Andritz Oy, Rep. Through Power Of ... vs Enmas Engineering Pvt. Ltd., Rep. By Its ... on 5 June, 2007

Equivalent citations: 2007(3)ARBLR545(MADRAS)

Author: V. Ramasubramanian

Bench: V. Ramasubramanian

JUDGMENT

V. Ramasubramanian, J.

1. This is an application taken out by the first defendant in the suit, under Section 45 of the Arbitration and Conciliation Act, 1996, seeking to refer the parties to the present suit CS No. 924 of 2006, to arbitration, in accordance with the provisions contained in the joint venture agreement dated 06.12.1995.

2. I have heard Mr. A.L. Somayaji, learned senior counsel appearing for the applicant/first defendant, Mr. Y.P. Narula, learned senior counsel appearing for the first respondent/plaintiff and Mr. N. Ramakrishnan appearing for the second respondent/second defendant.

3. The dispute between the parties, has arisen under the following circumstances:

> (a) The plaintiff, Enmas Engineering Private Limited, has an associate company by name Enmas Process Technology Limited (referred to in the abbreviated form as 'ETPL'), which is engaged in engineering, sales and distribution of recovery boilers and evaporators. The said company Enmas Process Technology Limited entered into a joint venture agreement on 06.12.1995 with a company known as A. Ahlstrom Corporation, a corporation duly organised and existing under the laws of Finland and having its principal place of business at Helsinki, Finland. The purpose of the joint venture agreement, as stated in its preamble, was to get engaged in the engineering, sourcing, supply, sale, marketing and distribution of recovery island equipment for the pulp and paper industry and the suppliers thereto in India.
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> (b) The said joint venture agreement, among other things, contemplated the formation and incorporation of a new company under the name and style of Enmas Ahlstrom Private Limited with ETPL acquiring 60% and Ahlstrom acquiring 40% of the paid up share capital of the company amounting to Rs. 20 million.

(c) Article 9.2 of the said Joint Venture Agreement contained an arbitration clause which reads as follows:

> 9.2. Arbitration--All disputes arising from this agreement, its supplements and modifications shall be finally settled by arbitration according to the rules of the International Chamber of Commerce, Paris, then in effect. The arbitration will be held in Paris, France. Any arbitration proceedings shall be conducted in English.

(d) Article 9.13 of the Joint Venture Agreement prohibited the assignment of the rights under the agreement by either party without the prior written consent of the other party and Article 9.12 contained a declaration that the agreement shall constitute the entire agreement between the parties and that it shall not be amended, supplemented or terminated, except by an instrument in writing by and between the parties. Article 9.4 contained a stipulation that the agreement shall survive the incorporation of the joint venture company and that it shall be effective, operative and binding upon the parties as well as their successors, for as long as both parties or their successors or assigns own any shares of stock.

(e) Article 2.2 of the Joint Venture Agreement stipulated that the Articles of Association of the Joint Venture Company to be formed and incorporated should be substantially in the form of Exhibit 1 annexed to the Joint Venture Agreement. However, it is claimed by the plaintiff that no such exhibit was annexed to the Joint Venture Agreement.

(f) Following the said joint venture agreement dated 06.12.1995, a company by name Enmas Ahlstrom Private Limited was incorporated and registered on 15.04.1996 with the Registrar of Companies, Chennai, bearing Registration No. 18-35189. As per the joint venture agreement, 60% of the share capital of the newly formed company was allotted to ETPL and 40% allotted to Ahlstrom.

(g) Subsequently, Ahlstrom was taken over by Andritz OY (defendant no. 1 herein), consequent upon which, the shares held by Ahlstrom in the newly formed company were transferred to Andritz OY and the name of the newly formed joint venture company itself was changed to Enmas Andritz Private Limited, with effect from 13.03.2002. The said joint venture company Enmas Andritz Private Limited is the second defendant in the present suit. Just as Ahlstrom became Andritz OY, Enmas Process Technology Limited (ETPL) also underwent a structural change leading to the groups controlling the plaintiff herein taking over the 60% shares held by ETPL in the newly formed company.

(h) The trouble between the parties erupted at this stage, when Enmas Process Technology Limited requested Andritz OY (defendant no. 1 herein) for their no objection for the transfer of the shares held by ETPL in the newly formed joint venture company in favour of the plaintiff herein.

(i) As a condition for the grant of no objection for the transfer of shares, Andritz OY, the first defendant herein, demanded a Memorandum of Understanding to be executed by the representatives of Enmas Process Technology Limited. Accordingly, a Memorandum of Understanding was signed on 08.04.2003 at Helsinki, Finland, under the caption "Restructuring of

Enmas Andritz Private Limited". Since the arguments in the present application revolve around this Memorandum of Understanding and also since it contains only four sentences, it is useful as well as convenient, to extract them as under:

> Andritz will have an option to increase its ownership in the company up to 51-60% by the end of 2005 and buy the remaining shares by the end of 2008.
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> A common business plan for developing countries and small size recovery units to be established by 15.07.2003. The key persons of Enmas Andritz are committed to stay in the company till 2010.
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> New joint venture agreement including the above points to be signed by 15.07.2003.

(j) Since the Directors of Enmas Process Technology Limited signed the Memorandum of Understanding dated 08.04.2003 at Helsinki, Finland as required by the first defendant, the first defendant issued a no objection letter on the same date to ETPL for the transfer of its 60% shares in the joint venture company in favour of the plaintiff. Thus, the plaintiff has become the owner of 60% shares and the 1st defendant is the owner of 40% shares in the second defendant company.

(k) When the first defendant started insisting on increasing its shareholding in the second defendant company, in accordance with the Memorandum of Understanding entered into on 08.04.2003, the plaintiff resisted the said attempt on the ground that no new joint venture agreement was signed and no common business plan was evolved before 15.07.2003, as contemplated under the Memorandum of Understanding dated 08.04.2003.

(l) Consequently, the first defendant did not sign the licence agreements after the year 2003, to enable the transfer of technical know-how in favour of the second defendant. Therefore, the second defendant was not able to carry on business.

(m) In the year 2006, the first defendant wanted to carry out an inspection of the joint venture company, viz. the second defendant through their agent KMPG, but the plaintiff refused permission to the agent of the first defendant to carry out the inspection. Therefore, the first defendant lodged its protest by their letter dated 01.12.2006, making the plaintiff apprehensive that the first defendant might seek to enforce joint venture agreement dated 06.12.1995 and refer the dispute to arbitration before an international forum.

(n) Such an apprehension on the part of the plaintiff that the first defendant may drag them to arbitration before an international forum has compelled the plaintiff to come up with the above suit seeking various reliefs. In essence, the reliefs sought for by the plaintiff in the suit are:

(i) for a declaration that the joint venture agreement dated 06.12.1995 was null and void, inoperative, non est in law, incapable of being enforced and has been abandoned by the parties;

(ii) for a declaration that the Memorandum of Understanding dated 08.04.2003 was not enforceable;

(iii) for a declaration that the joint venture agreement dated 06.12.1995 as well as the Memorandum of Understanding dated 08.04.2003 are not binding on the second defendant, as it is governed by its own Memorandum and Articles of Association;

(iv) for a perpetual injunction restraining the first defendant from invoking the arbitration clause or initiating any proceeding on the basis of the joint venture agreement;

(v) for a perpetual injunction restraining the first defendant from interfering with the functioning of the second defendant (joint venture company); and

(vi) for a perpetual injunction restraining the first defendant from claiming any rights under the agreement dated 08.04.2003.

4. Along with the suit, the plaintiff had also taken out three applications in OA Nos. 977,978 and 979 of 2006, seeking interlocutory orders of injunction, restraining the first defendant from interfering with the functioning of the second defendant company and from claiming any rights under the MoU dated 08.04.2003 or invoking the arbitration clause on the basis of the joint venture agreement dated 06.12.1995. On 16.12.2006, notice was ordered in those applications and after entering appearance and filing a counter affidavit in those applications, the first defendant has come up with the present application under Section 45 of the Arbitration and Conciliation Act, 1996.

5. At the outset, there is no dispute about the fact that Enmas Technology Private Limited and A. Ahlstrom Corporation entered into a joint venture agreement on 06.12.1995. in view of the internal restructuring that had taken place within the management of these two parties to the agreement, the plaintiff herein has acquired the interest of Enmas Technology Private Limited and the first defendant has acquired the interest of A. Ahlstrom Corporation. In simple terms, the plaintiff and the first defendant are the successors-in-interest of the parties to the joint venture agreement. The second defendant is the joint venture company formed and incorporated in pursuance of the joint venture agreement. In terms of Article 3.3 of the Joint Venture Agreement, the plaintiff holds 60% shares and the first defendant holds 40% shares in the second defendant company. Therefore, this is actually a dispute between two groups of shareholders, one holding majority shares and the other holding minority shares in a private limited company.

6. As seen from the averments contained in the plaint, the present dispute itself has arisen as a result of the attempt made by the first defendant, a minority shareholder, to increase its stake in the joint venture company, to the extent necessary to become i majority shareholder and the resistance

on the part of the plaintiff to allow the same to happen. Since the plaintiff did not allow the first defendant to increase its stake in the second defendant (joint venture company) from its present holding of 40% to 51-60% in terms of the Memorandum of Understanding dated 08.04.2003, the first defendant did not renew the licence agreements, resulting in the business of the second defendant getting crippled. As a measure of retaliation, the plaintiff did not permit an inspection to be carried out by the first defendant in the second defendant company. With the dispute thus having precipitated between the parties, the plaintiff has come up with the present suit as a pre-emptive bid, to prevent the first defendant from seeking any arbitration of the dispute before the International Chamber of Commerce, Paris, in terms of Article 9.2 of the Joint Venture Agreement dated 06.12.1995. Therefore, the first defendant has come up with the present application under Section 45 of the Arbitration and Conciliation Act, 1996.

7. Praying for an order referring the parties to arbitration under Section 45 of the Arbitration and Conciliation Act, 1996, Mr. A.L. Somayaji, learned senior counsel appearing for the applicant/first defendant contended:

> (a) that in view of Article 9-A of the Joint Venture Agreement, the agreement would survive the incorporation and operation of the company and would be effective, operative and binding upon the parties as well as their successors and assigns so long as both parties or their successors own any shares of stock;
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> (b) that though the suit is based upon a broad attack to the joint venture agreement that it is null and void, the plaintiff has not chosen to attack the arbitration clause (contained in Article 9.2 of the Joint Venture Agreement) as being null and void;
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> (c) that in view of the provisions of Section 2(1)(b) read with Section 7(1) and 7(2) of the Arbitration and Conciliation Act, 1996, an arbitration clause in an agreement is itself to be treated as an "arbitration agreement" and that, therefore, unless that arbitration clause is assailed as null and void, inoperative or incapable of being performed, the case would not fell under the exception to Section 45 of the Act;
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> (d) that, therefore, the dispute should be referred to arbitration, to the International Chamber of Commerce, Paris in terms of Article 11(3) of the First Schedule to the Act; and
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> (e) that in any event, by virtue of Article 6.2 of the Rules of Arbitration of the International Chamber of Commerce, the arbitral tribunal is itself competent to take any decision as to its jurisdiction, after the court (International Court of Arbitration) decides the existence, validity and scope of the arbitration agreement and that, therefore, it is open to the plaintiff to raise the very same points before the court and arbitral tribunal under the said provision.

8. Per contra, Mr. Y.P. Narula, the learned senior counsel for the first respondent/plaintiff contended that when the joint venture agreement dated 06.12.1995 and the Memorandum of

Understanding dated 08.04.2003 are challenged as null and void, inoperative and incapable of being enforced, the question of referring the dispute to arbitration in terms of Article 9.2 of the Joint Venture Agreement does not arise. On the question as to how the joint venture agreement dated 06.12.1995 and the Memorandum of Understanding dated 08.04.2003 have become null and void, inoperative and incapable of being performed, the contention of Mr. Y.P. Narula, the learned senior counsel for the first respondent/plaintiff is that the second defendant being a private limited company, is governed by the provisions of the Companies Act, 1956 and its own Memorandum and Articles of Association and that, therefore, no agreement can be enforced de hors the provisions of the Companies Act, 1956 and the Memorandum and Articles of Association of the company.

9. Before entering into the centre of the controversy, it is necessary to extract the relevant provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') and the Rules of Arbitration of International Chamber of Commerce. Section 2(1)(b) defines an "arbitration agreement" to mean an agreement referred to in Section 7. Section 7 of the Act contains a detailed description of an arbitration agreement on the following lines:

> 7. Arbitration agreement--
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> (1) In this Part, "arbitration agreement" means 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.
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> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
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> (3) An arbitration agreement shall be in writing.
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> (4) An arbitration agreement is in writing if it is contained in--
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> (a) a document signed by the parties;
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> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
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> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
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> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 44, dealing with the definition of "foreign award", reads as follows:

> 44. Definition--In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960--
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> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
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> (b) in one of such territories as the Central Government, being satisfied that the reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Section 45, dealing with the power of a judicial authority to refer parties to arbitration, reads as follows:

> 45. Power of judicial authority to refer parties to arbitration-- Notwithstanding anything contained in Part 1 or in the Code of Civil Procedure (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.

Article II of the First Schedule to the Act reads as follows:

> Article II
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> 1. Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
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> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
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> 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, shall, 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 and incapable of being performed.

Articles 6.2 and 6.4 of the Rules of Arbitration of the International Chamber of Commerce read as follows:

> 6.2. If the respondent does not file an answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the rules may exist. In such a case, any decision as to the jurisdiction of the arbitral tribunal shall be taken by the arbitral tribunal itself. If the court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.
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> 6.4. Unless or otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

10. India, France and Finland are signatories to the Convention on the Recognition and Enforcement of Foreign Awards, referred to popularly as "New York Convention, 1958". Therefore, there is no dispute about the fact that the joint venture agreement is an agreement to which the said Convention applies and hence it is an agreement to which Section 44 of the Act applies. Therefore, Chapter I of Part II of the Act containing Sections 44 to 52, applies to the disputes and differences arising out of the legal relationships between the parties to the joint venture agreement in question.

11. Mr. Y.P. Narula, learned senior counsel appearing for the first respondent/plaintiff while resisting the application under Section 45 of the Act, contended that the following issues have arisen for consideration in the present proceedings and that, therefore, the case falls under the exception carved out of Section 45:

> (1) Whether the joint venture agreement survives/enforceable after the incorporation of defendant no. 2 company which is governed by its own Articles of Association.
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> (2) Whether the joint venture agreement signed between two parties (prospective shareholders), prior to the incorporation of defendant no. 2 company can be enforced by one party against the other with regard to the transfer of shares for which specific provisions have been made in the Memorandum and Articles of Association of the defendant no. 2 company.
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> (3) Whether the parties abandoned the joint venture agreement after the defendant no. 2 company was incorporated, by conduct or otherwise.
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> (4) Whether the provisions of joint venture agreement can be enforced against the defendant no. 2 company which is governed by its own Memorandum and Articles of Association.

(5) Whether the defendant no. 2 can claim the benefit of joint venture agreement against the plaintiff which was never signed by the defendant no. 1 and the plaintiff, before or after the incorporation of the company.

(6) Whether the Memorandum of Understanding forms part of the joint venture agreement or is an independent contract between the parties.

(7) Whether the Memorandum of Understanding was signed between the parties keeping in view Clause 3.4 of the Joint Venture Agreement.

(8) Whether the Memorandum of Understanding is binding upon the defendant no. 2 company and its shareholders.

(9) Whether the new joint venture agreement was to be executed between the parties, only after the transfer had taken place as per the Memorandum of Understanding.

(10) Whether the Memorandum of Understanding has become barred by time.

(11) Whether the defendant no. 1 has any right to increase its shareholding in defendant no. 2 company, on the basis of the Memorandum of Understanding, which is contrary to the Memorandum and Articles of Association of the company.

(12) Whether the Memorandum of Understanding supersedes the Joint Venture Agreement.

12. It is the contention of Mr. Y.P. Narula, learned senior counsel for the first respondent/plaintiff that international arbitration is governed by Part II of the Act and that, therefore, if one of the parties to an agreement files a suit ignoring the arbitration clause and the other party invokes Section 45 of the Act, it is mandatory for the court to adjudicate and return a finding as to whether the agreement (arbitration agreement) is null and void, inoperative or incapable of being performed. In other words, the court, according to the learned senior counsel for the first respondent/plaintiff is obliged to get into the merits of the case on the issues referred to in the preceding paragraph, before taking a decision on the application under Section 45 of the Act. In support of the said contention, the learned senior counsel for the first respondent/plaintiff relied upon the following decisions:

1. Shivnath Rai Har Narain v. Italgrani SPA 2001 : 2001(3) Arb. LR 236 (Del.).

2. Global Marketing Direct Limited v. GTL Ltd. and Royal Consulting BV : 2004(3) Arb. LR 56 (Bom.).

3. Gaya Electric Supply Co. Ltd. v. State of Bihar .

4. Bharti Televentures Ltd. v. DSS Enterprises Pvt. Ltd. .

5. Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr. .

6. S.B.P. and Co. v. Patel Engineering Ltd. and Anr. AIR 2006 SC 450 : (2005) 8 SCC 618 : 2005(3) Arb. LR 285 (SC).

13. In Shivnath Rai Har Narain v. Italgrani SPA (supra) a learned judge of the Delhi High Court held that when the factum of existence of an agreement is disputed by the plaintiff, it should be decided as one of the issues, may be as preliminary issue by the court under Part II of the Act, as the arbitrator has not been bestowed with the power of ruling on its own jurisdiction or ruling on objections with respect to the existence or validity of the arbitration agreement and that under Part II of the Act, such power vests in the court and not with the arbitrator.

14. In Global Marketing Direct Limited v. GTL Ltd. (supra) a learned judge of the Bombay High Court held that even if Section 45 is invoked, the civil court would continue to have jurisdiction until it decides whether the agreement is void, inoperative or unlawful.

15. In Gaya Electric Supply Co. Ltd. v. State of Bihar (supra) the Supreme Court held that a dispute is referable to arbitration, if the avoidance of the contract arises out of the terms of the contract itself and it is not referable to arbitration if the party seeks to avoid the contract for reasons de hors the contract.

16. In Bharti Televentures Ltd. learned judge of the Delhi High Court, analysed in extenso, the case-law on the question of jurisdiction of civil courts and drew the distinction between Section 8 and Section 45 of the Act (coming under Part I and Part II of the Act respectively), as follows:

(a) that Section 8 comes into operation whenever a contract contains an arbitration clause, but Section 45 is attracted only when the matter is the subject of a New York Convention Arbitration Agreement;

(b) that Section 8 envisages the filing of an application by a party to the suit seeking reference of the dispute to arbitration, but Section 45 contemplates only a "request" for the purpose;

(c) that Section 8 contemplates no adjudication by the court, while Section 45 contemplates the returning of a judicial finding that the agreement to arbitrate has not become inoperative or incapable of performance;

(d) that Section 8 read in conjunction with Sections 5 and 16 prohibits interference by a civil court, while Section 45 expects a court to be satisfied that the agreement has not become null and void, inoperative or incapable of being performed, before acceding to the request of a person to make a reference; and

(e) that the scope of an enquiry under Section 8 is to return a prima facie finding while the scope of an enquiry under Section 45 is larger, just short off deciding

contentious issues of fact going to the root of the disputes.

17. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (supra) the Hon'ble Supreme Court considered the issue at length. Hon'ble Mr. Justice Y.K. Sabharwal (the Chief Justice of India, as he then was), held in his dissenting judgment that Section 45 casts an obligation upon the judicial authority to record a finding as to the validity of the arbitration agreement as stipulated in the section and that 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. In paragraph 57 (paragraph 61 of Arb. LR) of his dissenting judgment, the Hon'ble former Chief Justice of India held that under Section 45 of the Act, the determination has to be on merits, final and binding and not prima facie. However, Hon'ble Mr. Justice B.N. Srikrishna (as he then was) held in paragraph 106 (paragraph 120 of Arb. LR) of the judgment that the correct approach to be adopted under Section 45 at the pre-reference stage, is one of a prima facie finding by the trial court as to the validity or otherwise of the arbitration agreement. The Third Judge Hon'ble Mr. Justice D.M. Dharmadhikari, while particularly concurring with Hon'ble Mr. Justice B.N. Srikrishna held that such a prima facie view about the existence, nullity, voidness, inoperativeness or incapability of performance, had to be taken objectively on the basis of material and evidence produced by the parties on the record of the case. In paragraph 111 of the said judgment, Hon'ble Mr. Justice D.M. Dharmadhikari, while concurring with the decision of Hon'ble Mr. Justice B.N. Srikrishna, pointed out a distinction between a case where an application under Section 45 is allowed and a case where it is rejected. If the judicial authority decides to make a reference under Section 45 of the Act, all that is required of the judicial authority is merely to make a mention of the submissions and contentions of the parties and summarily decide the objection, if any, raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed" within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in a regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to the Supreme Court under sub-section (2) of the said section.

18. In S.B.P. and Co. v. Patel Engg. Ltd. (supra) the Constitution Bench of the Supreme Court, by a majority view, held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act was not an administrative power, but a judicial power. While holding so, the Supreme Court held in paragraph 47(iv) (paragraph 46(iv) of Arb. LR) that the Chief Justice or the Designated Judge will have the right to decide the preliminary aspects such as the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power, etc.

19. By drawing my attention to the provisions of Sections 8 and 45 and pointing out the distinction maintained under the Act between Part I and Part II of the Act and citing extensively from the aforesaid decisions, Mr. Y.P. Narula, learned senior counsel for the first respondent/plaintiff contended that the plaint cannot be simply thrown out of the window of this court, immediately on the filing of an application under Section 45 and that this court will have to decide the question as to whether the arbitration agreement is null and void, inoperative or incapable of being performed, on the basis of evidence let in by the parties.

20. On the question as to whether an arbitration clause contained in an agreement is to be treated as an independent agreement by itself Mr. Y.P. Narula, learned senior counsel for the first respondent/plaintiff contended that an arbitration clause, at the most could be taken to be an ancillary or collateral contract in relation to the main contract and that such a clause would have no meaningful existence except in relation to the rights and liabilities of the parties to the main contract. In support of the said contention, the learned senior counsel relied upon the decision of the Supreme Court in National Thermal Power Corporation v. Singer Co. and Ors. . In paragraph 29 of the said judgment, the Supreme Court held as follows:

> 29. The arbitration agreement contained in the arbitration clause in a contract is often referred to as a collateral or ancillary contract in relation to the main contract of which it forms a part. The repudiation or breach of the main contract may not put an end to the arbitration clause which might still survive for measuring the claims arising out of the breach and for determining the mode of their settlement.
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> Again in paragraph 45 of the said judgment, it was held as follows:
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> 45. It is true that an arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach of repudiation of the main contract. But it is not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such rights and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate agreement, but, as in the present case, in one of the clauses of the main contract.

21. On the question as to how the Joint Venture Agreement and the Memorandum of Understanding are to be regarded as null and void, inoperative and incapable of being performed, Mr. Y.P. Narula, learned senior counsel for the first respondent/plaintiff contended that the second defendant company (which is the joint venture company) is governed by its own Memorandum and Articles of Association as well as the provisions of the Companies Act, 1956 and that, therefore, any agreement between two sets of shareholders cannot be enforced de hors the provisions of Memorandum and Articles of Association of the company and the provisions of the Companies Act, 1956. In support of

the said contention, the learned senior counsel for the first respondent/plaintiff relied upon the decision of the Supreme Court in V.B. Rangaraj v. V.B. Gopalakrishnan . The said case arose out of a dispute between the legal heirs of two brothers, who had an equal shareholding in a private limited company. After the death of both the brothers, who had equal shareholding in the company, the legal heirs of both of them entered into an agreement prohibiting the transfer inter vivos, of shares, between the branches, so as to maintain equality of holding between the families of both the brothers. The Articles of Association of the company were not amended to bring them in conformity with such an agreement between the legal heirs of both the shareholders. Therefore, one of the legal heirs of one brother sold his shares to the other branch in violation of the agreement, resulting in a suit for a declaration that such transfer was null and void. Holding that such an agreement, imposing a restriction upon the right of a shareholder to transfer the shares cannot be enforced contrary to the Articles of Association of the company, the Supreme Court held in paragraphs 6 to 8 and 18 as follows:

> 6. Section 3(1)(iii) of the Companies Act (hereinafter referred to as 'the Act') defines private company to mean a company, which by its articles, restricts the right to transfer its shares, if any, and limits the number of its shares to 50 (excepting employees and ex-employees who were and are members of the company) and prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company. Section 26 of the Act provides that there shall in the case of a private company limited by shares, such as the defendant 3 company, be registered with the memorandum, Articles of Association signed by the subscribers of the memorandum, prescribing regulations for the company. Section 28 provides that the Articles of Association of a company limited by shares may adopt all or any of the regulations contained in Table A in Schedule I of the Act. Section 31 provides for alteration of the Articles by a special resolution of the company. Section 36 states that when the Memorandum and Articles of Association are registered, they bind the company and the members thereof. Section 39 provides for supply of the copies of Memorandum and Articles of Association to a member. Section 40 makes it mandatory to incorporate any changes in the Articles of Association in every copy of the Articles of Association. Section 82 defines the nature of shares and states that the shares or other interests of any member in a company shall be movable property transferable in the manner provided by the Articles of Association of the company.
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> 7. These provisions of the Act make it clear that the Articles of Association are the regulations of the company binding on the company and its shareholders and that the shares are movable property and their transfer is regulated by the Articles of Association of the company.
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> 8. Whether under the Companies Act or Transfer of Property Act, the shares are, therefore, transferable like any other movable property. The only restriction on the transfer of the shares of a company is as laid down in its articles, if any. A restriction which is not specified in the articles is, therefore, not binding either on the company or on the shareholders. The vendee of the shares cannot be denied the registration of

the shares purchased by him on a ground other than that stated in the articles.

18. Hence, the private agreement which is relied upon by the plaintiffs where under there is a restriction on a living member to transfer his shareholding only to the branch of family to which he belongs, in terms imposes two restrictions which are not stipulated in the article. Firstly, it imposes a restriction on a living member to transfer the shares only to the existing members and secondly the transfer has to be only to a member belonging to the same branch of family. The agreement obviously, therefore, imposes additional restrictions on the member's right to transfer his shares which are contrary to the provisions of the Article 13. They are, therefore, not binding either on the shareholders or on the company.

22. The aforesaid judgment of the Supreme Court was followed by a learned judge of the Delhi High Court in Pushpa Katach v. Manu Maharani 2005 (VI) AD (Delhi) 846.

23. In any event, according to the learned senior counsel for the first respondent/plaintiff, the application under Section 45 cannot be allowed in view of the fact that the original joint venture agreement along with its annexures, referred as Exhibits 1, 2 and 3 in the agreement, has not been filed into court. What is referred to as Exhibit 1 in Article 2.2 and as Exhibits 2 and 3 in Article 9.7.1 of the Joint Venture Agreement were not either signed by the parties or filed into court by either of the parties. The production of the complete original agreement along with its annexures is a mandatory prerequisite for referring a dispute to arbitration under Section 45 and hence, according to the learned senior counsel for the first respondent/plaintiff, the application under Section 45 has to fail in the absence of these annexures (referred to as Exhibits 1, 2 and 3 in the Joint Venture Agreement).

24. In response to the aforesaid contentions of Mr. Y.P. Narula, the learned senior counsel for the first respondent/plaintiff Mr. A.L. Somayaji, learned senior counsel for the applicant/first defendant contended:

(a) that in view of the definition of the term "arbitration agreement" under Section 2(1)(b) read with Section 7 of the Act and Article II of the First Schedule, an arbitration clause contained in a composite agreement, by itself is to be treated as a separate agreement;

(b) that the attack of the plaintiff in the suit, is only to the joint venture agreement dated 06.12.1995 as a whole and the Memorandum of Understanding dated 08.04.2003 and not to the arbitration clause contained in the joint venture agreement;

(c) that in the absence of any attack to the arbitration clause in the joint venture agreement, on the ground that the same is null and void, inoperative and incapable of being performed, there is no escape from the mandatory requirement of Section 45, since the said agreement is one to which New York Convention, 1958 would apply;

(d) that as per the majority judgment of the Supreme Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr. (supra), the court is only required to be prima facie satisfied about the validity of the arbitration agreement, at the pre-reference stage; and that if it is so satisfied about the validity of the arbitration agreement, it is mandatory that the dispute is referred to arbitration;

(e) that on prima facie basis, the arbitration agreement (or the joint venture agreement for that matter), cannot be said to be null and void, inoperative or incapable of being enforced and that, therefore, the provisions of Section 45 are naturally attracted;

(f) that the plaintiff cannot plead the non-availability of the original joint venture agreement, as a ruse, to contend that a reference under Section 45 cannot be made without filing the original arbitration agreement;

(g) that Section 45 does not require the original arbitration agreement to be filed into court and that in view of the provisions of Section 47(1)(b) and Section 8(2) of the Arbitration Act, even a copy or a duly certified copy is sufficient for invoking a reference;

(h) that the contention of the plaintiff that Exhibits 1, 2 and 3 to the Joint Venture Agreement were not available and not signed and that, therefore, a reference to arbitration cannot be made, cannot be countenanced in view of the fact that the plaintiff itself has produced a copy of the joint venture agreement certified by them to be a true copy.

25. On a careful consideration of the rival contentions, I find that the following issues arise for consideration:

(1) Whether the arbitration clause contained in Article 9.2 of the Joint Venture Agreement is severable from the main contract or agreement and is capable of being enforced de hors the main agreement ?

(2) Whether the arbitration clause would survive even in cases where it is only part of a main contract, which has become null and void ?

(3) What is the scope of the enquiry to be conducted in an application seeking reference under Section 45 ?

(4) Whether the Joint Venture Agreement and the Memorandum of Understanding, being at the most, agreements between the shareholders, could still be enforced de hors the Articles of Association of the company and the statutory provisions of the Companies Act, 1956 ?

26. Apart from the above main issues, certain ancillary issues have also been raised, which are as follows:

> (a) Whether a reference under Section 45 could be made in the absence of the original arbitration agreement (or the joint venture agreement) ?
>
> (b) Whether the non-availability of Exhibits 1, 2 and 3 to the Joint Venture Agreement, would make it an inchoate instrument, with which a reference cannot be made under Section 45 ?

Severability of Arbitration Clause

27. The Arbitration and Conciliation Act, 1996 was enacted on the basis of and on the lines of the Model Law adopted in 1985, by United Nations Commission on International Trade Law (UNCITRAL), on International Commercial Arbitration. Since it is based on the Model Law adopted by UNCITRAL and also since the Act was intended to replace the Arbitration Act, 1940, Act 26 of 1996 had to deal both with domestic arbitrations as well as international commercial arbitrations. Consequently, Act 26 of 1996 came to be divided into four parts, with Part 1 dealing with Domestic Arbitrations, Part II dealing with the Enforcement of Foreign Awards including New York and Geneva Convention Awards, Part III dealing with Conciliation and Part IV dealing with supplementary provisions. While Part II necessarily takes into account UNCITRAL Model Law on International Commercial Arbitration, 1985, Part III takes into account UNCITRAL Conciliation Rules, 1980. However, in paragraph 3 of the Statement of Objects and Reasons, it was made clear that "though UNCITRAL Model Law and Rules are intended to deal with International Commercial Arbitration and Conciliation, they could, with appropriate modifications, serve as a model for legislation on Domestic Arbitration and Conciliation".

28. Bearing the above distinction in mind, the courts have always treated the cases falling under Part I, different from the cases falling under Part II. Even the language employed in Parts I and II of the Act keeps this distinction alive and real. Therefore, any interpretation to Section 45 could be made only by keeping this distinction between Part I and Part II in mind.

29. Unfortunately, the provision relating to definitions falls only under Part I. Section 2(1)(b) defines "arbitration agreement" to mean an agreement referred to in Section 7. In order to dispel any wrong impression about the applicability of the definitions contained in Part I to Part II as well, Section 7(1) seeks to define an arbitration agreement, with a preface that the definition applies only to Part I. Section 7(1) begins with the words "In this Part, arbitration agreement means...." In other words, the definition of the term arbitration agreement, as found in Section 7(1) is applicable only to Part I. Therefore, the prescriptions contained in sub-sections (2), (3), (4) and (5) of Section 7, could also apply only to Part I of the Act. Consequently, the applicant/first defendant cannot rely upon Section 2(1)(b) read with Section 7(2) to contend that the arbitration clause contained in the joint venture agreement is severable.

30. If we cannot take recourse to Section 7(2) for the purpose of determining the question of severability insofar as the provisions of Part II are concerned, we will have to look for an answer to this issue only from Part II itself. As stated earlier, Part II of the Act contains two chapters, viz. Chapter I dealing with New York Convention Awards and Chapter II dealing with Geneva Convention Awards. Each of these chapters contains provisions which are similar to one another. But Chapters I and II are mutually exclusive. Both these chapters begin with a definition section under Sections 44 and 53. Both these chapters confer powers upon the judicial authority, under Sections 45 and 54, to refer the parties to arbitration. Interestingly, both these Sections 45 and 54 begin with a non obstante clause to the effect that they apply notwithstanding anything contained in Part I of the Act. Therefore, de hors Sections 2 and 7, it is to be seen whether the arbitration clause is severable from the joint venture agreement.

31. A reading of Section 45 shows that it can be invoked only when the parties have made an agreement referred to in Section 44. Section 44 reads as follows:

> 44. Definition--In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960--
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that the reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

32. By the use of the expressions "an agreement referred to in Section 44" and "the said agreement", Section 45 makes it clear that it refers only to one agreement, as referred to in Section 44. Section 44 speaks of "an agreement in writing for arbitration" to which the Convention set forth in the First Schedule applies. Article II of the First Schedule, extracted in paragraph 9 above contains a clause in Clause 2, which reads as follows:

> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Thus, Article 11(2) of the First Schedule reproduced above, is nothing but an abridged version of Sub-sections (2), (3), (4) and (5) of Section 7 since it contains all the requirements of those Sub-sections.

33. Therefore, the contention that the arbitration clause is severable and that it can be treated as an agreement in itself is well founded. This inevitable conclusion flows out of the provisions of Sections 2(1)(b) and 7(2) of the Act, in respect of cases covered by Part I and it flows out of the provisions of

Article 11(2) of the First Schedule to the Act, in respect of cases covered by Chapter I of Part II. In a sense, an arbitration clause contained only as part of a whole agreement, is to be treated as a life boat in a ship, of which it is a part. Whether the life boat would survive the ship when it is sinking, is the crucial issue to be considered in the next part of this judgment.

34. The law laid down in paragraphs 29 and 45 of the judgment of the Supreme Court in National Thermal Power Corporation v. Singer Co. and Ors. (supra), to the effect that an arbitration clause is not an independent contract, in my considered view, cannot be applied, in view of the fact that the said decision arose under the Arbitration Act, 1940. The 1940 Act did not contain any provisions, similar to Sections 2(1)(b), 7(2), 16(1)(a) and Article 11(2) of the First Schedule of Act 26 of 1996. Sections 2(1)(b), 7(2) and Article 11(2) of the First Schedule of Act 26 of 1996 have already been extracted above. Section 16(1) which has not been extracted above, reads as follows:

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

Therefore, the ratio laid down in paragraphs 29 and 45 of the judgment of the Supreme Court in National Thermal Power Corporation v. Singer Co. and Ors. (supra), may not be available to the plaintiff any more in the light of the express provisions incorporated in the new Act.

35. In Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors. (SO relied upon by the learned senior counsel for the applicant/first defendant, the Supreme Court held in paragraph 13 of the said judgment as follows:

> Under the scheme of the Arbitration and Conciliation Act the arbitration clause is separable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself.
>
> Though in the said case, the Supreme Court was dealing with a dispute which arose between the partners of a partnership firm and the case was one of domestic arbitration governed by Part I of the Act, the doctrine of severability as propounded in respect of Part I under Sections 7(2) and 16(1), have been imported into Part II by virtue of Article 11(2) of the First Schedule which governs the New York Convention Awards. As observed earlier, Section 7(2), (3) and (4) contains certain requirements, namely(1) that the agreement could be in the form of a clause in a contract or in the

> form of a separate agreement; (2) that it should be in writing; and (3) that it would be construed to be in writing if it is contained in a document signed by parties or exchange of letters, telex, telegram, etc. These very same prescriptions are found in Article 11(2) of the First Schedule. Therefore, there is no escape from the conclusion that the doctrine of severability is applicable to an arbitration agreement.
>
> Survival of the arbitration clause when the main contract perishes

36. The conclusion that the arbitration agreement is severable from the main contract, does not automatically mean that it would always survive the main contract. While the arbitration clause need not always follow the fate of the main contract, of which it is a part, the corollary that it will always survive even if the main contract perishes, cannot be taken to be true.

37. Therefore, in order to find out the circumstances under which the arbitration agreement would survive the main contract and the circumstances in which it would perish along with the main contract, we may have to take recourse to the provisions of the Contract Act, 1872.

38. The Contract Act, 1872, among other things, deals with--(1) valid and enforceable contracts; (2) voidable contracts; (3) contracts which are void from their very making (void ab initio); and (4) contracts which were enforceable at the beginning, but which became void after a point of time.

Section 2(g) of the Contract Act defines a void contract as follows:

> An agreement not enforceable by law is said to be void.
>
> Section 2(h) defines a contract as follows:
>
> An agreement enforceable by law is a contract.
>
> Section 2(i) defines a voidable contract as follows:
>
> An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.
>
> Section 2(j) defines a contract which subsequently becomes void as follows:
>
> A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.
>
> Keeping the above definitions in mind, we have to see the types of contracts in which the arbitration clause would survive, even if the whole contract goes.

39. The question as to whether an arbitration clause would survive a contract, of which it is a part, like a life boat in a sinking ship, does not arise at all, in respect of the first type of contracts, namely,

valid and enforceable contracts, out of which disputes arise. The question about the survival of the arbitration clause, de hors the survival of the whole contract, arises only in the other three types of contracts, namely--(1) voidable contracts; (2) contracts which are void ab initio; and (3) contracts which became void after a period of time (frustrated contracts).

40. Insofar as voidable contracts are concerned, it is seen that an agreement to which the consent of one of the parties is obtained by coercion, fraud or misrepresentation or undue influence is declared as voidable under Sections 19 and 19-A of the Contract Act. They are voidable at the option of the party whose consent was so obtained. But coercion, fraud or misrepresentation or undue influence, which taints the free consent of a party to a contract, are matters of fact. Therefore, the very right of a party to avoid a contract on any of these grounds, available under Sections 19 and 19-A of the Contract Act, becomes a contentious issue of fact and hence the arbitration agreement would definitely survive even the avoidance of the contract by one of the parties. In other words, in voidable contracts, the arbitration clause would survive even if the whole contract is avoided by one of the parties on any of the grounds available to him under the Contract Act.

41. Insofar as the third type of agreements, namely agreements which are void ab initio are concerned, the ability of the arbitration clause to survive the whole contract is doubtful. Suppose an agreement is entered into between a person in India and a foreigner, whereby the foreigner agrees to supply arms and ammunition to the Indian citizen who holds no licence for such import, such an agreement would be hit by Section 23 of the Contract Act. This agreement would be void ab initio and hence the arbitration clause contained in such an agreement cannot certainly survive the main agreement. To hold otherwise, would tantamount to permitting an arbitration into the rights and liabilities of the parties to the agreement out of which, no such rights and liabilities, ever flowed nor could ever flow. Therefore, if an agreement is void ab initio, the arbitration clause contained in such an agreement would not be a life boat in a sinking ship but a lifeless boat in a ship which never commenced its voyage.

42. Coming to the fourth category of agreements, namely, those which become void, subsequent to their inception, they are to be treated in a different manner than those agreements which are void ab initio. Dealing with a case where a contract got frustrated and became impossible of performance, attracting Section 56 of the Contract Act, the Supreme Court held in Naihati Jute Mills Ltd. v. Khyaliram Jagannath (1968) 2 SCJ 907, as follows:

> But assuming that the appellants had established frustration even then it would not be as if the contract was ab initio void and, therefore, not in existence. In cases of frustration it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes.

> Thus, in respect of the fourth category of agreements, the issue is no longer res integra and it stands settled by the aforesaid decision of the Supreme Court. ^

43. Therefore, in fine, I hold under Issue No. 2:

> (a) that an arbitration clause contained as part of a main agreement, would survive, even if the main agreement perishes, in cases where such an agreement is voidable;
>
> (b) that it would also survive in cases where the main agreement becomes void or becomes incapable of performance subsequent to its creation; and
>
> (c) that the arbitration clause would not survive, if the main agreement of which it is a part, is void ab initio.

Scope of enquiry under Section 45

44. As stated earlier, the Arbitration and Conciliation Act, 1996 confers powers upon a judicial authority which is seized of an action, to refer the parties to arbitration, under three different contingencies, viz., (i) when the action brought before it, is the subject matter of arbitration agreement, covered by Part I (Domestic Arbitrations); (ii) when the action brought before it, is the subject matter of an agreement referred to in Section 44 (Chapter I, Part II relating to New York Convention Awards); and (iii) when the action brought before it is the subject matter of a contract made between persons to whom Section 53 applies, including an arbitration agreement (Chapter II of Part II relating to Geneva Convention Awards). The above three contingencies are covered respectively by Sections 8, 45 and 54.

45. The scope of the enquiry under Section 8, is only peripheral in nature in the sense that it is confined to the examination of a few aspects namely (a) the existence of an arbitration agreement; (b) whether the action brought before the court is by one of the parties to the said agreement against the other party; (c) whether the subject matter of the action before the court is the same as the subject matter of the arbitration agreement; and (d) whether the other party moves the court seeking a reference to arbitration, before submitting its first statement on the substance of the dispute. In other words, the judicial authority is not empowered under Section 8 to get into the merits of the case to decide whether the parties should be referred to arbitration or not. The focus of the judicial authority in an application under Section 8 is only on the arbitration agreement and not on the merits of the dispute that has arisen between the parties. It is perhaps on account of this fact that Section 7(2) equated an arbitration agreement made out in the form of a separate agreement to an arbitration clause contained in a main agreement.

46. In contradistinction to Section 8 which applies only to domestic arbitration, Section 45, which applies to international commercial arbitration (confined only to the contracting States under the New York Convention), empowers the judicial authority to refuse to refer the parties to arbitration, if it finds that the agreement is null and void, inoperative or incapable of being j performed. The Convention detailed in the First Schedule to the Act applies to such cases.

47. Under Section 54, which applies to international commercial arbitration between contracting States under the Geneva Convention, the judicial authority is obliged to refer the parties to arbitration, but such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative. The Conventions under the Second Schedule and the Third Schedule to the Act apply to such cases.

48. Thus, it is seen that the scope of an enquiry under Section 45 and Section 54 is not limited to test the existence and validity of the arbitration clause or arbitration agreement but also to something more, viz. whether such agreement is null and void, inoperative or incapable of being performed. Even as between themselves, Sections 45 and 54 vary widely in their scope and ambit, but it is not necessary to get into the same for the purpose of deciding the issue on hand.

49. Since the judicial authority seized of an action, in a matter in respect of which the parties have made an agreement referred to in Section 44, is entitled to reject a reference to arbitration, if it finds the said agreement to be null and void, inoperative or incapable of being performed, the scope of the enquiry to be conducted under Section 45 is much wider than the one under Section 8. But there is a divergence of views, as to whether such an enquiry on the validity of the agreement is only to arrive at a prima facie finding or to arrive at a finding as a preliminary issue in the course of the trial of the suit.

50. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and Anr. (supra) Hon'ble Mr. Justice Y.K. Sabharwal (the Chief Justice of India, as he then was) in his minority view, held categorically in paragraph 57 (paragraph 61 of Arb. LR) of the judgment as follows:

> 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.
>
> Hon'ble Mr. Justice B.N. Srikrishna (as he then was) in his majority view, held in paragraphs 105 and 106 (paragraphs 119 and 120 of Arb. LR) as follows:
>
> 105....It is precisely for this reason that I am inclined to the view that at" the pre-reference stage contemplated by Section 45, the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the court at the post award stage.
>
> 106....Finally, having regard to the structure of the Act, consequences arising from particular interpretations, judgments in other jurisdictions, as well as the opinion of learned authors on the subject, I am of the view that, the correct approach to be adopted under Section 45 at the pre-reference stage, is one of a prima facie finding by the trial court as to the validity or otherwise of the arbitration agreement.
>
> Hon'ble Mr. Justice D.M. Dharmadhikari, partly concurring with Hon'ble Mr. Justice B.N. Srikrishna, added a rider to the conclusion reached by Mr. Justice B.N. Srikrishna. It is found in paragraph 111 (paragraph 69 of Arb. LR) of the judgment

which is reproduced as follows:

> 111....I respectfully agree with learned brother Srikrishna, J. only to the extent that if on a prima facie examination of the documents and material on record, including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make" a reference. It may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed" within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court, which is seized of the matter, to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to this court under sub-section (2) of the said section.

51. Therefore, it is clear that when the agreement is assailed as null and void, inoperative or incapable of being performed, this court has an obligation cast under Section 45, first to reach a prima facie conclusion, on the basis of the submissions and contentions. If such a prima facie conclusion, leads the court to a decision to reject the application under Section 45, the court must afford full opportunities to the parties to lead oral and documentary evidence and decide the question like the trial of a preliminary issue in a suit. Therefore, it is necessary for me to first arrive at a prima facie finding on the question as to whether the agreement has become null and void or inoperative or incapable of being performed. This prima facie finding will decide the future course, viz. as to whether it should proceed further towards trial or not.

52. The plaintiff has assailed the joint venture agreement dated 06.12.1995 to be null and void, inoperative and incapable of being performed. Therefore, one must have recourse to the provisions of the Contract Act, 1872 to find out the circumstances in which an agreement would be said to be void or voidable or unenforceable.

53. As stated in paragraph 40 above, all agreements to which the consent of one of the parties is obtained by coercion, fraud or misrepresentation or undue influence, are voidable under Sections 19 and 19-A of the Contract Act. They are voidable at the option of the party whose consent was so obtained. It is not the case of the plaintiff that the joint venture agreement is voidable, on any of the grounds available under Sections 19 and 19-A of the Contract Act. In any event, the voidability of an agreement, is not one of the grounds available to the plaintiff to seek a rejection of a request under

Section 45. Section 45 seems to cover only contracts which are either void ab initio or which become void and incapable of being performed at a subsequent point of time.

54. The agreements which are void, are dealt with under Sections 20, 23 to 30 and 36 of the Contract Act. In brief--

(i) Section 20 declares an agreement to be void if both parties to the agreement, are under mistake as to a matter of fact;

(ii) Section 23 lists out the circumstances under which the consideration or object of an agreement would be illegal;

(iii) Section 24 declares agreements whose considerations and objects are unlawful in part, to be void;

(iv) Section 25 declares an agreement without consideration to be void except under certain contingencies;

(v) Sections 26 and 27 declare agreements in restraint of marriage and trade to be void;

(vi) Section 28 declares agreements in restraint of legal proceedings to be void (with a few exceptions);

(vii) Section 29 declares an agreement to be void for uncertainty;

(viii) Section 30 declares an agreement by way of wager to be void (with the exception of horse racing); and

(ix) Section 36 declares all agreements contingent upon the happening of impossible events, to be void.

55. While the provisions of Sections 20, 23 to 30 and 36 of the Contract Act, deal with agreements which are void from their very origin, Section 35 deals with agreements which become void subsequently, though they are not vitiated at the time of their making. Section 35 reads as follows:

> 35. When contracts become void, which are contingent on happening of specified event within fixed time--Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

56. In contrast to agreements which are void ab initio (covered by Sections 20, 23 to 30 and 36) and in contrast to agreements which become void later on, (covered by Section 35), it is seen that Section 56 covers both categories. Section 56 deals with agreement to do acts which are impossible in

themselves or which become impossible subsequent to the making of the contract. Section 56 reads as follows:

> 56. Agreement to do impossible act--An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful--A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful--Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise.

57. Therefore, the basis of the plaintiff's claim that the joint venture agreement is null and void, inoperative and incapable of being performed, has to be tested on the touchstone of the parameters laid down under the Contract Act, 1872, in the aforesaid provisions. In other words, the plaintiff should bring his case within anyone of the parameters laid down under the aforesaid provisions of the Contract Act, if the application under Section 45 taken out by the first defendant is to be rejected. In simple terms, these parameters could be--(i) mistake of fact on the part of both the parties; (ii) the consideration or the object of the agreement being unlawful on account of being forbidden by law, defeating the provisions of law, fraudulent, involving or implying injury to the person or the property of another, immoral or opposed to public policy; (iii) lack of consideration for the contract; (iv) restraint of marriage, trade or legal proceedings; (v) uncertainty; (vi) wager; (vii) contingent on impossible events; (viii) contingent on an uncertain event that fails to happen within a fixed time; and (ix) agreement to do an act which is impossible or which becomes impossible subsequently.

58. Keeping the above provisions of the Contract Act in mind, if the averments contained in the plaint are scanned, it is seen that paragraphs 1 to 13 of the plaint contain only a narration of facts apart from the long cause title. The attack on the joint venture agreement dated 06.12.1995 and the Memorandum of Understanding dated 08.04.2003 begins only from paragraph 14 of the plaint. In paragraph 14 of the plaint, the plaintiff contends that as per the Memorandum of Understanding dated 08.04.2003, the joint venture agreement was given a go-by and it was abandoned and cannot be acted upon. Such an averment actually falls short of a clear-cut pleading that the joint venture agreement was null and void, inoperative or incapable of being performed.

59. Again paragraphs 15, 16 and 17 of the plaint, contains averments only to the effect that the first defendant failed to fulfil its obligations under the joint venture agreement. Towards the end of paragraph 17 of the plaint, the plaintiff concludes that the failure of the first defendant to fulfil its obligations under the joint venture agreement is a pointer to the fact that the joint venture agreement lost its significance and that it had been abandoned by the first defendant. This pleading

of abandonment of the joint venture agreement by the first defendant also does not tantamount to a clear-cut pleading that the joint venture agreement is null and void, inoperative or incapable of being performed. In other words, abandonment of an agreement is not covered by any of the provisions of Sections 20, 23 to 30, 35, 36 or 56 of the Contract Act. It is not even one of the grounds available under Section 45 of the Arbitration and Conciliation Act, 1996 to avoid a reference.

60. In paragraph 18 of the plaint, the plaintiff has taken a stand:

> (a) that the joint venture agreement got superseded by the Memorandum of Understanding and it, therefore, becomes non est in law and unenforceable;
>
> (b) that the Memorandum of Understanding cannot also be enforced on account of the failure to arrive at any agreement before the date 15.07.2003 stipulated in the Memorandum of Understanding; and
>
> (c) that the second defendant company is governed by its own Memorandum and Articles of Association, and that the clauses contained in Memorandum of Understanding dated 08.04.2003 have not been incorporated into the Memorandum and Articles of Association of the company.

61. A careful consideration of the averments contained in paragraph 18 of the plaint, would show that what the plaintiff pleads is actually the non-enforceability of the joint venture agreement on account of the same having been superseded by the Memorandum of Understanding and the non-enforceability of Memorandum of Understanding on the ground of the same having been not given effect to before 15.07.2003.

62. But unfortunately, for the plaintiff the Memorandum of Understanding does not say anywhere that it is in supersession of the joint venture agreement. On the contrary, it appears to be only in continuation of and in furtherance of the joint venture agreement dated 06.12.1995. As a matter of fact, the plaintiff has admitted in paragraph 11 of the plaint that the Memorandum of Understanding came into existence at the instance of the first defendant, when the plaintiff approached the first defendant for a no objection letter for the transfer of shares held by Enmas Process Technology Limited in the second defendant company in favour of the plaintiff. The question of obtaining the no objection of the first defendant for the transfer of shares of ETPL in favour of the plaintiff company arose only on account of certain restrictions stipulated in Article 4 of the Joint Venture Agreement dated 06.12.1995. If the parties had abandoned the joint venture agreement, the plaintiff need not have obtained a no objection letter on 08.04.2003 from the first defendant for the transfer of shares of ETPL to the plaintiff as admitted in paragraph 11 of the plaint. It is clear from the averments contained in paragraph 11 of the plaint that the plaintiff obtained no objection letter on 08.04.2003 after signing the Memorandum of Understanding dated 08.04.2003. Thus, the first defendant has been lured into issuing a no objection letter, on the basis of the Memorandum of Understanding signed by the plaintiff. The Memorandum of Understanding has acted as a quid pro quo for the no objection letter and the plaintiff who has reaped the benefit of the no objection letter, cannot now turn around and say that the Memorandum of Understanding is unenforceable.

63. The Memorandum of Understanding dated 08.04.2003 contemplated a new joint venture agreement to be signed before 15.07.2003. The plaintiff has taken a stand that no such new joint venture agreement was signed on or before 15.07.2003 and that, therefore, the Memorandum of Understanding also cannot be enforced. I am unable to countenance the said submission for the simple reason that every failure of a stipulation in a contract, cannot frustrate the contract. The said contention of the plaintiff in paragraph 18, if accepted as a proposition of law, is sufficient to dismiss all suits for specific performance. Every litigation arising out of a contract, is on account of the failure of one of the parties to perform his obligations. If such failure by itself, would make the contract unenforceable, the relief of specific performance can never be granted in any suit. Therefore, the contention that the Memorandum of Understanding cannot be enforced on account of the failure of the parties to arrive at a new agreement on or before 15.07.2003, is to be stated only to be rejected.

64. The contention in paragraph 18 of the plaint that the clauses contained in the Memorandum of Understanding dated 08.04.2003 were not incorporated in the Memorandum and Articles of Association of the company, does not take the plaintiff anywhere near the target. The Memorandum of Understanding dated 08.04.2003 contained just four sentences regarding the future course of action and it never contemplated an amendment to the Articles of Association.

65. The contention in paragraph 19 of the plaint that the joint venture agreement stood superseded by the Memorandum of Understanding dated 08.04.2003 and that, therefore, the arbitration clause (contained only in the Joint Venture Agreement and not in the Memorandum of Understanding) cannot be invoked, does not appear to be correct. The Memorandum of Understanding does not state that it supersedes the joint venture agreement. On the contrary, it appears to be in partial modification of the joint venture agreement. For example, the joint venture agreement contemplated 60% shares to be held by ETPL and 40% shares to be held by A. Ahlstrom. The plaintiff stepped into the shoes of ETPL and the first defendant stepped into the shoes of A. Ahlstrom. The Memorandum of Understanding conferred a right upon the first defendant to increase its shareholding up to 51-60% by the end of 2005 and to buy the remaining shares by the end of 2008. Such a prescription in the Memorandum of Understanding would have been impossible unless the joint venture agreement had been treated as the fountain-head of the mutual rights and obligations of the parties. As stated earlier, the plaintiff need not have asked for a no objection from the first defendant for the transfer of the shares held by ETPL in its own favour, if the joint venture agreement had been superseded. The claim of the plaintiff in paragraph 19 of the plaint that the parties did not have any surviving mutual rights and obligations under the joint venture agreement in view of the provisions of Section 7 of the Arbitration Act is also misconceived for two reasons, viz., (i) that the Memorandum of Understanding was .actually in continuation of the joint venture agreement; and (ii) Section 7 does not apply to the case falling under Part II.

66. Paragraph 20 of the plaint contains a narration of the dispute that arose between the plaintiff and the first defendant and the exchange of correspondence. Though the plaintiff has stated in paragraph 20 of the plaint that they refused to grant inspection to the agent of the first defendant on the ground that the joint venture agreement had become null and void, inoperative and incapable of being performed, the plaintiff has not specified as to how the joint venture agreement had become

null and void, inoperative and incapable of being performed. It is now well settled that a party to a litigation cannot invoke the jurisdiction of a court by merely reproducing the words contained in the provisions of a statute. The party should also plead necessary facts in order to infuse life into the words and expressions contained in the statutory provisions, so as to invoke the jurisdiction of the court. For example, it is not enough for a plaintiff in a suit for specific performance merely to plead that he was always ready and willing to perform his part of the obligations. He must also plead necessary facts sufficient to show his readiness and willingness, as otherwise the reproduction of the words contained in the statute would be no more than a mere chanting of mantras without devotion. Therefore, the averments contained in paragraph 20 of the plaint are also not sufficient to satisfy the tests laid down under Section 45 of the Arbitration and Conciliation Act, 1996.

67. In paragraphs 21 and 22, the plaintiff has taken a stand that the second defendant is governed by its own Memorandum and Articles of Association as well as the provisions of the Companies Act, 1956 and that, therefore, the Joint Venture Agreement and the Memorandum of Understanding are unenforceable. Paragraph 23 of the plaint narrates the cause of action, paragraph 24 deals with the jurisdiction of this court, paragraph 25 relates to the prayer for leave to sue, paragraph 26 contains the valuation of the suit and paragraph 27 contains the prayer in the suit.

68. Therefore, the only portion of the plaint that comes anywhere near the exception under Section 45 can be found only in paragraphs 21 and 22 of the plaint. The contention of the plaintiff in these two paragraphs is that the Joint Venture Agreement and the Memorandum of Understanding are not enforceable in view of the fact that the second defendant company is governed by its own Memorandum and Articles of Association and the provisions of the Companies Act, 1956 and that, therefore, the agreement between two shareholders cannot militate against these statutory regulations.

69. In order to drive home the contention that a private agreement between the shareholders cannot be enforced in the background of the Memorandum and Articles of Association of the company, Mr. Y.P. Narula, learned senior counsel for the first respondent/plaintiff placed heavy reliance on the judgment of the Supreme Court in V.B. Rangaraj v. V.B. Gopala-krishnan (supra). In paragraph 7 of the said judgment, the Supreme Court held that the Articles of Association are the regulations of the company, binding on the company and its shareholders and that the shares are a movable property whose transfer is regulated by the Articles of Association of the company. In para 8 of the said judgment, which I have extracted in paragraph 21 above, the Supreme Court held that a restriction which is not specified in the articles is not binding either on the company or on the shareholders.

70. Keeping in mind the averments in paragraphs 21 and 22 of the plaint and the aforesaid decision of the Supreme Court, we have to see if the rights and obligations conferred upon the parties under the Joint Venture Agreement and the Memorandum of Understanding have become unenforceable or incapable of being performed, in the light of the Memorandum and Articles of Association of the company and the provisions of the Companies Act, 1956. The plaintiff has filed the Memorandum and Articles of Association of the second defendant company, as Document No. 5. Article 2 of the Articles of Association describes the second defendant as a private limited company within the meaning of Sections 2(35) and 3(1)(iii) of the Companies Act, 1956. Therefore, the restriction on the

right to transfer the shares, the limitation as to the total number of members, the prohibition of any invitation to the public to subscribe to the shares of the company, are all extracted in Article 2.

71. Articles 6 and 7 of the Articles of Association filed by the plaintiff as Document No. 5 provide the shareholding pattern between the Indian promoters and foreign promoters and the discretion of the Directors to allot shares forming part of any increased capital of the company. Articles 6 and 7 read as follows:

> Shareholding Pattern Article 6
>
> (a) The Indian promoters shall be entitled to subscribe for in cash and be allotted shares in the company to the extent of 60% (Sixty per cent) of the issued equity share capital thereof for the time being.
>
> (b) The foreign promoters shall be entitled to subscribe for in cash and be allotted shares in the company to the extent of 40% (Forty per cent) of the issued equity share capital thereof for the time being.

Shares under the Control of Directors Article 7--Subject to the provisions of the Act and the articles, the shares in the capital of the company for the being including any shares forming part of any increased capital of the company shall be under the control of the Directors who may allot or otherwise dispose of the same to or any of them to such persons in such proportion and on such terms and conditions and either at a premium or at par (or subject to compliance with the provisions of Section 79 of the Act at a discount) and at such times as they may from time to time think fit and proper. Provided that the company will not give to any person the option to call of any share without the sanction of the shareholders of the company in general meeting.

72. Article 12 dealing with "Transfer and Transmission of Shares" reads as follows:

> Transfer and Transmission of Shares--
>
> (i) No member shall sell, transfer or otherwise dispose of any of the shares in the company until the shares have been fully paid up.
>
> (ii) No transfer of share shall be made or registered except when the transfer is made by any member of the company to another member.
>
> (iii) In case the Indian promoter or foreign promoter wishes to transfer the shares in the company such member (hereinafter known as "Offeror") shall first offer by written notice to sell such shares to the other promoter specifying the total number of shares to be transferred, the name and particulars of the transferee and the price which shall be determined in accordance with the rules mentioned hereafter.

(iv) The other member may elect to purchase all of the shares offered or none of them, by giving the Offeror written notice within thirty (30) days after receipt of the offer. Payment for shares purchased shall take place within thirty (30) days from the date of such written notice.

(v) Notwithstanding the restriction contained in clause (ii) above, regarding transfer of shares among members only, if the other member does not elect to purchase the shares of the Offeror or does not pay for that within the time specified, the Offeror may proceed to transfer its shares to a third party transferee at the price determined in accordance with the rules specified hereafter or at a higher price.

(vi) If the Offeror does not sell the shares within Sixty (60) days after it is free to do so, the Offeror must hereafter re-offer the shares to the other promoter in accordance with these rules, before any transfer to any third party.

(vii) If the Offeror wishes to sell its shares to any third party at a price lower than the price offered to the other promoter, it shall first re-offer to sell such shares to the other promoter in accordance with these rules stating in the notice the name and particulars of the new transferee, and the lower price at which the shares are offered for sale to the new transferee.

(viii) In computing any period referred above the time taken to obtain any necessary government approvals shall be excluded.

Article 9 also empowers the Board of Directors to issue and allot shares in the capital of the company as payment or part-payment for any property sold or goods transferred or machinery or appliances supplied or for purchasing trade marks, merchandise marks, licences, etc. Article 10 empowers the company to alter the conditions of the Memorandum of Association by passing the required resolution in the general meeting, increasing the share capital by such amount as it thinks expedient by issuing new shares.

73. Thus, it follows from the Articles of Association extracted above:

(a) that the shareholding pattern of 60% and 40% under Article 6 was fixed only "for the time being";

(b) that the Board of Directors are competent to issue and allot shares in the capital of the company, as payment for any goods supplied or services rendered including the grant of licences under Article 9;

(c) that the company was competent to increase its share capital by issuing new shares under Article 10;

(d) that the Directors are competent to allot or otherwise dispose of the shares forming part of the increased capital, to any person upon such terms and conditions they deem fit, by virtue of Article 7; and

(e) that the members have a pre-emptive right of purchase of the shares under Article 12.

74. The plaintiff has not chosen to point out as to how the Joint Venture Agreement and the Memorandum of Understanding are in conflict with the Articles of Association of the company or the provisions of the Act. Article 4 of the Joint Venture Agreement dealing with transfer of shares, contains the same restrictions as are found in Article 12 of the Articles of Association of the company. The only substantial difference between Article 4 of the Joint Venture Agreement and Article 12 of the Articles of Association is that the Joint Venture Agreement prescribes even the method of evaluation of the shares, while the Articles of Association is silent about it. Therefore, in the absence of a specific pleading, pointing out the area in which there is a direct conflict between the Joint Venture Agreement and the Articles of Association, it is not possible to hold that the joint venture agreement has become unenforceable on account of the Memorandum and Articles of Association of the second defendant company.

75. Under the aforesaid circumstances, I am of the view that the decision of the Supreme Court in V.B. Rangaraj v. V.B. Gopalakrishnan (supra), relied upon by the first respondent/plaintiff, is not applicable to the case on hand. In the case before the Supreme Court, the private arrangement between the shareholders (family members) was not transported into the Articles of Association of the company and Article 13 of the Articles of Association contained only one restriction on the right to transfer shares. Therefore, the Supreme Court held that there cannot be any restriction other than those stipulated under the Articles of Association. But in the present case, the restrictions placed on the Indian promoters and the foreign promoters, with regard to the transfer of shares under Article 4 of the Joint Venture Agreement, have been incorporated into the Articles of Association under Article 12. Therefore, the mutual rights and obligations as between the two branches of promoters, as found in the joint venture agreement, could still be enforced within the four corners of the aforesaid Articles of Association of the second defendant company including Article 12. In other words, the Articles of Association of the second defendant company do not appear to be in conflict with the joint venture agreement. Therefore, the judgment relied upon by the first respondent/plaintiff has no application to the facts of the present case.

76. Thus, a careful consideration of the entire plaint threadbare exposes the fact that the plaintiff has merely repeated, parrot like, the provisions of Section 45 of the Act that the Joint Venture Agreement and the Memorandum of Understanding are null and void, inoperative and incapable of being performed. There is not even a whisper in the plaint as to why and how they had become null and void, inoperative and incapable of being performed. There is no allegation anywhere in the plaint--(i) that there was a mistake of fact on the part of the parties to the contract attracting Section 20 of the Contract Act; or (ii) that the consideration or the object of the Joint Venture Agreement or the Memorandum of Understanding was unlawful so as to attract Section 23 or 24; or (iii) that the agreement was not supported by consideration so as to attract Section 25; or (iv) that the agreement

was in restraint of trade so as to attract Section 27; or (v) that the agreement was in restraint of legal proceedings so as to attract Section 28; or (vi) that the agreement was hit by uncertainty so as to attract Section 29; or (vii) that the agreement was by way of wager so as to attract Section 30; or (viii) that the agreement was contingent upon an impossible event or an event which became impossible so as to attract Section 35 or 36; or (ix) that the agreement was to do an act which subsequently became impossible or unlawful by reason of some event which the promisor could not prevent, so as to attract Section 56 of the Contract Act. In short, the pleading in the plaint, miserably falls short of touching any of the parameters laid down under any of these provisions of the Contract Act, even to examine as to how, when and why the joint venture agreement became null and void, inoperative or incapable of being performed.

77. In the absence of the pleadings of any material fact, on the foundation of which alone, the plaintiff would be entitled to assail the agreement as null and void or inoperative or incapable of being performed, I am afraid, the plaintiff may not even be entitled to lead any evidence, oral or documentary. It is well settled that a party to a proceeding cannot be allowed to produce any evidence to establish something not pleaded by him. Therefore, the question of directing the plaintiff to produce the oral and documentary evidence to prove that the Joint Venture Agreement and the Memorandum of Understanding have become null and void, inoperative or incapable of being performed, does not arise, in view of the lack of pleading of material facts. The only foundation laid by the plaintiff, not on the provisions of the Contract Act, but on the provisions of the Companies Act, 1956, is also very weak and so shaky that the plaintiff cannot ever build his case on the same, for the reasons stated in paragraph 75 above.

78. The plaintiff has filed a set of nine documents under Order 7 Rule 14(1), CPC along with the plaint. Therefore, despite the absence of specific pleading of material facts, as required under Order 6 Rule 2, CPC, I have also considered the set of documents filed by the plaintiff to find out if any of the documents make the case of the plaintiff fall under any of the parameters laid down by the Contract Act, 1872, to arrive at a prima facie finding (or a finding as on a preliminary issue) that the agreement is null and void, inoperative or incapable of being performed. But none of these documents contain any clue as to how the Joint Venture Agreement and the Memorandum of Understanding are null and void, inoperative or incapable of being performed. Document No. 1 filed along with the plaint is the Memorandum of Understanding dated 08.04.2003. Document No. 2 is the Memorandum of Association and Articles of Association of the plaintiff company. Document No. 3 is the xerox copy of a letter dated 14.06.2005 sent by the first defendant to the second defendant. This communication contains a proposal for the shareholders of the sale of 10% of shares from the plaintiff to the first defendant. The contents of this communication seek to enforce the Joint Venture Agreement and the Memorandum of Understanding and hence they do not lead one to the conclusion that the agreement is null and void, inoperative or incapable of being performed. Document No. 4 is the Joint Venture Agreement dated 06.12.1995. Document No. 5 is the Certificate of Incorporation, Memorandum of Association and Articles of Association of the second defendant company. This is the only document relied upon by the plaintiff to contend that the agreement has become incapable of being enforced and I have dealt with this submission in extenso in an earlier paragraph. Document No. 6 is the letter dated 01.12.2006 of the first defendant to the plaintiff recording their protest for not permitting an inspection by their agent. Document No. 7 is the

resolution passed by the Board of Directors of the plaintiff authorising one of the Directors to sign the pleadings. Document No. 8 is the reply of the plaintiff to the letter of the first defendant. Document No. 9 is the copy of the 'e-mail', between the plaintiff and the first defendant. This 'e-mail' merely contains a reference to the dispute raised between the parties. Interestingly, this 'e-mail' which bears the date 30.10.2006 does not contain any statement by the author that the Joint Venture Agreement or the Memorandum of Understanding are null and void, inoperative or incapable of being performed. Document No. 9 contains a statement by the plaintiff that the joint venture agreement is no more in force and iron est and that the Memorandum of Understanding dated 08.04.2003 lapsed on 15.07.2003. But such a bald statement without even outlining the logic or rationale behind the same, cannot improve the case of the plaintiff. Therefore, this is not a case where the plaintiff could be allowed to lead oral and documentary evidence, to prove that the agreement had become null and void, inoperative or incapable of being performed, when the pleadings are completely devoid of material facts and particulars necessary to enable this court to undertake such an exercise. It is relevant to point out that under Order 6 Rule 4, CPC, a plaint should contain an exemplified form of pleadings in certain cases. Order 6 Rule 4, CPC reads as follows:

> Particulars to be given where necessary--In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

79. The applicant/first defendant has filed a set of four 'e-mails' exchanged between the plaintiff and the first defendant. The 'e-mail' dated 19.01.2005 sent by the representative of the plaintiff to the first defendant shows that the plaintiff themselves pursued their relationship on the basis of the joint venture agreement. Particularly, this letter refers to the arbitration clause contained in Article 9.2 of the Joint Venture Agreement. The next 'e-mail' letter dated 08.07.2005 also deals with certain clauses in the original joint venture agreement. Therefore, the contention that the Memorandum of Understanding dated 08.04.2003 made the joint venture agreement dated 06.12.1995 a dead letter, appears to be too big for the consumption of this court. In any case, one need not even take note of the documents filed by the first defendant, since the plaintiff themselves have miserably failed to plead material and relevant facts to show as to how, why and when the agreement became null and void, inoperative and incapable of being performed.

80. Therefore, I hold that the pleadings of the plaintiff are not sufficient to make a roving enquiry in the form of the trial of a preliminary issue, to record a finding as to whether the Joint Venture Agreement and the Memorandum of Understanding are null and void, inoperative or incapable of being performed.

Objections as to the non-availability of the original agreement and the annexures to the original agreement

81. Mr. Y.P. Narula, learned senior counsel for the first respondent/ plaintiff contended that in the absence of the original joint venture agreement and its annexures Exhibits 1, 2 and 3, a reference to arbitration was impermissible. This argument is sought to be resisted by the learned senior counsel for the applicant/first defendant on the basis of Section 47(1)(b) of the Arbitration and Conciliation Act, 1996. However, Section 47(1)(b) of the Act, applies at the time of seeking enforcement of a foreign award and not at the time of seeking a reference under Section 45. But Article 4.3 of the Rules of Arbitration of the International Chamber of Commerce, requires a party seeking recourse to arbitration to furnish the following:

> (a) the name in full, description and address of each of the parties;
>
> (b) a description of the nature and circumstances of the dispute giving rise to the claim(s);
>
> (c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
>
> (d) the relevant agreements and, in particular, the arbitration agreement;
>
> (e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and
>
> (f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

82. Thus, Article 4 of the Rules of Arbitration of International Chamber of Commerce, does not contain a stipulation for the production of the original agreement. In any event, Articles 6.2 and 6.4 of the said rules, extracted in the first portion of this order, make it clear that the question of admissibility of such a document could also be decided by the arbitral tribunal.

83. In any case, it is clear from Section 45 that this court is entitled to reject a request to refer the parties to arbitration, only if it finds that the agreement is null and void, inoperative or incapable of being performed. Any ground other than those specifically enumerated in Section 45, is not available to this court to reject a request for referring the parties to arbitration. In simple terms, the non-availability of the original arbitration agreement, the non-signing of the agreement by the plaintiff or the first defendant, the non-availability of Exhibits 1, 2 and 3 to the agreement, are all not matters which would fall within the scope of an enquiry under Section 45, for the purpose of deciding whether to refer the parties to arbitration or not.

84. Therefore, in my considered view, the applicant/first defendant has made out a case for allowing the application under Section 45 of the Arbitration and Conciliation Act 1996. The first respondent/plaintiff has neither pleaded material facts to show nor established through documents produced along with the plaint, that the agreement was null and void, inoperative or incapable of

being performed. The mere mechanical reproduction, in the plaint of the words contained in Section 45, will not entitle the plaintiff to a trial of the same, even as a preliminary issue. Therefore, the application for reference under Section 45 deserves to be allowed. Accordingly, the application is allowed.

85. Before parting with the case, I am constrained to quote what the Supreme Court lamented in Guru Nanak Foundation v. Rattan Singh and Sons , as follows:

> Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 (Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with "legalese" of unforeseeable complexity.