arbitrators, the appellant herein moved an application under section 33 of the 1940 Act in the High Court. A learned single Judge of the High Court held that in the present case the disputes were referred to for arbitration only on 6.5.1997 and, therefore, the parties have to be governed by the provisions of the 1996 Act. The Letters Patent Appeal preferred therefrom was also dismissed by a five-Judge Bench of the High Court as not maintainable.

Mr. Harish Salve, learned senior counsel appearing on behalf of the appellant submitted that having regard to the fact that the notice appointing the arbitrator had been served by the appellant upon the respondent as far back as 14.9.1995 in terms whereof the arbitration proceedings commenced, the 1940 Act was applicable in the instant case. Referring to section 21 and section 85 (2) (a) of the 1996 Act, it was urged that there are well known expressions in arbitral proceedings being "commencement of the arbitration proceedings", "continuance of arbitration proceedings", "entering into reference", which in different context could carry different meanings. The Parliament however in the 1996 Act has chosen to use the expression "commencement of arbitral proceedings", in section 21 the meaning thereof as is understood in common parlance should be applied. Strong reliance in this connection was placed on the decision of Queen's Bench Division in *Charles M. Willie & Co. (Shipping) Ltd. v. Ocean Laser Shipping Ltd.*, (1999) 1 Lloyds Law Report 225].

Learned counsel for the appellant further submitted that there was a conflict in the decision of the two-Judge Benches of this Court as regards the

A construction of the arbitration agreement as contained in clause 20 thereof *vis-à-vis* the applicability of the 1996 Act. In this connection, my attention was drawn to the decision of this Court in the case *N.S. Nayak and Ors. v. State of Goa*, [2003] 6 SCC 56, wherein allegedly a different note has been struck from an earlier decision of this Court in *Delhi Transport Corporation Ltd. v. Rose Advertising*, [2003] 6 SCC 36.

B Per contra, Mr. R.K. Jain, learned senior counsel appearing on behalf of the respondent urged that having regard to the object of 1996 Act, as also in view of the fact that the arbitrators had already entered into the reference pursuant to the consent order dated 6.5.1997, this Court may not interfere with the impugned judgment in exercise of jurisdiction under Article 136 of the Constitution. Strong reliance was placed on the judgment of this Court in the case *Chandra Singh v. State of Rajasthan*, [2003] 6 SCC 545.

C It was next contended that a proceeding commences in the Court of law when a plaint is filed and by analogy an arbitration proceeding must be held to be initiated when a claim petition is filed by the claimant before the arbitrator; that before a proceeding is said to be initiated before a Court or Tribunal, the existence of such Tribunal was a condition precedent for initiation of proceedings. The learned counsel, therefore, contended that for purposes of determining the point of time "when an arbitration proceeding commences", an arbitral Tribunal must be constituted. Reliance in this connection was placed on the judgment of this Court in the case of *Secy. to Government of Orissa v. Sarbeswar Rout*, reported in [1989] 4 SCC 578. It was further submitted that an arbitrator enters into a reference when he applies his mind to the differences and disputes between the parties and not prior thereto. Alternatively, it was submitted that the proceeding commences when the arbitrator enters upon the reference. Reliance was placed on the judgment of this Court in the case *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* reported in [1998] 1 SCC 305. It was further submitted that in any event, the starting point for commencement of the arbitration proceedings would be when the dispute was referred to by the High Court on 6.5.1997 and not prior thereto.

F G Learned counsel for the respondent contended that in any event as the parties had agreed in terms of clause 20 of the contract that all such arbitration proceedings shall be in accordance with and subject to the provisions of the 1940 Act or any statutory modifications or re-enactment thereof, they must be deemed to have agreed that new Act shall apply. Strong reliance has been placed on the judgment of this Court in the case of *Thyssen Stahlunion*

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GMBH v. Steel Authority of India Ltd., reported in [1999] 9 SCC 334, *Delhi Transport Corporation Ltd.* (supra) and *N.S. Nayak* (supra). Lastly, it was submitted that section 37 of the 1940 Act, being for the purposes of commencement of the period of limitation, had no application whatsoever for the purposes of determining the question as to whether the 1940 Act will apply or the 1996 Act will apply.

I may now notice the provisions of the 1940 Act. Section 2 defines arbitration agreement to mean a written agreement to submit present or future dispute to the arbitration, whether an arbitrator is named therein or not. Section 2(e) defines "reference" to mean reference to arbitration. Therefore, the term "arbitration agreement" is different from the term "reference". "An agreement to refer" and "a reference" are two separate transactions while an arbitration agreement is only a contract to refer, reference is delegation of authority to a named arbitrator. Section 8 confers power upon the Court to appoint arbitrator where the parties concurred in the appointment of an arbitrator. In such a case, after the Court appointed an arbitrator, it is the parties who referred the dispute to him. On the other hand, section 20 enabled a party to apply for filing of the arbitration agreement in the Court and that section empowered the Court to make an order of reference to the arbitrator appointed by the parties and in the absence of such appointment, the Court was empowered to make an order of reference to the arbitrator appointed by it. In other words, under section 20, unlike section 8, it is the Court which referred the dispute. In the case of *Fertilizer Corporation of India Limited v. M/s Domestic Engineering Installation*, reported in AIR (1970) Allahabad 31, it has been held that under section 20(4), three courses were open to the Court. After the arbitration agreement was ordered to be filed, the Court shall proceed to make reference, firstly to the arbitrator appointed by the parties in the agreement, secondly to the arbitrator not named in the agreement but with regard to whom the parties agreed otherwise, and thirdly when the parties did not agree upon an arbitrator, to an arbitrator appointed by itself. This difference between Sections 8 and 20 was important as under section 48 of the 1940 Act, it was provided that the Act shall not apply to any reference pending at the commencement of the said Act, to which the law in force immediately prior to the commencement shall continue to apply notwithstanding any repeal effected by the Act. Section 48 was a transitory provision in which the emphasis was on "reference". Section 48 of the 1940 Act which corresponded to Section 25 of the English Arbitration Act 1899 was a subject of debate in larger number of matters as different dates for different stages of arbitration proceedings were provided for.

A Since transitory provision is to be interpreted in the light of facts and circumstances existing on the date the new Act coming into force, section 21 and 85(2) of the 1996 Act are quoted below:

B “21. Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

85. Repeal and savings. (1).

(2) Notwithstanding such repeal,

C (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;

D (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.”

E A bare reading of section 21 of the 1996 Act indicates that arbitral proceedings in respect of a dispute commences on the date on which request to refer such dispute to arbitration is received by the respondent, unless otherwise agreed by the parties. Section 21 is similar to section 14 of the English Arbitration Act 1996 which provides that parties are free to agree as to when an arbitration is to be regarded as commencing both under the
 F Arbitration Act 1996 and for limitation purposes. In the absence of such agreement, Section 14 of that Act applies. Russell on Arbitration, [XXII Ed. Page 165] says as follows:-

G “**Commencement for limitation purposes.** The parties are free to agree when an arbitration is to be regarded as commencing both under the Arbitration Act 1996 and for limitation purposes. In the absence of agreement the provisions of Section 14 of the Arbitration Act 1996 apply. Under that Section an arbitration is treated as being commenced when a notice in writing is served on the other party requiring him to agree to the appointment of an arbitrator or, if the parties are each to make an appointment, requiring him
 H to appoint an arbitrator. The party giving the notice does not have to have

already appointed his own arbitrator. Where, however, the arbitration agreement specifies the person to be appointed as arbitrator, the arbitration is treated as being commenced when a notice in writing is served on the other party requiring him to submit the dispute to that person. Finally, if the arbitrator is to be appointed by someone other than a party to the arbitration proceedings, such as an arbitral institution, the arbitration is treated as being commenced when notice in writing is given to that other person requesting him to make the appointment. It is prudent to send to the respondent a copy of the notice addressed to the person requested to make the appointment as this may avoid arguments about when the notice was given.”

In the present matter, one is concerned with transitional provision, i.e. section 85(2)(a) which enacts as to how the statute will operate on the facts and circumstances existing on the date it comes into force and, therefore, the construction of such a provision must depend upon its own terms and not on the basis of section 21 (see *Principles of Statutory Interpretation* by G.P. Singh 8th Ed. Page 188). In *Thyssen's* case (supra), Section 48 of the old Act and Section 85(2)(a) of the 1996 Act came for consideration. It has been held by this Court that there is a material difference between section 48 of the 1940 Act, which emphasized the concept of “reference” *vis-a-vis* section 85(2)(a) of the 1996 Act which emphasizes the concept of “commencement”; that there is a material difference in the scheme of two Acts; that the expression “in relation to” appearing in Section 85(2)(a) refers to different stages of arbitration proceedings under the old Act; and lastly that Section 85(2)(a) provides for limited repeal of the 1940 Act. therefore, I am of the view that one cannot confine the concept of ‘commencement’ under Section 85(2)(a) only to Section 21 of the 1996 Act which *inter alia* provides for commencement of arbitral proceedings from the date on which a request to refer a particular dispute is received by the respondent. In this connection, I may usefully quote commentary on “*Commercial Arbitration*” (2nd Edition, page 169) by *Mustill & Boyd* which reads as under:

“It is common to use expressions such as ‘a notice of arbitration’ or ‘the commencement of an arbitration’ as if they had the same meaning for all purposes, in the context of all the various possible types of agreement to arbitrate. This is misleading, for when enquiring whether sufficient steps have been taken to set an arbitration in train, the answer may depend on the reason why the question is being asked. There are several different reasons why it may matter when the arbitration has begun. Of these, the following are probably the

A most important.

First, the question may be whether, at a given moment, there is any person or group of persons with jurisdiction to make an award, and power to give directions and make rulings in the course of the reference. For this purpose, what is being considered is whether the arbitration has reached the stage where there is a completely constituted arbitral tribunal.

B

Second, the problem may relate to the jurisdiction of the arbitrator. Thus, if there is a general reference of disputes the scope of the reference will be determined by the state of the disputes at the moment when the arbitration was begun. Disputes arising thereafter must be the subject of a separate arbitration, unless brought within the existing reference by consent.

C

Third, the purpose of the enquiry may be to ascertain whether the claimant has taken such steps as may be prescribed by statute or contract for the purpose of preventing his claim from being time barred.

D

Finally, it may be necessary to consider whether one party has taken sufficient steps towards setting the arbitration in motion to give him certain procedural advantages in the appointment of the tribunal: either as a preliminary to appointing his own nominee as sole arbitrator, or at least by way of preventing the other party from exercising his statutory right to make, or procure, a nomination in default.

E

It is plain that expressions such as 'the commencement of the arbitration' must have different meanings in these various contexts. For example, the giving of a notice to concur in the appointment of a sole arbitrator is sufficient to prevent time from running under the Limitation Act 1980; and it is also an essential first step towards the making of a default appointment under section 10(a) of the Arbitration Act. But the arbitration has not at this stage 'commenced' in any practical sense, since there is no person or group of persons charged with any authority to determine the matters in dispute."

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Therefore, the position in law is that before the English Arbitration Act 1996, the expression "commencement of arbitration proceedings" depended upon the facts of each case. There was no single conclusive test to determine "commencement". In a case, where it was necessary to consider whether one

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party had taken sufficient steps for setting arbitration in motion, the court has to consider the date of setting up of arbitral tribunal. In the matter involving the scope of reference the test of the state of dispute was relevant. Therefore, the expression "commencement of arbitration proceedings" had different meanings in various contexts. The learned authors have further observed that although notice to concur is an essential step, arbitration proceedings cannot be said to have commenced in practical sense till tribunal charged with authority stood duly constituted. It is for this reason that English Arbitration Act 1996 now provides under Section 14 that commencement will take place from the date when notice to concur is served. This view is supported by the judgment of the division bench of this Court in *Delhi Transport Corporation Ltd.* (supra), in which a similar question was raised. In that matter, the parties had entered into an agreement on 15.1.1993 for display of advertisement on DTC buses in Delhi. The agreement was for a period of three years commencing from 15.1.1993. The agreement contained an arbitration clause. Disputes arose between the parties. A request was made by the contractor on 9.1.1995 for appointment of arbitrator to settle the disputes. This was followed by another letter dated 26.11.1995 containing a similar request. On 16.1.1996, he filed a petition under section 20 of the 1940 Act. The counsel appearing for DTC made a statement in the court on 19.7.1996 that an arbitrator had been appointed on 4.7.1996 as per the agreement. The petition became infructuous in view of that statement. The arbitrator conducted the proceedings and made an award on 6.10.1998. To enforce the award, the contractor filed an application under 1996 Act. The DTC contested that application on the ground that the 1996 Act was not applicable and, therefore, the execution petition was not maintainable. The contention of the DTC before the High Court was that the proceedings had commenced under the old Act. This objection was upheld by the learned single Judge based on the view that the arbitration proceedings had commenced on the date when request for appointment of arbitrator was made which was prior to 16.8.1996 when the new Act came into force. The contractor went in appeal. The division bench of the High Court found on facts that the parties went for arbitration with clear understanding that the proceedings would be conducted under the new Act, particularly when the appointment of arbitrator was made after the new Act had come into force and particularly when the parties had participated in the arbitration proceedings with the understanding that the proceedings would be governed by the new Act. Hence, the High Court decided the matter in favour of the contractor. Aggrieved, the DTC came in appeal to this Court. This Court found on facts that the arbitration clause, which is identical to the clause in the present case, showed that the parties had agreed to be governed

- A by the law in force at the relevant time and such arbitration clauses were recognised under the new Act. This Court further found from the conduct of the arbitration proceedings and the participation of the parties therein that the parties had agreed to proceed under the 1996 Act and, accordingly, this Court upheld the judgment of the division bench of the High Court. In my view the said judgment applies to the present case. The point to be noted is that while
- B construing Section 85(2) of the 1996 Act, which is a transitional provision, the terms of the arbitration clause and the conduct of the parties were taken into account. Therefore, interpretation of Section 85(2)(a) cannot be confined to section 21 of the 1996 Act. However, in cases where the new Act is applicable one has to go by section 21 and in which case arbitration
- C proceedings will commence from the date when request is received by the respondent for referring the dispute to arbitration, unless the parties have agreed to the contrary.

- D In the case of *N.S. Nayak* (supra), this court held that even in cases of pending arbitration proceedings the parties had an option of changing the procedure so as to be governed by the provisions of the 1996 Act.

- E In the case of *Charles M. Willie & Co. (Shipping) Ltd.* (supra), the facts were as follows. By a memorandum of agreement dated April 1, 1990, Charles M. Willie & Co. (Shipping) Ltd. sold their vessel to Ocean Laser Shipping Ltd. The MOA provided for an arbitration clause, which *inter alia* stated that if any dispute arises in connection with the contract, the same shall be decided by a single arbitrator and if the parties did not agree on the appointment of a single arbitrator, the dispute shall be settled by three arbitrators, each party appointing one arbitrator, the third to be appointed by London Maritime Arbitrators Association. On 21.11.1990, Willie received a letter from solicitor
- F of Ocean Laser Shipping Ltd. enquiring about an engine stoppage in January, 1988. Consequently, the dispute started. On 12.3.1992, Ocean Laser Shipping Ltd. through their solicitor invited Willie & Co. to agree on the appointment of a single arbitrator and further stated that in the event of Willie & Co.'s failure to nominate its arbitrator by 3.4.1992, Ocean Laser Shipping Ltd. appointed one Mr. Kazantzis as an arbitrator. On 5.11.1993, Ocean Laser
- G submitted their claim before the arbitrator. On 18.2.1994, points of defence were filed. One of the points which arose for determination was as to when the arbitration could be said to have commenced. Taking a clue from section 34(3) of the Limitation Act, 1980 which provided that an arbitration should be treated as having been commenced when one party served on the other
- H party a notice requiring him to agree to the appointment of an arbitrator, it

was held by Queen's Bench that commencement took place from receipt of such notice. This judgment has no application to the facts of the present case. The present case involves interpretation of transitional provisions, which was not in issue in the said judgment. Further, the judgment of Queen's Bench was based on provisions of Limitation Act, by analogy. Further, the judgment of Queen's Bench was delivered under the Arbitration Act, 1996 under which the parties are free to agree when arbitration is to be regarded as having commenced both under the said Act and for limitation purposes and that in the absence of the agreement, the provisions of Section 14 of the English Arbitration Act, 1996 were to apply.

To sum up, in this case, the question concerns interpretation of transitional provisions; that section 85(2)(a) emphasizes the concept of "commencement" whereas section 48 of the 1940 Act emphasized the concept of "reference"; that Section 85(2)(a) provides for implied repeal; that the scheme of 1940 Act is different from the 1996 Act; that the word "reference" in Section 48 of the old Act had different meanings in different contexts; and for the said reasons, I am of the view that while interpreting section 85(2)(a) in the context of the question raised in this appeal, one cannot only rely on Section 21 of 1996 Act.

In the light of what is stated above, I now refer to the facts of the present case. The parties entered into an agreement on 7.4.1992 which contained an arbitration clause 20, which *inter alia* stated that in the case of dispute between the parties arising in relation to the contract, the dispute shall be referred to a single arbitrator, in case both sides agree upon one such arbitrator and failing such agreement, the dispute shall stand referred to two arbitrators, one to be appointed by either party, and in case of disagreement, between the two arbitrators, the dispute was to be referred to an umpire to be appointed by the two arbitrators. Before entering upon the reference under clause 20 quoted above, all such arbitration proceedings were to be governed by provisions of the Arbitration Act, 1940 or under any statutory re-enactment. This clause is similar to the one considered by this Court in the case of *Delhi Transport Corporation Ltd.* (supra). On the strength of the agreement dated 7.4.1992, the respondent herein filed title suit No.40 of 1995 for injunction and in the said suit, the appellant herein applied for stay under section 34 of the 1940 Act. Suffice it to state that on 6.5.1997, when the matter came up before the High Court, the parties agreed that all disputes between them may be referred to arbitrators chosen by the parties as per the agreement. A consent order was accordingly passed on that day by the High Court referring the

A dispute to the arbitrators. Therefore, for all practical purposes, the arbitration commenced on 6.5.1997, by which time the 1996 Act had come into force. In the circumstances, I am in agreement with the majority decision of the arbitrators that the proceedings in the present case would be governed by the provisions of the 1996 Act.

B For above reasons, I respectfully dissent from the opinion of Sinha, J. Consequently I am of the view that this Civil Appeal ought to fail and be dismissed with no order as to costs.

CIVIL APPEAL Nos. 9673-9674 OF 2003

C Now coming to the Civil Appeal Nos.9673-9674 of 2003, the facts briefly are as follows. On 6.4.1998, the learned arbitrators by majority decision took the view that in the present case the arbitration proceedings had commenced on 6.5.1997 when a consent order was passed by the Patna High Court and, therefore, the proceedings were governed by the 1996 Act. Aggrieved, the appellant herein had moved the single Judge of Delhi High Court. By order dated 13.10.1998, the learned single Judge of the High Court was pleased to uphold the majority decision dated 6.4.1998. Being aggrieved, the appellant carried the matter in Letters Patent appeal which was dismissed as not maintainable. Having regard to the provisions of Section 39 of the 1940 Act as interpreted by this Court in the case of *Union of India v. Mohindra Supply Company*, reported in AIR (1962) SC 256 second appeal, which included Letters Patent appeal under section 39(2), was not maintainable. Accordingly, the civil appeal Nos. 9673-74 of 2003 fail and are dismissed.

There shall be no order as to costs in all the appeals.

F ORDER

In view of the majority judgment, Civil Appeal No. 9672/2003 is allowed.

Civil Appeal Nos. 9673-9674/2003 are dismissed.

G No costs.

S.K.S.

C.A. No. 9672/2003 is allowed.

C.A.Nos. 9673-9674/2003 are dismissed.