CASE NO.:
Appeal (civil) 9672 of 2003

PETITIONER:
Milkfood Ltd.

RESPONDENT:
M/s GMC Ice Cream (P) Ltd.

DATE OF JUDGMENT: 05/04/2004

BENCH:
CJI & S.B. Sinha.

JUDGMENT:
J U D G M E N T

W I T H

Civil APPEAL NOS.9673-74 OF 2003

S.B. SINHA, J :

Interpretation of certain provisions of the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996 (for short '1940 Act' and '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.

FACTUAL BACKGROUND :

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 :

"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 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.

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

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.

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.

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 :

"On the request the application dated 17.7.95 filed on behalf of the 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."

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 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.

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

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 :

"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.

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

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."

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 proceeding 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.

The appellant 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 proceeding. 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 proceeding."

Questioning the said order of the learned arbitrators, an application was filed by the appellant 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 of 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 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) 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 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.

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.

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 in force, therefore, only the 1996 Act has to be made applicable in this case.

e) The most vital and important circumstances 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.

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.

SUBMISSIONS :

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 proceeding 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 proceeding", "continuance of arbitration proceedings", "entering into reference" which in different context 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. vs. Ocean Laser Shipping Ltd. [(1999) 1 Lloyd's Rep.225].

Mr. Salve would submit that there appears to be some conflict in the decision of the two-Judge Benches of this Court as regard construction of the arbitration agreement, as contained in clause 20 thereof, referred to hereinbefore vis-'-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. vs. 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. vs. Rose Advertising [(2003) 6 SCC 36].

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 Chandra Singh and Others vs. State of Rajasthan and Another [(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.

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 Another vs. Sarbeswar Rout [(1989) 4 SCC 578].

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. vs. ONGC Ltd. and Others [(1998) 1 SCC 305].

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

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 vs. Steel Authority of India Ltd. [(1999) 9 SCC 334], Delhi Transport Corporation Ltd. (supra) and N.S. Nayak (supra).

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 :

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 :

"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."

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 proceedings 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 proceeding 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 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 the 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 Vs. 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 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.

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.

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.

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 proceeding, 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. Vs. Kuwait Aviation Fuelling Co. K.S.C. [1975] Lloyd's Rep. 8)

Section 14(3) & (5) of the English Arbitration Act, 1996 would also show that commencement of arbitral proceeding 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.

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 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. 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 :

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.

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.

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

...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 :

...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".

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 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. vs. Baltic Shipping Co. Ltd. [(1976) 2 Lloyd's Re. 47] and while pointing out the difference 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 moment, I express the view that even a direct an 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 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 no because of the Limitation Act, but because the respondent was then estopped from denying that he had submitted 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. 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 to be submitted to arbitration" should be regarded as such a request: indeed the hypothesis under consideration appears as an 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.

Under the 1939 Act the language was "shall be deemed to be commenced" and under the 1980 Act this phrase had become "shall 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 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 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 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."

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 vs. Fortuna Co. Inc. - (1999) 2 All ER 625 and Vosnoc Ltd. vs. Transglobal 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:

"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 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 Vs. 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.

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

"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."

'Commencement of an arbitration proceeding' and '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 Arbitration Act, 1940. Although at that point of time, no person or group of persons charged with anyauthority 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. 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 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.

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

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 Shetty’s Constructions Co. Pvt. Ltd. vs. Konkan Railway Construction and Another [(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 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 aforenoted 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 :

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

of the new Act..."

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.

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 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 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) [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 make 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 foreing proceedings. We would, therefore, 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."

In Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd. [(2001) 6 SCC 356], 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. Vs. H.P. SEB, C.A. No. 61 of 1999, wherein it was held:

"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 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 make 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 conincide 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.

The question was clearly answered by a Bench of this Court in which two of us were parties in State of West Bengal vs. Amritlal 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 :

"Thyssen Stahlunion GMBH vs. 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)

"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).

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 proceeding 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."

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."

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 :

"The said rule was enacted for a different purpose. The words employed therein are "entering on the reference". In Hari Shankar Lal vs. Shambhunath Prasad and Others [(1962) 2 SCR 720 whereupon Mr. Ray rlied 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.

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."

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 :

"...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.

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."

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

In Fertilizer Corporation of India Limited vs. 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.

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 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-'-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.

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-'-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.

In Jupitor Chit Fund (P) Ltd. vs. Shiv Narain Mehta (Dead) by Lrs. And Others [(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.

Applicability of 1940 Act or 1996 Act :

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 46 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 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 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 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 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.

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 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 1940 Act, 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. A reference is made to the arbitrator in terms of the arbitration agreement to make a reference. (See Bhailal Manilal Vs. Amratlal Lallubhai Shah, AIR 1963 Guj 141, Dinabandhu Vs. Durga Prasad Jana, AIR 1919 Cal 479).

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 Vs. A.K. Ghosh, AIR 1975 Cal 227).

THE UNCITRAL Model Rules of Arbitration vis-'-vis provision of 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 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 :

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

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)."

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 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 an 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 proceeding.

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 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.

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.

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."

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."

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."

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 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.

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.

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.

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). "

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.

Arbitration clause - effect of :

It inter alia reads :

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

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 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 :

"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."

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.

It is not a case where like Delhi Transport Corporation (supra) limited, 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 proceeding with the understanding and belief that the proceedings are governed under the 1996 Act. In the award itself the arbitrator noted that "both parties submitted claims before me under the Arbitration and Conciliation Act, 1996" and he purported to have made 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 emphasis thereon observed :

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

It was further observed :

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

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

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 negatived the said contention by interpreting the expression "unless otherwise agreed". The Court held that such agreement could be entered into even before coming into force of the new Act. However, it nowhere lays down that in a pending arbitral proceeding, which was being conducted as per the procedure prescribed under the old Act, the parties have option of changing the procedure."

(emphasis supplied)

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 :

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 the communication of this order. This order has been passed in the interest of justice and in the peculiar facts and circumstances of this case.

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.