
(2008) 10 BOM CK 0078

In the Bombay High Court

Case No : Writ Petition No. 4064 of 2008, Arbitration Petition No's. 2, 310, 340 and 341 of 2007 and Arbitration Petition (L) No's. 591, 592 and 593 of 2007

Mr. Puneet Malhotra and Another

APPELLANT

Vs

Mr. R.S. Gai, Sole Arbitrator and Others
 The Municipal Corporation of Greater Mumbai Vs Joint Venture Angerlehner Michell Bau GMBH
 Angerlehner Structural and Civil Engineering Co. Vs The Municipal Corporation of Greater Mumbai
 Mr Girish S. Khandagale Vs Union of India (UOI) and Another
 Kotak Securities Ltd. Vs Gaurav Goel and Another

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Arbitration Act, 1940 — Section 2, 30, 33
Arbitration and Conciliation Act, 1996 — Section 2, 20, 21, 34, 34(1)
Bombay Court Fees Act, 1959 — Article 1, 13, 18, 3
Contract Act, 1872 — Section 28
General Clauses Act, 1897 — Section 8, 8(1)

Citation : AIR 2009 Bom 42 : (2008) 6 ALLMR 856 : (2008) 4 ARBLR 398 : (2008) 6 BomCR 551 : (2011) 2 JCR 261 : (2008) 6 MhLj 867 : (2009) 2 RCR(Civil) 570

Hon'ble Judges : S.J. Vazifdar, J;J.P. Devadhar, J;D.K. Deshmukh, J

Bench : Full Bench

Advocate : S.S. Kanetkar, in Writ Petition No. 4064 of 2008, R.D. Dhanuka, R. Yadav, R.Y. Shirsekar and H.C. Pimple, in Arbitration Petition No. 340 and 341 of 2007 and Arbitration Petition L No. 590 of 2007, Zal Andhyarujina, Rajeev Talasikar and Shivani, instructed by Javed Gaya, in Arbitration Petition L Nos. 591, 592 and 593 of 2007, U.S. Samudrala, in Arbitration Petition No. 2 of 2007 and Karan Bharihoke, in Arbitration Petition No. 310 of 2007, for the Appellant; Vikas Shivarkar, for Respondent Nos. 3 and 4 in Writ Petition No. 4064 of 2008, Zal Andhyarujina, Rajeev Talasikar and Shivani, instructed by Javed Gaya in Arbitration Petition No. 340 and 341 of 2007 and Arbitration Petition (L) No. 590 of 2007, R.D. Dhanuka, R. Yadav, R.Y. Shirsekar and H.C. Pimple, in Arbitration Petition (L) Nos. 591, 592 and 593 of 2007, Suresh Kumar in Arbitration Petition No. 2 of 2007 and Uday Warunjikar in Arbitration Petition No. 310 of 2007, for the Respondent

Judgement

D.K. Deshmukh, J.—This bench has been constituted by the Hon'ble The Chief Justice of the Bombay High Court for answering the following question:

When a petition is filed challenging an Award u/s 34 of the Arbitration and Conciliation Act, 1996, under which Article of the Bombay Court fees Act 1959, the court fees would be payable ?

2. The necessity of constituting a larger bench for consideration of this question arose in the following circumstances:

When the Arbitration Act, 1940 (hereinafter referred to as "the 1940 Act") was in force, a person desiring to challenge an Award under 1940 Act had to apply to the Court u/s 33 of that Act. The term "Court" was defined by Section 2(c) of the 1940 Act, to mean a Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of a suit. Thus, in so far as the State of Maharashtra is concerned, in the State of Maharashtra excluding Bombay, an application u/s 33 of the 1940 Act was to be filed before the Civil Court and so far as the Bombay is concerned, an application to be filed either before this Court or the City Civil Court depending on the amount involved in the Award. When an application u/s 33 of the 1940 Act was filed in a Civil Court in the State of Maharashtra excluding city of Bombay, court fee was paid under Article 1(a) of the Second Schedule i.e. Rs.5/- and when an application was made to the City Civil Court in Bombay, the same court fee was to be paid under the same Article. But when an application was to be made u/s 33 before this Court, court fee was to be paid under Article 1(f)(iii) of the Second Schedule i.e. Rs.25/-. The court fee was paid under the Second Schedule because of Article 3 found in the First Schedule of the Bombay Court fees Act which provided that when an application to set aside or modify an Award otherwise than an Award under the 1940 Act, then court fee is payable on the amount of value of the Award sought to be set aside or modified, according to the scale prescribed under Article 1. Thus, because of Article 3 of Schedule I of the Court fees Act, an application u/s 33 of the 1940 Act challenging an Award made by an Arbitrator under the 1940 Act was excluded from Article 3, and therefore, court fee on an application filed u/s 33 of the 1940 Act was payable under the Second Schedule. The 1940 Act was repealed by the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the 1996 Act"). Section 34 of the 1996 Act provides that an Award made under that Act by an Arbitrator can be challenged by making an application to the Court. The term "Court" is defined by Section 2(e) of the 1996 Act, to mean the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide questions forming the subject matter of the Arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil court or any small causes Court. Thus, the definition of the term "Court" found in

the 1940 Act and the 1996 Act is little different. Under the 1940 Act an Award could be challenged before any Civil Court but now it can be challenged only before the principal Civil Court of original jurisdiction in a district. Thus, now an Award made under the 1996 Act can be challenged by making an application u/s 34 of that Act either in the district Court or in this Court on its original side. A question, therefore, arose as to which provision in the Bombay Court fees Act would apply when an application u/s 34 of the 1996 Act is made. That question arose when a Division Bench of this Court had before it an appeal filed u/s 37 of the 1996 Act challenging an order passed by a learned Single Judge of this Court dismissing an application filed u/s 34 of the 1996 Act. On that appeal, the appellant had paid court fee according to Article 13 of Schedule II of the Bombay Court fees Act, which provides that when a memorandum of appeal is filed, challenging an order which is not a decree and which does not have force of decree, in the High Court, court fee payable would be Rs.25/-. The Division Bench by its judgment in the case of "Maharashtra Industries Development Corporation v. Govardhani Constructions Company, 2007 (2) BCR 835" decided on 7.3.2007 held that an appeal filed against an order dismissing a petition filed u/s 34 of the 1996 Act will be governed by Article 3 of Schedule I of the Bombay Court fees Act. The Court held that by Article 3 of Schedule I only an application or memorandum of appeal challenging an award made under the Arbitration Act 1940 is excluded. In effect, the Division Bench held that when an application u/s 34 of the 1996 Act against the Award is made or an appeal is filed u/s 37 of the 1996 Act challenging the order made u/s 34 of the 1996 Act, payment of court fee will be governed by Article 3 Schedule I of the Bombay Court fees Act. The Division Bench held so because, according to the Division Bench, only an application or appeal challenging the Award made under the 1940 Act has been excluded from Article 3 of Schedule I of the Bombay Court Fees Act, and therefore, an application u/s 34 of the 1996 Act or an appeal u/s 37 of the 1996 Act would not be excluded from Article 3 of Schedule I of the Bombay Court fees Act, and therefore, Court fee will be payable according to Article 3 of Schedule I of the Bombay Court Fees Act. It appears that when a learned Single Judge of this Court had before him petition filed u/s 34 of the 1996 Act where Court fee in accordance with Article 3 of Schedule I of the Bombay Court fees Act was not paid, an objection was raised relying on the judgment of the Division Bench in the case of "Govardhani Construction Company" referred to above. The learned Single Judge found that he cannot agree with the view taken by the Division Bench in the judgment in the case of "Govradhani Construction Company", because according to him, while deciding the question, the Division bench in that case did not consider the provisions of Section 8 of the General Clauses Act and as the Division Bench did not consider the provisions of Section 8 of the General Clauses Act, the view taken by the Division Bench in the case of "Govardhani Construction Company" was not proper, and therefore, the learned Single Judge made an order dated 19.6.2008 directing the office to place papers before the Hon"ble the Chief Justice for placing the matter before a larger bench. The Hon"ble the Chief Justice pursuant to the order made by the learned Single

Judge made an order on 1.8.2008 constituting this bench for considering the question referred to above. It appears that another Division bench of this Court in appeal no.77 of 2007 and appeal no.78 of 2007 in the case "Oil & Natural Gas Corporation Ltd. v. Jindal Drilling & Industries Ltd." has considered the question "whether to an application filed u/s 34 of the 1996 Act and to an appeal filed u/s 37 of the 1996 Act, the provisions of Article 3 of Schedule I would be applicable". The Division Bench has considered the question with reference to the provisions of Section 8 of the General Clauses Act and has come to the conclusion that because the scheme of 1996 Act is totally different from the 1940 Act, the 1996 act cannot be said to be re-enactment of the 1940 Act and therefore, even considering the provisions of Section 8 of the General Clauses Act, it cannot be said that Article 3 of Schedule I of the Bombay Court fees Act is applicable to an application made u/s 34 and an appeal filed u/s 37 of the 1996 Act.

3. Thus, it is clear from what has been observed above that for answering the question framed above, first we have to consider whether Article 3 of Schedule I of the Bombay Court fees Act applies to an application filed u/s 34 and an appeal filed u/s 37 of the 1996 Act, and if we find that Article 3 of Schedule I of the Bombay Court fees Act does not apply then we will have to make an enquiry to find out which is the provisions which will be applicable ?

4. In so far as the writ petition no.4064 of 2008 which also has been placed before us is concerned, it appears that a petition u/s 34 of the 1996 Act challenging an Award was filed before the District Judge, Pune. Before the learned District Judge, an application was made by the respondent for direction to applicant to pay court fee in accordance with Article 3 of Schedule I of the Bombay Court Fees Act. That application has been decided by the learned District Judge by order dated 20.2.2008. The learned District Judge held that court fee is payable according to the provisions of Article 3 of Schedule I of the Bombay Court fees Act. That order was challenged in writ petition no.4064 of 2008. When that writ petition came up before the learned Single Judge of this Court, it was contended before the learned Single Judge that the judgment of the Division Bench in "Govardhani Constructions Company" case needs reconsideration. The learned Single Judge on finding that the question of correctness or otherwise of the judgment of the Division Bench in the case of "Govardhani Constructions Company" has been referred to a larger bench, has directed the office to place the paper to the Hon"ble the Chief Justice, and accordingly, that petition has also been placed before us. The question to be considered in that petition is also the same as in the other petitions that are listed before us. As the question before us relates to payment of Court fees, we issued notice to the State of Maharashtra. In response to the notice, the learned Advocate General appeared before us, we heard him.

5. On behalf of the petitioners, it was submitted that Article 1(f)(iii) of Schedule II of the Bombay Court Fees Act is applicable to the petitions filed u/s 34 of the 1996 Act and not Article 3 of Schedule I of the Bombay Court Fees Act. It was

submitted that the Arbitration Act, 1940 has been repealed and re-enacted by the Arbitration & Conciliation Act, 1996. It was submitted that remedy to challenge an award was by way of an arbitration petition u/s 33 of the 1940 Act, and since the Court is considering the issue as to which article of Bombay Court Fees Act is attracted to a petition challenging an Award u/s 34 of the 1996 Act, the Court would have to examine whether there is any repeal and re-enactment of the provision relating to challenge of an award under the Arbitration Act, 1940 by another provision under the 1996 Act. It was further submitted that remedy of challenging an Award which was available under the provisions of the 1940 Act is now available u/s 34 of the 1996 Act. It was submitted that Article 18(a) of Schedule II provided for payment of fixed court fees on an application u/s 20 of the 1940 Act. It was submitted that though the 1940 Act has been repealed and re-enacted by the 1996 Act, subject legislated upon i.e. arbitration has remained the same. It was submitted that remedy of challenging an award available u/s 33 of the 1940 Act is continued u/s 34 of the 1996 Act. It was submitted that since the Court is considering the applicability of the relevant article of Bombay Court fees Act, the Court has to see whether the relevant article applicable to the petition challenging an award under the provisions of the 1940 Act has been repealed and re-enacted by another provisions under the 1996 Act or not. It was submitted that since Section 33 of the 1940 Act is repealed and re-enacted by the 1996 Act, in view of the provisions of Section 8 of the General Clauses Act, the provisions applicable to challenge an Award is Section 34 of the 1996 Act on which court fees is to be paid, therefore, reference in Article 3 of the Bombay Court Fees Act to 1940 Act has to be read as reference to 1996 Act. The learned Counsel relied on the judgment of the Supreme Court in the case *The State rep. by Inspector of Police, Pudukottai, Tamil Nadu Vs. A. Parthiban*, , as also the judgment of the Supreme Court in the case *New Central Jute Mills Co. Ltd. Vs. The Assistant Collector of Central Excise, Allahabad and Others*, .

6. He further submitted that Section 8 of the General Clauses Act does not require that latter Act repealing and re-enacting an earlier Act should be a repealing and amendment Act but only requires that a Central Act should repeal and re-enact a former enactment either with modification or without modification. He submitted that where a provision of an Act omitted by an Act and the said Act is simultaneously re-enacts a new provision which specially covers the filed occupied by the repealed provision with certain modification, in that event such re-enactment is regarded as having force continuously and the modification or changes are considered as amendment coming into force with effect from the date of enforcement of re-enacted provision. He relied on the judgment of the Supreme Court in the Case *Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc.*, ". He further submitted that even the statement of objects and reasons of the 1996 Act makes it clear that the bill sought to consolidate and amend the law relating to domestic arbitration, international and commercial arbitration, enforcement of foreign arbitral award and to define the law relating to conciliation taking into account

the Uncitral modern law and rules. He further submitted that most of the provisions of the 1940 Act are also incorporated in the 1996 Act with or without modification. It was submitted that some of the provisions of 1940 Act are deleted in 1996 Act and certain new provisions are introduced in the 1996 Act. It was submitted that chapter regarding Conciliation proceedings has been introduced in the 1996 Act. It was submitted that Section 8 of General Clauses Act applies even when any provision of a former enactment is repealed and re-enacted with or without modification. The learned Counsel then took us through the definition of term "modification" given in "Law Lexicon". Then the learned Counsel took us through the provisions of Section 85 of the 1996 Act to show that the 1940 Act has specifically been repealed by Section 85 of the 1996 Act. The learned Counsel then relied on the judgment of the Supreme Court in the case *Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd.*, " and submitted that the Supreme court in that judgment has held that when an arbitration clause entered into before 1996, the 1940 Act is referred to, to the arbitration proceedings initiated after the commencement of 1996 Act in relation to such an arbitration clause, the provisions of the 1996 Act apply. The learned Counsel submits that the Division Bench in its judgment in the case *"Jindal Drilling & Industries Ltd."* could not have considered all the provisions of the 1996 Act and the 1940 Act because only the relevant provisions were to be considered in view of Section 8 of the General Clauses Act. The learned Counsel, thus, submitted that in view of the provisions of Section 8 of the General Clauses Act it has to be held that reference to the provisions of 1940 Act in Article 3 of Schedule I of the Bombay court fees Act has to be read to the relevant provisions of the 1996 Act.

7. On the other hand, the learned Advocate General submitted that Article 3 of Schedule I of the Bombay Court fees Act carves out an exemption from payment of ad-valorem court fee in case of any application, petition, including memorandum of appeal for setting aside or modifying any award under the 1940 Act. It was submitted that the said provision specifically referred to the 1940 Act and the exemption conferred thereunder is restricted to an award made under the 1940 Act and the said exemption cannot be extended to the arbitration petition challenging the award made under the 1996 Act. It was submitted that in order to claim benefit u/s 8(1) of the General Clauses Act, the following elements are required:

- (i) Repeal and re-enactment of any provision.
- (ii) With or without modification.
- (iii) Reference to the said provision in any other enactment.
- (iv) Unless contrary intention appears, to be construed as reference to the re-enacted provision.

It was further submitted relying on the observations of the Supreme Court in the case *"Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2 SCC 477"* that the scheme of the 1996 Act and the 1940 Act is totally different and the provisions of

the 1940 Act cannot be referred for interpreting the provisions of the 1996 Act. It was, therefore, submitted that the 1996 Act is not a re-enactment of the 1940 Act. It was submitted that the 1996 Act is entirely a new enactment. It was further submitted that Section 34 of the 1996 Act cannot be said to be an enactment of Section 30 or Section 33 of the 1940 Act. The learned Advocate General took us through the provisions of Sections 30 and 33 of the 1940 Act and the provisions of Section 34 of the Arbitration Act and submitted that width and amplitude of challenge provided by two provisions is totally different. It was submitted, therefore, that Section 34 of the 1996 Act cannot be said to be a re-enactment with modification of Sections 30 or 33 of the 1940 Act. The learned Advocate general took us through some decisions to show what, according to him, is the meaning of term "modification". It was submitted that although heading of Section 34 of the 1996 Act is similar to that of Section 33 or Section 30 of the 1940 Act, the substance thereof is entirely new. It was contended that the reliance placed by the petitioners on the observations of the Supreme Court in its judgment in the case "Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd." referred to above is also not proper because the question that was considered by the Supreme Court is totally different.

8. For the purpose of considering the first question that is "whether the provisions of Article 3 of Schedule I of the Bombay Court Fees Act apply to a petition filed u/s 34 of the 1996 Act or an appeal filed u/s 37 of that Act", we have first to see Article 1 and Article 3 of Schedule I of the Bombay Court fees Act. Perusal of Article 1 of Schedule I shows that on a plaint or memorandum of appeal presented to any civil or revenue Court, the Court fee is liable to be paid according to the subject matter involved in such a plaint or memorandum of appeal. Thus, according to Article 1 court fee is payable on ad-valorem basis. Article 3 of Schedule I reads as under:

3. Plaint, application or --- A fee on the petition (including amount or value of memorandum of appeal), to the award sought set aside or modify any to be set aside or award otherwise than under modified, according the Arbitration Act,1940. to the scale prescribed under Article 1.

According to Article III of Schedule I, on any plaint, application or petition or memorandum of appeal for setting aside or modifying an award, same court fee is payable as is payable on a plaint or memorandum of appeal under Article 1. Thus, when an award is challenged by a plaint, application, petition or memorandum of appeal, court fee is payable on ad-valorem basis. But from this requirement of payment of court fee on ad-valorem basis, Article 3 excludes an application or petition or memorandum of appeal filed in civil or revenue Court challenging any award made under the Arbitration Act,1940. Thus, the provisions of Article III of Schedule I do not apply when an application is filed or appeal is filed challenging an award made under the Arbitration Act,1940. The question, therefore, that arises for consideration is "whether reference to the provisions of 1940 Act found in Article III of Schedule I of the Bombay Court fees Act can be

said to include reference to the 1996 Act." The petitioners have relied on the provisions of Section 8 of the General Clauses Act to contend that reference to the provisions of the 1940 Act in Article III of Schedule I has to be taken as reference to the relevant provisions in the 1996 Act. It is Sub-section 1 of Section 8 of the General Clauses Act which has been relied on. Sub-section (1) of Section 8 of the General Clauses Act reads as under:

8. Construction of references to repealed enactments.- (1) Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals and reenacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

Perusal of the above provisions shows that where by a central enactment any provision of a former enactment is repealed and re-enacted with or without modification then reference in any other enactment to the provision so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted. In the present case, it is common ground that the former enactment is the 1940 Act, the new enactment is the 1996 Act and any other enactment is the Bombay Court Fees Act.

9. Now first we have to see which is the provision of 1940 Act (former enactment) which has been referred to in the Bombay Court Fees Act (any other enactment). Perusal of Article 3 of Schedule I quoted above shows that the provision of 1940 Act which relates to making of an application or petition providing for setting aside or modifying an Award is referred to. It may be pointed out here that for considering the effect of Section 8 of the General Clauses Act, primarily it is not necessary to consider the scheme of entire new enactment and the former enactment, what is primarily to be considered is the provisions of the former enactment which is referred to in the other enactment. Therefore, in this case, primarily, it is not necessary for us to consider the entire scheme of the 1940 Act (former enactment) and the 1996 Act (the new enactment). What we have to, primarily, consider is the provision relating to challenge to an Award contained in the 1940 Act and the provisions contained in the 1996 Act relating to challenge to an Award made under that Act, and to decide whether it can be said that those provisions which were contained in the 1940 Act have been repealed and re-enacted with or without modification in the new Act.

10. It was not disputed before us that by Section 85 of the 1996 Act one of the enactments which has been repealed is the 1940 Act, therefore, there is no debate that all the provisions of the 1940 Act including the provisions which are referred to in Article 3 of Schedule I of the Bombay Court Fees Act have been repealed by the new Act. The entire debate before us was whether those provisions have been re-enacted with or without modification in the new enactment. For that purpose, first we have to see which are the provisions

contained in the 1940 Act relating to challenging an award made by Arbitrator under the 1940 Act. The first provisions which is relevant in that regard is Section 33 of the 1940 Act which reads as under:

33. Arbitration agreement or award to be contested by application. - Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

PROVIDED THAT where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

Perusal of the above quoted provision shows that any award made by Arbitrator under that Act can be challenged by making an application to the Court. The term "Court" is defined by Section 2(c) of the 1940 Act which reads as under:

2.(c) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not except for the purpose of arbitration proceedings u/s 21, include a Small Cause Court;

Thus, an award made under the 1940 Act can be challenged by making an application u/s 33 to a civil Court which would have jurisdiction had the subject matter of the Award been the subject matter of a suit. Section 30 of the 1940 Act lays down as to on what ground an Award can be set aside by the Court. Section 30 reads as under:

30. Grounds for setting aside award.- An award shall not be set aside except on one or more of the following grounds, namely:

(a) that an arbitrator or umpire has misconducted himself or the proceedings:

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec.35:

(c) that an award has been improperly procured or is otherwise invalid.

Thus, an award made under the 1940 Act could be challenged by making an application u/s 33 to the Court and that Award could be set aside by the Court on the grounds which are mentioned u/s 30.

11. So far as the 1996 Act is concerned, the relevant provisions is Section 34. It is Sub-section (1) and (2) of Section 34 which are relevant for the present purpose which reads as under:

34. Application for setting aside arbitral award- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An Arbitral award may be set aside by the Court only if -

(a) the party making the application furnishes proof that -

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(b) the Court finds that -

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India. Explanation.- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

Perusal of Sub-section (1) and (2) of Section 34 shows that Arbitral award can be challenged by making an application before a Court. The term "Court" is defined by Section 2(e) of the 1996 Act. It reads as under:

2.(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

A comparison of definition of term "Court" in the 1940 Act and the 1996 Act which are both quoted above shows that the definitions are substantially the same except that in the 1940 Act an application could be made to the Civil Court but now as per the 1996 Act an application can be made only to the Principal Civil Court of original jurisdiction in a district. So far as this Court on original side is concerned, there is no change made. Thus, a comparison of the provisions of Sub-section (1) of Section 34 of the 1996 Act with the provisions of Section 33 of the 1940 Act shows that by virtue of the provisions of Section 85 of the 1996 Act, Section 33 of the 1940 Act has been repealed and has been re-enacted in the form of Sub-section (1) of Section 34 of the 1996 Act with a slight

modification in the definition of the term "Court". As observed above, in so far as the original jurisdiction of this Court is concerned, even that difference does not exist. In other words, in so far as the original jurisdiction of this Court is concerned, in the matter of challenge made to an award made by Arbitrator, the provisions of Section 33 of the 1940 Act has been repealed and reenacted with hardly any modification. A comparison of the provisions of Sub-section (2) of Section 34 of the 1996 Act with the provisions of Section 30 of the 1940 Act shows that the grounds on which an award could be set aside by the Court under the 1940 Act are different than the ones on which an award can be set aside under Sub-section (2) of Section 34 of the 1996 Act. But, in our opinion, so far as the provisions of Article 3 of Schedule I of the Bombay Court Fees Act is concerned, the grounds on which the Court can set aside an Award is not relevant, because the subject matter of the provisions of Bombay Court Fees Act is payment of Court fees on plaint, application, petition or memorandum of appeal and not the grounds on which the Court can grant reliefs to the applicant, plaintiff, petitioner or appellant. In our opinion, therefore, the only provision of the 1940 Act referred to in Article 3 of Schedule I of the Bombay Court Fees Act is the provisions of Section 33 of the 1940 Act and bare comparison of that provision with the provisions of Sub-section (1) of Section 34 of the 1996 Act shows that the provision of Section 33 of the 1940 Act is repealed and re-enacted in Sub-section (1) of Section 34 of the 1996 Act with slight modification. Therefore, reference to the provisions of Section 33 of the 1940 Act in Article 3 of Schedule-I of the Bombay Court fees Act has to be construed, in view of the provisions of Section 8 of the General Clauses Act, as reference to the provisions of Section 34 of the 1996 Act. So far as an appeal filed u/s 37 of the 1996 Act is concerned, perusal of Section 37 shows that an appeal is provided to the appellate Court against an order setting aside the arbitral award or refusing to set aside an arbitral award u/s 34. Thus, as we have found that the provisions of "Article 3 of Schedule-I" do not apply to an application or petition filed u/s 34 of the 1996 Act, they will also not apply to the memorandum of appeal filed to set aside or modify an award made by the Arbitrator under the 1996 Act. In other words nothing contained in Article 3 of Schedule-I of the Bombay Court fees Act applies to an application, petition or memorandum of appeal to set aside or modify any Award made under the 1996 Act as it does not apply to an application or petition or memorandum of appeal to set aside or modify an Award made under the Arbitration Act, 1940. Perusal of the provisions of Section 8 of the General Clauses Act shows that "references in any other enactment to a provision in a former enactment" is to be construed as "reference to re-enacted provision in the new enactment" unless a different intention appears. The different intention may appear either in the new enactment or in the other enactment. Nobody has pointed out to us any provision either in the 1996 Act or in the Bombay Court fees Act which can be construed as a different intention or which will show that it was not the intention of the Maharashtra legislature to exclude an application or petition or memorandum of appeal filed in Court to set aside or modify an award made under the 1996 Act, from the provisions of

"Article 3 of Schedule-I" of the Bombay Court Fees Act. It appears that the intention behind excluding an application made, challenging the Award made under the 1940 Act, from requirement of payment of ad-valorem court fee which is required to be paid if the same litigant files a suit on the same subject matter, was to encourage a litigant to go for arbitration instead of filing a suit. Nothing has been pointed out to us that there is any change in that legislative policy. On the contrary, from the preamble of the 1996 Act it is clear that the policy of the legislature is to encourage people to adopt the mode of arbitration for resolving disputes.

12. So far as the judgment of the Division bench in "Govardhani Construction Company" case is concerned, it is obvious from the judgment that the provisions of Section 8 of General Clauses Act were not pointed out to the Court and the Court, therefore, on reading the language of Article 3 of Schedule I of the Bombay Court Fees Act held that in that Article there is no reference to an Award made under the 1996 Act. The relevant observations are to be found in paragraph 10 of that judgment which read as under:

10. It was also sought to be contended that in the Article 3 of Schedule I of the said Act, the Legislature in its wisdom has excluded the award passed under Arbitration Act, 1940 and the same principle should apply in case of award passed under the Arbitration and Conciliation Act, 1996. We are afraid, the contention cannot be accepted for the simple reason that the Arbitration and Conciliation Act came into force in the year 1996, specifically w.e.f. 22nd August, 1996. Prior to that, the Arbitration and Conciliation Ordinance, 1996 was promulgated on 16th January, 1996. The Arbitration and Conciliation Act, 1996 replaced the said Ordinance and the Arbitration Act, 1940. Yet no amendment has been made since 1996 till this date to Article 3 of Schedule I of the said Act which clearly restricts the exclusion from its applicability the Award under the Arbitration Act, 1940. In other words, the award passed under the Arbitration and Conciliation Act, 1996 is not excluded under Article 3 of Schedule I and for the same reason, the said Article which specifically deals with the subject-matter of setting aside or modifying any award either at the original stage by filing an application or a petition in that regard, and also at the appellate stage by presenting memorandum of appeal, would naturally be applicable to all such proceedings. Needless to say that the appeal is a continuation of the proceedings at the original stage. The provision under Article 3 of Schedule I clearly speaks of plaint, application or petition including memorandum of appeal to set aside or modify any award. A memorandum of appeal to set aside or modify any award spoken of under Article 3 of Schedule I is obviously in relation to an order passed on an application or a petition to set aside or modify an award. The Arbitration and Conciliation Act, 1996 nowhere provides any appeal against the award itself. On the contrary, it specifically provides for a petition u/s 34 for setting aside the arbitral award and Section 37(1)(b) entitles the aggrieved party to file an appeal against the order passed u/s 34 either to set aside or to refuse to set aside the arbitral award. Once it is apparent that Article 3 of Schedule I nowhere excludes

from its applicability any award passed under any other statutes including the Arbitration and Conciliation Act, 1996 and further it relates to a petition as well as an appeal to set aside or modify "any award", it would obviously include an award passed under the Arbitration and Conciliation Act, 1996 or any order in relation thereto. In our considered view, therefore, the appellant is liable to pay Court fee on the appeal in hand in terms of Article 3 of Schedule I of the said Act.

So far as the judgment of the Division Bench in the case "Jindal Drilling & Industries Ltd.", it is clear that the provisions of Section 8 of the General Clauses Act were pointed out to the Court and they have been considered by the Court. The Court has indicated the question it was considering in paragraph (9) of the judgment in the case "Jindal Drilling & Industries Ltd." as follows:

The question, however, which arises is whether the New Act can be said to be a statute of the nature of re-enactment on repeal of the Old Act.

The Division Bench, thereafter, referred to the judgment of the Supreme Court in the case *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, then judgment in the case of *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, then judgment of the Supreme Court in the case *Union of India Vs. M/s Popular Construction Co.*, " and has, in paragraph (14) and (15), held thus:

14. The Apex Court having already considered and declared that the New Act is different from the Old Act, the contention that the New Act is a reenactment within the meaning of the said expression u/s 8 of the General Clauses Act, cannot be accepted. The New Act has been enacted not merely by way of an amendment to the Old Act but the entire scheme of the New Act has been totally different and this has been elaborately discussed and clearly held by the Apex Court in the matters of *Sundaram Finance*, *Mehul Construction* as well as in *Popular Construction* and *Olympus Superstructures* (supra).

15. In the facts and circumstances as stated above, therefore, it is difficult to accept the contention on behalf of the appellants that Article 3 in Schedule I of the BCF Act is required to be read as referred to the New Act in place of the Old Act consequent to enforcement of the New Act.

It is, thus, clear that the Division Bench has held that because the Supreme Court has observed in the above referred three judgments that the Scheme of 1996 Act is totally different from the scheme of 1940 Act in many respect the 1996 Act cannot called a re-enactment of the 1940 Act within the meaning of the said expression found in Section 8 of the General Clauses Act.

13. In our opinion, in order to find out whether because of the provisions of Section 8 of the General Clauses Act, the expression "Arbitration Act, 1940" found in Article 3 of Schedule I of the Bombay Court Fees Act can be taken to mean Arbitration Act, 1996, it was not necessary for the Division bench to consider the scheme of the entire 1996 Act. What should have been seen was whether the

provision in the 1940 Act relating to challenging an Award is re-enacted with or without modification in the new enactment. Because, it appears that when the Division Bench delivered the judgment in the case of "Jindal Drilling & Industries Ltd.", the question "whether the 1996 Act is a re-enactment of 1940 Act with modification was no more res integra because of the judgment of the Supreme Court in the case "Steel authority of India Ltd." referred to above. In the case of "Steel authority of India Ltd.", the Supreme Court was considering the provisions of Section 85 of the 1996 Act which reads as under:

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

(2) Notwithstanding such repeal,-

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

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

Perusal of the provisions of above quoted Section 85 of the 1996 Act shows that by Sub-section (1) among other Acts, the Arbitration Act 1940 has been repealed, and by virtue of clause (a) of Sub-section (2) the provisions of the 1940 Act continued to apply to arbitral proceedings which commenced before the commencement of 1996 and in so far as the arbitral proceedings which commence on or after the commencement of the Act, the provisions of the 1996 Act apply to such proceedings. The Supreme Court has decided several cases by its judgment in the case of "Steel Authority of India Ltd." One of the cases was that of "Rani Constructions (P) Ltd. The Supreme Court in that case was considering the provisions of Section 85(2)(a) of the 1996 Act with reference to the arbitration clause in the case "Rani Constructions (P) Ltd.". That arbitration clause has been quoted by the Supreme Court in paragraph (9) of that judgment, which reads as under:

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

The question in "Rani Constructions (P) Ltd." which the Supreme Court in the above quoted arbitration clause was considering is "whether the 1996 Act can be stated to be a statutory modification or reenactment of the 1940 Act." Perusal of the judgment of the Supreme Court in the case "Steel Authority of India Ltd" shows that the Supreme Court has referred to its judgment in the case

"Sundaram Finance Ltd." and has held that the term "statutory modification or re-enactment for the time being in force" used in the arbitration clause in the case of "Rani Constructions (P) Ltd." includes reference to the 1996 Act. The observations of the Supreme Court in paragraphs (35), (36), (37) and (38) are relevant, they read as under:

35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of Rani Constructions (Civil Appeal No.61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions - one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. The expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the New Act would clearly apply in the case of Rani Constructions in Civil appeal no.61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Constructions that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expression "unless otherwise agreed" and "law in force" it does give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after the coming into force of the new Act.

36. Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by a Single Judge in Reshma Constructions v. State of Goa. In that case the arbitration clause in the contract provided as under:

Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory

modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may be brought about in such law. This is how the High Court considered the issue before it;

Considering the scheme of the Act, harmonious reading of the said provision contained in Sub-section (2) of Section 85 thereof would disclose that the reference "otherwise agreed" necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Section 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be followed - other in terms of the new Act or the old Act - is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference "otherwise agreed by the parties" in Section 85(2)(c) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression "otherwise agreed" does not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act.

We agree with the High Court on the interpretation put to the arbitration clause in the contract.

38. Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that. Thus

construing Clause 25, in Rani Constructions (CA No.61 of 1999) the new Act will apply.

It is clear from the observations of the Supreme Court quoted above that the 1940 Act and the 1996 Act are legislation on the same subject and the 1996 Act is a re-enactment of 1940 Act with modification. In our opinion, therefore, the Division Bench in "Jindal Drilling & Industries Ltd." was not justified in holding that the 1996 Act cannot be termed as reenactment of the 1940 Act within the meaning of that explanation u/s 8 of the General Clauses Act as observed above.

14. Now having found that Article 1 of Schedule 1 of the Bombay Court Fees Act does not apply to an application or petition or memorandum of appeal filed to challenge an Award made under the 1996 Act, the question arises which would be the Article which will govern payment of court fees on a petition filed u/s 34 firstly before this Court challenging the Award made under 1996 Act. Bare perusal of the Bombay Court Fees Act and the Schedules of that Act shows that payment of court fees on a petition filed on the original side of this Court challenging an Award made u/s 34 of the 1996 Act would be governed by Article 1(f)(iii) of Schedule II of the Bombay Court Fees Act, which reads as under:

15. In so far as an appeal filed before this Court u/s 37 of the Arbitration and Conciliation Act, 1996 against an order made in a petition filed u/s 34 of the 1996 Act is concerned, it will be governed by Article 13 of Second Schedule which reads as under:

When a petition u/s 34 is to be filed before a Principal Civil Court of original jurisdiction which is not a High Court, the question arises which Article of either First Schedule or Second Schedule would apply. In so far as the challenge to an Award made under the 1940 Act is concerned, an application u/s 33 of that Act could be made to a Civil Court and therefore, payment of court fee was governed by Article 1(a) of Schedule II which reads as under:

This was so because the application was to be presented to the Court of Civil Judge which was not a principal Civil Court of original jurisdiction. But now because of change of definition of term "Court" in the 1996 Act, a petition has to be presented, challenging an Award made under the 1996 Act in terms of the provisions of Section 34 thereof, before the Principal Civil Court of original jurisdiction. We have not been pointed out any entry either in the first Schedule or in the Second Schedule which applies to an application or petition to be made before the Principal Civil Court of original jurisdiction, and therefore, when a litigant wants to file petition before a Principal Civil Court having original jurisdiction which is not High Court, challenging an Award made under the 1996 Act, no Court fee under Bombay Court Fees Act is payable because of absence of a general or specific provision. Whereas on an appeal filed u/s 37 of the 1996 Act against an order made in that petition, court fee would be payable as observed above under Article 13 of Schedule II of the Bombay Court Fees Act, because the appeal will lie to the High Court. The question, therefore, framed for our

consideration is answered thus:

(i) Article 3 of Schedule I of the Bombay Court fees Act does not apply to a petition, application or memorandum of appeal filed for challenging an Award made under the 1996 Act, and Court fee on a petition filed u/s 34 of the 1996 Act challenging an Award in this Court is payable according to Article 1 (f)(iii) of Schedule II.

(ii) No Court fee under the Bombay Court fees Act is payable when a petition u/s 34 challenging an Award is filed before any Principal Civil Court of original jurisdiction which is not High Court.

(iii) On an appeal filed in this Court u/s 37 of the 1996 Act challenging an order passed in a petition filed u/s 34 of the 1996 Act court fee is payable according to Article 13 of Schedule II of the Bombay Court Fees Act.