Visakha Petroleum Products Pvt. Ltd vs B.L. Bansal And Anr on 4 March, 2015

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.653 OF 2011

M/s. Visakha Petroleum Products Pvt. Ltd.)
10-2-69, Plot No.28, Road No.1,)
West Marredpally)

Secundarabad - 500 026) .. Petitioner
Vs.
1. B.L. Bansal, Sole Arbitrator)
Indian Oil Corporation Ltd.,)

(Marketing Division) IOC Bhavan,)
Bandra (E), Mumbai 400 051.)

2. Indian Oil Corporation Ltd.,)
IOC Bhavan (Marketing Division),)

G-9, Ali Yavar Jung Marg,)
Bandra (E), Mumbai 400 051.) .. Respondents

Mr.Prateek Seksaria a/w Ms. Nidhi Singh a/w Ms. Smiriti Churiwal

i/by M/s.Vidhi Partners for the petitioner.

Mr.Sharan Jagtiani a/w Mr.S.R. Ganoo a/w Mr.Omprakash Jha i/by

M/s. The Law Point for respondent no.2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 13th January 2015

PRONOUNCED ON : 4th March 2015

JUDGMENT :

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. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Arbitration Act"), the petitioner has impugned the arbitral award dated 30th March 2000 made by the learned arbitrator allowing the claims made by respondent no.2 and directing the petitioner to pay a sum of Rs.48,11,103/- to the respondent no.2 with interest @7% p.a. from the date of claim till the date of award and @18% p.a. from the date of award till the date of ppn 2 arbp-653.11(j).doc payment. Some of the relevant facts for the purpose of deciding this petition are as under :-

> 2. The petitioner was the original respondent in the arbitration proceedings whereas the respondent no.2 was the original claimant.

On 6th July 1993, respondent no.2 entered into an agreement for sale/supply of kerosene oil on the terms and conditions set out therein. It was provided in the said agreement that the said agreement shall come into force on 6th July 1993 and shall remain for a period of one year during which period the buyer shall get the requirements of superior kerosene oil (SKO) through Indian Oil Corporation Ltd. (IOC); provided nothing contained in clause 1 shall prejudice the rights of IOC to terminate this agreement earlier on the happening of any of the events specified in clause 10.7 of the said agreement. Under clause 4.1 of the agreement, it was provided that sale of SKO will be made by IOC from time to time through import.

3. Under clause 5.1 of the agreement, it was agreed that for each import parcel that may be required by the buyer, the IOC shall establish provisional cost and freight (C & F) price in Indian Rupees which was required to be worked out in accordance with the said clause. Demurrage was payable @100/ MT. Under clause 5.2 of the said agreement, it was provided that IOC will work out the final price for each parcel sold to the buyer on the basis mentioned therein by including the elements set

out therein within a period of 45 days from the date on which the provisional price was established for the same. Under clause 6.1 of the agreement, it was provided that the buyer shall open a confirmed irrevocable letter of credit without recourse to drawers 30 ppn 3 arbp-653.11(j).doc days in advance of the expected arrival of the cargo in favour of IOC through SBI duly confirmed by its commercial branch, Bombay. The letter of credit to be opened by the buyer shall be in a format as advised by IOC and acceptable to IOC.

4. Under clause 6.2 of the agreement, it was agreed that the payment under the letter of credit shall be based on the bill of lading quantity. Clause 10.2 of the said agreement which is relevant for the purpose of deciding this matter is extracted as under :-

> "10.2 CLAIMS :
>
> Any claim regarding quality, quantity, demurrage, non-delivery or otherwise which either party may have against the other party shall be filed with that other party within 150 days from the date of delivery of the product to the buyer or the last date on which such delivery should have been made (hereinafter referred to as "the Delivery date"). If such claim is not admitted in full within 90 days of its being filed with the other party, it shall automatically lapse and be forfeited and the other party against whom it is made shall be discharged of all liability with regard thereto unless arbitration proceedings in respect thereof are commenced and notice thereof is given within 360 days of the delivery date to the party against whom the claim is made."

Clause 11 of the agreement provides an arbitration clause.

5. By letter dated 20th December 1993, the respondent no.2 informed the petitioner about revision in settled terms of the original agreement dated 6th July 1993 and informed that the said revision shall constitute as an integral part of the agreement dated 6th July 1993 and that all other clauses of the agreement dated 6 th July 1993 shall remain unaltered.

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6. On 6th July 1994, the petitioner and respondent no.2 signed an agreement thereby reviving and extending the said agreement dated 6th July 1993 for a further period of 12 months commencing from 6 th July 1994, however, on the same terms and conditions as contained in the agreement dated 6th July 1993. On 6th July 1995, the petitioner and respondent no.2 entered into an another agreement thereby reviving and extending the said agreement dated 6th July 1994 for a further period of 12 months commencing from 6th July 1995, however, on the same terms and conditions as contained in the agreement dated 6th July 1994.

7. It is the case of the petitioner that though the sale of superior kerosene oil in favour of the petitioner is supposed to have been completed on High Seas, the petitioner had to take actual possession of the product only from the share tank which was in complete possession of respondent no.2. The petitioner was required to rely upon the assistance of respondent no.2 in all matters

relating to receipt, storage and handling of the product purchased from the petitioner on High Seas basis. It is the case of the petitioner that respondent no.2, however, did not extend any help to the petitioner in the matter of receipt, storage and handling of SKO purchased from the petitioner on High Seas basis under clause 10.1 of the amended agreement.

8. During the course of the arguments, learned counsel for the petitioner tendered a statement showing relevant dates of the delivery of SKO and under clause 10.2 of the agreement, respondent no.2 was liable to make a claim, if any, against the petitioner and when the arbitration proceedings commenced. It is submitted that the details mentioned in ppn 5 arbp-653.11(j).doc the said statement are not disputed. It is the case of the petitioner that the admitted dates of delivery of SKO from respondent no.2 to the petitioner were during the period from 10th October 1995 to 23rd January 1996. The respondent no.2 by its letter dated 6 th June 1997 invoked arbitration agreement by addressing a letter to the Director (M) of IOC Ltd. alleging that a sum of Rs.38,58,107.86 became due and payable by the petitioner to respondent no.2 on account of the supplies made. It is stated in the said letter that the petitioner was requested to clear the outstanding vide letter dated 17th May 1997 with interest accrued thereon. The petitioner, however, failed to pay the said amount and interest accrued thereon despite the said notice served upon it and as a result thereof, the dispute had arisen in terms of the agreement dated 6 th July 1995 and the amendments thereto. By the said letter, respondent no.2 requested the Director (M) of the respondent no.2 to appoint his nominee in case the said Director (M) himself was unable to act as a sole arbitrator for adjudication of the claims of the respondent no.2.

Copy of the said notice was forwarded to the petitioner.

The petitioner vide its letter dated 10th June 1997 requested

9. the respondent no.2 to waive-off the interest on the dues and allow it to pay the outstanding amount in parts, along with every parcel of SKO in future. The petitioner stated in the said letter that as the petitioner was desirous of reviving the import of SKO through respondent no.2 forthwith, the petitioner requested the respondent no.2 to allow the petitioner to clear the outstanding amount as suggested in the said letter.

10. The Director (M) appointed one Mr.G.R. Menon as a sole arbitrator who resigned subsequently. The Director (M) thereafter ppn 6 arbp-653.11(j).doc appointed Mr.B.L. Bansal, Dy. General Manager (LPG-OPS), HO of respondent no.2 as a sole arbitrator. Pursuant to the directions issued by the learned arbitrator, the parties filed their respective pleadings along with copies of the documents. None of the parties led any oral evidence. The learned arbitrator framed 15 issues for consideration.

11. On the issue of limitation raised by the petitioner herein that the claims were barred under clause 10.2 of the agreement, the learned arbitrator rendered a finding and answered the said issue in negative holding that the claims of respondent no.2 were not barred by limitation under clause 10.2 of the agreement. The learned arbitrator also held that the petitioner had not discharged all its liability in respect of the claims made by respondent no.2 though the arbitration proceedings had

not been commenced and notice thereof had not been given within 360 days of the delivery date to the petitioner. The learned arbitrator also held that respondent no.2 (original claimant) could be permitted to urge that clause 10.2 of the agreement was void as opposed to Section 28 of the Indian Contract Act, 1872.

12. The learned arbitrator rejected the allegations of official bias made against him by the petitioner. It is held by the learned arbitrator that the elements of demurrage could be included in the price structure. On merits of the claim, the learned arbitrator held that the petitioner was liable to pay demurrage charges at actual due to the congestion at berthing which was beyond the control of the petitioner and for which it was not at all responsible. It is held by the learned arbitrator that the petitioner was not entitled to refund of the demurrages ppn 7 arbp-653.11(j).doc at actual paid by the petitioner with interest. The learned arbitrator rendered a finding that respondent no.2 was right in contending that the petitioner had admitted to the claim. The learned arbitrator accordingly allowed the claims made by the respondent no.2 with interest. This award has been impugned by the petitioner in this petition under Section 34 of the said Arbitration Act.

13. Mr. Seksaria, learned counsel for the petitioner made the following submissions :-

a) In the impugned award, the learned arbitrator had declared the clause 10.2 of the agreement as allegedly opposed to Section 28 of the Indian Contract Act. The learned arbitrator could not have declared any provision of the agreement as void as the same was beyond the scope and powers of the learned arbitrator. The award shows patent illegality on the face of the award.

b) Under clause 10.2 of the agreement, the claim regarding quality, quantity, demurrage, non-delivery or otherwise was required to be made within 150 days from the date of delivery of the product to the buyer or the last date on which such delivery should have been made and if such claim was not admitted in full within 90 days of its being filed with the other party, such claim shall automatically lapse and be forfeited and the other party would be discharged of all its liability with regard thereto unless the arbitration proceedings in respect thereof were commenced and notice thereof was given within 360 days of the delivery date to the party against whom the claim was made. Since, the claim has not been preferred by respondent no.2 within the period ppn 8 arbp-653.11(j).doc stipulated in clause 10.2 of the agreement and since the arbitration clause was not invoked in respect of such claim within 360 days from the date of delivery of the product to the petitioner in each instance, the claims made by respondent no.2 were barred by limitation and liability of the petitioner, if any, stood discharged. The respondent no.2 invoked the arbitration agreement only on 6th June 1997 by addressing a letter to the Director (M) which was long after 360 days from the date of delivery of the product to the petitioner in each case.

c) It was the case of the respondent no.2 itself in the claim filed before the learned arbitrator that the provisional cost and freight price was required to be worked out in

> Indian Rupees as provided in clause 5.1 and final price for each parcel sold to the buyer which was required to be worked out by respondent no.2 as provided in clause 5.2 of the said agreement within 45 days from the date of establishing the provisional price. In respect of 9 invoices, respondent no.2 had furnished final invoices much after 45 days from the date of provisional invoice and all the final invoices had been furnished beyond 116 days.

d) The letter of 10th June 1997 addressed by the petitioner to respondent no.2 did not amount to an admission of its alleged liability in paying the alleged outstanding amount to the respondent no.2. The said letter was a conditional letter and was issued as and by way of counter offer to the respondent no.2 stating that if the respondent no.2 would waive the interest then the petitioner would pay the outstanding amount which offer was not accepted by respondent no.2. There was no binding contract arrived at between the parties based on Exhibit-H. Acknowledgement of liability has to be during the subsistence of the ppn 9 arbp-653.11(j).doc liability and not after the claim having become time barred. The letter dated 10th June 1997 at Exhibit-H could not revive the time barred claim. There was no fresh promise of the petitioner to pay to the respondent no.2 as contemplated under Section 25(3) of the Indian Contract Act, 1872. The finding of the learned arbitrator that the petitioner had acknowledged its liability is thus contrary to Section 25 (3) of the Indian Contract Act and also by misinterpreting the letter of the petitioner dated 10th June 1997. The agreement entered into between the petitioner and the respondent no.2 duly amended came to an end on 5th July 1996 which was prior to the amendment to Section 28 of the Indian Contract Act notified on 8th January 1997, which amendment declared any contract that extinguishes the rights of any party or discharges any party from any liability after the expiry of a specified period to be void. The amendment to Section 28 of the Indian Contract Act is not retrospective in operation. Clause 10.2 did not seek to curtail the period of limitation for enforcement but stipulates the forfeiture or extinguishment of the rights itself.

e) The learned arbitrator appointed by the Director (M) was an employee of respondent no.2 and was bound to follow the instructions of the Director (M) of respondent no.2 who was involved in the dealings with the petitioner on several occasions in the past before the matter was referred to the arbitration. The learned arbitrator has, therefore, clearly shown an official bias. The petitioner vide its letter dated 28 th December 1996 raised certain complaints to the Director (M) in respect of demurrage charges. The learned arbitrator thus appointed by the Directior (M) would be obviously obliged to follow the instructions of the superior and could not permit to act as an independent arbitrator.

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14. In support of the submission that the amendment to Section 28 notified on 8th January 1997 was not with retrospective effect, learned counsel for the petitioner relied upon the following Judgments:-

> 1. M/s. Continental Construction Ltd. Vs. Food Corporation of India and Ors., reported in AIR 2003 DELHI 32;

2. The Oriental Insurance Company Limited Vs. Karur Vysya Bank Limited, reported in AIR 2001 MADRAS 489;

3. Food Corporation of India Vs. New India Assurance Co.Ltd. & Ors., reported in (1994) 3 SCC 324;

4. National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak & Co. & Anr., reported in (1997) 4 SCC 366;

5. Wild Life Institute of India, Dehradun Vs. Vijay kumar Garg, reported in (1997) 10 SCC 528;

6. Himachal Pradesh State Forest Company Limited Vs. United India Insurance Company Limited, reported in (2009) 2 SCC 252;

7. Judgment of the Division Bench of this Court in the case of M/s.

Indusind Bank Ltd. Vs. Union of India & Ors., delivered on 20 th April 2011 passed in Appeal No.258 of 2008;

8. Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited, reported in 2012 (2) Bom.C.R. 271;

9. Unreported judgment of this Court in the case of M/s.Mascon Multiservices & Consultants Pvt. Ltd. Vs. Bharat Oman Refineries Ltd., delivered on 11st August 2014 passed in Arbitration Petition No.1088 of 2010; and

10. Judgment of the Delhi High Court in the case of M/s. Chander Kant & Co. Vs. The Vice Chairman, DDA & Ors., delivered on 26th May 2009 passed in Arbitration Petition No.246 of 2005.

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15. Relying upon the aforesaid judgments, learned counsel for the petitioner submits that since the last date of delivery under the contract was 23rd January 1996 and the entire cause of action had arisen much prior to the date of amendment i.e. 8th January 1997, unamended Section 28 of the Indian Contract Act, 1872 would apply to the dispute between the parties and not amended Section 28 as sought to be canvassed by respondent no.2.

16. In support of the submission that there was an official bias on the part of the learned arbitrator who was an employee of respondent no.2 and the award is vitiated on that ground alone is concerned, learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of Indian Oil Corporation Limited Vs. Raja Transport Private Limited, reported in (2009) 8 SCC 520 and it is submitted that there can be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate to the officer whose decision was the

subject matter of the dispute.

17. Mr.Jagtiani, learned counsel for respondent no.2, on the other hand, supported the reasonings and conclusions in the impugned award. Learned counsel for the respondent no.2 made the following submissions:

a) Amendment to Section 28 of the Indian Contract Act, 1872 notified on 8th January 1997 would apply with retrospective effect to all the existing contracts on the date of amendment. It would also apply to the contracts entered into prior to the date of amendment. The expression ppn 12 arbp-653.11(j).doc "any agreement/contract" would not mean that such agreement/contract was to be entered into only after the date of amendment for the purpose of attraction of Section 28 (b) of the Indian Contract Act, 1872 and if such argument of the petitioner is accepted, it would be in violation of the words "any agreement/contract."

b) The period of 360 days mentioned in clause 10.2 would not mean that the contractual obligation/right of the parties would not survive after expiry of 360 days. It is not the case of the petitioner that under the provisions of the Limitation Act, 1963, the claims of the respondent no.2 have become barred. If such argument is accepted, the whole purpose of Section 28(b) of the Indian Contract Act, 1872 would be defeated.

c) Since the dispute between the parties was governed by the amended provision of Section 28 of the Indian Contract Act, the learned arbitrator was entitled to consider such amended provision applicable to the parties and was empowered to declare clause 10.2 of the agreement as void in view of the amended Section 28 (b) of the Indian Contract Act. The learned arbitrator has not exceeded his jurisdiction and that the award does not show any illegality on this ground.

d) Since the petitioner had not complied with its obligation to pay price for supplies effected by the respondent no.2, the term of the agreement/contract for the purpose of payment/obligation continued and was in place. The petitioner had not disputed its liability on merits, but had opposed the claim only on the ground of limitation under clause 10.2 of the agreement.

e) Under clause 10.2 of the agreement, the purchase by the petitioner

was required to be completed within one year. In so far as the payment/ obligation of the petitioner under the agreement was concerned, the same was required to be continued even beyond the expiry of one year and such obligation was not discharged till such payment was made by the petitioner. It is submitted that under clause 10.2 of the agreement, the claims were kept alive for a period of 360 days from the date of delivery and not from the date of execution of the contract. There were various dates on which the delivery was effected by respondent no.2 to the petitioner. The agreement/contract would not come to an end on 8 th January 1997.

f) The petitioner cannot be permitted to urge that obligation of the petitioner to make payment to the respondent no.2 also was required to be made within one year i.e. during the contractual period. It is submitted that by letter dated 3rd July 1996, the petitioner had informed the respondent no.2 that the petitioner had made a representation to the Chairman of respondent no.2 for considering its claim for waiver and it was in the process of making arrangement for drawal of the product from the respondent no.2. The Director of the petitioner was planning to visit the office of respondent no.2 to explain the problems faced by the petitioner and also with regard to the upliftment of the product. The said letter was addressed three days prior to 3 rd July 1996. The respondent no.2 vide its letter dated 26th July 1996 addressed to the petitioner in response to the said letter dated 6 th July 1996 called upon the petitioner to settle the dues of Rs. 39,31,674.35 at the earliest.

g) On 17th May 1997, the respondent no.2 called upon the petitioner

to pay the outstanding dues within 15 days from the date of receipt of the said notice and threatened to take legal action. The said notice was followed by notice for invoking arbitration agreement on 6 th June 1997. On 10th June 1997, the petitioner requested the respondent no.2 to waive-off the interest on the dues and to allow the petitioner to pay the outstanding amount in parts along with every parcel of SKO in future and requested to permit the petitioner to clear the outstanding amount as suggested in the said letter. The respondent no.2 in response to the said letter informed the petitioner that it was not possible for respondent no.2 to waive the interest and called upon the petitioner to pay the outstanding amount immediately. Relying upon the aforesaid correspondence, it is submitted that the demand made by the respondent no.2, refusal on the part of the petitioner to pay the amount as demanded and request for waiver of the interest, raised a fresh cause of action. The respondent no.2 had not given up its request made by letter dated 26th July 1996.

h) On the allegations of bias made by the petitioner against the learned arbitrator, it is submitted that no such allegations of bias were made before the learned arbitrator. No application under Sections 12 and 13 was made before the learned arbitrator. The petitioner has not even raised any such ground under Section 34 of the said Arbitration Act in this petition and thus cannot be allowed

to urge such ground across the bar. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors., reported in (2002) 3 SCC 572 (para 18).

i) The petitioner had never disputed its liability to pay to the respondent no.2 but had only requested for waiver of interest. The learned arbitrator has interpreted the correspondence exchanged between the parties and has held that the petitioner had admitted and acknowledged its liability. The learned arbitrator has considered all the submissions made by the parties and had rendered a reasonable and valid award.

18. Learned counsel placed reliance on the judgment of the Supreme Court in the case of Dr. Indramani Pyarelal Gupta and Ors.

Vs.W.R. Natu and Ors., reported in AIR 1963 SC 274 in support of his submission that the amendment to Section 28 of the Indian Contract Act would apply with retrospective effect.

19. Learned counsel for respondent no.2 also placed reliance on the judgment of Delhi High Court in the case of D.D.A. Vs. Pandit Construction Co., delivered on 19th April 2012 in FAO(OS) 382 of 2007.

20. Learned counsel placed reliance on the objects and reasons of amendment to Section 28 of the Indian Contract Act, 1872 in support of the submission that the said amendment was made effective with retrospective effect. Learned counsel also placed reliance on the Ninety-

Seventh Report of the Law Commission of India on the amendment to Section 28.

21. Learned counsel distinguished the judgments relied upon by Mr.Seksaria, learned counsel for the petitioner on the ground that all the judgments referred to and relied upon by the petitioner had ppn 16 arbp-653.11(j).doc considered the unamended provision of Section 28 of the Indian Contract Act, 1872 and not the amended provision. The facts in this matter are totally different and those judgments would not assist the case of the petitioner. It is submitted that in so far as the judgment of the Division Bench of this Court in the case of Dr. Indramani Pyarelal Gupta and Ors. (supra) is concerned, the Division Bench of this Court has considered the judgment of the Supreme Court in the case of Food Corporation of India Vs. New India Assurance Co. Ltd. & Ors. (supra) in which the Supreme Court has considered unamended Section 28 of the Indian Contract Act, 1872. Learned counsel submits that the learned Single Judge of this Court in the case of Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited (supra) also considered the judgment of the Division Bench of

this Court in the case of Dr. Indramani Pyarelal Gupta and Ors. (supra) and thus that judgments would not assist the case of the petitioner. It is submitted that in the judgment of the Division Bench of this Court, the Court was considering the validity period of a bank guarantee. The facts of that case were totally different and the said judgment is thus not applicable to the facts of this case.

22. Learned counsel placed reliance on the judgment of this Court delivered on 20th August 2014 in the case of JSW Steel Ltd. Vs. AI Ghuriar Iron & Steel LLC passed in Arbitration Petition No.398 of 2014 and would submit that the judgment of the Division Bench of this Court relied upon by the petitioner had already been interpreted by the learned Single Judge of this Court.

23. It is submitted that in view of plain language of Section 28 (b) of the Indian Contract Act, the said provision applies to 'every ppn 17 arbp-653.11(j).doc agreement' and 'any contract' subsisting on that date and entered into thereafter. Section 28 (b) of the Indian Contract Act applies to the contracts which are subsisting as on 8 th January 1997 and those which were not discharged, such as the present agreement, where the claims made by the petitioner against the respondent no.2 were outstanding. Reliance is placed on the judgment of the Delhi High Court in the case of Chander Kant and Co. Vs. the Vice Chairman DDA and Ors. (supra) and would submit that the applicability of Section 28 (b) of the Contract Act would not be determined by the date of the contract. Reliance is also placed on the judgment of the Division Bench of the Delhi High Court in the case of Delhi Development Authority Vs.Pandit Construction Co. (supra).

24. It is submitted that the purpose of enacting Section 28(b), was to overcome the situation wherein the liability was extinguished because of clause like clause 10.2 and to get over such mischief.

Reliance is placed on Section 37 of the Contract Act by the learned counsel. Reliance is also placed on the judgment in the case of East and West Steamship Co., Georgetown, Madras Vs. S.K. Ranalingam Chettiar, reported in AIR 1960 SC 1058 which explains what is 'discharge of liability.' The discharge of liability takes place only when there was no response to the demand within 90 days of the demand and the arbitration proceedings were not initiated within 365 days from the date of date of delivery. Reliance is also placed on the judgment of the Supreme Court in the cases of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., reported in (1999) 9 SCC 334 and Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika ppn 18 arbp-653.11(j).doc Township Private Limited, decided on 15th September 2014 in Civil Appeal No.8750 of 2014 and other connected matters.

25. In rejoinder, Mr.Sekseria, learned counsel for the petitioner submits that an amendment to a substantive law is never retrospective and is presumed not to have retrospective operation unless the same is expressly provided or it follows by necessary implication. It is submitted that any amendment, which modifies accrued rights or imposes obligations, or imposes new duties or attaches new disability has to be treated as prospective unless and until the legislature's intention is so clear that it intended to give the enactment retrospective effect. It is submitted that the presumption in favour of a legislation giving retrospective effect is only when the legislation seeks to confer benefit on some person but without inflecting corresponding detriment on some other person

or the public generally. It is submitted that the expression 'discharged from liability' has been interpreted by the Supreme Court in the case of East and West Steamship Co., Georgetown, Madras Vs. S.K. Ranalingam Chettiar (supra) and followed by this Court in the case of Reliance Industries Limited Vs. P & O Containers Limited and Anr., reported in AIR 2005 Bom 65. The expression 'discharged from liability' would mean a total extinction of liability following upon the extinction of right. The words 'absolved from liability' and 'discharged from liability' do not bear any distinction and that the expression 'discharged from liability' was intended to mean and do mean the liability has totally disappeared.

26. It is submitted by the learned counsel that in this case, the tenure of the agreement came to an end on 5 th July 1996. The goods ppn 19 arbp-653.11(j).doc were delivered by the respondent no.2 to the petitioner between 22nd August 1995 and 29th February 1996. The period of 150 days for assertion of right by the respondent no.2 to a claim for demurrage expired on or before 28th July 1996 which is calculated as 150 days from the last delivery date. The period of 90 days within which the petitioner had to accept the claim as contemplated under clause 10.2 expired on 26th October 1996. The notice invoking arbitration agreement was issued on 6th June 1997 which was barred by law of limitation. The petitioner stood discharged of its liability accordingly which was much prior to the amendment to Section 28 of the Indian Contract Act, 1872. Learned counsel distinguished the judgments of the Supreme Court relied upon by the respondent no.2. It is submitted that since the liability of the petitioner stood discharged/ extinguished before the amendment, there was no right available to the respondent no.2 that could be enforced by it whether before or after the amendment.

There was no question of any outstanding obligation to pay alleged subsisting dues under the said agreement on the date of amendment.

27. In so far as the submission of the learned counsel for the respondent no.2 that there was an admission of the liability on the part of the petitioner is concerned, the learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of East and West Steamship Company (supra) and submits that once the liability of the petitioner stood discharged, no acknowledgement of liability could have resurrected such a dead liability. Reliance is also placed on the judgment of this Court in the case of Reliance Industries Limited (supra).

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28. In so far as the reliance placed by the respondent no.2 on Section 37 of the Contract Act is concerned, it is submitted that Section 37 of the Contract Act itself is qualified by the words 'unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.' It has been held that a contracting party is bound by termination clauses, exemption clauses and clauses entitling forfeiture. It is submitted that reliance placed on Section 37 of the Indian Contract Act, 1872 by the respondent no.2 is thus misplaced. Learned counsel distinguished the judgments relied upon by the respondent no.2 including the judgment of the learned Single Judge of this Court in the case of JSW Steel Ltd. Vs. AI Ghuriar Iron & Steel LLC (surpa) on the ground that the learned Single Judge could not have declared the judgment of the Division Bench of this Court as per

incurium.

29. In so far as the submission of the learned counsel for the respondent no.2 that in view of retrospective effect of Section 28 of the Indian Contract Act, the learned arbitrator could have declared clause 10.2 of the agreement as void is concerned, it is submitted by the learned counsel for the petitioner that the learned arbitrator could not re-write the contract between the parties and had no jurisdiction to sever part of the agreement by declaring clause 10.2 of the agreement as void. The learned arbitrator could not construe a part of the clause as offending the amended provisions of Section 28 of the Contract Act to render the said clause as void and retain the rest of the agreement. It is submitted that a contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible.

REASONS AND CONCLUSIONS :-

30. I have heard the learned counsel appearing for the parties at length and have given anxious consideration to the rival submissions made by the learned counsel. The following issues arise for consideration in this matter :

a) Whether the amendment to Section 28 (b) of the Indian Contract Act, 1872 effective from 8th January 1997 is prospective or retrospective?

b) If the amendment to Section 28 (b) of the Indian Contract Act, 1872 is not with retrospective effect, whether the claims made by the respondents were barred by limitation ?

c) Whether the learned arbitrator has power to declare any part of the contract as void and opposed to Section 28 of the Indian Contract Act, 1872 ?

d) Whether the petitioner had admitted its alleged liability by letter dated 10th June 1997 or any other correspondence ?

e) Whether the learned arbitrator had acted with any official bias of the matter ?

31. I shall now deal with the issue whether amendment to Section 28 of the Indian Contract Act, 1872 would apply with retrospective effect or prospective effect.

32. Prior to 8th January 1997, the unamended Section 28 of the Indian Contract Act, 1872 is extracted as under :-

ppn 22 arbp-653.11(j).doc "Section 28. Agreements in restraint of legal proceedings void -

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usu0al legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

Amendment to Section 28 of the Indian Contract Act, 1872 reads thus :-

> "Section 28. Agreements in restraint of legal proceedings void :
>
> Every agreement, --
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in,respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
>
> (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent..."

33. A perusal of the record indicates that the agreement entered into between the petitioner and the respondent no.2 was extended till 6th July 1995. During the period between 22nd August 1995 and 29th February 1996, the goods were delivered by the respondent no.2 to the petitioner in accordance with the said agreement. The period of 150 days for assertion of right by the respondent no.2 to a claim for demurrage expired on or before 28th July 1996 which was calculated at 150 days from the last delivery date of the goods. The period of 90 days within which the petitioner could accept the claim as contemplated under clause 10.2 expired on 26th October 1996. The respondent no.2 invoked ppn 23 arbp-653.11(j).doc arbitration agreement on 6th June 1997. The amendment to Section 28 of the Indian Contract Act, 1872 was brought into effect on 8th January 1997.

34. It is the submission of the learned counsel for the petitioner that since the liability of the petitioner stood discharged much prior to the amendment to Section 28 of the Indian Contract Act, 1872, there was no right available to the respondent no.2 which could be enforced by it before or after the amendment, the respondent no.2 could not claim any benefit of the amendment to Section 28 of the Indian Contract Act, 1872 brought into effect from 8 th January 1997. It is also the case of the petitioner that once the liability of the petitioner stood discharged prior to the letter of 10th June 1997 addressed by the petitioner requesting to waive the interest which was in any event the conditional letter, the alleged claims of the respondents did not revive and a fresh period of

limitation did not commence.

35. Per contra, the submission of the learned counsel for the respondents on this issue is that the amendment to Section 28 of the Indian Contract Act, 1872 would apply with retrospective effect to all the existing contracts on the date of the amendment. The expression "any agreement/contract" would not mean that such agreement/contract was to be entered into only after the date of amendment for the purpose of attraction of Section 28 (b) of the Indian Contract Act, 1872. Claims of the respondents were not barred by limitation under the provisions of Limitation Act, 1963. Since the petitioner failed to comply with its obligation to pay price for supplies effected, the term of the agreement for the purpose of payment/obligation continued and was in place on the ppn 24 arbp-653.11(j).doc date of amendment to Section 28 of the Indian Contract Act, 1872.

Under clause 10.2 of the agreement, the claims were kept alive for the period of 360 days from the date of delivery and not from the date of execution of the contract.

36. Both the learned counsel placed reliance on the several judgments of the Supreme Court, this Court and other High Courts in support of their respective submissions on the issue whether the amendment to Section 28 of the Indian Contract Act, 1872 would apply with retrospective effect or prospective effect.

37. The Supreme Court in the case of Wild Life Institute of India, Dehradun Vs. Vijay Kumar Garg, reported in (1997) 10 SCC 528 construed an arbitration clause which provided that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from other party that the bill is ready for payment, the claim of the contractor would be deemed to have been waived and absolutely barred and the owner shall be discharged and released of all liabilities under the contract. The Supreme Court held that such clause operates to discharge the liability of the owner on expiry of 90 days as set out therein and was not merely a clause providing a period of limitation. Paragraph 6 of the said judgment in the case of Wild Life Institute of India, Dehradun (supra) reads thus :-

> "6. It is also necessary to refer to the arbitration clause under the contract which clearly provides that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the appellants that the bill is ready for payment, the claim ppn 25 arbp-653.11(j).doc of the contractor will be deemed to have been waived and absolutely barred and the appellants shall be discharged and released of all liabilities under the contract in respect of these claims. The liability, therefore, of the appellants ceases if no claim of the contractor is received within 90 days of receipt by the contractor of an intimation that the bill is ready for payment. This clause operates to discharge the liability of the appellants on expiry of 90 days as set out therein and is not merely a clause providing a period of limitation. In the present case, the contractor has not made any claim within 90 days of even receipt of the amount under the final bill. The dispute has been raised for the first by the contractor 10 months after the receipt of the amount under the final bill."

38. The Supreme Court in case of National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak & Co. and Anr., reported in (1997) 4 SCC 366 has considered a case under unamended Section 28 of the Indian Contract Act and has held that such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. It is held that to put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. It is held that if the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time barred. Paragraphs 5, 7, 8, 13 and 16 of the said judgment of the Supreme Court in the case of National Insurance Co. Ltd.(supra) read thus :-

> "5. The appellants contested the suit inter alia on the ground that the suit was barred by limitation as well as by condition No. 19 of the policy and on the ground that the claim made by the respondent No.1 was not covered by the policy. Condition 19 of the policy which was set up by way of defence runs as ppn 26 arbp-653.11(j).doc under:
>
> "Condition No. 19 - In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration."

7. In the present appeal, the appellant contended that condition No. 19 extinguishes the right of the assured as the suit was not filed within 12 months from the day when the loss or damage had occurred. It is further reiterated in the appeal that special Condition 5(i)(b) of the Riot and Strike Endorsement excludes the claim of the respondent No.1 from the scope of two Insurance Policies.

8. Section 28 of the contract Act may be quoted now before going into further discussion :

> "Section 28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

13. The next case we would like to notice is the Food Corporation of India (supra); the abridged factual matrix is that it, as principal, had appointed millers for procuring, hulling and supplying rice on certain conditions. On behalf of these millers the respondent insurance company executed fidelity Insurance Guarantee in favour of the appellant hereunder the former undertook to indemnify the latter for any loss suffered by the appellant by reason of branch of agreement.

Under the terms of the guarantee when the appellant found that it had suffered losses on account of breach of terms and conditions of their respective contracts by the millers it made demands on the insurance company to indemnify it. These demands were made well before the expiry of six months from the date of termination of the contract with the concerned miller. The insurance company did not satisfy the demands which led the appellants to file suits to recover the losses. Those suits were decreed in favour of the appellants against the ppn 27 arbp-653.11(j).doc respondents including the

insurance companies. The insurance companies filed appeals in the High Court which were allowed holding that the terms of the guarantee concerned in each case did not entitle the appellant to sue the insurance companies after 'six month' period from the date of termination of the respective contracts with the rice millers. The matter was therefore carried in appeal to this Court.

16. From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending section 28 of the Contract Act. That is because such a an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced with in the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and ca be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in Brief, seems to be the settled legal position. We may now apply it to the facts of this case."

39. The Supreme Court in the case of Himachal Pradesh State Forest Company Limited Vs. United India Insurance Company Limited, reported in (2009) 2 SCC 252 has considered its earlier judgment in the case of National Insurance Co. Ltd. Vs.Sujir Ganesh Nayak & Co. and Anr. (supra). The judgment of the Supreme Court in ppn 28 arbp-653.11(j).doc the case of Food Corporation of India Vs. New India Assurance Co.

Ltd. and Ors., reported in (1994) 3 SCC 324 and several other judgments and applied the principles laid down even to the case arising under amendment to Section 28 of the Indian Contract Act, 1872. Paragraphs 13, 14 and 15 of the said judgment in the case of Himachal Pradesh State Forest Company Limited (supra) read thus :-

> "13. In Sujir Nayak's case (supra) to which primary reference has been made by the learned counsel for the parties while dealing with an identical situation where a contract contained a provision prescribing a period of limitation shorter than that prescribed by the Limitation Act, it was held that the contractual provision was not hit by Section 28 as the right itself had been extinguished.
>
> 14. Mr. Sharma has, however, submitted that in view of the observations in some paragraphs in Food Corporation of India's case, the observations in Sujir Nayak's case were liable to reconsideration. We, however, find no merit in this plea for the reason that in Sujir Nayak's case, Food 12 Corporation of India's case (supra) has been specifically considered and Vulcan Insurance Company's case (supra) too had been relied upon.

> 15. In Sujir Nayak's case, this Court was called upon to consider condition 19 of the policy which was in the following terms: (SCC p.370 para 5) "5. ..... 'Condition 19. - In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration.'"

While construing this provision vis-a-vis Section 28 of the Contract Act and the cases cited above and several other cases, in addition, this is what the Court ultimately concluded: (Sujir Ganesh Nayak, SCC pp.375-77 paras 16, 19 & 21) "16. From the case-law referred to above the legal position that emerges is that an agreement which in ppn 29 arbp-653.11(j).doc effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provide for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act.

To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case.

19. The clause before this Court in Food Corpn. case extracted hereinbefore can instantly be compared with the clause in the present case. The contract in that case said that the right shall stand extinguished after six months from the termination of the contract. The clause was found valid because it did not proceed to say that to keep the right alive the suit was also required to be filed within six months. Accordingly, it was interpreted to mean that the right was required to be asserted during that period by making a claim to the Insurance Company. It was therefore held that the clause extinguished the right itself and was therefore not hit by Section 28 of the Contract Act. Such clauses are generally found in insurance contracts for the reason ppn 30 arbp-653.11(j).doc that undue delay in preferring a claim may open up possibilities of false claims which may be difficult of verification with reasonable exactitude since memories may have faded by then and even ground situation may have changed. Lapse of time in such cases may prove to be quite costly to the insurer and therefore it would not be surprising that the insurer would insist that if the claim is not made within a stipulated period, the right itself would stand extinguished. Such a clause would not be hit by Section 28 of the Contract Act.

21. Clause 19 in terms said that in no case would the insurer be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of

any pending action or arbitration. Here the claim was not subject to any action or arbitration proceedings. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the Insurance Company shall cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause therefore has the effect of extinguishing the right itself and consequently the liability also. Notice the facts of the present case. The Insurance Company was informed about the strike by the letter of 28-4-1977 and by letter dated 10-5-1977.

The insured was informed that under the policy it had no liability. This was reiterated by letter dated 22-9- 1977. Even so more than twelve months thereafter on 25-10- 1978 the notice of demand was issued and the suit was filed on 2-6-1980. It is precisely to avoid such delays and to discourage such belated claims that such insurance policies contain a clause like clause 19. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded. The forfeiture clause 12 also provides ppn 31 arbp-653.11(j).doc that if the claim is made but rejected, an action or suit must be commenced within three months after such rejection; failing which all benefits under the policy would stand forfeited. So, looked at from any point of view, the suit appears to be filed after the right stood extinguished. That is the reason why in Vulcan Insurance case while interpreting a clause couched in similar terms this Court said: (SCC p. 952, para 23) "23....It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act....."

Even if the observations made are in the nature of obiter dicta we think they proceed on a correct reading of the clause."

In the light of the fact that Food Corporation's case has been considered in Sujir Nayak's case, no further argument remains in the present matter, as Clause 6(ii) and Condition 19 are, in their essence, pari materia."

40. The Supreme Court in the case of Food Corporation of India (supra) has held that such a condition can be construed as a condition precedent for filing of a suit that a party should have exercised the right within the period agreed to between the parties. The assertion of right is governed by the agreement and it is imperative that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand, but also to put on guard that in case it is not complied, it may have to face proceedings in the Court of law. It is held that since admittedly, the claimant did issue notice prior to expiry of six months from the termination of the contract, it was in accordance with the Fidelity Insurance clause and, therefore, the suit filed by the claimant was within the time. Paragraphs 2 and 8 of the said ppn 32 arbp-653.11(j).doc judgment in the case of Food Corporation of India (supra) read thus :

> "2. Shortly the issue of law that arises for consideration in these appeals directed against judgment of Madras High Court is, if the suit filed after six months by the appellant, a public sector corporation, against Insurance Company was barred by

time in view of the following recital in the Fidelity Insurance Guarantee-

> "However, that the corporation shall have no rights under this bond after the expiry of (period) six months from the date of the termination of the contract."

What does it mean? Does it restrict the right of the appellant precluding it from filing suit for recovery of money from the Insurance Company within six months from the date of termination of the contract or is it the outer limit for exercising the right of making the demand? What is the impact of Section 28 of the Contract Act on such clause? Since no factual dispute survives, and even if there was any it has been ironed out by the two courts below, the skeleton facts and findings as are necessary shall be referred as and where necessary for appreciating the legal issue. The appellant, as principal, appointed millers for procuring, hulling and supplying rice on certain conditions. To ensure its compliance the Insurance Company on behalf of 329 the millers, executed Fidelity Insurance Guarantee in favour of the appellant guaranteeing honest accounting and refund of money received by the millers for supplying rice to the appellant. The appellant was given right under the guarantee to indemnify for any loss, directly, from the company. The exact words were:

> "We The Anand Insurance Company Limited do hereby undertake to indemnify and keep indemnified the Corporation to the extent of Rs 1,50,000 (Rupees One lakh and fifty thousand only) against any loss, claim, suit proceeding and expenses caused to or suffered by the Corporation by reason of any breach by the said miller of any term or condition of the said agreement and authorise the Corporation to recover the same directly from us."

Since there was breach of agreement the appellant filed suits for recovery of money against the millers and the company. The ppn 33 arbp-653.11(j).doc findings on agreement between the appellant and the miller and the company, the terms of agreement, its breach, shortfall in supply of rice, amount due etc. are all agreed to by both the courts below and were in fact more or less conceded. For instance on the relevant issues about the quantum of short delivery and the amount due to the appellant the trial court in Civil Appeal No. 1799 which is treated as leading found that it was admitted that the firm- defendant entered into agreement with the appellant to procure paddy, transport the same deliver to other millers as directed by the appellant for hulling converting it into rice and for supply. It further found that there was no dispute about the quantity of supply of paddy and the balance which ought to have been supplied. It, therefore, held that as regards Insurance Company the default occurred within the stipulated period of agreement. It observed that in reply notice sent by the company demanding the amount it was never claimed that the company was liable only if there was misappropriation or that the claim was barred by time. It was found that even in the written statement the plea of limitation was not raised. The trial court held that even though it was mentioned in the guarantee agreement that the appellant would lose all the claims as against the Insurance Company if it was not claimed within six months from the date of expiry of the contract of fidelity and the agreement terminated on February 15, 1971 and calculating six months from that date the claim was barred but non-filing of the suit within six months did not mean that the suit was barred by limitation. It held when the law of limitation allows a person to recover the amount within three years the parties could not agree to reduce the period of limitation and say that

the amount should be claimed within the agreed time. Since by agreement time for recovery cannot be circumscribed against the provisions of the Limitation Act the suit could not be held to be barred by limitation. The suit was thus decreed both against the miller and the Insurance Company. In the High Court the appeal of miller was dismissed. And that order has become final. But the appeal of the company was allowed. It was held that as the policy has no force after expiry of six months from the date of termination of the contract no liability could be fastened on the Insurance Company. The court 330 observed that the enforceability of the contract ceased after six months from the date of termination of contract ppn 34 arbp-653.11(j).doc which admittedly was March 15, 1971. The High Court found that a mere demand made by the appellant by notice sent on June 7, 1971 did not amount to enforceability. The High Court construed the Fidelity Insurance Guarantee offered by the Insurance Company to be effective only between February 15, 1970 to February 15, 1971. The High Court did not agree that once the notice was issued the relationship between the appellant and the Insurance Company was that of a creditor and debtor. It relied on a number of decisions both Indian and English and held that a clause in the Fidelity Insurance Guarantee to the effect that no claim shall be entertained after six months was not contrary to Section 28 of the Contract Act nor was it against public policy under Section 23 of the Contract Act.

8. From the agreement it is clear that it does not contain any clause which could be said to be contrary to Section 28 of the Contract Act nor it imposes any restriction to file a suit within six months from the date of determination of the contract as claimed by the company and held by the High Court. What was agreed was that the appellant would not have any right under this bond after the expiry of six months from the date of the termination of the contract. This cannot be construed as curtailing the normal period of limitation provided for filing of the suit. If it is construed so it may run the risk of being violative of Section 28 of the Contract Act. It only puts embargo on the right of the appellant to make its claim known not later than six months from the date of termination of contract. It is in keeping with the principle which has been explained in English decisions and by our own court that the insurance companies should not be kept in dark for long and they must be apprised of their liabilities immediately both for facility and certainty. The High Court erroneously construed it as giving up the right of enforceability of its claim after six months. Since the period is provided under the agreement the appellant had to move within this period asserting its right and apprising the company of the breach or violation by the miller to enable it either to pay or to persuade the miller to pay itself. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the Corporation shall be precluded from filing suit ppn 35 arbp-653.11(j).doc after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. Since admittedly the Corporation did issue notice prior to expiry of six months from the termination of contract, it was in accordance with the Fidelity Insurance clause

and, therefore, the suit filed by the appellant was within time. "

41. The division bench of this Court in the judgment delivered on 20th April 2011 in the case of M/s. Indusind Bank Ltd. Vs. Union of India and Ors. in Appeal No.258 of 2008 has considered the amendment to Section 28 of the Indian Contract Act, 1872 and has construed a similar clause in the contract. It is held by the division bench that the effect of enactment of Section 28(b) was that not only the curtailment of limitation period is impermissible, but also the extinction of right if sought to be brought by the agreement within a specified period which period is less than the period limitation prescribed for the suit under the contract is also rendered void. As a result of amendment of Section 28 in the year 1997, not only a term in the contract which restricts right to adopt remedy under law by curtailing the period of limitation is void but a term in the contract which restricts enforcement of the accrued right under the contract is also declared to be void. It is ppn 36 arbp-653.11(j).doc held that a term in the contract which requires a party to the contract to assert its right or requires a party to make a claim within certain time will not be affected by Section 28 (b) of the amended section of the Indian Contract Act, 1872. Paragraphs 2 to 4 of the said judgment of the division bench of this Court in the case of M/s. Indusind Bank Ltd. (supra) read thus :

"2. The only question that has been decided by the learned Single Judge is whether the term in the bank guarantee that the claim has to be lodged in any case on or before 30th April 1997 is void in view of provisions of section 28 of the Contract Act? . The learned counsel appearing for appellants submits that the finding recorded by the learned Single Judge that the aforesaid term in the contract is hit by section 28(b) of the Contract Act is incorrect. The learned counsel submits that the term in the bank guarantee for lodging claim or making claim by the plaintiffs before a particular date in order to make the Bank liable under the bank guarantee is in no way affected by section 28. The learned counsel submits that there is no clause in the bank guarantee which imposes any restriction on filing a suit within any period which is shorter than the period provided by the Limitation Act. The learned counsel submits that the term in the bank guarantee is in relation to the assertion of right and not in relation to enforcement of right. The learned counsel relies on the judgment of the Supreme Court in the case of Food Corporation of India v/s New India Assurance Co.Ltd. and others, reported in (1994) 3 SCC 324 in support of his submission.

4. Section 28 of the Contract Act before its amendment with effect from 8th January 1997 read as under :-

"28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

ppn 37 arbp-653.11(j).doc Provisions of unamended section 28 were interpreted by this Court in its judgment in the case of Baroda Spinning and Weaving Co.Ltd. v/s Satyanarayan Marine and Fire Ins. Co.Ltd., reported in 15 Bom.L.R. 948. That judgment of this Court was considered by the Supreme Court in its judgment in the case of Vulcan insurance Co. v/s Maharaj Singh, reported in AIR 1976 SC 287 as also in the judgment in the case of Food Corporation of India v/s New India Assurance Co.Ltd. & others, reported in (1994) 3 SCC 324. The Supreme Court in its judgment in the case of National Insurance Co.Ltd. v/s Sujir Ganesh Nayak and Co. & others., reported in AIR 1997 SC 2049, after referring to all the above referred cases, in paragraph 17 has observed thus :-

"17. From the case law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time barred. Such a clause would fall outside the scope of section 28 of the Contract Act. This, in brief, seems to be the settled legal position. We may now apply it to the facts of this case."

ppn 38 arbp-653.11(j).doc Thus, the law in relation to section 28 before its amendment in the year 1997 was that the curtailment of the period of limitation is not permissible in view of section 28 but extinction of the right itself unless exercised within a specified time is permissible. In order to remedy the situation and to declare that even a term in the contract which extinguishes the right if not exercised within specified time to be void by Amendment Act No.1 of 1997 which came into force on 8th January 1997 section 28 was amended. The original section 28 became section 28(a) and clause (b) was added. The amended section 28 reads as under :-

28. Agreements in restraint of legal proceedings, void (every agreement -

(a) .....

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent).

In the present case, we are considering whether the above quoted term in the bank guarantee is void or invalid because of section 28(b). The effect of enactment of section 28(b) was that not only the curtailment of limitation period is impermissible but also the extinction of right if sought to be brought by the agreement within a specified period which period is less than the period of limitation prescribed for the suit under the contract is also rendered void. Thus, as a result of amendment of section 28 in 1997, now not only a term in the contract which restricts right to adopt remedy under law by curtailing the period of limitation is void but a term in the contract which restricts enforcement of the accrued right under the contract is also declared to be void. However, a distinction has to be made between the term in contract restraining a party to the contract from enforcing its right and the term in the contract requiring it to make a claim or assert his right within a specified time or prescribe a period for operation of the contract. A term in the contract which requires a party to the contract to assert its right or requires a party to make a claim within certain time will not be affected by section 28(b). We find that this distinction has been noted and recognised by the Supreme Court in its judgment in the ppn 39 arbp-653.11(j).doc case of Food Corporation of India referred to above. The Supreme Court in paragraph 7 of its judgment has quoted the term in the contract which fell for its consideration. It reads as under :-

> "We The Anand Insurance Co.Ltd. Further agree that the guarantee herein contained shall remain in full force and effective upto and inclusive of February 15, 1971 the date referred to above or the expiry of the extended period from time if any and that it shall continue to be enforceable till all the dues of the Corporation under or by virtue of the said agreement has / have been fully paid and its claim satisfied or discharged or till the Regional Manager of the Food Corporation of India certified that the terms and conditions of the said agreement have been fully and properly carried out by the said miller and accordingly discharges the guarantee subject, however, that the Corporation shall have no rights under this bond after the expiry of (period) six months from the date of the termination of the contract."

The Supreme Court then observed thus :-

> "A right under an agreement or a statute may be enforced in the manner provided. The right of the appellant under the agreement was to recover all dues against the miller, directly, from the company. That was never in dispute.
>
> How to recover it ? First by making a demand and on delay or refusal by moving the machinery provided in the agreement or by approaching the court. Enforceability thus commences from making a demand and extends to ultimate vindication of the claim. When the appellant gave notice to the company informing it of the default and made demand of the amount due it was an exercise of right under the bond for satisfaction of its claim arising out of negligence of the miller.

When the appellants gave notice to the Company informing it of the default and made demand of the amount due, it was an exercise of right under the bond for satisfaction of claim arising out of negligence of the miller. The Supreme Court in ppn 40 arbp-653.11(j).doc relation to the above quoted clause, in paragraph 8 has observed thus :-

"8. From the agreement it is clear that it does not contain any clause which could be said to be contrary to section 28 of the Contract Act nor it imposes any restriction to file a suit within six months from the date of determination of the contract as claimed by the company and held by the High Court. What was agreed was that the appellant would not have any right under this bond after the expiry of six months from the date of the termination of the contract. This cannot be construed as curtailing the normal period of limitation provided for filing of the suit. If it is construed so it may run the risk of being violative of section 28 of the Contract Act. It only puts embargo on the right of the appellant to make its claim known not later than six months from the date of termination of contract. It is in keeping with the principle which has been explained in English decisions and by our own court that the insurance companies should not be kept in dark for long and they must be apprised of their liabilities immediately both for facility and certainty."

The term that fell for consideration of the Supreme Court in its judgment in Food Corporation of India s case is similarly to the term which we are considering in the present case. The Supreme Court in paragraph 8 of that judgment in relation to the term in the contract further observes thus :-

"Since the period is provided under the agreement the appellant had to move within this period asserting its right and apprising the company of the breach or violation by the miller to enable it either to pay or to persuade the miller to pay itself. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the Corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties."

ppn 41 arbp-653.11(j).doc The Supreme Court then observes thus :-

"Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand but also to put on guard that in case it is not complied, it may have to face proceedings in the court of law. (emphasis supplied)"

Thus, the Supreme Court has held that the term in the contract which deals with assertion of right is in no way connected with what is contemplated by section 28 of the Act. The term in the bank guarantee requiring the respondents to make their claim or demand with the Bank on or before 30th April 1997 does not affect the right of the respondents to enforce their rights by approaching the court of law within the normal period of limitation if the respondents assert their right or make a demand or claim with the Bank within the period mentioned in the bank guarantee. In our opinion, really speaking, in view of the law laid down by the Supreme Court in its judgment in the case of Food Corporation of India, there does not remain any possibility of any debate whether a term in the bank guarantee requiring beneficiaries of the bank guarantee to make claim under the bank guarantee within the stipulated period would be void because of the provisions of section 28 of the Act because such a term in the agreement is relatable to the assertion of right so as to perfect that right and not in relation to enforcement of that right in the court of laws. In our opinion, therefore, the learned Single Judge was not justified in holding that the above quoted term in the bank guarantee is void in view of provisions of section 28 (b) of the Contract Act."

42. Learned single judge of this Court in the case of Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited, reported in ppn 42 arbp-653.11(j).doc 2012 (2) Bom.C.R. 271 has also considered the case under amended Section 28 of the Indian Contract Act and has dealt with several judgments of the Supreme Court and the judgment of the division bench of this Court in the case of M/s. Indusind Bank Ltd. Vs. Union of India and Ors. (supra). Paragraphs 32 to 34, 41 and 42 of the said judgment in the case of Axios Navigation Co. Ltd.(supra) read thus :

> "32. The Division Bench of this Court (M/s. Indusind Bank Ltd) (Supra) has set aside the judgment and decree by the learned Single Judge, whereby such restrictive clause was declared to be void. We have held that such clause is not void as by such clauses right to claim damages or compensation in regular Court is not restricted. What is restricted is their claim or demand and/or assertion of their right, as agreed, within the period mentioned in such document. Therefore, we have also observed that such clause does not affect the right of the parties to enforce their rights by approaching the Court of law within normal period of limitation, but it should be subject to the assertion of their right within agreed period. It is also observed that the provisions of Section 28 of the Contract Act and the terms in the agreement is relatable to the assertion of right so as to perfect that right and not in relation to enforcement of that right in the Court of laws.
>
> 33. I see no reason to overlook the above observations/ findings given by the Division Bench by interpreting the amended Section 28(b) and the similar nature of clauses. I am also of the view that the commercial documents need to be interpreted on the basis of commercial usages and practices, followed and adopted in such type of transaction at national or international level. The commercial document and the clause in question and/or similar clause has been interpreted in above cases as cited by the learned counsel appearing for the Respondents which, in my view, cannot be overlooked as the commercial intention underlying these clauses have been to ensure that the claims need to be mentioned by the owners within a short period of final

discharge so that the claims would be investigated and resolved as early as possible Babanaft International (supra). The documentary requirement along with ppn 43 arbp-653.11(j).doc such claim within the specified period with details and amount is also relevant for the early disposal of the claim. The rejection of such time barred claim, as it was not filed with the document within specified period, in my view, are in consistent with the commercial sense and certainty. [The Sabrewing, The Voltaz, Mira Oil, and Metalimex (Supra) specially in view of clear and unambiguous and independent clause 24 in question. The other clauses, even if any, of the agreement, cannot prevail over such clear agreed terms. There was no question to look into other clauses.

34. The submission of the learned counsel appearing for the Petitioners by referring to above judgments cited by him are therefore of no assistance as the facts and circumstances were totally different and distinguishable. The Court needs to consider the relevant facts and the nature of commercial document between the parties. The judgments so referred and relied upon by the counsel appearing for the Respondents and apart from the judgment of the Division Bench of this Court to which I was also a party, in my view, is correct view of the matter. Such clauses are permissible and not prohibited under Section 28 (b) of the Contract Act.

The clause which mandate to assert rights within stipulated time is permissible and binding:-

41. Another facet is, Section 28 of the Contract Act itself permits the parties to get their dispute settled through the Arbitration and the amount so awarded in the Arbitration shall only be recoverable. In totality, therefore, I am not inclined to accept the submission that any Arbitration Proceedings, based upon the commercial documents, where an agreement limiting the time within which party must assert its right failing which the claim of damages/compensation shall be forfeited and/or not entitled to claim damages after prescribed period, can be stated to be against the public policy and/or any such Analogue doctrine.

42. The Limitation Act itself permits for a shorter period of limitation if a particular statute and/or special Acts restrict the same. The special Acts, therefore, a prescribing shorter period of limitation than that provided under the limitation Act is not a foreign concept and/or against any public policy Act and/or ppn 44 arbp-653.11(j).doc Law. Therefore, if the Constitution of India and law of the land contemplates and provides the freedom of contract in the matter of trade and/or commerce and further permits the parties to settle their disputes through the provisions of Arbitration and/or such other alternative modes as available and as referred under Section 89 of the Civil Procedure Code (for short, CPC), and the particular business or transaction and/or trade or practice if permits the parties to restrict and/or provide fixed period to assert their claims for damages or compensation and therefore, to say that such clause/clauses of Arbitration and/or agreement between the parties is against Section 28 (b), in my view, specially in

Arbitration matter is unacceptable. Such restriction will frustrate the whole purpose and object of Arbitration Act and also infringes the freedom of free trade and the commercial contract."

43. The Supreme Court in the case of Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited, decided on 15th September 2014 in Civil Appeal No.8750 of 2014 and other connected matters has held that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. Paragraphs 30 to 34 of the said judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi (supra) read thus :

"General Principles concerning retrospectivity

30. A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of 'Interpretation of Statutes'. Vis-a-vis ordinary prose, a legislation differs in its provenance, lay-out and features as also in the ppn 45 arbp-653.11(j).doc implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs.Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd. Thus, legislations which modified accrued rights or which impose obligations

or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

33. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a ppn 46 arbp-653.11(j).doc benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association5, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

34. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors."

44. The Supreme Court in the case of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., reported in (1999) 9 SCC 334 has held that there is a presumption that the legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. Paragraph 28 of the said judgment in the case of Thyssen Stahlunion Gmbh (supra) reads thus :

ppn 47 arbp-653.11(j).doc "28. Section 85(2)(a) is the saving clause. It exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act uptill the time of the enforcement of the award.

This Section 85(2)(a) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. There is a presumption that Legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. It is correct that the new Act is a remedial statute and, therefore, Section 85(2)(a) calls for strict construction, it being a repealing provision. But then as stated above where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter."

45. The Supreme Court in the case of East and West Steamship Co., Georgetown, Madras Vs. S.K. Ranalingam Chettiar, reported in AIR 1960 SC 1058 has held that the ordinary grammatical sense of "discharged from liability" does not connote "free from the remedy as regards liability" but are more apt to mean a total extinction of the liability following upon an extinction of the right. The words are apt to express an intention of total extinction of the liability and should specially in view of the international character of the legislation, be construed in that sense. It is held that it is hardly necessary to add that once the liability is extinguished under such clause, there is no scope of any acknowledgement of liability thereafter. Paragraphs 1 and 25 of the said judgment in the case of East and West Steamship Co., Georgetown, Madras (supra) read thus :

> "1. These three appeals-Civil Appeal No. 88 of 1956, Civil Appeal No. 91 of 1958 and Civil Appeal No. 92 of 1958, of which one is from a decision of the High Court of Madras and the other two from decisions of the High Court of Bombay raise some common questions of general importance to carriers of ppn 48 arbp-653.11(j).doc goods by sea and of shippers as regards the 3rd clause of paragraph 6 of Art. III in the Schedule of the Carriage of Goods by Sea Act (hereinafter called "the Act"). This clause provides that "in any event the carrier and the shipper shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered". In all the three appeals before us the carriers' main defence to claims of compensation by the owners of the goods was based on this clause and the courts had to consider whether this defence was available to the carrier.
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> 25. On the next question whether this clause prescribes only a rule of limitation or provides for the extinction of a right to compensation, it will be observed that the Bombay High- Court has not discussed it at all, apparently because on the facts of the case before it would have mattered little whether the provision was one of limitation or of extinction of right. The question is however of some importance in the facts of the Madras Case. For if the provision is one of limitation there would be some scope for argument in the facts of that case that the period was extended by acknowledgments of liability within the meaning of Art. 19 of the Limitation Act. The question we have to decide is whether. in saying that the ship or the carrier will be "discharged from liability", only the remedy of the shipper or the consignee was being barred or the right was also being terminated. It is useful to remember in this connection the international character of these rules, as has been already emphasised above. Rules of limitation are likely to vary from country to country. Provisions for

> extension of periods prescribes for limitation would similarly vary. We should be slow therefore to put on the word "discharged from liability" an interpretation which would produce results varying in different countries and thus keeping the position uncertain for both the shipper and the shipowner. Quite apart from this consideration, however, we think that the ordinary grammatical sense of "discharged from liability" does not connote "freed from the remedy as regards liability" but are more apt to mean a total extinction of the liability following upon an extinction of the right. We find it difficult to draw any reasonable distinction between the words "absolved from liability" and "discharged ppn 49 arbp-653.11(j).doc from liability" and think that these words "discharged from liability" were intended to mean and do mean that the liability has totally disappeared and not only that the remedy as regards the liability has disappeared. We are unable to agree with the learned Judge of the Madras High Court that these words merely mean that "that even though the right may inhere in the person who is entitled to the benefits, still the liability in the opposite party is discharged by the impossibility of enforcement." The distinction between the extinction of a right and the extinction of a remedy for the enforcement of that right, though fine, is of great importance. The Legislature could not but have been conscious of this distinction when using the words "discharged from all liability" in an article purporting to prescribe rights and immunities of the shipowners. The words are apt to express an intention of total extinction of the liability and should, specially in view of the international character of the legislation, be construed in that sense. It is hardly necessary to add that once the liability is extinguished under this clause, there is no scope of any acknowledgment of liability thereafter."

46. The Division Bench of this Court in the case of Reliance Industries Limited Vs. P & O Containers Limited and Anr., reported in AIR 2005 Bom 65 has interpreted a similar clause and after following the judgment of the Supreme Court of East and West Steamship Co., Georgetown, Madras (supra) and various other judgments has held that such clause has already been interpreted as not pertaining to the right of limitation, but it is a clause pertaining to the discharge or extinction of the liability. It is held that it was a clause not curtailing the limitation and applying the test as laid down by the Apex Court in the case of National Insurance Co. Ltd. Vs. sujir Ganesh Nayak reported in (1997) 4 SCC 366, the clause in question was a valid clause and was not void as per the provisions of Section 28 of the Indian Contract Act, 1872. Paragraphs 4, 17, 18 and 19 of the said judgment of the Reliance Industries Limited (supra) read thus :

ppn 50 arbp-653.11(j).doc "4. Upon service of the summons, the respondents have submitted the application at Exhibit 16 raising a preliminary objection under Order VII, Rule 11 of the Code of Civil Procedure to the effect the suit is barred by law, that is to say, by the Law of Limitation. The Respondents relied upon the facts as pleaded by the appellants and stated that the claim of the appellants is based against the respondents on the Bill of Lading issued by Respondent No. 1 and thereby the privity of contract between the Appellants and the Respondents is through the Bill of Lading, which is subject to the various terms and conditions printed on the face of Bill of Lading and also on the reverse thereof. The said Bill of Lading is subject to the provisions of the Hague Rules. The Respondents raised the contention that Article III, Rule 6 of the Hague Rules provides :

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of goods or of the date when they should have been delivered."

The respondents claimed that the vessel having been admittedly arrived at port Nhava-Sheva on or about 24.8.1993, and goods having been dispatched on or about the same date, the suit ought to have been filed on or before 24.8.1994; and the suit which has been filed on 20/6/1995 is beyond the period of one year, and therefore, barred by Law and the same be dismissed.

17. Thus, the Apex Court has summarised the law on the point. Therefore, we will have to scrutinize paragraph (3) of Rule 6 of Article III in the light of this observations to find out as to whether by the said paragraph the period of limitation has been curtailed and/or it provides for simplicitor forfeiture because if it curtails the period of limitation, then it will have to be held as void. However, if it provides for any forfeiture, then it will be a valid one.

18. Learned Counsel for the appellants relied upon the ruling in the case of Mahajan Silk Mills v. M.V. MSC Elena, 2000 (3) Bom. C. R. 841, wherein the learned Single Judge of ppn 51 arbp-653.11(j).doc this Court has considered Section 28 of the Contract Act as amended by Amending Act (1) of 1997 and Article III and Clause 6 of the Carriage of Goods by Sea Act, 1925 and, referring to amended Article III, Rule 6, has held that the said clause is void, inoperative to the extent that it limits the time to institute suit or extinguishes the right of the plaintiffs to file a suit. We must emphasis that this judgment of the learned single Judge of this Court is not applicable to the facts of the present case because the suit in that case was filed after Section 28 of the Contract Act was amended in 1997 and the facts involved were of subsequent year to that of 1997. So also the amended clause of the Hague Rules was considered which we have already held as not applicable in India when the port of dispatch is not Indian port. On the contrary, from the facts of the above referred judgment, it appears that the port from which the goods were dispatched and the Bill of Lading was issued is a Mumbai, i.e. Indian port and therefore the Carriage of Goods by Sea Act as amended by the Brussels Protocols of 1968 and 1979 was applicable. In this respect, we have already held that the said Act is not applicable to the facts of this case as discussed in the earlier para of this judgment. Therefore, we find that the point for consideration in that case and the present case in relation to the clauses of the Hague Rules was different. Therefore, we thus distinguish the said case and refrain from looking into it. In the case which we are dealing with, this Amending Act of 1997 is not applicable because the suit is of 1995 and the facts involved in the present case are of the earlier year than 1997. Therefore, we have to see whether on the date of the filing of the suit in 1995, the suit is within limitation and whether the rights to file suit have been extinguished in view of the said clause. According to us, the said clause is not void to Section 28 of the Contract Act. We are supported in our view by the ruling of the Apex Court in the case of East & West Steamship Co. v. S. K. Ramalingam, A.I.R. 1960 S. C. 1058. The Apex Court in paragraph (25) has observed as under :

> "The question we have to decide is whether in saying that the ship or the carrier will be "discharged from liability", only the remedy of the shipper or the consignee was being barred or the right was also being terminated. It is useful to remember in this connection the international character of these rules, as has been already emphasised

> ppn 52 arbp-653.11(j).doc above. Rules of limitation are likely to vary from country to country. Provisions for extension of periods prescribed for limitation would similarly vary. We should be slow therefore to put on the word "discharged from liability" an interpretation which would produce results varying in different countries and thus keeping the position uncertain for both the shipper and ship owner. Quite apart from this consideration, however, we think that the ordinary grammatical sense of "discharge from liability" does not connote " free from the remedy as regards liability" but are more apt to mean a total extinction of the liability following upon an extinction of the right. We find it difficult to draw any distinction between the words "absolved from liability" and "discharged from liability"

and think that these words" discharged from liability "were intended to mean and do mean that the liability has totally disappeared and not only that the remedy as regards the liability has disappeared. We are unable to agree with the learned Judge of the Madras High Court that these words merely mean that "that even though the right may inhere in the person who is entitled to the benefits, still the liability in the opposite party is discharged by the impossibility of enforcement." The distinction between the extinction of a right and the extinction of a remedy for enforcement of that right, though fine, is of great importance. The Legislature could not but have been conscious of the distinction when using the words "discharged from all liability" in an Article purporting to prescribe rights and immunities of the shipowners. The words are to express an intention of total extinction of the liability and should, specially in view of the international character of the legislation, be construed in that sense. It is hardly necessary to add that once the liability is extinguished under this clause, there is no scope of any acknowledgment of liability thereafter."

19. Thus, the Apex Court has held that this clause operates for extinction of the liability and does not curtail the remedy available under the law. This clause has been already interpreted as not pertaining to the right of limitation, but it is a ppn 53 arbp-653.11(j).doc clause pertaining to the discharge or extinction of the liability. Thus, viewed, it is a clause not curtailing the limitation and applying the test as laid down by the Apex Court in the case of National Insurance Co. Ltd. v. Sujir Ganesh Nayak, (1997) 4 Supreme Court Cases 366 (supra), we find that paragraph (3) of Rule 6 of Article III of the unamended Hague Rules is a valid clause and is not void as per the provisions of Section 28 of the Indian Contract Act."

47. The Madras High Court in the case of The Oriental Insurance Company Limited Vs. Karur Vysya Bank Limited, reported in AIR 2001 MADRAS 489 has interpreted a similar clause and after dealing with the unamended and amended Section 28 of the Contract Act, has held that in the absence of any specific reference regarding its operation, it is presumed that it is only prospective. It is held that though it is clear that by the Indian Contract (Amendment) Act, 1997, the original Section 28 has been replaced by a new paragraph in which such extinction of right unless exercised within the specified period of time, if not beyond the period of limitation, is also rendered void. It is held that in the absence of any specific reference in the amended Act, it is prospective in nature and the same cannot affect the contract made earlier. Relevant parts of paragraph 9 of the said judgment in the case of The Oriental Insurance Company Limited (supra) read thus :

> "9.....In the light of the rival contentions, it is useful to refer the condition No.19 of the policy in question:-
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> "No. 19. In no case whatsoever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration; it being expressly agreed and declared that if the company shall disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the disclaimer have been made ppn 54 arbp-653.11(j).doc the subject matter of a suit in a court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

By heavily relying on the said condition (condition No.19), learned counsel appearing for the appellant would contend that since the 12 months period from the date of disclaimer, namely, 23.9.85 expired long back, the learned-Subordinate Judge ought to have dismissed the suit as barred by limitation. Before considering this contention which is based on merits, we shall consider the other legal aspects. We have already extracted the condition No.19 of the policy-Ex. A-8. Learned counsel for the appellant even at the beginning, by relying on a decision of the Apex Court in National Insurance Company Ltd. v. Sujir Ganesh Nayak and Company, , would contend that the said condition in the policy is valid and acceptable. .....

.....Mr. Sampathkumar while stating that the present appeal is the extension of suit, in view of the amendment made to Section 28 of the Indian Contract Act, the day on which this Court considers condition No.19, its validity or otherwise is to be decided. No doubt, with regard to the said contention, Mr. Nageswaran, learned counsel appearing for the appellant- Insurance Company, would contend that in the absence of such a plea in the plaint, the same cannot be considered at this stage. Though elaborate arguments were advanced on this aspect, we are of the view that it is unnecessary to refer the same since the amendment to Section 28 was brought into effect only on 8.1.1997. In the absence of any specific reference in the amended provision regarding its operation, it is presumed that it is only prospective. Though it is clear that by the Indian Contract (Amendment) Act, 1997, the original section 28 has been replaced by a new paragraph in which such extinction of right unless exercised within a specified period of time, if not beyond the period of limitation, is also rendered void. As observed earlier, in the absence of any specific reference in the amended Act, it is prospective in nature and the same cannot affect the contract made earlier. However, the law as it now stands after this amendment not only the curtailment of limitation period is impermissible, but also the extinction of ppn 55 arbp-653.11(j).doc right, if sought to be brought by the agreement within a specified period, which period is less than the period of limitation prescribed for the suit under the contract in question is also rendered void. In view of our conclusion, as stated earlier, it is unnecessary to consider the contention regarding failure to plead etc."

48. The Delhi High Court in the case of M/s. Continental Construction Ltd. Vs. Food Corporation of India and Ors., reported in AIR 2003 DELHI 32 has held that the amendment to Section 28 of the Contract Act is not retrospective in its operation. It is held that the contract in question considered

by the Delhi High Court had been arrived at before the amendment and even the work executed before that. Consequently, the provisions of the amended Section 28 of the Contract Act will not have a role to play, so far as that dispute was concerned. Paragraph 11 of the said judgment of the Delhi High Court in the case of M/s. Continental Construction Ltd. (supra) reads thus :

> "11. Section 28 of the Contract Act as reproduced above was introduced on the recommendation of the Law Commission in order to remove the anomalies created by the earlier Act. The position of law settled before the amendment was that Section 28 would invalidate only a clause in an agreement which restricts a party from enforcing his right absolutely or which limits the time within which he may enforce his right. Section 28 before the amendment does not come into operation when contractual term spell out an extension of a right of a party to sue or spell out the discharge of a party from the liabilities. It is true that the argument of the applicants learned counsel as per the amended provisions of section 28 of the Act would come to his rescue but the snag in the argument is that Section 28 of the Contract Act as amended is not retrospective in its operation. The present contract between the parties had been arrived at before the amendment and even the work executed before that. Consequently the provisions of the amended provisions of Section 28 of the Contract Act will not have a role to play, so far ppn 56 arbp-653.11(j).doc as the present dispute is concerned. In that view of the matter the said argument so much thought of will be of little avail."

49. In so far as the judgment of the Division Bench of the Delhi High Court in the case of D.D.A. Vs. Pandit Construction Co., delivered on 19th April 2012 in FAO (OS) 382 of 2007 relied upon by the learned counsel for the respondent no.2 is concerned, the Delhi High Court was considering a situation where the agreement between the parties was entered into prior to the amendment to Section 28 of the Indian Contract Act, 1872, however, the work lingered on till 28 th April 1998. The final bill was prepared on 5th July 1999 and intimation of it be finalized sent to the Opponent on 20th March 2001. The dispute was raised on 9th July 2001. Considering these facts, the Division Bench of the Delhi High Court held that that matter would be governed by the amendment to Section 28 of the Indian Contract Act, 1872. Paragraphs 9 to 12 of the Delhi High Court in the case of D.D.A. Vs. Pandit Construction Co.(supra) read thus :

> "9. A perusal of the amended Section 28 of the Contract would reveal that both kinds of agreements i.e. which restrict the right, by providing a period within which claims could be preferred, as also agreement which extinguish the right of a party to prefer a claim or discharges any party from any liability under a contract on the expiry of a specified period are void.
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> 10. Thus, the position post January 08, 1997 would be that Clause 25 of the General Conditions of Contract would be void.
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> 11. Now, in the instant case, the agreement between the parties is dated November 30, 1990 i.e. a date prior to Section 28 of the Contract Act being amended. But, the

work lingered on till April 28, 1998. The final bill was prepared on July 05, 1999 and intimation of it be finalized sent to the respondent on March 20, 2001. The dispute was raised on July 09, 2001.

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12. Now, retroactive is defined as acting backward and affecting what is past. In its strict application, a retroactive law takes away or impairs vested rights acquired under existing law and creates a new obligation and imposes a new duty or attaches a new disability in respect to past transactions. Alternatively it can be said that a law is retroactive if it affects transactions that have occurred or rights that have accrued before the law becomes operative and ascribes to them affects not inherent in their nature in FAO(OS) 382/2007 Page 4 of 12 view of the law in force at the time they occurred. However, in the instant case, we need not bother ourselves whether Section 28 of the Contract Act when amended by Act No.1 of 1997, in relation to the amendment incorporated is retroactive or not, for the reason as held by a Division Bench of the Court in the decision dated May 26, 2009 in Arb.P.No.246 of 2005 Ms. Chander Kant & Co. vs. The Vice Chairman DDA & Ors. has held that law as in force has to be considered when a dispute arises and not when a contract was entered into. In the instant case, the dispute arose only when intimation of the bill being finalized was sent to the respondent on March 20, 2001. The decision reported as AIR 2003 Delhi 32 M/s Continental Construction Ltd. vs. Food Corporation of India & Ors. is distinguishable on account of the fact that in said case the dispute arose under the contract prior to January 08, 1997 and thus the Court considered the applicable clause in the contract with reference to Section 28 of the Contract Act as per its pre existence."

50. In so far as the judgment of the Supreme Court in the case of Dr. Indramani Pyarelal Gupta and Ors. Vs.W.R. Natu and Ors., reported in AIR 1963 SC 274 is concerned, reliance is placed on the said judgment by the learned counsel for the respondent no.2 in support of the submission that the effect of the amendment to Section 28 of the Indian Contract Act would be retrospective in operation and also in support of the submission that considering the undue mischief and hardship to a party by a shorter period of limitation provided in the agreement entered into between the parties, the amendment to Section ppn 58 arbp-653.11(j).doc 28 of the Indian Contract Act was introduced by the legislature to avoid such mischief and hardship. Paragraph 25 of the said judgment in the case of Dr. Indramani Pyarelal Gupta & Ors. (supra) reads thus :

"25. Mr. Pathak next contended that the impugned bye-law was invalid because it operated retrospectively. This argument he presented under two heads. His first submission was that consistently with the rule that an enactment would not be construed as retrospective unless the same were to have that effect by express language or by necessary intendment, the impugned bye-law should be held to affect and close out only those contracts which were entered into after the date on which the bye-law came into operation and that if he was right in this construction, the

impugned notification had gone beyond the powers conferred on the Commission by the new bye-law. We are wholly unable to accept this submission as to the construction of the bye law. The first paragraph of the bye-law by its last words points out the consequence of a notification by the Forward Markets Commission. It provides that if the Chairman were notified that the continuation of trading in hedge contracts for any delivery etc. "was detrimental to the interests of the general public or the larger interests of the economy of India," then notwithstanding, anything to the contrary contained the bye-

laws of the Association or in any hedge etc., contract the provisions contained in the second paragraph should have effect. If one had regard only to paragraph and nothing more there might be some room for a plausible argument that subsisting contracts were not to be affected, though the expression "notwithstanding anything to the contrary contained in any hedge etc. contract" would undoubtedly militate against any such contention. But such ambiguity if any is cleared by the provision in paragraph 2 which has effect on the notification under paragraph I, for by express terms it refers to "every hedge contract" and "every on call contract" "in so far as cotton is uncalled thereunder or in so far as the price has not been fixed thereunder". This therefore places it beyond doubt that executory contracts which were subsisting on the date of the notification were within its scope and were intended to be affected by it. And this, if anything more needed, is made more certain by the reference in para. (2) to the provisions of cls. (3), ppn 59 arbp-653.11(j).doc (4) and (6) of bye-law 52A. Bye-law 52A deals with cases where the Board of the Association resolves, to repeat its terms "that a state of emergency exists or is likely to occur which makes free trading in forward contracts difficult and on obtaining the concurrence of the Forward Markets Commission, then notwithstanding anything to the contrary contained in these Bye-

laws or in any forward contract made subject to these Bye- laws, the following provision shall have effect :

"(1) The Board shall at a meeting specially convened in this behalf,

(a) fix date for the purposes hereinafter contained,

(b) fix settlement prices for forward contracts,

(c) fix a special Settlement Day."

Clause (3) of bye-law 52A runs :-

"52A. (3) All differences arising out of every such contract between members shall be paid through the Clearing House on the Settlement Day fixed under clause (1) (c) hereof....."

Clause (4) "52A. (4) All differences arising out of every such contract between a member and a non-member shall become immediately due and payable,"

> and Clause (6) "52A. (6) In hedge and on call contracts entered into between a member and a non-member and in contracts to which clause (5) applies, any margin received shall be adjusted and the whole or the balance thereof, as the case may be, shall be immediately refundable."

It is thus clear that the entire machinery for resolving emergencies such as is contemplated by bye-law 52A includes the suspension of forward business together with the closing out of forward contracts of hedge and on call types whose volume or nature had led to the emergency. It proceeds on the basis that the crisis could not be met unless subsisting contracts were closed out and, so to speak a new chapter begun. That is the ratio underlying the combined effect of bye-laws 52AA and 52A and in view of this circumstance the argument that on a reasonable construction of the amended bye-law it would apply to contracts ppn 60 arbp-653.11(j).doc to be entered into in future and not to subsisting contracts must be rejected."

51. Learned counsel appearing for the respondent no.2 also placed reliance on the recommendation of the Law Commission of India for amendment to Section 28 of the Indian Contract Act, 1872.

Paragraphs 5.1 to 5.3 of the recommendation of the Law Commission of India of March 1984 in its Ninety-Seventh Report are extracted as under :-

> "5.1. We now come to the changes that are needed in the present law. In our opinion, the present legal position as to prescriptive clauses in contracts cannot be defended as a matter of justice, logic, commonsense or convenience. When accepting such clauses, consumers either do not realise the possible adverse impact of such clauses, or are forced to agree because big corporations are not prepared to enter into contracts except on these onerous terms. "Take it or leave it all", is their general attitude, and because of their superior bargaining power, they naturally have the upper hand. We are not, at present, dealing with the much wider field of "standard form contracts" or "standard" terms. But confining ourselves to the narrow issue under discussion, it would appear that the present legal position is open to serious objection from the common man's point of view. Further, such clauses introduce an element of uncertainty in transactions which are entered into daily by hundreds of persons.
>
> 5.2. It is hardly necessary to repeat all that we have said in the preceding Chapters about the demerits of the present law.
>
> Briefly, one can say that the present law, which regards prescriptive clauses as valid while invalidating time limit clauses which merely bar the remedy, suffers from the following principal defects:-

(a) It causes serious hardship to those who are economically disadvantaged and is violative of economic justice.

(b) In particular, it harms the interests of the consumer, dealing with big corporations.

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(c) It is illogical, being based on a distinction which treats the more severe flaw as valid, while invalidating a lesser one.

(d) It rests on a distinction too subtle and refund to admit of easy application in practice. It thus, throws a cloud on the rights of parties, who do not know with certainty where they stand, ultimately leading to avoidable litigation.

5.3. On a consideration of all aspects of the matter, we recommend that Section 28 of the Indian Contract Act, 1872, should be suitably amended so as to render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, rights accruing from the contract. Here is a suggestion for re-drafting the main paragraph of Section 28.

Revised Section 28, main paragraph, Contract Act as recommended

28. Every agreement ---

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or

(b) which limits the time within which he may thus enforce his rights, or

(c) which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period or on failure to make a claim or to institute a suit or other legal proceeding within a specified period, or

(d) which discharges any party thereto from any liability under or in respect of any contract in the circumstances specified in clause (c), is void to that extent."

52. Learned counsel appearing for respondent no.2 also placed reliance on the judgment of this Court in the case of M/s.Mascon Multiservices & Consultants Pvt. Ltd. Vs. Bharat Oman Refineries Ltd., delivered by the learned Single Judge of this Court on 11 st August 2014 passed in Arbitration Petition No.1088 of 2010. It is submitted that the learned Single Judge of this Court has interpreted the amendment ppn 62 arbp-653.11(j).doc to Section 28 of the Indian Contract Act and also the judgment of the Division Bench of this Court in the case of M/s. Indusind Bank Ltd. (supra) and has held that the amendment to Section 28 of the Indian Contract Act, 1872 would apply with retrospective effect. A perusal of the said judgment of the learned Single Judge of this Court in the

case of M/s.Mascon Multiservices & Consultants Pvt. Ltd. (supra) indicates that the learned Single Judge has followed the judgment of the Delhi High Court in the case of M/s. Chander Kant & Co. Vs. The Vice Chairman, DDA & Ors., delivered on 26th May 2009 passed in Arbitration Petition No.246 of 2005 which was delivered prior to the judgment of the Division Bench of this Court in the case of M/s. Indusind Bank Ltd. (supra) and has held that the judgment of the Delhi High Court in the case of M/s. Chander Kant & Co.(supra) has not been considered by the Division Bench of this Court and thus the judgment of the Division Bench of this Court in the case of M/s. Indusind Bank Ltd. (supra) to that extent is per incurium. Paragraph 109 of the said judgment of the learned Single Judge of this Court in the case of M/s.Mascon Multiservices & Consultants Pvt. Ltd. (supra) reads thus :

> "109. There has been a later Division Bench judgment of the Bombay High Court being the case of M/s. Indusing Bank Ltd. Vs. Union of India & Ors. in Appeal No. 258 of 2008 dated 20 th April, 2011 in which the period of the validity of the bank guarantee was set out. In that case the claim was to be made within 3 months of the validity of the bank guarantee. The claim having not been made, the bank claimed to be relieved and discharged from its liability under the bank guarantee and claimed that nothing was payable to the plaintiff. The learned Single Judge considered the law under Section 28 and held that the bank guarantee was void as it laid down the period of 90 days during which a legal claim had to be made.
>
> ppn 63 arbp-653.11(j).doc The Court considered that the bank guarantee was to remain in force until a specific day and any claim under the bank guarantee had to be made within 3 months therefrom. If no demand was made, the claim under the bank guarantee could not be made. The Court observed that the respondent's right to make the claim or demand against the bank under the said bank guarantee was to be perfected only if the claim or demand was lodged before 90 days period.
>
> The Court considered the provision of unamended Section 28 and the judgment of the Supreme Court as also other Courts thereunder. The Court set out the judgment of the Supreme Court in the case of National Insurance (supra) which was also considered by the learned Division Bench of the Delhi High Court to set out and amplify the distinction that was carved out in that judgment pre amendment. Based upon the decision of the Supreme Court in the pre amendment case, the learned Division Bench of the Bombay High Court drew a parallel. The Supreme Court judgment set out the distinction between the right to enforce and the forfeiture or the waiver of rights as also the curtailment of limitation which was held to be not permissible and the extinction of the rights which was permissible and enforceable. The Division Bench of the Bombay High Court, therefore, considered the law before the amendment of 1997 and after the amendment. Having done so it set out the distinction between the right to adopt the remedy (the right to sue) and the restriction of enforcement of an accrued right. After observing that both were declared void, it drew the distinction and held that only the former was void and the latter was not affected by Section 28(b).

It further referred to the decision of the Supreme Court in the case of Food Corporation of India Vs. New India Assurance Co. Ltd. 1999 (3) SCC 324 which was also pre amendment and consequently showed the distinction. Extensively quoting the Supreme Court in the case of Food Corporation of India (supra) the Division Bench of the Bombay High Court held that such a clause did not affect "the right of the respondents to enforce their rights" by approaching a Court of Law within the normal period of limitation if the respondents assert their right or make a demand or claim with the bank within the period mentioned in the bank guarantee.

ppn 64 arbp-653.11(j).doc Consequently it held that in a case of a bank guarantee the assertion of right must be within the period mentioned though the action in law may be taken as per the law of limitation. Thereupon the Division Bench of the Bombay high Court set aside the judgment of the Single Judge which had held that such a clause was void under Section 28(b) of the Contract Act.

This judgment has not considered the judgment of the Delhi High Court in the case of Chander Kant (Supra) as also Avinash (Supra) and as per incurium to that extent."

53. The learned Single Judge of this Court has taken a similar view in the judgment delivered on 20th August 2014 in the case of JSW Steel Ltd. Vs.AI Ghuriar Iron & Steel LLC passed in Arbitration Petition No.398 of 2014 and has held that the judgment of the Division Bench of this Court is per incurium, not having considered the prior judgment of the Delhi High Court. With respect to the learned Single Judge, in my view, the judgment of the Division Bench of this Court in the case of M/s.Indusind Bank Ltd. (supra) was binding on the learned Single Judge and not the judgment of the Delhi High Court. I am bound to accept the judgment of the Division Bench of this Court which is applicable to the facts of this case and not the judgment of the learned Single Judge in which the judgment of the Division Bench of this Court in the case of M/s. Indusind Bank Ltd. (supra) has been declared as per incurium.

54. A perusal of the above referred judgments of the Supreme Court, this Court and other High Courts clearly indicates that the Supreme Court and this Court have consistently taken a view that the amendment to Section 28 of the Indian Contract Act would apply with prospective effect and not retrospective effect. The Supreme Court in the case of National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak & Co.

ppn 65 arbp-653.11(j).doc and Anr.(supra) has held that if the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time barred.

55. Division Bench of this Court after referring to and considering the several judgments of the Supreme Court in the case of M/s. Indusind Bank Ltd. Vs. Union of India and Ors.(supra) has held that the term in the contract which deals with assertion of right is in no way connected with what is contemplated by Section 28 of the said Arbitration Act. The term in the contract requiring the party

to make his claim or demand on a particular date does not affect the right of such party to enforce his rights by approaching the Court of law within the normal period of limitation if the party asserts his right or make a demand or claim with other party within the period mentioned in the contract.

56. Learned Single Judge of this Court in the case of Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited (supra) has also taken the similar view and has held that the clause which mandate to assert rights within the stipulated time is permissible and binding. Division Bench of this Court in the case of Reliance Industries Limited Vs. P & O Containers Limited and Anr.(supra) has interpreted a similar clause and has held that such clause has already been interpreted as not pertaining to the right of limitation, but it is a clause pertaining to the discharge or extinction of the liability. I am respectfully bound by the judgments of the Supreme Court and the Division Bench of this Court holding that such clause which mandate to assert rights within the ppn 66 arbp-653.11(j).doc stipulated time is permissible and binding and not contrary to Section 28 of the Indian Contract Act, 1872.

57. In so far as the judgments of the Madras High Court in the case of The Oriental Insurance Company Limited Vs. Karur Vysya Bank Limited (supra) and Delhi High Court in the case of M/s. Continental Construction Ltd. Vs. Food Corporation of India and Ors. (supra) are concerned, I am in agreement with the views expressed by the Madras High Court and the Delhi High Court in the aforesaid judgments respectively.

58. In my view, the petitioner has rightly distinguished the judgment of the Division Bench of the Delhi High Court in the case of D.D.A. Vs. Pandit Construction Co. (supra) relied upon by the respondent no.2. The facts before the Delhi High Court in the said judgment were totally different. Though the contract was awarded prior to the date of amendment, admittedly the work lingered on till 28th April 1998, the final bill was prepared on 5th July 1999 and intimation of it be finalized was sent to the Opponent on 20 th March 2001. The dispute was raised on 9th July 2001. All these activities, except the award of contract, took place after the said amendment to Section 28 of the Indian Contract Act, 1872 came into effect. In that context, the Delhi High Court took a view that the matter would be governed by the amendment to Section 28 of the Indian Contract Act, 1872. However, in the facts of this case, the contractual period was over much prior to the amendment came into effect. The period for submission of invoice and raising the dispute was over much prior to the amendment came into effect. The ppn 67 arbp-653.11(j).doc judgment of the Delhi High Court, in my view, would not assist the case of the respondents.

59. I am not inclined to accept the submission of the learned counsel for the respondents that the contract between the parties was not discharged. In my view, since the time to assert a right under clause 10.2 was extinguished much prior to the date of amendment to Section 28 of the Indian Contract Act, 1872, the amendment to the said provision would not affect the right which was accrued in favour of the petitioner prior to such amendment having come into effect. A perusal of the objects and reasons and the report of the Law Commission of India does not indicates that it was the intention of the legislature to introduce amendment to Section 28 with an intent to make it applicable with retrospective effect. In my view, the learned arbitrator has re-written the contract by declaring clause 10.2 as void and by severing that part of the agreement from the other part of the

agreement which is not permissible in law. The award shows patent illegality on the face of the award.

60. In so far as the judgment of the Supreme Court in the case of Dr. Indramani Pyarelal Gupta and Ors. Vs.W.R. Natu and Ors.(supra) relied upon by the respondent no.2 is concerned, the said judgment would not assist the case of the respondents. It is held by the Supreme Court in the case of Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited (supra) that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. In my view, a perusal of the objects and reasons and report submitted by the Law Commission of India as ppn 68 arbp-653.11(j).doc well as plain reading of amended Section 28 itself indicates that amendment to Section 28 was not to be intended to have a retrospective operation. I am respectfully bound by the judgment of the Supreme Court in the case of Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited (supra) and also the judgment of the Supreme Court in the case of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd.(supra).

61. In my view, the amended Section 28 of the Indian Contract Act, 1872 would apply only to those agreements which were entered into after such amendment came into effect i.e. from 8 th January 1997 and not to the contracts entered into prior thereto. The rights which were already accrued and/or stood extinguished under the existing contracts prior to the amendment were not divested by amendment to Section 28 of the Indian Contract Act, 1872. I am thus not inclined to accept the submission of the learned counsel for the respondents that the said amendment would apply with retrospective effect and that it was not necessary that it would apply only to the contracts entered into after the date of the amendment.

62. In so far as the submission of the learned counsel for the respondents that the learned arbitrator was entitled to consider amended provision applicable to the parties and to declare clause 10.2 as void is concerned, in my view, there is no merit in the submission of the learned counsel for the respondents. Learned arbitrator could not have declared any part of the agreement as void and to sever that part of the agreement from other part of the agreement. Neither there was any such prayer of ppn 69 arbp-653.11(j).doc the respondents to declare any such part of the agreement as void, nor the learned arbitrator was empowered to declare the provision of the agreement as void. Learned arbitrator, in my view, has exceeded jurisdiction by declaring clause 10.2 as void in view of the amendment to Section 28 of the Indian Contract Act, 1872 and has committed patent illegality on the face of the award.

63. In my view, there is no merit in the submission of the learned counsel for the respondents that since the petitioner had allegedly not complied with its obligation to pay price for supplies effected by the respondent no.2, the term of the agreement/contract for the purpose of payment/ obligation continued and was in place.

64. In so far as the submission of the learned counsel for the respondents that the petitioner had not raised any dispute on merit and in view of the petitioner's letter dated 10 th June 1997 requesting the respondent no.2 to waive the interest due, there was fresh cause of action and limitation was

extended on that ground is concerned, in my view, since the right, if any, of the respondent no.2 to make any claim against the petitioner stood extinguished in view of the respondent no.2 not making claim within the time prescribed under clause 10.2 of the agreement, question of any alleged acknowledgement of the liability on the part of the petitioner after such right of the respondents to make a demand stood extinguished did not arise. For the purpose of fresh cause of action under Section 19 of the Limitation Act, 1963, unconditional acknowledgement has to be made during the subsisting of the liability and not after such liability/right has been extinguished. I am thus not ppn 70 arbp-653.11(j).doc inclined to accept the submission of the learned counsel for the respondents that there was any fresh cause of action in favour of the respondents to invoke the arbitration in view of the letter dated 10 th June 1997 addressed by the respondents. Be that as it may, a perusal of the letter dated 10th June 1997 and other correspondence between the parties does not indicate that the petitioner has unconditionally accepted its alleged liability as canvassed by the respondents.

65. In so far as the reliance placed on Section 37 of the Indian Contract Act by the respondent no.2 is concerned, a perusal of the said provision clearly indicates that the said section itself is qualified by the words 'unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.' Since the parties in this case agreed that the right of a party would be extinguished, if any, the right is asserted before a particular date. In my view, Section 37 of the Contract Act would not apply and reliance placed thereon by the respondent no.2 is misplaced.

66. In so far as the submission of the learned counsel that the learned arbitrator has acted with official bias is concerned, reliance is placed by the learned counsel for the petitioner on the judgment of the Supreme Court in the case of Indian Oil Corporation Limited Vs. Raja Transport Private Limited, reported in (2009) 8 SCC 520 and in particular paragraph 34 thereof which reads thus :

> "34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject ppn 71 arbp-653.11(j).doc contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute."

67. Mr. Jagtiani, learned counsel for the respondent no.2, on the other hand, placed reliance on the judgment of the Supreme Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors., reported in (2002) 3 SCC 572 and it is submitted that since the issue of appointment of learned arbitrator and bias was not alleged under Sections 12, 13 and 16 of the said Arbitration Act, the petitioner cannot be allowed to raise such issue for the first time under Section 34 of the said Arbitration Act. Paragraph 18 of said judgment in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia (supra) reads thus :

> "18. Even otherwise, under the said Act the grounds of challenge to an arbitral award are very limited. Now an award can be set aside only on a ground of challenge under

> Sections 12, 13 and 16 provided such a challenge is first raised before the arbitral tribunal and has been rejected by the arbitral tribunal. The only other provision is Section 34 of the said Act. The only ground, which could be pressed in service by Mr. Venugopal, is that provided under Section 34(2)(a)(v). Section 34(2)(a)(v) has been extracted hereinabove. According to Mr. Venugopal if the composition of the arbitral tribunal or the arbitral procedure, even though it may be in accordance with the agreement of the parties, is in conflict with a provision of the Act from which the parties cannot derogate, then the party is entitled to have the award set aside. He submits that the words "unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate" as well as the words "failing such agreement" show that an award can be set aside if the agreement is in conflict with a provision of Part I of the said Act or if there is no agreement which is in consonance with the provisions of Part I of the said Act. In other words, according to Mr. Venugopal, even if the composition or procedure is in accordance with the agreement of the parties an ppn 72 arbp-653.11(j).doc award can be set aside if the composition or procedure is in conflict with the provisions of Part I of the said Act. According to Mr. Venugopal the words "failing such agreement" do not mean that there should be no agreement in respect of the composition of the tribunal or the arbitral procedure. According to Mr. Venugopal, an agreement in respect of the composition of the arbitral tribunal or arbitral procedure which is not in consonance with a provision of Part I of the said Act would be invalid in law and therefore would be covered by the phrase "failing such agreement". He submits that the words "failing such agreement" mean failing an agreement which is in consonance with a provision of Part I of the said Act. He submits that Section 34(2)(a)(v) entitles the Respondents to challenge the award and have it set aside."

68. A perusal of the record indicates that the petitioner did not raise any issue before the learned arbitrator under Sections 12, 13 and 16 of the Arbitration Act within the time prescribed or otherwise that there was any official bias on the part of the learned arbitrator being an employee or any other ground. Mr. Seksaria, learned counsel for the petitioner could not dispute this statement of the learned counsel for the respondents that no such plea of bias was raised by the petitioner before the learned arbitrator under Sections 12, 13 and 16 of the Arbitration Act. In my view, the allegations of the bias, if any, ought to have been made and objection regarding appointment of the learned arbitrator also ought to have been raised in accordance with the provisions of Sections 12, 13 and 16 respectively of the Arbitration Act. The petitioner not having raised such an issue at the appropriate stage before the learned arbitrator, under the aforesaid provisions, in my view, cannot be allowed to raise such plea for the first time under Section 34 of the said Arbitration Act. The judgment of the Supreme Court in the case of Indian Oil Corporation Limited Vs. Raja Transport Private Limited ppn 73 arbp-653.11(j).doc (supra) relied upon by the learned counsel for the petitioner is thus of no assistance to the petitioner.

69. In my view, the learned counsel for the respondents is right in placing reliance on the judgment of the Supreme Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors. (supra) in support of the submission that if a challenge under Sections 12, 13 and 16 is not raised before the

learned arbitrator in accordance with those provisions, it would amount to waiver under Section 4 of the Arbitration Act and such plea cannot be allowed to be raised for the first time in the application filed under Section 34 of the said Arbitration Act. I am respectfully bound by the judgment of the Supreme Court in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Ors. (supra) which is applicable to the facts of this case.

70. I am, therefore, of the view that the impugned award suffers from non-application of mind and shows patent illegality on the face of the award and is in conflict with the public policy. The award also discloses perversity on the face of the award since the learned arbitrator has declared part of the agreement as void and has exceeded his jurisdiction.

71. I, therefore, pass the following order :-

a) Arbitration Petition is made absolute in terms of prayer clause (a).

b) The impugned award dated 30th March 2000 made by the learned arbitrator is set aside.

c) There shall be no order as to costs.

R.D. DHANUKA, J.