Bombay High Court M/S. Reshma Constructions vs State Of Goa on 12 March, 1998 Equivalent citations: 1998 (3) BomCR 837, 1999 (1) MhLj 462 Author: R Khandeparkar Bench: R Khandeparkar ORDER R.M.S Khandeparkar, J. 1. The question which arises for determination in the present petition is about the applicability of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the new Act") to the arbitration proceedings commenced under the Arbitration Act, 1940 (hereinafter called as "the old Act") and which were pending for disposal at the time when the new Act came into force. 2. The facts, in brief relevant for the decision are that the petitioner was awarded with the work of Construction of Canal Head Regulator of Chapoli Minor Irrigation Tank at Canacona and the agreement between the parties in respect thereof provided that in case of dispute between the parti es, the same to be settled by way of arbitration. It is the case of the petitioner that the respondent failed to settle the dues which were claimed by the petitioner by its letter dated 15-8-93 and, therefore, the petitioner invoked the arbitration clause in the said agreement by a letter dated 8-2-94 and since the Chief Engineer, Irrigation Department, Government of Goa failed to appoint an arbitrator within the prescribed time, the petitioner filed an application under section 20 of the old Act in the Court of Civil Judge, Senior Division at Margao, which was registered as Special Civil Suit No. 174/94. The trial Court in the said civil suit appointed a retired Executive Engineer by name Shri H.R. Anand as the sole arbitrator to decide the dispute between the parties and the said arbitrator gave his award on 30-7-1996. Meanwhile, the new Act came into force with effect from 25-1-96. The arbitrator filed his award in the trial Court in terms of the provisions contained in section 14 of the old Act and the respondent herein filed its objections to the said award on 7-9-1996. The respondent further filed an application on 20-10-96 challenging the very appointment of the arbitrator by the trial Court on the ground that the arbitrator ought to have been appointed by the personal designata and not by the Court. While the said proceedings were pending before the trial Court, the petitioner herein on 20-12-96 filed an application for dismissal of the entire proceedings before the trial Court on the ground that in view of section 85 of the new Act, read with Clause 25 of the said agreement between the parties, the provisions of the new Act are applicable to the proceedings and, therefore, in terms of section 26 of the new Act, the award of the arbitrator is itself enforceable as if it is a decree of the Civil Court. The said application was objected to by the respondent herein. The trial Court by impugned order dated 2- 8-97, dismissed the said application of the petitioner holding that section 85 of the new Act provides that the proceedings commenced under the old Act before coming into force of the new Act would be governed by the old Act, unless the parties enter into an agreement to the contrary, after the new Act comes into force. 3. The section 85 of the new Act reads thus :- "85. Repeal and saving. - (1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937), the Arbitration Act, 1940 (X of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (XLV 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." The above quoted section 85 of the new Act is hereinafter called as "the section 85" On plain reading of the section 85, it is clear that it not only contains the provisions relating to repealing of the old Act, but it also contains the provisions regarding saving Clause in respect of the provision of the old Act to the pending proceedings. The sub-section (1) of section 85 deals with repeal of the old Act along with some other enactments; whereas, sub-section (2)(a) deals with saving Clause in relation to the provisions of the old Act to the pending proceedings under certain circumstances. Under the saving Clause in the sub-section 2(a), the parties can agree that the provisions of the new Act should apply to the proceedings which were pending at the time when the new Act came into force. Clause (b) of sub-section (2) of section 85, provides that the rules and the notification issued under the old Act shall be deemed to be issued under the new Act to the extent to which they are not repugnant to the provisions contained in new Act. In other words, section 85 makes it abundantly clear that the provisions of the old Act shall continue to apply to the proceedings which had commenced before the new Act had come into force, unless otherwise agreed upon between the parties to the proceedings. 4. The question which, therefore, arises now is whether the agreement which is referred to in the section 85 for the purpose of applicability of the new Act to the pending proceedings which had already commenced under the old Act is one necessarily to be entered into after enforcement of the new Act or any clause to that effect in an agreement already entered into between the parties before enforcement of the new Act would be sufficient for that purpose. Once the new Act has come into force and by virtue of section 85, the old Act having been repealed, in the normal circumstances there would have been no scope for any insistence of applicability of the provisions of the old Act, but repealing section does not merely repeal the old Act, but it also saves its applicability to the pending proceedings by virtue of the provisions contained in sub-section 2(a) of section 85. But for the said provision relating to the saving of the provisions of the old Act to the pending proceedings, there would have been no difficulty in following the well established principle of law that no person has any vested right in any particular procedure and if by an Act of Parliament the mode of procedure is altered then he has no other right than to proceed according to altered mode and for the same reason, in agreeing with the contention of the petitioner about the applicability of the new Act to the proceeding in question. However, the saving clause in section 85 provides to the contrary and accordingly, the provisions of the old Act would continue to apply to the pending proceedings. Therefore, normally by virtue of the saving clause, the arbitration proceedings pending on the dale of enforcement of the new Act would continue to be governed by the provisions of the old Act. However, the saving clause also contains one exception to this rule, whereby the applicability of the old Act to the pending proceedings is made subject to the agreement to the contrary

between the parties to the proceedings. Indeed, the sub-clause (2) of the section 85 in no uncertain terms saves applicability of the provisions of the old Act to the pending proceedings unless otherwise agreed by the parties. 5. Now the question, therefore, arises is that what does the expression "unless otherwise agreed by the parties" in the saving clause of the said section convey? Does it refer to the time factor as to when such agreement is required to be entered into between the parties? Does it mean that the agreement is necessarily to be executed after coming into force of the new Act? Does it mean that an agreement to that effect entered into prior to the enactment of the new Act would be of no effect? Does it refer to the intention of the parties regarding applicability of the provisions of the particular Act new or old, irrespective of time factor as regards the execution of such agreement? 6. At this stage, one cannot forget that any provision in law cannot be considered out of the framework of a statute. The provisions of the law should be considered to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences. The Court's endeavour should be to avoid an unjust or absurd result. The purpose of the Act and the object of particular section to be interpreted, has to be borne in mind and the Act should be read purposefully and meaningfully having regard to the spirit of the Act. The provisions of the law are to be given rational meaning. It is well established rule of interpretation of statute that while the words of an enactment are important, the context is no less important. The words, therefore, should be read in context and not in isolation. It is said that the words 'like men' do not have their full significance when standing alone and like men they are better understood by the company they keep. 7. The Statements of Objects and the Reasons given in the Arbitration and Conciliation Bill 1995 disclose that the bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and to define the law relating to conciliation taking into account the UNCITRAL Model Law and Rules. Some of the main objectives of the Bill read thus :- (a) to make provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration; (b) to minimise the supervisory role of courts in the arbitral process; (c) to provide that every final arbitral award is enforced in the same manner as if it was a decree of the Court. 8. Perusal of the various provisions of the new Act disclose that most of provisions therein are made "subject to an agreement between the parties". Almost every section incorporates expressions "unless otherwise agreed by the parties" or "parties are free to agree" or "unless the parties have otherwise agreed" and the like. Indeed, the provisions contained in Chapter III of the new Act relating to composition of arbitral Tribunal while dealing with the procedure of appointment of arbitrator, procedure for challenging the appointment of arbitrator, provisions regarding termination of mandate and substitution of arbitrator, the procedure for repeatation of the hearing before the replaced arbitrator, procedure regarding validity of the order passed by the earlier arbitrator, so also the provisions regarding the jurisdiction of the arbitral tribunal under Chapter IV of the new Act. While dealing with the interim measures by the arbitral tribunal, then under Chapter V, regarding conducting arbitral proceed-

ings, the procedural rules to be followed by arbitral tribunal, provision regarding the date of commencement of the arbitration proceedings, the language of arbitral proceedings; the provision regarding amendment of claim and defence, procedure of hearing before the arbitral tribunal, procedure to be followed in default of the parties, procedure regarding making arbitral award and termination of proceedings, under Chapter VI including the provisions regarding formal contents of the award, etc., are some of the important provisions in the new Act, which are made subject to the agreement to the contrary between the parties to the proceedings. In other words, the parties are given free hand to agree regarding the procedure relating to various aspects of the arbitration proceedings and only in the absence of such agreement, the provisions contained in the new Act in respect thereof would apply to such proceedings. 9. In fact, the above quoted objects described in the bill of 1995, disclose a clear intention on the part of the legislature to make the arbitration procedure not only fair and efficient, but capable of meeting the need of each and every arbitration proceedings and further to minimise interference of the Court in such proceedings and to give finality to the awards passed in such proceedings without much scope for judicial review of the same. Various provisions of the new Act clearly give ample freedom to 'the parties to the proceedings to decide about different procedural aspects of the arbitration proceedings in the manner the parties deem fit and proper. In this background, it will be relevant to peruse the saving clause even at the cost of repeatation. The said saving clause contained in sub-section 2(a) of section 85 of the new Act reads thus :- "2(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;" 10. Considering the scheme of the Act, harmoneous 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 agreement. 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- either 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)(a) 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 expressions "otherwise agreed" do 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. The intention of the legislature in this regard is evident from the later portion of the saving Clause which provides that the new Act shall apply to the arbitral proceedings commenced after enforcement of the new Act, but in relation to the agreement which has already entered into and which contains provision for reference of the matter to the arbitration. In other words, in relation to the matters wherein the arbitration proceedings would commence after enforcement of the new Act, but under the agreement already executed before coming into force of the new Act, the provisions of the new Act would apply to such proceedings. In respect of such proceedings, it is not left to the Will of the parties to adopt the procedure of their choice - old or new Act but such proceedings are necesarily to be governed by the provisions of the new Act. But one thing is clear from this provision that the provisions of the new Act are made applicable even to the proceedings which commence after coming into force of the new Act, but under the agreement executed before coming into force of the new Act. Bearing this in mind, it will be thus clear that the expressions "otherwise agreed by the parties" necessarily refer to the intention of the parties regarding applicability of the provisions of the new or old Act and not to the time factor. In this view of the matter, the findings of the trial Court that the said agreement is required to be executed after enforcement of the new Act is not only erroneous and contrary to the scheme and spirit of the Act, but tends to defeat the very object and purpose sought to be attained by the new Act. In fact, the trial Court had rushed to the conclusion that such an agreement is necessarily to be executed after enforcement of the new Act without analysing even the scope and meaning of the expressions "otherwise agreed by the parties". The impugned order does not even disclose application of mind by the trial Court in this regard to the matter in issue. 10-A. The question then arises in the instant case is whether there is any such agreement between the parties for applicability of the new Act to the arbitration proceedings between them or not ? The petitioner insists that there has been an agreement between the parties to the effect that the new Act would apply to the proceedings in question and the same is contained in sub-clause of the Clause 25 of the agreement between the parties and which reads thus : "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." There is no dispute about the existence of the said clause in the agreement between the parties. According to the learned Advocate for the petitioner, the expressions ". . . . . or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply . . . . .", would clearly mean that the parties had already agreed upon that in case of new statute being introduced, in relation to the proceedings concerning arbitration, then the provisions of such new statute would apply to the proceedings between the parties. Since the new Act came into force during the pendency of the proceedings between the parties

and considering the fact that in terms of section 36 of the new Act, an award of an arbitrator becomes enforceable as a decree of the Civil Court, there is no scope for entertaining any objection to the award by the Civil Court and/or for award being made rule of the Court as per the old Act. 11. On plain reading of above quoted sub-clause of Clause 25 of the agreement between the parties, it is clear that the parties have in no uncertain terms agreed that the arbitration proceedings between the parties would be governed by the provisions contained in the Arbitration Act, 1940 as well as in terms of any modification or reenactment thereof. It is further agreed therein that the law time being in force shall apply to such proceedings, these terms in the agreement disclose that the parties had unequivocally agreed to be governed, in the matter of procedure of the proceedings relating to the arbitration, by the law which was in force at the time of execution of the agreement as well as by any further statutory changes those may be brought about in such law. Now if we peruse the Preamble of the new Act, it is seen that it reads thus: "An Act to consolidate and amend the law relating to domestic arbitration ..... and for matters connected therewith or incidental thereto." The Statement of Objects and Reasons as given in the Arbitration and Conciliation Bill, 1995, reads thus : "The law of arbitration in India is at present substantially contained in three enactments, namely the Arbitration Act, 1940. .....". In other words, the new Act has come into force as a result of consolidation and amendment of all the laws relating to arbitration - domestic as well as international, which include the old Act. Being so, considering the Clause 25 in the agreement which provides that "..... or any statutory modification or any enactment thereof. .....", it is evident that the parties had agreed to follow the procedure under a statute which would modify the old Act as and when such modification would take place. The agreement between the parties does not disclose any intention on the part of the parties to the agreement to provide for the procedure to be followed in the arbitration under the agreement, shall always be one that has been provided under the old Act. Indeed, the intention appears to be to the contrary. In this view of the matter, the finding of the trial Court that because the parties to the agreement in the case in hand, have not entered into a new agreement, relating to the applicability of the new Act to the pending proceedings, after enforcement of the new Act, the provisions of the new Act are not applicable to the proceedings between the parties, cannot be sustained and is liable to be set aside. 12. Having held that the provisions of the new Act would apply to the proceedings in question, it is necessary to decide about the late of the proceedings before the trial Court in S.C.S. No. 229/96/II, as also the effect of the said decision on the rights of the parties to exercise their rights in terms of provisions contained in sections 33 and 34 of the new Act. Section 33 of the new Act provides that within 30 days from the receipt of the arbitral award, the parties are entitled to prefer an application either for correction or for interpretation of the Award as well as for additional award. Section 34 of the new Act provides that the parties are entitled to move to the Court for setting aside the arbitral award on the grounds mentioned therein within a period of three months from the date on which the party making such application had received the arbitral award

or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal. Both the sections clearly refer to the statutory period of limitation for taking further steps by the parties from the date of receipt of the arbitral award. The provisions regarding receipt of arbitral award contained in section 31(5), read thus :– "31. (5) Alter the arbitral award is made, a signed copy shall be delivered to each party." In other words, in terms of the provisions contained in section 31(5) of the new Act, it is mandatory for the arbitrator to issue a signed copy to each of the parties to the arbitral proceedings. Sections 33 and 34 of the new Act further provides limitation period for taking recourse under said sections from the date of receipt of the copy of such arbitral award. Further section 36 of the new Act provides that the award by the Arbitrator can be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court. In other words, receipt of signed copy of the arbitral award is an important event in the arbitration proceedings. It assumes further importance in the case in hand in view of the undisputed fact that the arbitrator in the instant case by his notice dated 30-7-96 had informed the parties to collect signed copy of the award on prior payment of the fees and further on payment of such fees had filed the original award in the Civil Court on 9-8-96, along with a forwarding letter wherein it was disclosed that both the parties had collected their respective signed copies of the award from the arbitrator. The forwarding letter was dated 9-8-96. In other words, the parties had definitely collected the signed copies of the arbitral award prior to 9-8-96. This being so, in the absence of any agreement to the contrary in terms of section 33 of the new Act, a party desiring to seek any correction or interpretation of the said Award ought to have taken steps in any case prior to 9-8-96. So also the application for setting aside the award could have been filed by the parties within 3 months from the date of receipt of such award in August, 1996. Moreover, in view of filing of the original award in the trial Court by the arbitrator in terms of section 14 of the old Act, the respondent herein preferred to file objections in September, 1996 and further application challenging the appointment of the arbitrator in December, 1996. In any case, the application of objection was filed within 3 months from the date of receipt of copy of the signed award by the respondent. Being so, having held that the provisions of the new Act would apply to the proceedings in question, it will be unjust to deny the opportunity to the respondent to take recourse under section 33 and/or section 34, if it so desires, considering the fact that it had already filed objections under the provisions of the old Act. Moreover, the said application, if filled now, would be certainly barred by law of limitation in terms of the provisions contained in section 34(3) of the new Act, but for the benefit being extended to the respondent in terms of section 14 of the Limitation Act, 1963. Undisputedly, the respondents had been prosecuting the matter with due diligence in the Civil Court under the bona fide belief that the proceedings were governed by the provisions of the old Act. In the facts and circumstances, the period spent from 7-9-96 till the date of this judgment is necessarily to be excluded for the purpose of calculation of the limitation period under section 33(1) and/or section 34(3) of the new Act

in case the respondent prefers to take recourse under sections 33 or 34 of the new Act. 13. In the result, therefore, the revision application succeeds and is hereby allowed. The impugned order is hereby set aside. The proceedings in S.C.S. 229/96/ II do not survive and therefore declared as closed. The parties are however free to exercise their option available under sections 33 and 34 of the new Act within the period of limitation prescribed under the said provisions, subject to exemption of period from 7-9-96 till today, as observed above. In the circumstances, there shall be no order as to costs. 14. Revision application allowed.