

SHIN-ETSU CHEMICAL CO. LTD.
v.
AKSH OPTIFIBRE LTD. AND ANR.

AUGUST 12, 2005

[Y.K. SABHARWAL, D.M. DHARMADHIKARI AND
B.N. SRIKRISHNA, JJ.]

Arbitration and Conciliation Act, 1996—Sections 8, 44, 45 and 50—Respondent filing a suit before trial court for declaration and injunction for cancellation of arbitration agreement being void ab initio, inoperative and incapable of performance—Appellant filing an application under section 8 of the Act for direction to submit the respondent to arbitration proceedings under the agreement—Trial Court allowing the application of the appellant—High Court remanding back to trial court for fresh adjudication under section 45 of the Act—Scope of power of Judicial authority in deciding the validity of the arbitration agreement at pre-reference stage contemplated under section 45 of the Act—Whether the judicial authority should give a prima facie finding based on materials on record or a final finding on merits after conducting a full-fledged trial—Held, as per majority view, the judicial authority should give a prima facie finding and not a final finding by conducting a full-fledged trial about the validity of the arbitration agreement to avoid inordinate delay in legal proceedings defeating the object of the Act—Arbitration Act, 1940—Section 34; Arbitration (Protocol and Convention) Act, 1937; Foreign Awards (Recognition and Enforcement) Act, 1961—Section 3.

Appellant and first respondent entered into a commercial agreement which contained an international arbitration clause. On termination of the agreement by the appellant, the respondent instituted a suit before trial court claiming a decree of declaration and injunction against the appellant for cancellation of the arbitration agreement being void *ab initio*, inoperative and incapable of performance. The appellant filed an application in the suit, under section 8 of the Arbitration and Conciliation Act, 1996 for direction to the first respondent to submit to arbitration proceedings under the agreement. The trial court allowed the application and referred the dispute to arbitration. The first respondent challenged the order of the trial before High Court under

A Article 227 of the Constitution of India. The High Court, by holding that the trial court ought to have proceeded to examine the application of the appellant under section 45 of the Act, set aside the order of the trial court and remanded back for fresh adjudication.

B In appeal to this Court, the appellant contended that on combined reading of Sections 45, 48 and 50 of the Arbitration and Conciliation Act, 1996, the judicial authority is required only to give a *prima facie* finding on examination of the documents and materials on record including the arbitration agreement and not a final finding after conducting a full-fledged trial, and that the intention of the legislature is to avoid inordinate delay in the legal proceedings and the full-fledged trial for a final finding may defeat the very purpose of the Act.

C The first respondent contended that Section 45 of the Act should be interpreted so as to give full effect to the opening *non-obstante* clause; and that if an issue is raised before the court regarding the legality or validity of the agreement, then the court must give a finding on the issue after conducting a full-fledged trial.

D Remanding back the appeal to the trial Court, the Court

E HELD : [*Per B.N. SRIKRISHNA, J.*]

F 1.1. If the court takes a *prima facie* view that the arbitration agreement is not vitiated on account of factors enumerated in Section 45 of the Arbitration and Conciliation Act, 1996 and the arbitrator upon a full trial holds that there is no vitiating factor in the arbitration agreement and makes an award, such an award can be challenged under Section 48 (1) (a) of the Act. The award will be set aside if the party against whom it is invoked satisfies the court *inter alia* that the agreement was not valid under the law to which the parties had subjected it or under the law of the country where the award was made. The two basic requirements, namely, expedition at the pre-reference stage and a fair opportunity to contest the award after full trial would be fully satisfied by interpreting Section 45 of the Act as enabling the court to act on a *prima facie* view. [735-C, D, E]

H 1.2. If the finding made under Section 45 of the Act as to the validity

of the arbitral agreement were to be treated as final, then the competent court, while entertaining an application for enforcement of a foreign award, might decline to go into the same question. In other words, the court before which enforcement is sought may not re-examine whether the agreement was valid under the applicable law, on the ground that a final judgment had been rendered on an earlier occasion by another competent court. The principles analogous to *res judicata* might preclude the party from raising the defence in a post-award situation under section 48(1)(a) of the Act. Hence, it would be preferable to hold that Section 45 of the Act requires only a *prima facie* view of the matter as to the absence of the vitiating factors contemplated therein. [736-B, C, D]

1.3. If it is held that a final finding has to be given under section 45 of the Act, then it must necessarily be after a trial recording all necessary evidence, in order to eliminate the likelihood of fraud, coercion etc that may render the agreement void, inoperative or unenforceable. If the view is taken that it could be done only on the basis of affidavits by excluding oral evidence altogether, then it would render injustice to the party because a final judgment would have been rendered on insufficient material. An award may be challenged on the other grounds available under Section 48 of the Act, which would have to be tried out by a full trial by involving all kinds of evidence including oral evidence. If that be so, then all issues, including the present issue, could also be tried fully after the award instead of seeking a final finding at the pre-reference stage under Section 45 of the Act. This would be in consonance with the ethos of the Act to avoid delay at different stages, to centralize the court review of all disputes relating to the arbitration at the post-award stage and also carry forward the objectives of the Model Law. [736-D-E; 740-A, B]

1.4. It would not only be unfeasible to prove the applicable foreign law exclusively through affidavits but it would also entail enormous expenditure of time and money if it has to give a final finding after conducting a full fledged trial on the validity of the arbitration agreement at the pre-reference stage under section 45 of the Act. If it is held that the finding under Section 45 of the Act is only a *prima facie* view, then all these difficulties could be obviated. Neither the arbitral tribunal nor the court enforcing the arbitral award may consider itself bound by the *prima facie* view expressed under Section 45 of the Act. The

A difficulty of having to conclusively prove the applicable foreign law at a trial would also be obviated. [732-G; 738-D, E]

B 1.5. Fixing of a time limit, within which an issue can be determined without oral evidence, may not be practical. If the applicable law is a foreign law, the time limit of three months is unlikely to be complied with as it would be unfeasible. If, at the enforcement stage, a full trial under Section 48 of the Act is permissible, it is better for the parties not to have two trials i.e. one at the stage of Section 45 of the Act and another at the stage of Section 48 of the Act. [748-D, E]

C 1.6. The object of dispute resolution through arbitration, including international commercial arbitration, is expedition and that the object of the Act would be defeated if proceedings remain pending in court even after commencing of the arbitration. Hence, at the pre-reference stage contemplated by Section 45 of the Act, 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. Adopting a final and determinative approach under Section 45 of the Act may not only prolong the proceedings at the initial stage but also correspondingly increase costs and uncertainty for all the parties concerned. [748-F, G; 749-A]

E *Renusagar Power Co. v. General Electric Co.*, [1984] 4 SCC 679, distinguished.

F *Mittal Engineering Works v. Collector of Central Excise*, [1997] 1 SCC 203; *Jagdish Lal v. State of Haryana*, [1997] 6 SCC 538; *Divisional Controller, KSRTC v. Mahadeva Shetty & Ors.*, [2003] 7 SCC 197; *M/s Amarnath Om Prakash v. State of Punjab*, [1985] 1 SCC 345; *Firm Ashok Traders & Anr. v. Gurumukh Das Saluja*, [2004] 3 SCC 155; *National Thermal Power Corporation v. Singer Company*, [1992] 3 SCC 551; *J.K. Cotton Mills Spinning and Weaving Mills Co. Ltd. v. State of U.P.*, AIR (1961) SC 1170; *Aswini Kumar v. Arabinda Bose*, AIR (1952) SC 369; *Nathi Devi v. Radha Devi Gupta*, [2005] 2 SCC 271 and *Ghanshyamdas v. Regional Assistant Commissioner*, AIR (1964) SC 766, referred to.

H *G.P. Singh, Principles of Statutory Interpretation* [9th Edition 2004]; *Craies on Statute Law* [S.G.G. Edgar eds., 7th Edn., 1971, 1999 Indian Reprint], referred to.

SMG Swedish Machine Group v. Swedish Machine Group, XVIII Y.B. COMM. ARB 457 [1993]; *Fondation M. v. Banque X*, [1996] BULL. ASA 527 (Swiss Fed. Trib); *FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* [E. Gaillard and J. Savage, eds. 1999]; *Pacific International Lines (Pte.) Ltd. v. Tsinlien Metals and Minerals Co. Ltd.* [XVIII Y.B. COMM. ARB. 180 (1993)] *Rio Algom Ltd. v. Sami Steel Co. Ltd.*, [XVIII Y.B. COMM. ARB. 166 (1993)]; *Azov Shipping Co. v. Baltic Shipping Co.*, (1999) 1 Lloyd's Rep. 68 Q.B., referred to.

[Per D.M. DHARMADHIKRI, J. concurring]

1. 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 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 a 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.

[750-A, B, C, D, E]

[Per Y.K. SABHARWAL, J. dissenting]

HELD : 1.1. fine words 'shall' and 'unless' appearing in section 45 of the Arbitration and Conciliation Act, 1996 mandates that before

A referring the parties to arbitration, the judicial authority should be satisfied that the arbitration agreement is not null and void, inoperative or incapable of being performed. If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, i.e., if the statute enacts that it shall be done in such a manner and no other manner, then those requirements are in all cases absolute and that neglect to attend to them will invalidate the whole proceeding. [717-E, F, H, 718-A]

B
C *Konkan Railway Corpn. Ltd. & Ors. v. Mehul Construction Co.*, [2000] 7 SCC 201; *Union of India & Anr. v. G.M. Kokil & Ors.*, [1984] Supp. SCC 196; *Khub Chand & Ors. v. State of Rajasthan & Ors.*, AIR (1967) SC 1074 and *Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia & Ors.*, [1995] Supp. 2 SCC 280, referred to.

D *Craies on Statute Law*, 7th Ed., referred to.

E
F 1.2. Under Section 8 of the Act, insofar as domestic arbitration is concerned, the legislature intended to achieve speedy reference of disputes to arbitration tribunal and left most of the matters to be raised before the arbitrators or post award. Under Section 45 of the Act, in the case of international arbitration, however, in its wisdom, the legislature left the question relating to validity of arbitration agreement being examined by the court. One of the main reasons for the departure being the heavy expense involved in such arbitrations which may be unnecessary if the arbitration agreement is to be invalidated in the manner prescribed in Section 45 of the Act. Hence, adopting liberal approach and restricting the determination by judicial authority about validity of agreement only from *prima facie* angle, would amount to adding words to Section 45 of the Act without there being any ambiguity or vagueness therein. [721-G, H, 722-A, B]

G
H *Pacific International Lines (Pte) Ltd. v. Tsinlien Metal and Minerals Co. Ltd.*, [Year Book of Commercial Arbitration, Vol. XVIII 1993, page 180]; *Rio Algom Ltd. v. Sammi Steel Co. Ltd.*, (Year Book of Commercial Arbitration, Vol. XVIII 1993, page 160); *Comptek Telecomm v. IVD Corp.* [XXII Y. B. COMM. ARB. 905 (1997)] and *SMG Swedish Machine Group v. Swedish Machine Group* [XVIII Y.B. COMM.ARB.457(1993)], referred to.

Fouchard Gaillard Goldman on International Commercial Arbitration-Emmanuel Gaillard and John Savage Ed. 1999, referred to.

1.3. When words in an earlier statute have received an authoritative exposition by superior Court, use of the same words in a similar context in a latter Act will give rise to a strong presumption that the Parliament intends that the same interpretation should also be followed for construction of these words in the latter statute. Further, Part II of the Act was enacted to update the international commercial arbitration regime to meet the present day challenges. If the legislature intended a minimalist role of the courts, it would have enacted Section 45 more in terms of section 8 of the Act than its present form. [719-G-H; 720-F]

Renusagar Power Co. Ltd. v. General Electric Co. & Anr., [1984] 4 SCC 679, relied on.

Bengal Immunity Co. Ltd. v. State of Bihar, [1955] 2 SCR 603, referred to.

1.4. If the court is not asked to satisfy itself as to the validity of the agreement at a pre-award stage under Section 45 of the Act, then by virtue of Section 48, it is given another opportunity to do so. Apart from this, under Section 48 of the Act, the court may refuse to enforce foreign award on the ground other than the invalidity of the arbitration agreement. It is well settled in law that an appeal is a creature of statute. The legislature under Section 50 of the Act has clearly allowed appeal only in case the judicial authority refuses to refer the parties to arbitration or refuses to enforce the foreign award. The fact that a provision is not made for an appeal in case reference is made to arbitration is not a ground to say that the court should *prima facie* decide the validity of the agreement ignoring the express provisions of Section 45 of the Act. The legislature has granted right of appeal in the event of refusal to refer but not in the event of order being made for reference of the parties to arbitration. This provision for appeal is not determinative of the scope of Section 45 of the Act to mean that the determination thereunder has to be only *prima facie*. The Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration. Hence, under Section 45 of the Act, the determination has to be

A on merits, final and binding and not *prima facie*. [729-C, D, E, F, G]

B 1.5. The application filed by the appellant before the trial court would be treated as an application under Section 45 of the Act. The parties would be given opportunity to file documents and affidavits by way of evidence. No oral evidence would be examined. Though the appellant itself is responsible for the delay that has occurred because of application under provisions which had no applicability and insistence thereupon, yet, considering that the application has been pending for nearly two years, it is directed for disposal within a period of two months of the receipt of the copy of this order. [729-H; 730-A, B]

C 1.6. Ordinarily, such cases shall be decided on the basis of affidavits and other relevant documents and without oral evidence. There may, however, be few exceptional cases where it may become necessary to grant opportunity to the parties to lead oral evidence. In both eventualities, the judicial authority is required to decide the issue expeditiously within a fixed time frame and not to treat such matters like regular civil suit. The object of arbitration including international commercial arbitration is expedition. The object of the Act would be defeated if the international commercial disputes remain pending in court for months and years before even commencement of arbitration. Accordingly, it is directed that any application that may be filed under Section 45 of the Act must be decided within three months of its filing. In rare and exceptional cases, the judicial authority may extend the time by another three months but by sending a report to the superior/appellate authority setting out the reasons for such extension, It would be for the superior/appellate authority to issue appropriate directions to the judicial authority and/or take such other action as may be called for. [730-C, D, E, F]

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5048 of 2005.

E From the Judgment and Order dated 12.1.2005 of the Rajasthan High Court in S.B.C. W.P. No. 6371 of 2003.

F R.F. Nariman, Dhruv Mehta, Mohit Chaudhary, Surendra Mann, and
H Harshvardhan Jha for M/s. K.L. Mehta & Co. for the Appellant.

S. Ganesh and Manish Singhvi for P.V. Yogeswarani for the Respondent
No. 1. A

Sunil Dogra and Ms. Rashi Malhotra for M/s. Suresh A. Shroff & Co.
for the Respondent. 2.

The Judgment/Order dated of the Court were delivered by B

Y.K. SABHARWAL, J. : Leave granted.

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

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

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

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

Under Section 45 of the Act, the judicial authority has to mandatorily G

H

A refer the parties to arbitration, if conditions specified in the section are fulfilled and agreement is not found to be null and void, inoperative or incapable of being performed.

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

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

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

E “WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:

F AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

G AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

H AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations; A

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;” B

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

“50. *Appealable orders.*—(1) An appeal shall lie from the order refusing to— F

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.” G

As can be seen from above, an order refusing to refer the parties to arbitration under Section 45 of the Act is appealable. There is, however, no H

A provision for filing an appeal if the judicial authority refers the parties to arbitration.

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

B *“8. Power to refer parties to arbitration where there is an arbitration agreement.—* (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

C (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

D (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

E Under the Old Arbitration Act (Section 34 of Arbitration Act, 1940), court had discretion in the matter of grant of stay of legal proceedings where there was an arbitration agreement on being satisfied that the arbitration agreement exists factually and legally and disputes between the parties are in regard to the matter agreed to be referred to arbitration. The Court in exercise of its discretion could also decline an order of stay despite existence of aforesaid conditions, depending upon the facts and circumstances of the case. The discretion was, however, required to be exercised on well settled judicial principles.

G Section 8 of the Act is a departure from Section 34 of the old Act. Under this section judicial authority has no discretion. It is mandatory for the judicial authority to refer the parties to arbitration on the existence of conditions stipulated in the section. Unlike Section 45, the judicial authority under Section 8 has not been conferred the power to refuse reference to arbitration on the ground of invalidity of the agreement. It is evident that H the object is to avoid delay and accelerate reference to arbitration leaving

the parties to raise objection, if any, to the validity of the arbitration agreement before the arbitral forum and/or post award under Section 34 of the Act. A

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

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

- A visions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject matter of judicial scrutiny of a Court of Law. Under the new law the grounds on which an award of an Arbitrator could be challenged before the Court have been severely cut down and such challenge is now permitted on the basis of invalidity of the agreement, want of jurisdiction on the part of the Arbitrator or want of proper notice to a party of the appointment of the Arbitrator or of Arbitral proceedings. The powers of the Arbitrator have been amplified by insertion of specific provisions of several matters. Obstructive tactics adopted by the parties in arbitration proceedings are sought to be thwarted by an express provision inasmuch as if a party knowingly keeps silent and then suddenly raises a procedural objection will not be allowed to do so. The role of institutions in promoting and organising arbitration has been recognised. The power to nominate Arbitrators has been given to the Chief Justice or to an institution or person designated by him. The time limit for making awards has been deleted. The existing provisions in 1940 Act relating to arbitration through intervention of Court, when there is no suit pending or by order of the Court when there is a suit pending, have been removed. The importance of transnational commercial arbitration has been recognised and it has been specifically provided that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute. Under the new law unless the agreement provides otherwise, the Arbitrators are required to give reasons for the award. The award itself has now been vested with status of a decree, inasmuch as the award itself is made executable as a decree and it will no longer be necessary to apply to the Court for a decree in terms of the award. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a Court.
- H When United Nations established the Commission on International

Trade Law it is on account of the fact that the General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission on International Trade Law as a medium which could play a more active role in reducing or removing the obstacles. Such Commission, therefore, was given a mandate for progressive harmonization and unification of the law of International Trade. With that objective when Uncitral Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting Uncitral Model, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of Courts in the arbitral process...”

True, now the judicial interference has been limited to a narrower circumference than under the old arbitration laws but the question here is when Section 45 of the Act envisages judicial interference, what is the extent thereof having regard to the language of the section and the scheme of the Act. What is the standard of review that the judicial authority should adopt in relation to the arbitration agreement at the initial stage of Section 45, viz., a *prima facie* finding or a final finding?

At this stage, we may briefly notice the circumstances under which the matter has come up for consideration before this Court. There is hardly any controversy in respect of material facts necessary for examination of the question involved. The controversy is only in regard to the power exercisable by a judicial authority under Section 45 of the Act.

Parties (Appellant and Respondent No.1) entered into an agreement dated 16/18th November, 2000 which contained an arbitration clause as under:

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

A The appellant terminated the agreement in terms of its letter dated 31st December, 2002. The first respondent instituted a suit claiming a decree of declaration and injunction against the appellant for cancellation of the document dated 16/18th November, 2000 and/or declaration that the long term sale and purchase agreement dated 16/18th November, 2000 including the arbitration clause on the ground that the terms of agreement are unconscionable, unfair and unreasonable and against the public policy and the same was entered into under undue influence and is, therefore, void *ab initio*, inoperative and incapable of performance and cannot be given effect to. The appellant made an application in the suit praying that the plaintiff shall be directed to submit to the ongoing arbitration proceedings before the International Chamber of Commerce in Tokyo, Japan. The application was, however, filed under Section 8 of the Act.

D The trial court by order dated 29th September, 2003 came to the conclusion that the application of the appellant under Section 8 of the Act deserves to be allowed. Consequently, the parties were referred to arbitration. It was urged on behalf of the appellant before the trial court that since there is an arbitration clause in the agreement, court's jurisdiction is exhausted as Section 8 is mandatory and, therefore, court must refer the dispute to arbitration. As already noticed, unlike Section 45 the objection as to the validity of the arbitration agreement cannot be raised as a defence to an application filed under Section 8. This seems to be the reason for the appellant insisting before the trial court that Section 8 is applicable and not Section 45 of the Act. It is clearly not a case of filing an application under a wrong provision. The trial court also proceeded under erroneous assumption that Section 45 comes into play after the award is made as such a submission seems to have been made by the appellant before that court.

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

H The High Court examined the question whether Section 45 has been applied by the trial court and, if so, in its true perspective. The High Court

held that the trial court ought to have proceeded to examine the application under Section 45 of the Act which was not done. Under these circumstances, without entering into merits of the case, the High Court directed fresh adjudication of the application by the trial court after application of Section 45 of the Act. Consequently, by the impugned judgment, the order of the trial court dated 29th September, 2003 was set aside and matter remanded for fresh decision of the trial court.

Before this Court, learned counsel for the parties have rightly taken the stand that only Section 45 is applicable and Section 8 has no applicability. It is evident that there has been no adjudication of the application by the trial court in terms of Section 45 of the Act. The trial court has not gone into the question, *prima facie* or finally, as to agreement being null and void, inoperative or incapable of being performed, which was the objection raised by the first respondent in reply to the application of the appellant. Thus, on ingredients of Section 45, there was no adjudication. Therefore, the direction of the High Court for fresh adjudication of application of the appellant having regard to the provisions of Section 45 of the Act cannot be faulted. It is also necessary to issue directions for expeditious adjudication of the said application by the trial court but after first determining the scope of adjudication in exercise of power under Section 45.

On behalf of the appellant, Mr. Nariman contends that the consideration by the judicial authority under Section 45 has to be on a *prima facie* view of the matter based on examination of the plaint and any documents attached thereto, reply to the application for reference and any documents attached thereto and the affidavits filed by the parties. The court, on a *prima facie* examination of the pleadings and documents, should come to the conclusion as to whether the arbitration agreement is null or void, inoperative or incapable of being performed. Learned counsel submits that final determination on merits in some cases may even require recording of evidence and proceedings may turn out to be a full fledged trial thereby defeating the very purpose for the enactment of the Act. It is urged that the final determination can be made if such objections are raised before the arbitral forum and/or post award by the court.

On the other hand, on behalf of first respondent, Mr. Ganesh contends that Section 45 of the Act should be interpreted so as to give full effect to the opening non-obstante clause and to the wordings of Section 45 which

A are entirely different from Section 8 in their effect and operation. It is urged that Section 45 cannot be construed in a way that it becomes indistinguishable from Section 8. It is further submitted that under Section 45, if an issue is raised before the court regarding the legality or validity of the agreement, then the court must give a finding on the issue. The contention is that the court would make an order of reference to arbitration only if the arbitration agreement is legal and valid. Further, it is contended that it would be a different matter if objection as to the validity of the arbitration agreement is not raised before the judicial authority and the party prefers to raise it before the arbitral forum and/or post award, in the event of award being against that party.

C Which of the two views is correct requires determination.

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

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

H Both the sections start with a non-obstante clause giving overriding

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

A non-obstante clause is a legislative device which is usually implied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation of all contrary provisions. [*Union of India & Anr. v. G.M. Kokil & Ors.*, [1984] Supp.SCC 196].

Section 45 uses the expression ‘shall’ in respect of referring the parties to arbitration, unless judicial authority finds that the said agreement is null and void, inoperative or incapable of being performed. The term ‘shall’ in its ordinary significance is mandatory and the court shall ordinarily give that interpretation unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the statute. [*Khub Chand & Ors. v. State of Rajasthan & Ors.*, AIR (1967) SC 1074].

The words ‘shall’ and ‘unless’ appearing in Section 45 mandates that before referring the parties to arbitration, the judicial authority should be satisfied that the arbitration agreement is not null and void, inoperative or incapable of being performed. In *Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia & Ors.*, [1995] Supp. 2 SCC 280 at 286, this Court held :

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

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

A if the statute enacts that it shall be done in such a manner and no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding. [Craies on Statute Law; 7th Ed., at page 263].

B Section 45 is clear; there is no doubt, ambiguity or vagueness in it.

Now, I may refer to decision in *Renusagar Power Co. Ltd. v. General Electric Co. & Anr.*, [1984] 4 SCC 679 in which interpretation of Section 3 of the Foreign Awards Act, 1961 came up for consideration. One of the parties to the arbitration agreement invoked the arbitration clause while the

C other party filed a suit seeking declaration that claims referred to the arbitration were beyond the scope of the arbitration agreement and the other party is not entitled to refer the claims to the arbitration and making consequential prayers for injunction restraining the party invoking arbitration clause and the arbitrator from proceeding with the matter and obtained

D an interim order. The other party filed a petition under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 seeking the stay of the proceedings in the suit and praying for vacating the interim relief granted in the matter. Learned Single Judge of the High Court allowed the petition under Section 3 and granted stay of proceedings in the suit and vacated the interim relief. The order was maintained by the Division Bench.

E Before this Court, it was argued that a stay, if granted in a petition under Section 3, would render the suit dead for all purposes and there would be nothing left to be decided in the suit either because the suit is stayed indefinitely or alternatively because the decision on the issue would operate as *res judicata* in the suit, and, therefore, no relief of stay should be granted

F which will have such effect merely on a *prima facie* view or a *pro tanto* finding on the issue of arbitrability of the claims. In other words, the contention was that a Section 3 petition could not be a proper stage to decide the issue of arbitrability of the claims but the same should be decided in the suit when it will be finally tried.

G While rejecting this contention it was held that :

“if regard be had to the provisions of Section 3 as well as the legal position arising under decided cases the contention will be found to be devoid of any substance. It may be that a stay of the suit either under Section 3 of the Foreign Awards Act or under Section 34 of

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

(Emphasis supplied by us)

In Para 59 the Court further observed that :

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

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

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

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

C
 In *Bengal Immunity Co. Ltd. v. State of Bihar*, [1955] 2 SCR 603,
 D Venkatarama Aiyer, J. stated that :

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

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

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

“Article II of the New York Convention

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 1. ***

2. ***

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

The aforesaid provision has been substantially reproduced in Section 45.

Clearly Section 45 casts an obligation upon the judicial authority when seized of the matter to record a finding as to the validity of the arbitration agreement as stipulated in the Section and there is nothing to suggest either from the language of the section or otherwise that the finding to be recorded is to be only *ex facie* or *prima facie*.

It is true that Section 5 limits judicial intervention in the manner provided therein. It accelerates the arbitral process by curtailing chances of delay that may be caused in court proceedings. But, at the same time, it is also clear that though Sections 8 and 45 both deal with the power of judicial authority to refer parties to arbitration, in the former which deals with domestic arbitration, no provision has been made for examining at that stage the validity of the arbitration agreement whereas under Section 45 which deals with arbitrations to which New York Convention applies, a specific provision has been made to examine the validity of the arbitration agreement in the manner provided in Section 45. Both provisions are differently structured albeit the purpose of both is to refer parties to arbitration but in one case domestic arbitration and in other case international arbitration. Unlike Section 8 which provides that the application shall be moved not later than when submitting the first statement of the substance of the dispute, under Section 45 there is no such limitation. The apparent reason is that insofar as domestic arbitration is concerned, the legislature intended to achieve speedy reference of disputes to arbitration tribunal and left most of the matters to be raised before the arbitrators or post award. In case of foreign arbitration, however, in its wisdom the legislature left the question relating to validity of arbitration agreement being examined by the court. One of the main reasons for the departure being the heavy expense involved

A in such arbitrations which may be unnecessary if the arbitration agreement is to be invalidated in the manner prescribed in Section 45.

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

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

E The 1987 Swiss Private International Law Statute stipulates that “if the parties have concluded an arbitration agreement covering an arbitrable dispute, a Swiss court seized of it shall decline jurisdiction unless: b. the court finds that the arbitral agreement is null and void, inoperative or incapable of being performed” (Article 7). These provisions could easily be read as implying that a court seized of the merits of a dispute in spite of the existence of an arbitration agreement would have to fully address the question of that agreement’s effectiveness. However, after some hesitation, F the Swiss Federal Tribunal decided to interpret them as restricting the court’s review at the outset of proceedings to a *prima facie* verification of the existence and effectiveness of the arbitration clause. (Fouchard Gaillard Goldman on International Commercial Arbitration-Emmanuel Gaillard and John Savage Ed.1999 - Para 675, Page 409)

G According to the French Code of Civil Procedure (which applies to both domestic and international arbitration), the courts are obliged to decline jurisdiction where an arbitration agreement exists, provided that the merits of the dispute have already been put before an arbitral tribunal. Even where the dispute is not before an arbitral tribunal, the French Courts must also H decline jurisdiction unless the arbitration agreement is “patently void”. This

in substance amounts to a *prima facie* review of the existence and validity of the arbitration agreement. Similarly, Art.VI (2) of the European Convention on International Commercial Arbitration (1961) adopts a *prima facie* standard by providing that courts shall not determine the initial validity/existence of the arbitration agreement unless there are “good and substantial reasons to the contrary”.

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

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

“Article 7. Definition and form of arbitration agreement

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

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

A that the contract is in writing and the reference is such as to make that clause part of the contract.”

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

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

H The court decided the matter on the basis of the affidavits, as it was not possible for it to examine in detail the documents since the parties failed

to produce the document containing the authorization given to the broker to act on behalf of the shipping company. Therefore, the court has referred to the commercial reality as well as the affidavits of the parties to arrive at the conclusion that there was an arbitration agreement. The court has adapted the standard of “plainly arguable case” or “strongly arguable case” since the arbitral tribunal would examine the issue once again. Therefore, it cannot be stated as a general rule that in every case there should be a “plainly arguable case” or “strongly arguable case”, since the legislations in other jurisdictions may not provide for such a provision. More over, the case did not concern directly with Article 8 of the UNCITRAL Model Law, the court was concerned with Article 7 of the UNCITRAL Model Law dealing with definition and form of the arbitration agreement.

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

“(1) Subject to subsections (2) and (3), article 8 of the UNCITRAL Model Law (Arbitration agreement and substantive claim before court) applies to a matter that is the subject of a domestic arbitration agreement in the same way as it applies to a matter that is the subject of an international arbitration agreement.

(2) Subject to subsection (3), if a party to an arbitration agreement that provides for the arbitration of a dispute involving a claim or other matter this is within the jurisdiction of the Labour Tribunal or a person claiming through or under such a party, commences legal proceedings in any court against any other party to the agreement or any person claiming through or under that other party, in respect of any matter agreed to be referred, and any party to those legal proceedings applies to that court after appearance and before delivering any pleadings or taking any other step in the proceedings, to stay the proceedings, the court or a judge of that court may

- A make an order staying the proceedings, if satisfied that-
- (a) there is no sufficient reason why the matter should not be referred in accordance with the agreement; and
- B (b) the applicant was ready and willing at the time the proceedings were commenced to do all things necessary for the proper conduct of the arbitration, and remains so.
- (3) Subsections (1) and (2) have effect subject to section 15 of the Control of Exemption Clauses Ordinance (Cap 71).
- C (Replaced 75 of 1996 s. 9)”

D Section 23 A of the Hong Kong Arbitration Ordinance provides for the determination of preliminary point of law by the court and there is a no analogous provision in the Arbitration and conciliation Act 1996.

E It is clear from a plain reading of Hong Kong and English provisions that both confer discretion on the court, unlike Section 45 of the Act, which is mandatory. It is evident from the words ‘may’ and ‘satisfied’ used in Hong Kong provision and also from the language used in Section 32 of the English Arbitration Act, 1996, that the intention in the said two jurisdictions was to confer on court discretionary powers indicative of limited review from *prima facie* point of view.

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

G “Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral

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tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

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

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

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

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

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

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

D It may be noted that both approaches have its own advantage and disadvantage. The approach whereby the court finally decides on merits on the issue of existence and validity of the arbitration agreement results to a certain degree time and cost avoidance. It may prevent parties to wait for several months or in some cases years before knowing the final outcome of the dispute regarding jurisdiction. It will often take that long for the arbitrators and then the courts to reach their decisions. The same considerations of cost and time explain the position taken in English Law which under Section 32(2) of the 1996 English Arbitration Act provides that the parties may agree (or, if the parties fail to agree, the arbitral tribunal may agree) that it would be more efficient to have the question resolved immediately by the courts. (Fouchard (supra) Para 678, Page 410)

E F G H I may also deal with the contention urged on behalf of the appellant that only *prima facie* finding is required to be given on combined reading of Sections 45, 48 and 50 from which it can be culled out that a party who has suffered an award can always challenge the same under Section 48 on the ground that the arbitration agreement is null and void. This read in conjunction with the right of appeal given under Section 50 and the power

of the arbitrator to rule on his own jurisdiction clearly shows the intent of the legislature to avoid delay which would be inevitable if it has to be a final decision and it would defeat the object of soon placing all material before the arbitration tribunal. I am afraid that this cannot be accepted as the real purpose of Section 48 is to ensure that at some stage whether pre-award, post award or both, a judicial authority must decide the validity, operation, capability of performance of the arbitration agreement. In various cases the parties may not resort to Section 45 in the first place, and to overcome such eventuality, the legislature has enacted Section 48(1)(a). In other words, if the court is not asked to satisfy itself as to the validity of the agreement at a pre-award stage (Section 45), then by virtue of Section 48, it is given another opportunity to do so. Apart from this, under Section 48, the court may refuse to enforce the foreign award on the ground other than the invalidity of the arbitration agreement. As far as the question of Section 50 is concerned, it is well settled in law that an appeal is a creature of statute (*M/s M. Ramnarain (P) Ltd. & Anr. v. State Trading Corporation of India Ltd.*, [1983] 3 SCC 75) and a right to appeal inheres in no one (*Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors.*, [1999] 4 SCC 468). The legislature under Section 50 has clearly allowed appeal only in case the judicial authority refuses to refer the parties to arbitration or refuses to enforce the foreign award. The fact that a provision is not made for an appeal in case reference is made to arbitration is not a ground to say that the court should *prima facie* decide the validity of the agreement ignoring the express provisions of Section 45. The legislature has granted right of appeal in the event of refusal to refer but not in the event of order being made for reference of the parties to arbitration. This provision for appeal is not determinative of the scope of Section 45 to mean that the determination thereunder has to be only *prima facie*.

I am of the view that Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration.

In view of the aforesaid discussion, I am of the view that under Section 45 of the Act, the determination has to be on merits, final and binding and not *prima facie*.

Turning to the present case, I direct that the application filed by the appellant before the trial court would be treated as an application under Section 45 of the Act. Having regard to the nature of controversy in the

A present case, parties would be given opportunity to file documents and affidavits by way of evidence. No oral evidence would be examined. Though the appellant itself is responsible for the delay that has occurred because of application under provisions which had no applicability and insistence thereupon, yet, considering that the application has been pending for nearly two years, I direct its disposal within a period of two months of the receipt of the copy of this order.

B

Before concluding, this Court also deems it necessary to issue general directions for expeditious disposal of petitions/applications filed so as to challenge the validity of the arbitration agreement under Section 45. Ordinarily, such cases shall be decided on the basis of affidavits and other relevant documents and without oral evidence. There may, however, be few exceptional cases where it may become necessary to grant opportunity to the parties to lead oral evidence. In both eventualities, the judicial authority is required to decide the issue expeditiously within a fix timeframe and not to treat such matters like regular civil suit.

D

The object of arbitration including international commercial arbitration is expedition. The object of the Act would be defeated if the international commercial disputes remain pending in court for months and years before even commencement of arbitration.

E

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

F

The appeal is disposed of in the above terms.

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SRIKRISHNA, J. : Leave granted.

I have had the benefit of carefully considering the erudite judgment delivered by my esteemed and learned Brother Sabharwal. Regretfully, I find myself in the unenviable position of having to disagree with the views expressed therein.

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The judgment of Brother Sabharwal fully sets out the facts in the Civil Appeal arising out of Special Leave Petition (Civil) No. 3160/05 as well as the issue which arises for determination. The core issue in this case is: Whether the finding of the court made under Section 45 of the Indian Arbitration and Conciliation Act, 1996 (“the Act”) that the arbitration agreement, falling within the definition of Section 44 of the Act, is or is not “null and void, inoperative or incapable of being performed” should be a final expression of the view of the court or should it be a *prima facie* view formed without a full-fledged trial ?

Ambiguity in the Wording of Section 45

The contrast in language between Section 8 and 45 of the Act has been rightly noticed by my Learned Brother. Section 8, which leaves no discretion in the court in the matter of referring parties to arbitration, does not apply to the present case, as we are concerned with Part II of the Act. On the other hand, Section 45 which is directly applicable to the present case, empowers the court to refuse a reference to arbitration if it “finds” that the arbitration agreement is “null and void, inoperative or incapable of being performed”.

This Court in *Konkan Railways Corporation Ltd. & Ors. v. M/s Mehul Construction Co.*¹ pointed out that Parliament had clearly indicated that the Act had substantially adopted the Model Law on International Commercial Arbitration 1985 (“the Model Law”) which had been drafted by the United Nations Commission on International Trade Law (“UNCITRAL”). The objective, as the court observed, was to pursue the “progressive harmonization and unification of the Law of International Trade”². It is further pointed out in the said judgment that, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act. Indeed, Section 45 of the Act is *pari materia*, not only with Article 8 of the Model Law but also with Article 2(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”).

However, even while bearing these objectives in mind, there is signifi-

1. [2000] 7 SCC 201.

2. *Ibid.* at p. 206 (para 4), per Pattanaik, J. (as he then was).

A cant difficulty in interpreting the provisions of Section 45 of the Act, which envisages pre-reference judicial interference with the arbitral process, as there is no determinative indicator to ascertain whether the finding of the court under Section 45 should be based on a *prima facie* view or on the result of a final decision rendered in the trial court.

B *The Judgment in Renusagar*

C A survey of the situation in other jurisdictions has been made in the judgment of Brother Sabharwal, and I refrain from duplicating his efforts, except to point out that two distinct stands are possible on the wording of Article 2(3) of the New York Convention, the language of which, as I have already said, has been reproduced in Section 45 of the Act. My Learned Brother strongly relies on the observations made in paragraphs 58 and 59 of *Renusagar Power Co. v. General Electric Co.*³ (“*Renusagar*”), which no doubt appear to suggest, in the context of Section 3 of the Foreign Awards Act, 1961 (“Foreign Awards Act”) and the Arbitration Act, 1940, that the court must be fully satisfied that the arbitration agreement exists before granting stay of the proceedings. Following these observations, Brother Sabharwal in his judgment, opines that:

E “When words in an earlier statute have received an authoritative exposition by superior Court (interpretation of Section 3 in *Renusagar’s* case), use of same words in a similar context in a later Act will give rise to a strong presumption that the Parliament intends that the same interpretation should also be followed for construction of these words in the later statute.”

F With great deference to the opinion of my Learned Brother, I find myself unable to agree to this proposition. In fact, the observations in *Renusagar* (supra) are clearly distinguishable. In the first place, in paragraph 51 of the judgment, the learned Judges set forth six propositions as the conditions required to be fulfilled for invoking Section 3 of the Foreign Awards Act, which incidentally has been repealed by the Act. What is of relevance is proposition No. 5, which the court states as follows:

G “(v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the

H 3. [1984] 4 SCC 679.

satisfaction about the “existence and validity” of the arbitration agreement. (*In the instant case these questions do not arise*)”⁴

After having said so, the court proceeded to make the observations in paragraph 58, which have been referred to and highlighted by my Learned Brother. In my respectful view, if the court thinks that an issue does not arise, then any observation made with regard to such an issue would be purely *obiter dictum*. It is a well settled proposition that the *ratio decidendi* of a case is the principle of law that decided the dispute in the facts of the case and, therefore, a decision cannot be relied upon in support of a proposition that it did not decide.⁵ An apt observation about this principle was made in *M/s Amarnath Nath Om Prakash v. State of Punjab*⁶ :

“We consider it proper to say, as we have already said in other cases, that judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.... It is needless to repeat the oft-quoted truism of Lord Halsbury that a case is only a authority for what it actually decides and not for what may seem to follow logically from it.”⁷

Further, decisions rendered under the Arbitration Act, 1940 or under the Foreign Award Act should be considered with caution as the Act purports to bring a new approach to arbitration, as has been observed in *Firm Ashok Traders & Anr. v. Gurumukh Das Saluja*⁸ :

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4. *Ibid.* at p. 725 (para 51) per Tulzapurkar, J. (*emphasis supplied*).
 5. *Mittal Engineering Works v. Collector of Central Excise*, [1997] 1 SCC 203 at p. 207 (para 8); *Jagdish Lal v. State of Haryana*, [1997] 6 SCC 538 at p. 560 (para 17); *Divisional Controller, KSRITC v. Mahadeva Shetty & Ors.*, [2003] 7 SCC 197 at p. 206 (para 23).
 6. [1985] 1 SCC 345.
 7. *Ibid.* at p. 363 (paras 10 and 11), per Chinnappa Reddy, J. Similar observations were also made in, *Union of India v. Amrit Lal Manchanda*, [2004] 3 SCC 75 at pp. 83-84 (paras 15-18).
 8. [2004] 3 SCC 155.

A “The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on (sic) UNCITRAL Model. *The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act.*”⁹

B Secondly, no one can doubt that Part II of the 1996 Act is intended to opt for the international arbitration regime to meet the challenges of international trade and commerce, nor can it be doubted that Section 45 offers a greater discretion to the court for judicial intervention at the pre-reference stage. Despite all this, the question would still remain as to whether the discretion available for the court for interference, even under C Section 45 of the Act, should be exercised on a *prima facie* view of the nature of the arbitral agreement, or should it be on a final finding?

Ex Visceribus Interpretation of the Statute

D True, that there is nothing in Section 45 which suggests that the finding as to the nature of the arbitral agreement has to be *ex facie* or *prima facie*. In my view, however, this is an inescapable inference from an *ex visceribus* interpretation of the statute. Sub-section (3) of Section 8 in Part I of the Act envisages that even in a situation where an application to the court has been E made under sub-section (1), the arbitration may commence, continue and even an arbitral award be made. This was obviously meant to cut down delay in the conclusion of the arbitral proceedings. There is conspicuous absence of a corresponding provision either in Section 45 or in the rest of the provisions in Part II. This legitimately gives rise to an inference that once F the arbitral agreement has been subjected to scrutiny before the court under Section 45 of the Act, conceivably, the arbitral proceedings could be stayed till the decision of the court on the nature of the arbitral agreement. If it were to be held that the finding of the court under Section 45 should be a final, determinative conclusion, then it is obvious that, until such a pronouncement is made, the arbitral proceedings would have to be in limbo. This G evidently defeats the credo and ethos of the Act, which is to enable expeditious arbitration without avoidable intervention by judicial authorities.

The absence in Part II of the Act of a provision corresponding to Section 5 in Part I has been highlighted as supportive of the view that greater

H 9. *Ibid.* at 165 (para 13) (*emphasis supplied*)

judicial intervention is contemplated in Part II of the Act. The question that has arisen before the Court is not the presence or absence of judicial intervention; it is one with regard to the manner in which the said judicial intervention should proceed—whether on a final view or *prima facie* view of the factors enumerated in Section 45 of the Act.

There are distinct advantages in veering to the view that Section 45 does not require a final determinative finding by the Court. First, under the Rules of Arbitration of the International Chamber of Commerce (as in force with effect from 1.1.1998), as in the present case, invariably the arbitral tribunal is vested with the power to rule upon its own jurisdiction. Even if the court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a *prima facie* view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there no scope for arbitration. Since the arbitrator's finding would not be an enforceable award, there is no need to take recourse to the judicial intercession available under Section 48(1)(a) of the Act.

The finding of the court that the arbitration agreement is valid, operative and enforceable, if in favour of the party setting up the arbitration agreement, is not appealable under Section 50 as a matter of legislative policy. Refusing to refer parties to arbitration under Section 45, is however, made appealable under Section 50(1) (a) of the Act. Even after the court takes a *prima facie* view that the arbitration agreement is not vitiated on account of factors enumerated in Section 45, and the arbitrator upon a full trial holds that there is no vitiating factor in the arbitration agreement and makes an award, such an award can be challenged under Section 48(1)(a). The award will be set aside if the party against whom it is invoked satisfies the court *inter alia* that the agreement was not valid under the law to which the parties had subjected it or under the law of the country where the award was made. The two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by interpreting Section 45 as enabling the court to act on a *prima facie* view.

A *Res Judicata* and Unfairness

B If the finding made under Section 45 as to the validity of the arbitral agreement were to be treated as final, then the competent court while entertaining an application for enforcement of a foreign award might decline to go into the same question. In other words, the court before which enforcement is sought may not re-examine whether the agreement was valid under the applicable law, on the ground that a final judgment had been rendered on an earlier occasion by another competent court. The principles analogous to *res judicata* (even though the Code of Civil Procedure, 1908 does not directly apply) might preclude the party from raising the defence under clause (a) of sub section (1) of Section 48.

C When a party raises the issue as to the validity of the agreement in an application under Section 45, the court must either hold a full-fledged trial and give a final finding or give a *prima facie* finding on that issue. If we were to hold that a final finding has to be given, then it must necessarily be after a trial recording all necessary evidence, in order to eliminate the likelihood of fraud, coercion etc that may render the agreement void, inoperative or unenforceable. If we were to take the view that it could be done only on the basis of affidavits by excluding oral evidence altogether, I am afraid, it would render injustice to the party because a final judgment would have been rendered on insufficient material.

D Moreover, since principles analogous to *res judicata* may operate, as mentioned earlier, such a party may not even be heard in a post-award situation under Section 48(1)(a) on the same issue as the finding given under Section 45 would be treated as final and binding. For this reason also, I am of the view that, it would be preferable to hold that Section 45 requires only a *prima facie* view of the matter as to the absence of the vitiating factors contemplated therein.

E Treating the finding under Section 45 as final results in a paradoxical situation. A final decision rendered by the competent court on the nature of the arbitral agreement may have to be ignored by the arbitral tribunal, which would be entitled to decide the issue afresh on the material presented to it. It may also lead to another curious result, that the competent court in the jurisdiction where the arbitration proceeds (Japan, as in the present case) would have to reckon with the fully binding effect of a finding made under

Section 45 by a competent court in India arrived at by following a summary procedure without admitting all relevant evidence.

Proof of Applicable Foreign Law

There is yet another strange result which may come about by holding that Section 45 requires a final finding. This can be illustrated by reference to the facts of the present case. The parties here have subjected their agreement to the laws of Japan. The question that will arise is: When a court has to make a final determinative ruling on the validity of the arbitration agreement, under which law is this issue to be tested? This question of choice of law has been conclusively decided by the judgment of this court in *National Thermal Power Corporation v. Singer Company*,¹⁰ where it was observed:

“The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, of the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption.”¹¹

Thus, the proper law of the arbitration agreement is the substantive law governing the contract itself. In the present case, to effectively decide whether the arbitration agreement is “null and void, inoperative or incapable of being performed”, the court would have to apply the law to which the contract has been expressly subjected, namely, Japanese law. Obviously, proof of Japanese law (as applicable to arbitration agreements) would have to be rendered on the lines of proving facts in a trial.

It would not only be unfeasible to prove foreign law exclusively through affidavits, but it would also entail enormous expenditure of time and money. *Fouchard, Gaillard, Goldman on International Commercial*

10. [1992] 3 SCC 551.

11. *Ibid.* p. 563 (para 23), per Thommen, J.

A *Arbitration* highlights that this problem as best exemplified in the U.S. case of *SMG Swedish Machine Group v. Swedish Machine Group*.¹² In this case, it was held by the U.S. court that the validity or existence of the arbitration agreement would have to be conclusively determined by the court itself at the pre-award stage. The law applicable to the arbitration agreement was

B Swedish law and therefore the validity of the agreement had to be determined in accordance with this law. The court reviewed the Swedish law opinions submitted by both parties, but found them poorly documented. When parties submitted new opinions, these were found to be mutually contradictory. Finally, the court had to conduct a hearing where parties could provide proof of their true intentions as to the issue.¹³ Thus, similar

C difficulties, delays and costs may be encountered by the trial court in the present case if it has to give a final finding (after conducting a full-fledged trial) on the validity of the arbitration agreement at the pre-reference stage under Section 45.

D On the other hand, if one were to take the view that the finding under Section 45 is only a *prima facie* view, then all these difficulties could be obviated. Neither the arbitral tribunal, nor the court enforcing the arbitral award may consider itself bound by the *prima facie* view expressed under Section 45 of the Act. The difficulty of having to *conclusively* prove the

E applicable foreign law at a trial would also be obviated.

Redundancy in the Statute

Another undesirable result flows from the view that the court conclusively rules upon the validity of the arbitration agreement at the pre-reference stage. If a final finding were to be made upon the arbitration agreement, finding it valid and operative, such a finding might operate as *res judicata*. Thus, one ground made available by Parliament under Section 48(1)(a) to assail the award at the post-award stage, by impugning the validity of the arbitration agreement, would be totally precluded because the finding under Section 45 on the said issue would be final. The approach suggested by

G Brother Sabharwal would, therefore, preclude this ground in cases where Section 45 is in fact resorted to by parties. Indeed, the present case is such

12. XVIII Y.B. COMM. ARB. 457 (1993) (decided on 4.1.1991).

H 13. See, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage, eds. 1999) at p. 411-412 (para 680).

a case, where the ground might be precluded if a final finding were to be arrived at by the trial court in the application under Section 45. A

It is a well accepted principle of statutory interpretation that a court must make every effort to give effect to all words in a statute since Parliament cannot be held to have been wasting its words or saying something in vain.¹⁴ Only in exceptional situations can this be departed from. In *J.K. Cotton Mills Spinning and Weaving Mills Co. Ltd. v. State of U.P.*,¹⁵ it was observed: B

“In the interpretation of statutes the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.”¹⁶ C

This principle has received widespread acceptance by this court in numerous decisions.¹⁷ If the approach suggested by Brother Sabharwal in interpreting Section 45 were to be adopted, it could effectively make a part of the provision in Section 48(1)(a) redundant; an outcome which Parliament could surely have not intended. D

Possibility of Multiple Trials

It appears to me that, at the post-award stage, at least, the finding has to be recorded on a full trial of the relevant issue under Section 48(1)(a). If this be so, I see no special advantage in taking the view that the finding under Section 45 should be anything other than a *prima facie* finding. E

Even if the view were to be taken that the finding under Section 45 of the Act would be a final finding not amenable to reiteration under Section 48(1)(a) at the time of the attempt to enforce the award, it is quite possible F

14. See, for example, G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (9th edn., 2004) at p. 68; CRAIES ON STATUTE LAW (S.G.G. Edgar eds., 7th edn., 1971 1999 Indian Reprint) at pp. 193-107. G

15. AIR (1961) SC 1170.

16. *Ibid.* at p. 1174 (para 7).

17. See, for example, *Aswini Kumar v. Arabinda Bose*, AIR (1952) SC 369 at p. 377 (para 26); *Nathi Devi v. Radha Devi Gupta*, [2005] 2 SCC 271 at p. 277 (para 14); *Ghanshyamdas v. Regional Assistant Commissioner*, AIR (1964) SC 766 at p. 772 (para 15). H

A that the award may be challenged on the other grounds available under Section 48. As I have already said, this challenge will have to be tried out by a full trial by involving all kinds of evidence (including oral evidence). If that be so, then all issues including the present issue could be tried fully after the award instead of seeking a final finding at the pre-reference stage under Section 45 of the Act. This would be in consonance with the ethos of the Act to avoid delay at different stages, to centralize the court review of all disputes relating to the arbitration at the post-award stage, and also carry forward the objectives of the Model Law.

C *Approach in Foreign Jurisdictions*

The importance of carrying forward the objectives underlying the Model Law can hardly be gainsaid. There is evident dearth of guiding Indian precedent which might be useful in interpreting Section 45 of the Act. Hence, it becomes necessary to seek light from foreign judgments interpreting corresponding provisions that have been modeled on the Model Law. Now, for a survey of such foreign precedents.

E It has rightly been noticed in the judgment of Brother Sabharwal that different countries have approached the issue depending on their substantive and processual laws. It has been noticed that the situation under the French Code of Civil Procedure favours a *prima facie* view, since under the Statute if the dispute is not before an arbitral tribunal, the French Courts must decline jurisdiction unless the arbitration agreement is “patently void”.

F Similarly, Article 7 of the 1987 Swiss Private International Law Statute stipulates that the courts decline jurisdiction “...b. unless the court finds that the arbitral agreement is null and void, inoperative or incapable of being performed”. This has been interpreted by the Swiss Federal Tribunal as restricting the courts review at the start of the proceedings to a *prima facie* verification of the existence and effectiveness of the arbitration clause.¹⁸

G As far as the U.S. jurisdiction is concerned, the statute there, which deals both with the substantive law and the law of procedure, is worded

18. See, *Foundation M. v. Banque X.*, 1996 BULL. ASA 527 (SWISS Fed. Trib., Apr. 29, 1996) cited from FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage, eds. 1999) at p. 409 (para 675).

differently from the Act. Indeed, not all jurisdictions in the U.S. have even modeled their law on the Model Law and U.S. cases must be approached with great caution. The U.S. position is, therefore, not very helpful in resolving the issue before us.

It has been noticed in Brother Sabharwal's judgment that in at least two common law jurisdictions, Ontario and Hong Kong, both of which have based their law on the Model Law (like India), the courts have adopted a 'liberal approach' to the issue, namely, that of *prima facie* view as to the existence and non-vitiating of the arbitral agreement, before making a reference. The Hong Kong and Ontario judgments will be examined presently.

The Hong Kong Judgment

There is no doubt that in *Pacific International Lines (Pte.) Ltd. v. Tsinlien Metals and Minerals Co. Ltd.*,¹⁹ ("Pacific International Lines") the High Court of Hong Kong was concerned precisely with the issue as to whether there was a valid arbitration agreement within the meaning of Article 7 of the Model Law. The court was of the view that there was a "plainly arguable" case to support the proposition that there was an arbitration agreement that complied with Article 7 of the Model Law. The Court observed:

"It follows, therefore, that if I am satisfied that there is a plainly arguable case to support the proposition and there was an arbitration agreement which complies with Art. 7 of the Model Law, I should proceed to appoint the arbitrator in the full knowledge that the defendants will not be precluded from raising the point before the arbitrator and having the matter reconsidered by the court consequent upon that preliminary ruling."²⁰

Further, the court held:

"I am quite satisfied that the plaintiffs have made out a strongly arguable case in support of an arbitration agreement which complies Article 7 of the Model Law."²¹

19. XVIII Y.B. COMM. ARB. 180 (1993) (decided on 1.7.1992).

20. *Ibid.* at p. 185 (par 18), per Kaplan, J.

21. *Ibid.* at p. 185 (para 19, per Kaplan, J.

A In my reading of the case, the Hong Kong High Court was squarely concerned with the issue as to whether the arbitration agreement complied with Article 7 of the Model Law or not. This became relevant because under Article 8 the Court was empowered to decide as to the existence or otherwise of the arbitral agreement and Article 7 required the agreement to be in the form prescribed by that Article itself. With respect, it would be incorrect to distinguish the case on the ground that it was not concerned with Article 8 of the Model Law. In my view, the court was directly concerned with the validity of the arbitration agreement as it was argued that the arbitration agreement did not comply with Article 7 and, therefore, was invalid.

B

C The second ground of distinction sought to be made by my learned Brother is that the Hong Kong Arbitration Ordinance (“the Hong Kong Ordinance”) was based upon the English Arbitration Act, 1996 (“the English Act”) and that the Hong Kong judgment was in the special context of these statutes. In particular, my Learned Brother holds that Section 6 of the Hong Kong Ordinance is similar to Section 32 of the English Act (both of which are not present in our Act), as a distinguishing feature rendering the Hong Kong judgment inapplicable to the present case. To clear the air, I quote below both the concerned provisions.

D

The Hong Kong Ordinance:

E “Section 6 Court to refer matter to arbitration in certain cases

F (1) Subject to subsections (2) and (3), article 8 of the UNCITRAL Model Law (Arbitration agreement and substantive claim before court) applies to a matter that is the subject of a domestic arbitration agreement in the same way as it applies to a matter that is the subject of an international arbitration agreement.

G (2) Subject to subsection (3), if a party to an arbitration agreement that provides for the arbitration of a dispute involving a claim or other matter this is within the jurisdiction of the Labour Tribunal or a person claiming through or under such a party, commences legal proceedings in any court against any other party to the agreement or any person claiming through or under that other party, in respect of any matter agreed to be referred, and any party to those legal proceedings applies to that court after appearance and before

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delivering any pleadings or taking any other step in the proceedings, to stay the proceedings, the court or a judge of that court may make an order staying the proceedings, if satisfied that-

(a) there is no sufficient reason why the matter should not be referred in accordance with the agreement; and

(b) the applicant was ready and willing at the time the proceedings were commenced to do all things necessary for the proper conduct of the arbitration, and remains so.

(3) Subsections (1) and (2) have effect subject to section 15 of the Control of Exemption Clauses Ordinance (Cap 71)."

The English Act:

"Section 32. — Determination of preliminary point of jurisdiction.

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless-

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied -

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the

A grounds on which it is said that the matter should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal. But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.”

D On a comparative reading of Section 6 of the Hong Kong Ordinance and Section 32 of the English Act, it appears to me that the two are neither similar, nor resemble each other, the purposes of the two sections being totally different. This distinction made by Brother Sabharwal, with respect, appears to be unsupportable.

E On the other hand, what corresponds to Section 32 of the English Act is Section 23A of the Hong Kong Ordinance, which is reproduced below:

F *“Section 23A Determination of preliminary point of law by Court*

(1) Subject to subsection (2) and section 23B, on an application to the Court made by any of the parties to a reference-

G (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with his consent, or

(b) with the consent of all the other parties,

H the Court shall have jurisdiction to determine any question of law arising in the course of the reference.

(2) The Court shall not entertain an application under subsection (1)(a) with respect to any question of law unless it is satisfied that-

(a) the determination of the application might produce substantial savings in costs to the parties; and

(b) the question of law is one in respect of which leave to appeal would be likely to be given under section 23(3)(b).

(3) A decision of the Court under subsection (1) shall be deemed to be a judgment of the Court within the meaning of section 14 of the High Court Ordinance (Cap 4) (appeals to the Court of Appeal), but no appeal shall lie from such a decision unless the Court or the Court of Appeal gives leave. (Amended 25 of 1998 s. 2)

(4) (Repealed 64 of 1989 s. 15)”

Courts under both Section 32 of the English Act as well as Section 23A of the Hong Kong Arbitration Ordinance, can make a determination of preliminary point of jurisdiction with the ‘consent of all the parties’ or atleast with the ‘consent of the arbitrator’ and only upon being satisfied that the determination of the application might reduce substantially the costs to the parties, and the question of law is one in which leave is likely to be given.

The Hong Kong decision has also been distinguished on the ground that Section 23A of the Hong Kong Ordinance specifically provides for determination of the preliminary issue by the court and that there is no similar provision in the Act. With respect, this distinction may also not be valid. In the first place, the judgment in *Pacific International Lines* (supra) was rendered in the year 1992; it does not make any reference whatsoever to Section 23A of the Hong Kong Ordinance. Nor does it appear from the judgment that there was any analogous provision when the Hong Kong High Court decided the matter. Indeed, all references in the judgment are to the provisions of the Model Law. Moreover, if Section 23A had been applicable, it would have been wholly unnecessary for the court to express its opinion on an interpretation of Article 7 or 8 of the Model Law as it could straightaway have relied on Section 23A. In my view, the Hong Kong judgment squarely deals with the issue before us and conclusively holds that the approach to be adopted is whether it is a “plainly arguable” that the arbitration agreement was in existence.

A *The Ontario Judgment*

The Ontario Court of Justice in *Rio Algom Ltd. v. Sami Steel Co. Ltd.*²² dealt with Article 16 of the Model Law with regard to the competence of the arbitral tribunal to rule on its jurisdiction and the court's own powers at the preliminary stage. Article 16 has been quoted in Learned Brother Sabharwal's judgment. The court expressed its categorical opinion on the relevant issue in the following words:

C "What appears to me of significance is that the Model Law reflects an emphasis in favour of arbitration in the first instance in international commercial arbitrations to which it applies (of which it is common ground this is one). The courts in matters of contract interpretation as such are limited in that they do not appear to have a role in determining matters of law or construction; jurisdiction and scope of authority are for the arbitrator to determine in the first instance, subject to later recourse to set aside the ruling or award. The role of the court before arbitration appears to be confined to determining whether the arbitration clause is null and void, inoperative or incapable of being performed (Art. 8) - if not it is mandatory to send the parties to arbitration. Kane, J. did not follow this course - he referred questions of the construction of the agreement to trial without apparent reference to the condition specified in Art. 8; these issues to be tried relate to matters of law, including jurisdiction and scope of the arbitrator's authority, but not, so far as I can see, to the issues for the court to determine under Art. 8. It seems to me to be at least arguable that the matters referred to trial are not matters that permit the intervention of the court in the light of Art. 5, (supra)."²³

G In my view, this is a clear and unequivocal expression on the part of the court on the issue before us. Indeed, the Ontario Court has clearly held that the court in the matter of interpretation of the existence and non-*prima facie* jurisdiction and is not required to render a final decision at that stage.

22. XVIII Y.C. COMM. ARB. 166 (1993) (decided on 1.3.1991).

H 23. *Ibid.* at pp. 170-171 (para 13).

The English Judgment

The English judgment in *Azov Shipping Co. v. Baltic Shipping Co.*,²⁴ raised a different issue altogether. The case of the applicant before the court was that he was not a party to the arbitral agreement, which contained the arbitration clause, and, despite this, the arbitrator had delivered an award in favour of the other party. The arbitrator after a full trial found that there was a valid arbitration agreement and that he had jurisdiction over the parties. There was a challenge to the award. The issue before the court was: Where a full-scale hearing on jurisdiction had been completed before the arbitrator, and there was a challenge to the award, whether the jurisdiction of the arbitrator could be challenged with complete oral evidence and cross-examination so the challenge in effect became a full hearing of what had already occurred before the arbitrator?

The court allowed the application and held that even at the post-award stage, it was permissible to lead oral evidence to demonstrate that the arbitrator had no jurisdiction. The point of distinction is that the court was dealing with a challenge at a post-award stage. There could be no doubt that, at that stage the finding on the jurisdictional issue or the existence of vitiating factors has to be rendered only after complete trial and has to be a final finding. Further, the observations of the court were perfectly in consonance of Sections 32 and 67 of the English Act which are not in any manner reflected in the Act.

Consequences of the Mollificatory Suggestions

The suggestions made by Learned Brother Sabharwal to mollify some of the obvious drawbacks of the approach that he adopts, also needs closer scrutiny. He has suggested a trial by affidavits as well as a fixed time-frame to reduce the possible delays ensuing from a protracted trial at the pre-reference stage. In my view, any attempt to mollify the significant adverse consequences of the determinative approach by enabling the court to render final judgment only on the basis of affidavits, albeit within a fixed time-frame, may prove counter-productive.

There are several instances where affidavit evidence cannot aid in

24. [1999] 1 Lloyds Rep. 68 (Q.B.).

A making a final determinative finding on the issue. For instance, where a defence taken is that the signature of a party was forged or that agreement itself is entirely fabricated, I cannot conceive of the issue being satisfactorily determined fully and finally merely on the basis of affidavits without oral evidence. Correspondingly, if courts at the preliminary stage were to admit oral evidence, simply because forgery or the like is pleaded, the consequences are still troublesome. In fact, if the view postulated by learned Brother Sabharwal were to prevail, then all international commercial arbitrations can be defeated by a totally bogus defence that the agreement is forged or fabricated. If such a defence were to be allowed, it would necessarily require a full-fledged trial (with oral evidence) at the pre-reference stage with all its consequential delay and expense. On the other hand, if only a *prima facie* view were to be taken, then the issue could still be examined in-depth after a full trial either before the arbitral tribunal or at any rate under Section 48(1)(a) when the enforceability of the ensuing award is questioned.

D I am afraid that the suggestion of fixing a time limit, within which an issue can be determined without oral evidence, may also not be practical. As pointed out earlier, if the applicable law is a foreign law (which is not an uncommon feature in international commercial contracts), the time limit of three months is unlikely to be complied with as it would be unfeasible. In any event, since it is undoubted that at the enforcement stage a full trial under Section 48 is permissible, parties are none the better by having two trials i.e. one at the stage of Section 45, and another at the stage of Section 48.

F I fully agree with my Learned Brother's view that the object of dispute resolution through arbitration, including international commercial arbitration, is expedition and that the object of the Act would be defeated if proceedings remain pending in court even after commencing of the arbitration. 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.

H Undoubtedly, an international commercial arbitration involves huge expenses, particularly where the parties have subjected the contract to a foreign law. But, that cannot be a deterrent to this Court from pronouncing

on the correct approach to be adopted under Section 45 of the Act. In fact, as I have pointed out, adopting a final and determinative approach under Section 45 may not only prolong proceedings at the initial stage but also correspondingly increase costs and uncertainty for all the parties concerned. 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,²⁵ 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.

For all these reasons, I respectfully differ from the judgment of my esteemed Brother Sabharwal. I am of the view that the present matter needs to be remitted to the trial court, but not for a full trial as directed by the impugned judgment of the High Court. The application under Section 45 would have to be determined by the trial court after arriving at the *prima facie* satisfaction that there exists an arbitral agreement, which is "not null and void, inoperative or incapable of being performed". If the trial court finds thus, the parties shall be referred to arbitration.

The appeal is accordingly allowed and Ordered accordingly.

DHARMADHIKARI, J. : Leave granted.

I have carefully gone through very elaborate and well-considered opinions differing with each other of learned Brethren Y. K. Sabharwal and B. N. Srikrishna JJ.

With utmost respect to both of them, I am inclined to agree with the view expressed by learned Brother Srikrishna J. but only with a rider and a partly different reason which may I state below:-

The main issue is regarding the scope of power of any judicial authority including a regular civil court under section 45 of the Act in making or

25. See, for example, FOUCHARD, GAILLARD, GODLMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage, eds. 1999) at pp. 412-412 (para 682) as well as JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003) AT P. 346 (para 14-53) who support the *prima facie* approach.

A refusing a reference of dispute arising from an international arbitration agreement governed by the provisions contained in Part III Chapter-I of the Act of 1996. I respectfully Agree with learned Brother Srikrishna J only to the extent that if on *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.

Whether such a decision of the judicial authority or the court of refusal to make a reference on grounds permissible under section 45 of the Act would be subjected to further reexamination before the arbitral tribunal or the court in which eventually the award comes up for enforcement in accordance with section 48(1)(a) of the Act, is a legal question of sufficient complexity and in my considered opinion since that question does not directly arise on the facts of the present case, it should be left open for consideration in an appropriate case where such a question is directly raised and decided by the court.

With this addition, I agree with the view expressed by learned Brother Srikrishna J., and with his conclusion that the matter should be remitted to the original court for a fresh decision in the light of the view expressed by this Court.

ORDER

A

The direction of the High Court in the impugned judgment remanding the application under Section 45 of the Arbitration and Conciliation Act, 1996, for fresh decision by the trial court is confirmed. On remand, the trial court would decide the application in the light of the majority opinion within two months of receipt of the judgment of this Court.

B

B.S.

Appeal disposed of.