CASE NO.:
Appeal (civil) 5048 of 2005

PETITIONER:
Shin-Etsu Chemical Co. Ltd.

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

DATE OF JUDGMENT: 12/08/2005

BENCH:
B. N. Srikrishna

JUDGMENT:
J U D G M E N T
(arising out of SLP (C) No. 3160/2005)

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.

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. 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". 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

significant 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.

The Judgment in Renusagar

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. ("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:

"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."

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:

"(v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the "existence and validity" of the arbitration agreement. (In the instant case these questions do not arise)"

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. An apt observation about this principle was made in M/s Amarnath Nath Om Prakash v. State of Punjab :

"We consider it proper to say, as we have already said in other cases, that judgments of courts are not 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\005.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."

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 :
"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."

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 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

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 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 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 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 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 \026 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.

Res Judicata and Unfairness

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.

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.

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.

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, 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."

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 Arbitration highlights that this problem as best exemplified in the U.S. case of SMG Swedish Machine Group v. Swedish Machine Group. 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 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. Thus, similar 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.

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 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 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 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.

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. 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., it was observed:

"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."

This principle has received widespread acceptance by this court in numerous decisions. 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.

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.

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 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.

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.

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".

Similarly, Article 7 of the 1987 Swiss Private International Law Statute stipulates that the courts decline jurisdiction "\005b. 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.

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 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-vitiation 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., ("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."

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."

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.

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.

The Hong Kong Ordinance:

"Section 6 Court to refer matter to arbitration in certain cases

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

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

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

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

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

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 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."

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.

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:

"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-

(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,

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 l eave 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 at least 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.

The Ontario Judgment

The Ontario Court of Justice in Rio Algom Ltd. v. Sami Steel Co. Ltd. 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:

"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) \026 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 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."

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-vitiation of the arbitral agreement has only a prima facie jurisdiction and is

not required to render a final decision at that stage.

The English Judgment

The English judgment in Azov Shipping Co. v. Baltic Shipping Co., 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 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.

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.

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.

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, 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.