Shin-Etsu Chemical Co. Ltd vs M/S. Aksh Optifibre Ltd. & Anr on 12 August, 2005

CASE NO.:
Appeal (civil) 5048 of 2005

PETITIONER:
Shin-Etsu Chemical Co. Ltd.

RESPONDENT:
M/s. Aksh Optifibre Ltd. & Anr

DATE OF JUDGMENT: 12/08/2005

BENCH:
Y.K. Sabharwal

JUDGMENT:

J U D G M E N T (Arising out of SLP(C) No.3160 of 2005) Y.K. Sabharwal, J.

Leave granted.

The interpretation of Section 45 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') falls for determination in this matter. Section 45 is as under:

> "45. Power of judicial authority to refer parties to arbitration. Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The real question for consideration is as to the nature of adjudication that is contemplated by Section 45 when the objection about the agreement being "null and void, inoperative or incapable of being performed" is raised before a judicial authority. Should the judicial authority while exercising power under Section 45 decide the objection on a prima facie view of the matter and render a prima facie finding or a final finding on merits on affording parties such opportunity as the justice of the case may demand having regard to facts of the case?

The question is important and at the same time not free from difficulty. World over the opinion is divided. Courts in some of the countries have preferred the view that the adjudication should be prima facie so as to be raised again before arbitral forum and others have preferred a final adjudication.

Under Section 45 of the Act, the judicial authority has to mandatorily refer the parties to arbitration, if conditions specified in the section are fulfilled and agreement is not found to be null and void, inoperative or incapable of being performed.

From Indian perspective to answer the question, first it would be useful to examine few other provisions of the Act besides the Preamble and the Statement of Objects and Reasons and in that light consider the international precedents.

The question being examined by this Court is in relation to a consolidated legislation which deals with domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Before enactment of the Act there were separate statutes governing the international arbitration and domestic arbitration, namely, the Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), The Arbitration Act, 1940 (10 of 1940) and The Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961). These statutes have been repealed as provided in Section 85 of the Act.

The 1996 Act was enacted considering the international scenario as is evident from its Preamble, which reads :

> "WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:
>
> AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;
>
> AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;
>
> AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;
>
> AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;
>
> AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

The enforcement of foreign awards has been dealt with in Part II of the Act which has two Chapters, Chapter I dealing with New York Convention Awards and Chapter II dealing with Geneva Convention Awards. In this matter we are concerned with Chapter I which comprises of Sections 44 to 52. Section 44 defines foreign award. It is not in dispute that the present case falls under the ambit of Section 44. Section 45 has already been extracted above. Conditions for enforcement of foreign awards are stipulated in Section 48 under which enforcement may be refused at the request of the party against whom it is invoked only if that party furnishes to the court proof as postulated in clauses (a) and (e). In addition, the enforcement of the award may also be refused on the grounds stipulated in Section 48(2) of the Act. Section 49 provides that where the court is satisfied that the foreign award is enforceable under Chapter I, the award shall be deemed to be a decree of the court. Section 50 provides as to against which orders an appeal shall lie. It reads as under :

> "50. Appealable orders. (1) An appeal shall lie from the order refusing to
>
> (a) refer the parties to arbitration under section 45;
>
> (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.
>
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

As can be seen from above, an order refusing to refer the parties to arbitration under Section 45 of the Act is appealable. There is, however, no provision for filing an appeal if the judicial authority refers the parties to arbitration.

Reference may also be made to Section 8 of the Act although it deals with domestic arbitration. It reads thus:

> "8. Power to refer parties to arbitration where there is an arbitration agreement. (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Under the Old Arbitration Act (Section 34 of Arbitration Act, 1940), court had discretion in the matter of grant of stay of legal proceedings where there was an arbitration agreement on being

satisfied that the arbitration agreement exists factually and legally and disputes between the parties are in regard to the matter agreed to be referred to arbitration. The Court in exercise of its discretion could also decline an order of stay despite existence of aforesaid conditions, depending upon the facts and circumstances of the case. The discretion was, however, required to be exercised on well settled judicial principles.

Section 8 of the Act is a departure from Section 34 of the old Act. Under this section judicial authority has no discretion. It is mandatory for the judicial authority to refer the parties to arbitration on the existence of conditions stipulated in the section. Unlike Section 45, the judicial authority under Section 8 has not been conferred the power to refuse reference to arbitration on the ground of invalidity of the agreement. It is evident that the object is to avoid delay and accelerate reference to arbitration leaving the parties to raise objection, if any, to the validity of the arbitration agreement before the arbitral forum and/or post award under Section 34 of the Act.

Dealing with the statement of object and reasons of the Act, this Court in Konkan Railway Corpn. Ltd. & Ors. v. Mehul Construction Co. [(2000) 7 SCC 201] said:

> "At the outset, it must be borne in mind that prior to the 1996 Act, the Arbitration Act of 1940, which was in force in India provided for domestic arbitration and no provision was there to deal with the Foreign Awards. So far as the Foreign Awards are concerned, the same were being dealt with by the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the Uncitral Model Law of International Commercial Arbitration and since then, number of countries have given recognition to that Model in their respective legislative system. With the said Uncitral Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India replacing the Indian Arbitration Act, 1940, which was the principal legislation on Arbitration in the country that had been enacted during the British Rule. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. The Indian law relating to the enforcement of Foreign Arbitration Awards provides for greater autonomy in the arbitral process and limits judicial intervention to a narrower circumference than under the previous law. To, attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in Uncitral Model and, therefore, in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act

of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the Arbitrator or want of proper notice to a party of the appointment of the Arbitrator or of Arbitral proceedings. The powers of the Arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate Arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the Court when there is a suit pending, have been removed. The importance of transnational commercial arbitration has been recognised and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the Arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the Court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a Court. When United Nations established the Commission on International Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when Uncitral Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting Uncitral Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process ..."

True, now the judicial interference has been limited to a narrower circumference than under the old arbitration laws but the question here is when Section 45 of the Act envisages judicial interference, what is the extent thereof having regard to the language of the section and the scheme of the Act.

What is the standard of review that the judicial authority should adopt in relation to the arbitration agreement at the initial stage of Section 45, viz., a prima facie finding or a final finding? At this stage, we may briefly notice the circumstances under which the matter has come up for consideration before this Court. There is hardly any controversy in respect of material facts necessary for examination of the question involved. The controversy is only in regard to the power exercisable by a judicial authority under Section 45 of the Act. Parties (Appellant and Respondent No.1) entered into an agreement dated 16/18th November, 2000 which contained an arbitration clause as under:

> "Governing Law. This Agreement shall be governed by and construed and interpreted under the laws of Japan. All disputes arising out of or in relation to this Agreement which cannot be settled by mutual accord shall be settled by arbitration in Tokyo, Japan, in accordance with the Rules of Conciliation and Arbitration of International Chamber of Commerce. The award of arbitration shall be final and binding upon both parties."

The appellant terminated the agreement in terms of its letter dated 31st December, 2002. The first respondent instituted a suit claiming a decree of declaration and injunction against the appellant for cancellation of the document dated 16/18th November, 2000 and/or declaration that the long term sale and purchase agreement dated 16/18th November, 2000 including the arbitration clause on the ground that the terms of agreement are unconscionable, unfair and unreasonable and against the public policy and the same was entered into under undue influence and is, therefore, void ab initio, inoperative and incapable of performance and cannot be given effect to. The appellant made an application in the suit praying that the plaintiff shall be directed to submit to the ongoing arbitration proceedings before the International Chamber of Commerce in Tokyo, Japan. The application was, however, filed under Section 8 of the Act. The trial court by order dated 29th September, 2003 came to the conclusion that the application of the appellant under Section 8 of the Act deserves to be allowed. Consequently, the parties were referred to arbitration. It was urged on behalf of the appellant before the trial court that since there is an arbitration clause in the agreement, court's jurisdiction is exhausted as Section 8 is mandatory and, therefore, court must refer the dispute to arbitration. As already noticed, unlike Section 45 the objection as to the validity of the arbitration agreement cannot be raised as a defence to an application filed under Section 8. This seems to be the reason for the appellant insisting before the trial court that Section 8 is applicable and not Section 45 of the Act. It is clearly not a case of filing an application under a wrong provision. The trial court also proceeded under erroneous assumption that Section 45 comes into play after the award is made as such a submission seems to have been made by the appellant before that court.

The order of the trial court was challenged by the first respondent before the High Court in a petition filed under Article 227 of the Constitution of India, there being no provision of appeal against an order of reference to arbitration. Even before the High Court, it was contented for the appellant that as both Section 8 and Section 45 were applicable, the application under Section 8 of the Act was rightly moved before the trial court and the court did not commit any error in considering the matter for reference to arbitration after application of Section 45 of the Act. The High Court examined the question whether Section 45 has been applied by the trial court and, if so,

in its true perspective. The High Court held that the trial court ought to have proceeded to examine the application under Section 45 of the Act which was not done. Under these circumstances, without entering into merits of the case, the High Court directed fresh adjudication of the application by the trial court after application of Section 45 of the Act. Consequently, by the impugned judgment, the order of the trial court dated 29th September, 2003 was set aside and matter remanded for fresh decision of the trial court. Before this Court, learned counsel for the parties have rightly taken the stand that only Section 45 is applicable and Section 8 has no applicability. It is evident that there has been no adjudication of the application by the trial court in terms of Section 45 of the Act. The trial court has not gone into the question, prima facie or finally, as to agreement being null and void, inoperative or incapable of being performed, which was the objection raised by the first respondent in reply to the application of the appellant. Thus, on ingredients of Section 45, there was no adjudication. Therefore, the direction of the High Court for fresh adjudication of application of the appellant having regard to the provisions of Section 45 of the Act cannot be faulted. It is also necessary to issue directions for expeditious adjudication of the said application by the trial court but after first determining the scope of adjudication in exercise of power under Section 45.

On behalf of the appellant, Mr.Nariman contends that the consideration by the judicial authority under Section 45 has to be on a prima facie view of the matter based on examination of the plaint and any documents attached thereto, reply to the application for reference and any documents attached thereto and the affidavits filed by the parties. The court, on a prima facie examination of the pleadings and documents, should come to the conclusion as to whether the arbitration agreement is null or void, inoperative or incapable of being performed. Learned counsel submits that final determination on merits in some cases may even require recording of evidence and proceedings may turn out to be a full fledged trial thereby defeating the very purpose for the enactment of the Act. It is urged that the final determination can be made if such objections are raised before the arbitral forum and/or post award by the court. On the other hand, on behalf of first respondent, Mr. Ganesh contends that Section 45 of the Act should be interpreted so as to give full effect to the opening non-obstante clause and to the wordings of Section 45 which are entirely different from Section 8 in their effect and operation. It is urged that Section 45 cannot be construed in a way that it becomes indistinguishable from Section 8. It is further submitted that under Section 45, if an issue is raised before the court regarding the legality or validity of the agreement, then the court must give a finding on the issue. The contention is that the court would make an order of reference to arbitration only if the arbitration agreement is legal and valid. Further, it is contended that it would be a different matter if objection as to the validity of the arbitration agreement is not raised before the judicial authority and the party prefers to raise it before the arbitral forum and/or post award, in the event of award being against that party.

Which of the two views is correct requires determination. It may be noted that Section 3 of the Foreign Awards Act, 1961, before the enactment of the Act, contained somewhat similar provision providing for the stay of the proceedings in the court, unless the agreement was null and void, inoperative or incapable of being performed. The only material difference between the said Section 3 and present Section 45, is that former contains provision for stay of the proceedings in the suit and latter for reference to be made to arbitration. That difference, for our purposes, is of no consequence. Section 3 of the Foreign Awards Act, 1961 as amended by Act 47 of 1973, (omitting

unnecessary words) reads as under :

> "3. Stay of proceedings in respect of matters to be referred to arbitration. - Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Articles II of Convention set forth in the Schedule applies, commences any legal proceedings in any court against any other party to the agreement, in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceeding and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

Both the sections start with a non-obstante clause giving overriding effect to the provisions contained therein and making it prevail over anything to the contrary contained in the Arbitration Act, 1940 in one case, or Part I of the Act in the other case or the Code of Civil Procedure. Further, unlike Section 34 of the Arbitration Act, 1940, which confers a discretion upon the court, as earlier noted, Section 3 uses the mandatory expression and makes it obligatory for the court to pass an order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled.

A non obstante clause is a legislative device which is usually implied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation of all contrary provisions. {Union of India & Anr. v. G.M.Kokil & Ors. [(1984) Supp.SCC 196]}. Section 45 uses the expression 'shall' in respect of referring the parties to arbitration, unless judicial authority finds that the said agreement is null and void, inoperative or incapable of being performed. The term 'shall' in its ordinary significance is mandatory and the court shall ordinarily give that interpretation unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the statute. {[Khub Chand & Ors. v. State of Rajasthan & Ors. [AIR (1967) SC 1074]}. The words 'shall' and 'unless' appearing in Section 45 mandates that before referring the parties to arbitration, the judicial authority should be satisfied that the arbitration agreement is not null and void, inoperative or incapable of being performed. In Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia & Ors. [1995 Supp.(2) SCC 280 at 286] this Court held :

> "The court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of Article II shall upon the request of one of the parties, refer to arbitration, unless it finds the agreement is null and void, inoperative or incapable of being performed."

If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a

manner and no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding. [Craies on Statute Law; 7th Ed., at page 263]. Section 45 is clear; there is no doubt, ambiguity or vagueness in it. Now, I may refer to decision in Renusagar Power Co. Ltd. v. General Electric Co. & Anr. [(1984) 4 SCC 679] in which interpretation of Section 3 of the Foreign Awards Act, 1961 came up for consideration. One of the parties to the arbitration agreement invoked the arbitration clause while the other party filed a suit seeking declaration that claims referred to the arbitration were beyond the scope of the arbitration agreement and the other party is not entitled to refer the claims to the arbitration and making consequential prayers for injunction restraining the party invoking arbitration clause and the arbitrator from proceeding with the matter and obtained an interim order. The other party filed a petition under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 seeking the stay of the proceedings in the suit and praying for vacating the interim relief granted in the matter. Learned Single Judge of the High Court allowed the petition under Section 3 and granted stay of proceedings in the suit and vacated the interim relief. The order was maintained by the Division Bench. Before this Court, it was argued that a stay, if granted in a petition under Section 3, would render the suit dead for all purposes and there would be nothing left to be decided in the suit either because the suit is stayed indefinitely or alternatively because the decision on the issue would operate as res judicata in the suit, and, therefore, no relief of stay should be granted which will have such effect merely on a prima facie view or a pro tanto finding on the issue of arbitrability of the claims. In other words, the contention was that a Section 3 petition could not be a proper stage to decide the issue of arbitrability of the claims but the same should be decided in the suit when it will be finally tried.

While rejecting this contention it was held that :

> "if regard be had to the provisions of Section 3 as well as the legal position arising under decided cases the contention will be found to be devoid of any substance. It may be that a stay of the suit either under Section 3 of the Foreign Awards Act or under Section 34 of the Arbitration Act, 1940 may have the effect of finally disposing of the suit for all practical purposes as pointed out by the Allahabad High Court. But that is no reason why the relief of stay should be refused by the Court if the concerned legal provision requires the court to do so. Here we are concerned with Section 3 which makes it obligatory upon the Court to stay the legal proceedings if the conditions of the section are satisfied and what is more the section itself requires that before any stay is granted the Court should be satisfied that the arbitration agreement is valid, operative and capable of being performed and that there are disputes between the parties with regard to the matters agreed to be referred to arbitration [conditions (v) and (vi) mentioned earlier]. In other words, the section itself indicates that the proper stage at which the Court has to be fully satisfied about these conditions is before granting the relief of stay in a Section 3 petition and there is no question of the Court getting satisfied about these conditions on any prima facie view or a pro tanto finding thereon. Parties have to put their entire material before the Court on these issues (whichever may be raised) and the Court has to record its finding thereon after considering such material.

> [Emphasis supplied by us]"

In Para 59 the Court further observed that :

> "It may be stated that though Section 34 of the Arbitration Act, 1940 confers a discretion upon the Court in the matter of granting stay of legal proceedings where there is an arbitration agreement, it cannot be disputed that before granting the stay the Court has to satisfy itself that arbitration agreement exists factually and legally and that the disputes between the parties are in regard to the maters agreed to be referred to arbitration."

The question is : did the Parliament intend differently while using the terminology in Section 45 as it did? When words in an earlier statute have received an authoritative exposition by superior Court (interpretation of Section 3 in Renusagar's case), use of same words in a similar context in a later Act will give rise to a strong presumption that the Parliament intends that the same interpretation should also be followed for construction of these words in the later statute :

> "D' Emden v. Pedder (1904) 1 C.L.R. 91, 100 per Griffiths C.J.: " When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them."

> "According to Lord Macmillian, 'if an Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them'."

In Bengal Immunity Co. Ltd. V. State of Bihar [1955 (2) SCR 603], Venkatarama Aiyer, J. stated that :

> "It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the legislature is presumed to be acquainted with the construction which the courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind."

Further, Part II of the Act was enacted to update the international commercial arbitration regime to meet the present day challenges. If the legislature intended a minimalist role of the courts, it would have enacted Section 45 more in terms of Section 8 than its present form. Section 3 of the Foreign

Awards Act above noticed, was analogous to Article II (3) of the New York Convention which is in the following terms :

> "Article II of the New York Convention
>
> 1. ***
>
> 2. ***
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The aforesaid provision has been substantially reproduced in Section 45.

Clearly Section 45 casts an obligation upon the judicial authority when seized of the matter to record a finding as to the validity of the arbitration agreement as stipulated in the Section and there is nothing to suggest either from the language of the section or otherwise that the finding to be recorded is to be only ex facie or prima facie. It is true that Section 5 limits judicial intervention in the manner provided therein. It accelerates the arbitral process by curtailing chances of delay that may be caused in court proceedings. But, at the same time, it is also clear that though Sections 8 and 45 both deal with the power of judicial authority to refer parties to arbitration, in the former which deals with domestic arbitration, no provision has been made for examining at that stage the validity of the arbitration agreement whereas under Section 45 which deals with arbitrations to which New York Convention applies, a specific provision has been made to examine the validity of the arbitration agreement in the manner provided in Section 45. Both provisions are differently structured albeit the purpose of both is to refer parties to arbitration but in one case domestic arbitration and in other case international arbitration. Unlike Section 8 which provides that the application shall be moved not later than when submitting the first statement of the substance of the dispute, under Section 45 there is no such limitation. The apparent reason is that insofar as domestic arbitration is concerned, the legislature intended to achieve speedy reference of disputes to arbitration tribunal and left most of the matters to be raised before the arbitrators or post award. In case of foreign arbitration, however, in its wisdom the legislature left the question relating to validity of arbitration agreement being examined by the court. One of the main reasons for the departure being the heavy expense involved in such arbitrations which may be unnecessary if the arbitration agreement is to be invalidated in the manner prescribed in Section 45.

In view of the aforesaid, adopting liberal approach and restricting the determination by judicial authority about validity of agreement only from prima facie angle, would amount to adding words to Section 45 without there being any ambiguity or vagueness therein.

The traditional approach has been to allow a court, where a dispute has been brought despite an arbitration agreement, to fully rule on the existence and validity of the arbitration agreement. This

approach would ensure that the parties are not proceeding on an invalid agreement as this would be a fruitless exercise involving much time and expenditure. In some countries, however, the traditional approach has changed. The liberal approach which seems to be gaining increasing popularity in many legal systems both statutorily as well as through judicial interpretation is to restrict the review of validity of arbitration agreement at a prima facie level. For final review the parties may raise issue before arbitral forum or post award.

The 1987 Swiss Private International Law Statute stipulates that "if the parties have concluded an arbitration agreement covering an arbitrable dispute, a Swiss court seized of it shall decline jurisdiction unless: b. the court finds that the arbitral agreement is null and void, inoperative or incapable of being performed" (Article 7). These provisions could easily be read as implying that a court seized of the merits of a dispute in spite of the existence of an arbitration agreement would have to fully address the question of that agreement's effectiveness. However, after some hesitation, the Swiss Federal Tribunal decided to interpret them as restricting the court's review at the outset of proceedings to a prima facie verification of the existence and effectiveness of the arbitration clause. (Fouchard Gaillard Goldman on International Commercial Arbitration- Emmanuel Gaillard and John Savage Ed.1999 Para 675, Page 409) According to the French Code of Civil Procedure (which applies to both domestic and international arbitration), the courts are obliged to decline jurisdiction where an arbitration agreement exists, provided that the merits of the dispute have already been put before an arbitral tribunal. Even where the dispute is not before an arbitral tribunal, the French Courts must also decline jurisdiction unless the arbitration agreement is "patently void". This in substance amounts to a prima facie review of the existence and validity of the arbitration agreement. Similarly, Art.VI (2) of the European Convention on International Commercial Arbitration (1961) adopts a prima facie standard by providing that courts shall not determine the initial validity/existence of the arbitration agreement unless there are "good and substantial reasons to the contrary".

The Geneva Protocol on Arbitration Clauses in Commercial Matters (1923) (Art.IV, Para 1), the New York Convention (Art.II, Para 3) as well as the UNCITRAL, Model Law (Art.VIII) like Section 45 of the Act have similarly ambiguous phraseology capable of either interpretation. It is true that courts in two common law jurisdictions, Ontario and Hong Kong, both of which have based their law on the UNCITRAL Model Law (like India), have adopted a liberal approach to the issue.

In Pacific International Lines (Pte) Ltd. v. Tsinlien Metal and Minerals Co. Ltd, the High Court of Hong Kong (Year Book of Commercial Arbitration, Vol. XVIII, 1993, pg.180) was concerned with the issue as to whether on the facts of the case there was an arbitration agreement within the meaning of Article 7 of the UNCITRAL Model Law, which deals with the definition and form of arbitration agreement and reads thus :

> "Article 7. Definition and form of arbitration agreement (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

> (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

The parties entered into a charter party agreement containing an arbitration clause through a broker. The ship company raised a claim for certain sum of money. The arbitration clause provided that one arbitrator was to be nominated by the shipping company and the other by the charters. The charters failed to appoint its arbitrator, whereupon, the shipping company approached the High Court to appoint an arbitrator on behalf of the charters. The charters objected that there was no valid arbitral clause between the parties. It was the contention of the charters that they entered into charter party agreement with the broker and not with the shipping company who deny having given the brokers any authority to enter into an agreement. The Court laid down the proposition that "if the court is satisfied that there is a 'plainly arguable' case to support the proposition and there was an arbitration agreement which complies with Article 7 of the Model Law, the Court should proceed to appoint the arbitrator in the full knowledge that the defendants will not be precluded from raising the point before the arbitrator and having the matter re- considered by the court consequent upon that preliminary ruling."

The Court after examining the documents and taking into account the commercial reality of the situation came to the conclusion that the plaintiffs, i.e., shipping company has made out a 'strongly arguable case' in support of the existence of an arbitration agreement. The Court further observed that "obviously it has not been possible for me to go into this in any great detail and indeed the whole matter has been dealt with affidavit evidence. Despite the fact that there is no document before me, which shows that World Ace were held out or authorized by the defendant to act for them in relation to its fixture. I cannot believe that such documentation does not exist. The arbitrator will have to go into this matter and sort it out but for my part and I am satisfied at this stage that Article 7 of the Model Law has been complied with and that there is an arbitration agreement between these parties". Thus, the court found the arbitral clause as existing and valid and referred the dispute to arbitration and granted time to the charters to appoint its arbitrator.

The court decided the matter on the basis of the affidavits, as it was not possible for it to examine in detail the documents since the parties failed to produce the document containing the authorization given to the broker to act on behalf of the shipping company. Therefore, the court has referred to the commercial reality as well as the affidavits of the parties to arrive at the conclusion that there was an arbitration agreement. The court has adapted the standard of "plainly arguable case" or "strongly arguable case" since the arbitral tribunal would examine the issue once again. Therefore, it cannot be stated as a general rule that in every case there should be a "plainly arguable case" or "strongly arguable case", since the legislations in other jurisdictions may not provide for such a provision. More over, the case did not concern directly with Article 8 of the UNCITRAL Model Law, the court

was concerned with Article 7 of the UNCITRAL Model Law dealing with definition and form of the arbitration agreement.

Apart from the fact that the Arbitration and Conciliation Act, 1996 is not a complete adaptation of the UNCITRAL Model Law, the scheme/ provisions of the Hong Kong Arbitration Ordinance are different from the Arbitration and Conciliation Act,1996. Therefore it may not be appropriate to follow the decisions interpreting the provisions of UNCITRAL Model Law or Hong Kong Arbitration Ordinance. Section 6 of the Hong Kong Arbitration Ordinance is similar to Section 32 of the English Arbitration Act 1996, which is not present in the Arbitration and Conciliation Act 1996. It reads as under :

> "(1) Subject to subsections (2) and (3), article 8 of the UNCITRAL Model Law (Arbitration agreement and substantive claim before court) applies to a matter that is the subject of a domestic arbitration agreement in the same way as it applies to a matter that is the subject of an international arbitration agreement. (2) Subject to subsection (3), if a party to an arbitration agreement that provides for the arbitration of a dispute involving a claim or other matter this is within the jurisdiction of the Labour Tribunal or a person claiming through or under such a party, commences legal proceedings in any court against any other party to the agreement or any person claiming through or under that other party, in respect of any matter agreed to be referred, and any party to those legal proceedings applies to that court after appearance and before delivering any pleadings or taking any other step in the proceedings, to stay the proceedings, the court or a judge of that court may make an order staying the proceedings, if satisfied that-
>
> (a) there is no sufficient reason why the matter should not be referred in accordance with the agreement; and
>
> (b) the applicant was ready and willing at the time the proceedings were commenced to do all things necessary for the proper conduct of the arbitration, and remains so.
>
> (3) Subsections (1) and (2) have effect subject to section 15 of the Control of Exemption Clauses Ordinance (Cap 71).

(Replaced 75 of 1996 s. 9)"

> Section 23 A of the Hong Kong Arbitration Ordinance provides for the determination of preliminary point of law by the court and there is a no analogous provision in the Arbitration and conciliation Act 1996 It is clear from a plain reading of Hong Kong and English provisions that both confer discretion on the court, unlike Section 45 of the Act, which is mandatory. It is evident from the words 'may' and 'satisfied' used in Hong Kong provision and also from the language used in Section 32 of the English Arbitration Act, 1996, that the intention in the said two jurisdictions was to confer on court discretionary powers indicative of limited review from prima facie point of

view.

In Rio Algom Ltd. v. Sammi Steel Co. Ltd., Ontario Court of Justice, General Division (Year book of Commercial Arbitration, Vol. XVIII, 1993, Page 166) dealt with Article 16 of the UNCITRAL Model Law dealing with the competence of arbitral tribunal to rule on its jurisdiction which reads as under:

"Article 16. Competence of arbitral tribunal to rule on its jurisdiction (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

In pursuance of an arbitration agreement, one of the parties referred the dispute to the arbitrator whereas the other party commenced an action before the court challenging the jurisdiction of the arbitrator to arbitrate the issues and for an order staying the arbitration proceedings. The Court ordered the trial of issues raising matters of the contract interpretation affecting arbitrator's jurisdiction. On appeal, it was held that issues defining the scope of the arbitration agreement, which raise matters of contract interpretation, ought to be resolved by the arbitrators in the first instance before resort to the courts. The Court observed that 'what appears to me of significance is that the Model Law reflects an emphasis in favour of arbitration in the first instance in international commercial arbitrations to which it applies'. The Courts in matters of contract interpretation as such are limited in that they do not appear to have a role in determining matters of law or construction; jurisdiction and scope of authority are for the arbitrator to determine in the first instance, subject to later recourse to set aside the ruling or award. The role of the court before arbitration appears to be confined to determining whether the arbitration clause is null and void, inoperative or incapable of being performed (Article

8), if not it is mandatory to send the parties to arbitration. Thus, it was observed that the issue of validity of the arbitration agreement is to be determined by the court. However, there is no reference as to whether the court should take a prima facie view or a final view.

The 1996 English Arbitration Act adopted a slightly different solution, whereby the courts may only rule on the issue of jurisdiction with the agreement of the parties or, if the parties do not agree, with the consent of the arbitral tribunal. In this latter case, the court must also find that its decision is liable to save substantial cost, that the application was made promptly, and that there is a valid reason for the claim to be heard by a court (Sec.32). (Fouchard (supra) Para 675 Page 409).

The American approach also favours traditional approach of final review of court. (Comptek Telecomm v. IVD Corp., XXII Y.B. COMM. ARB.905 (1997) decided on August 1, 1995 and SMG Swedish Machine Group v. Swedish Machine Group, XVIII Y.B. COMM.ARB.457 (1993) decided on January 4, 1991.

It may be noted that both approaches have its own advantage and disadvantage. The approach whereby the court finally decides on merits on the issue of existence and validity of the arbitration agreement results to a certain degree time and cost avoidance. It may prevent parties to wait for several months or in some cases years before knowing the final outcome of the dispute regarding jurisdiction. It will often take that long for the arbitrators and then the courts to reach their decisions. The same considerations of cost and time explain the position taken in English Law which under Section 32(2) of the 1996 English Arbitration Act provides that the parties may agree (or, if the parties fail to agree, the arbitral tribunal may agree) that it would be more efficient to have the question resolved immediately by the courts. (Fouchard (supra) Para 678, Page 410) I may also deal with the contention urged on behalf of the appellant that only prima facie finding is required to be given on combined reading of Sections 45, 48 and 50 from which it can be culled out that a party who has suffered an award can always challenge the same under Section 48 on the ground that the arbitration agreement is null and void. This read in conjunction with the right of appeal given under Section 50 and the power of the arbitrator to rule on his own jurisdiction clearly shows the intent of the legislature to avoid delay which would be inevitable if it has to be a final decision and it would defeat the object of soon placing all material before the arbitration tribunal. I am afraid that this cannot be accepted as the real purpose of Section 48 is to ensure that at some stage whether pre-award, post award or both, a judicial authority must decide the validity, operation, capability of performance of the arbitration agreement. In various cases the parties may not resort to Section 45 in the first place, and to overcome such eventuality, the legislature has enacted Section 48(1)(a). In other words, if the court is not asked to satisfy itself as to the validity of the agreement at a pre-award stage (Section 45), then by virtue of Section 48, it is given another opportunity to do so. Apart from this, under Section 48, the court may refuse to enforce the foreign award on the ground other than the invalidity of the arbitration agreement. As far as the question of Section 50 is concerned, it is well settled in law that an appeal is a creature of statute {M/s M. Ramnarain (P) Ltd. & Anr. v. State Trading Corporation of India Ltd. [(1983) 3 SCC 75]} and a right to appeal inheres in no one {Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors. [(1999) 4 SCC 468]}. The legislature under Section 50 has clearly allowed appeal only in case the judicial authority refuses to refer the parties to arbitration or refuses to enforce the foreign award.

The fact that a provision is not made for an appeal in case reference is made to arbitration is not a ground to say that the court should prima facie decide the validity of the agreement ignoring the express provisions of Section 45. The legislature has granted right of appeal in the event of refusal to refer but not in the event of order being made for reference of the parties to arbitration. This provision for appeal is not determinative of the scope of Section 45 to mean that the determination thereunder has to be only prima facie.

I am of the view that Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration. In view of the aforesaid discussion, I am of the view that under Section 45 of the Act, the determination has to be on merits, final and binding and not prima facie.

Turning to the present case, I direct that the application filed by the appellant before the trial court would be treated as an application under Section 45 of the Act. Having regard to the nature of controversy in the present case, parties would be given opportunity to file documents and affidavits by way of evidence. No oral evidence would be examined. Though the appellant itself is responsible for the delay that has occurred because of application under provisions which had no applicability and insistence thereupon, yet, considering that the application has been pending for nearly two years, I direct its disposal within a period of two months of the receipt of the copy of this order.

Before concluding, this Court also deems it necessary to issue general directions for expeditious disposal of petitions/applications filed so as to challenge the validity of the arbitration agreement under Section 45. Ordinarily, such cases shall be decided on the basis of affidavits and other relevant documents and without oral evidence. There may, however, be few exceptional cases where it may become necessary to grant opportunity to the parties to lead oral evidence. In both eventualities, the judicial authority is required to decide the issue expeditiously within a fix timeframe and not to treat such matters like regular civil suit. The object of arbitration including international commercial arbitration is expedition. The object of the Act would be defeated if the international commercial disputes remain pending in court for months and years before even commencement of arbitration.

Accordingly, I direct that any application that may be filed under Section 45 of the Act must be decided within three months of its filing. In rare and exceptional cases, the judicial authority may extend the time by another three months but by sending a report to the superior/appellate authority setting out the reasons for such extension. It would be for the superior/appellate authority to issue appropriate directions to the judicial authority and/or take such other action as may be called for. The appeal is disposed of in the above terms.