* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO(OS) No.268/2011 & CM No.10057/2011

Dr. Devinder Kumar Gupta ...Appellant through
Mr. Sandeep Sethi, Sr. Adv. with Mr. Ashish Dhaulakia and Mr. Anand Srivastava, Advs.

versus

Realogy Corporation & Anr. .....Respondent through
Mr. P.V. Kapur, Sr. Adv. with Mr. Anish Dayal, Mr. Siddharth Vaid, Mr. Aman Anand & Mr. Ranabir Dutta, Advs. for Respondent No.1.
Mr. Rajiv Nayar, Sr. Adv. with Mr. Prateek Jalan, Mr. Siddharth Bhatnagar, Mr. Darpan Wadhwa, Mrs. Sonia Dube and Mr. S. Chakraborty, Advs. for Respondent No.2.

WITH

RFA(OS) No.112/2010 & CM No.20283/2010

JSM Corpn. Pvt. Ltd. .....Appellant through
Dr. A.M. Singhvi, Sr. Adv. with Mr. Akhil Sibal, Mr. Deepak Khurana & Mr. Pradeep Chhindra, Advs.

versus

IndoChine India Ltd. .....Respondent through
Mr. N.K. Kaul, Sr. Adv. with Mr. R. Sudhir, Mr. Gaurav Liberhan & Ms. Prerna Amitabh, Advs.

WITH

RFA(OS) No.59/2010 & CM No.11380/2010

Bhushan Steel Ltd. .....Appellant through
Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Ranjana Roy Gawai,
Ms.Vasudha Sen &
Mr. Pradeep Chhindra, Advs.

versus

Singapore Intl. Arbitration Centre ....Respondent through
Mr. Sandeep Sethi, Sr. Adv.
with Mr. Anil Kumar Mishra
& Ms. Sindhu Sinha, Advs.
for Respondent No.2

WITH

FAO(OS) No.698/2010 & CM No.22313/2010

Bhushan Steel Ltd. .....Appellant through
Mr. A.S. Chandhiok, Sr. Adv.
with Ms. Ranjana Roy Gawai,
Ms.Vasudha Sen &
Mr. Pradeep Chhindra, Advs.

versus

Singapore Intl. Arbitration Centre ....Respondent through
Mr. Sandeep Sethi, Sr. Adv.
with Mr. Anil Kumar Mishra
& Ms. Sindhu Sinha, Advs.
for Respondent No.2

WITH

RFA(OS) No.43/2009

WPIL Ltd. .....Appellant through
Mr. T.K. Ganju, Sr. Adv. with
Mr. Gaurav Chauhan, Adv.

versus

NTPC Ltd. ....Respondent through
Mr. Bharat Sangal,
Ms.Vernika Tomar &
Ms. Srijana Lama, Advs. for
Respondent No.1
Mr. Rajiv Nayyar, Sr. Adv.
with Mr. Ayush Agrawal,
Adv. for Respondent No.2
Mr. Chetan Sharma, Sr. Adv.
with Mr.S. Kumar, Adv. for
Respondent No.3

% Date of Decision: July 25, 2011

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

FAO(OS) No.268/2011

1. This Appeal challenges the Order dated 4.5.2011 of the learned Single Judge who has concluded that the Court cannot go into the controversy concerning the existence or validity of the Arbitration Clause invoked by one of the parties; nor can it issue an injunction restraining that party from continuing with the arbitration proceedings initiated by that party before the American Arbitration Association. Succinctly stated, the case of the Appellant is that the Arbitration Clause featured as

paragraph 11 of the "Century 21 International Sub Franchise Agreement" is only between the styled Respondent No.1, Realogy Corporation and DGS Realtors Pvt. Ltd. This Agreement is obviously and apparently a standard form contract prepared by the Claimant. It is salutary to bear in mind that the rule of *contra proferentem* enjoins Courts to lean in favour of the party which is not the originator or drafter of the document if a contradiction is encountered. We have perused the said Agreement dated 24.10.2007 which incontrovertibly is between the said two parties only. The Arbitration Clause provides, *inter alia*, for the submission of all disputes for arbitration to the New York Office of the American Arbitration Association. Sub-clause (2) thereof empowers each of those two parties to appoint its arbitrator who will thereafter, together appoint a third arbitrator to assume the responsibilities of the Chairman of the Tribunal. It is also not in controversy that the Appellant, Dr. Devinder Kumar Gupta is the Managing Director of DGS Realtors Pvt. Ltd. and that the latter had executed not only the sub-franchise Agreement on behalf of the Company but also a "Deed of Guarantee and Indemnification" of even date, that is, 24.10.2007. This Deed of Guarantee and Indemnification admittedly is Exhibit 1 to the aforementioned "Century 21 International Sub Franchise Agreement". The contention on

behalf of the Respondent is that since the "Deed of Guarantee and Indemnification" is part and parcel of "Century 21 International Sub Franchise Agreement", the Arbitration Clause in the latter would also assume and take the former within its sweep. With this brief narration, we must rule on the correctness of the impugned Judgment, that is, whether a civil suit is not maintainable with regard to the existence or validity of an arbitration agreement.

2. A Division Bench of this Court in ***Spentex*** *Industries Ltd. –vs- Dunvant S.A.*, 2009 (X) AD Delhi 162 had dealt with this conundrum, but only partially. A Civil Suit had been filed in those proceedings in which one of the prayers was for a Declaration that the Arbitration Clause was *non est* and unenforceable. The other reliefs pertained to the validity of the Arbitral Award which had already been rendered. Inasmuch as an Arbitral Award has not been published so far as the parties before us are concerned, ***Spentex*** does not apply on all fours. After analyzing the celebrated Judgments reported as ***Bhatia*** *International –vs- Bulk Trading S.A.*, (2002) 4 SCC 105, and ***SBP*** *& Co. –vs- Patel Engineering*, (2005) 8 SCC 618 and ***Shin-Etsu*** *Chemical Co. Ltd. –vs- Aksh Optifibre Ltd.*, (2005) 7 SCC 234, the Division Bench in ***Spentex*** held that the suit was incompetent and that the only procedure provided by law was to

assail the Award after it had been published, by way of filing Objections either under Section 34 or Section 48 of the Arbitration & Conciliation Act, 1996 (A&C Act), as the case may be. It would also be apposite to mention another Division Bench decision titled **Progressive Career Academy Pvt. Ltd. –vs- FIIT JEE Ltd.** which has been delivered on 16.5.2011. A batch of Appeals and one Reference from a learned Single Judge to the Division Bench had been heard together, all of which concerned the jurisdiction of civil courts where allegations of bias had been leveled against the Arbitral Tribunal. Several decisions had been rendered on this subject, which came to be analyzed by the Division Bench. The conclusion was that the A&C Act contemplated an immediate remonstration raising the bias of the Arbitral Tribunal. In the event that the challenge on the ground of bias was not accepted, the remedy was to await the Award and thereupon raise grounds of bias as Objection under Sections 34 and 48, as the case may be. In the penultimate paragraph, it has been opined that "curial interference is not possible at the pre-award stage on the allegations of bias or impartiality of the Arbitral Tribunal. …." The A&C Act proscribes intervention by Courts obviously because the endeavour and expectation of the Legislature is that the Award should be pronounced at the earliest; and logically, therefore,

obtrusion and interruptions from any quarters are statutory anathema. As has already been enunciated in ***Bhatia***, the A&C Act is unhappily worded, leading to an explosion of litigation. So far as Section 11 of the A&C Act is concerned, it applies to domestic as well as international arbitrations. The heading of the fasciculus styled as "PART-II - ENFORCEMENT OF CERTAIN FOREIGN AWARDS" ought not to contain provisions dealing with incidences which are anterior to the publication of an Award. However, courts as well as the litigants, have by now become adept at grappling with and adjusting to the incongruencies in the A&C Act. Chapter-I of Part II is styled as "NEW YORK CONVENTION AWARDS" and substantially reproduces the New York Convention, to which litigating parties before us are bound.

3. Returning to the facts of the present case, the two parties specifically mentioned in the Arbitration Clause have already submitted to the jurisdiction of the American Arbitration Association in New York. The Plaintiff, however, contends that no Arbitration Clause subsists between Realogy Corporation and himself. ***Bhatia*** lays down that Part I applies to all arbitration. Ergo, since the Plaintiff/Appellant is not willing to submit to arbitration, and especially since the procedure prescribed in the Arbitration Agreement does not envisage the appointment of an

arbitrator by the Appellant/Plaintiff, does not the law mandate the invocation of Section 11 of the A&C Act. Realogy Corporation could have approached the Court under Section 11 (6) of the A&C Act stating that the Appellant/Plaintiff has failed to act as required under the agreed procedure and, therefore, the Chief Justice of India should ordain necessary measures. So far as the facts of the case in hand are concerned, Realogy Corporation as well as DGS Realtors Pvt. Ltd. have, in consonance with the Arbitration Clause, appointed their respective Arbitrators. The legal nodus is that the Arbitration Clause does not postulate that similar action has to be taken by the Plaintiff/Appellant, apparently vindicating his contention that he should not be compelled to submit to the jurisdiction of the Arbitral Tribunal. Be that as it may, none of the provisions of Section 11 of the A&C Act empower the Chief Justice of India to appoint an arbitrator on behalf of a third party, such as the Plaintiff/Appellant. This could only mean that Section 11 would have no application to cases such as the one before us. But the Plaintiff/Appellant cannot be left without legal remedy, which can either be by way of filing a civil suit or, if he has received a notice from the Arbitral Tribunal, to immediately object to its jurisdiction on the ground that he is not a necessary or proper party to those proceedings. Obviously and reasonably, the

Plaintiff/Appellant can contend that the Arbitration Agreement is null and void, inoperative or incapable of performance *vis-à-vis* him. We may also clarify that Section 8, the gravamen or intendment of which is obviously apposite, does not come to the rescue of a party, such as the Plaintiff/Appellant, whose assertion is that he has not agreed to an adjudication of disputes through arbitration.

4. No cavil is possible that it is an international commercial arbitration that has been constituted in New York. In ***Bharti*** *Televentures Ltd. –vs- DSS Enterprises Private Ltd.*, 123(2005) DLT 532, one of us (Vikramajit Sen, J.) had, after due dissection of the A&C Act, concluded that in the case of an international commercial arbitration, the concerned judicial authority is duty-bound to refer parties to arbitration, even without being petitioned to do so, unless it returns the finding that the Arbitration Agreement is null and void or inoperative or incapable of performance *vis-à-vis* some or all the parties concerned. It is uncontrovertable that a civil court is a judicial authority as contemplated by Section 45 of the A&C Act. In a fashion similar to what would transpire under Section 8, by virtue of Section 45, the civil court is statutorily bound to go into the question of whether the Arbitration Clause set up by one party is null and void so far as the objector is concerned. Of

course, it would have been salutary for the Section to have separately provided for the event where one of the parties alleges that it was not privy to any agreement to arbitrate upon its disputes. This would have totally obviated the filing of a civil suit as appropriate relief, within the parameters of the A&C Act, would be available. It was for this reason that in ***Bharti*** the *non obstante* clause in Section 45 was found to be extremely significant since it, *inter alia*, neutralizes the effect of Section 5 contained in Part I which prohibits intervention of judicial authorities governed by that Part.

5. An analysis of decisions of Single Benches of this Court presents a veritable cauldron of opinions which can be broadly segregated into two. One view is that the Court must point the adversaries to the path of arbitral tribunal for a complete adjudication of all contentions; the other that before doing so the Court must satisfy itself that an agreement to arbitrate is present so far as each and every party is concerned before any or all of them can be so referred. As regards maintainability of a Suit asserting the absence of an Arbitral Agreement or challenging the constitution of an Arbitral Tribunal under an alleged Arbitral Agreement, learned Single Judges of this Court have held divergent opinions. (i) In *Akshay Kapur –vs- Rishan Kapoor* 105(2003) DLT 467, 2003(2) Arb LR 508(Del), a Suit for

Declaration and Injunction was filed against an 'Evaluation Report' and connected arbitral proceedings, and the view was that "if the Court is of the opinion that the action, in the present case the suit for declaration and injunction, is not the subject matter of the arbitration agreement, it would be improper not to hear it. Notwithstanding the non obstante words employed in Section 5, if the dispute raised in the suit is not covered by the Arbitration Clause, it must be considered on its merits, regardless of whether the Arbitration Proceedings are impeded in the process. It cannot be laid that Section 16 of 1996 Act changes every aspect of common law and that excepted, or exempted or excluded matters cannot be adjudicated upon even in absence of a decision by the Arbitrator as to their arbitrability, on where the ambivalence of the Arbitrator is apparent". (ii) In *Jagson International Ltd. –vs- Frontier Drilling* 113(2004) DLT 189: 2004(76) DRJ 299, the Plaintiff had filed a Suit for declaration and permanent injunction seeking a Declaration that the Arbitral Agreement stipulating International Arbitration with its seat in London is null, void and inoperative, *non est* and incapable of being performed and pass an injunction against the Defendant from taking any steps pursuant to the said Arbitration Agreement. The Court, dealing with an application under Order XXXIX Rules 1 and 2 for

injunction against invocation of Bank Guarantee, held that a "comparative perusal of Sections 45 and 8 of the Act makes it clear that under section 45 of the Act the Court has been given a wider discretion on the question of referring the parties to Arbitration. The apparent reason is that in the case of domestic arbitration the legislation aiming at speedy reference of the disputes to Arbitral Tribunal has left most of the matters relating to existence and validity of the arbitration agreement to be decided by the arbitrator themselves. However, in case of foreign arbitration, Section 45 of the Act clearly provides that notwithstanding anything contained in the part one or in CPC, a judicial authority may refer the parties to Arbitration unless it finds the agreements null and void, inoperative or incapable of being performed. The conditionality mentioned in Section 45 of the Act are conspicuously absent in Section 8 of the Act. In case of foreign Arbitrations enormous expenses and efforts get involved and as such the legislature in its wisdom has thought that the question relating to the validity of Arbitration Agreement, its cooperativeness and capability of being performed should be examined by the Court itself instead of leaving those in the hands of Arbitrators in foreign land. Therefore, this Court fully agrees with the submission made by learned Counsel for the Plaintiff that the present case before

invoking Section 45 of the Act as prayed by the Defendant, this Court is under a duty to consider as to whether the Arbitration Agreement is null and void, inoperative or incapable of being performed." However on facts, the Court found that the Agreement is binding on the parties. The fraud alleged by the Plaintiff was not such as would annul the Arbitration Agreement. The Court drew a distinction between frauds that vitiate the entire base of the Contract and those which are incidental and do not strike at the root of the agreement. (iii) In ***Bharti***, the Court was once again confronted with the issue of maintainability of a Suit in respect of an International Arbitration. The Findings of Court on this legal conundrum can be enumerated as follows:-

(a) Pronouncement in Bhatia International to the effect that Part I applies to all arbitration, domestic and international does not conclude that Section 8 overrides Section 45 of A&C Act.

(b) Section 5 does not act as an absolute bar to Civil Courts.

(c) Section 8 requires/mandates filing of an application for reference, whereas Section 45 contemplates only a 'request' for this purpose.

(d) Section 8 envisages the reference to the Arbitration of only those disputes which the Arbitrator is competent or empowered to decide.

(e) The enquiry of applicability of Arbitral Agreement to subsisting dispute is mandated in both Sections 8 and Section 45. In Section 8, the Court has to return a prima facie finding, in Section 45 it should be in great detail (though in Shin-Etsu, Supreme Court has held that the enquiry in case of Section 45 can also be of *prima facie* nature).

(iv) In *City Corp. –vs- Toli Investers*, 2006(4) Arb LR 119 (Del), the Single Judge held a Civil Suit to be maintainable in a case of infringement of the Trade mark 'City' belonging to the Plaintiff. The Defendant's stand was that in light of establishment of "**.**IN Domain Name Dispute Resolution Policy" the suit was not maintainable and the Court must refer the suit for Arbitration under the said INDRP regime. The Plaintiff had, *inter alia,* asserted the jurisdiction of the Civil Court on the basis that there was no arbitration agreement between the parties. The Court held in the favour of the Plaintiff holding the Suit to be maintainable. (v) In *Sara International Ltd. –vs- Golden Agri International*, 2010(3) Arb.LR 29, authored by Manmohan Singh, J., a Suit for Declaration was filed to declare the Arbitration Agreement to be *non est* as the same was allegedly not signed by the Plaintiff. On a *prima facie* analysis, the learned Single Judge held the suit to be maintainable and dismissed Order VII Rule 11 application of Defendant relying on

Section 5 of A&C Act. Preliminary Issue as regards maintainability was framed and suit listed for further hearing.

(vi) In *Lucent Technologies –vs- ICICI Bank Ltd.*, 2010(5) R.A.J. 574, authored by Gita Mittal, J., a Suit for declaring an arbitral agreement to be inoperative was held maintainable and interim injunction granted in favour of the Plaintiff against the Bank regarding guarantee of bridge loan and proceeding against him in arbitration proceedings. It was noted that Section 8 does not prohibit the right of a party to maintain a suit in express terms. It also conferred primacy on the Court to determine the question with regard to existence of an Arbitration Agreement. Under Section 8, the party claiming existence of a valid Arbitration Agreement has to take that plea by filing an Application along with the agreement which would have to stand the scrutiny of the Court. The other is enabled to take the defence of validity and bindingness of the Arbitration Agreement. Looking at the *prima facie* case, irreparable loss and balance of convenience, an interim injunction in favour of Plaintiff was granted.

(vii) In *Oval Investment –vs- India Bulls Financial Services*, 2009(165) DLT 652, Muralidhar, J. a Suit for Declaration and Injunction against the Defendant alleging that the invocation of Arbitration Agreement by issuance of notices under Section 21

was fraudulent as the notices sent on the wrong addresses had been filed. The Court held that such a Suit, in light of Sections 5 and 16 of A&C Act, for restraining the Defendant from invoking the arbitration Agreement was not maintainable, particularly when it was not the case of the Plaintiff that the Arbitration Agreement either did not exist or that it was otherwise vitiated in law. The same was upheld by the Division Bench. (viii) In *Handicraft and Handloom Export –vs- Ashok Metal Corp.*, Reva Khetrapal, J. held a Suit for Declaration and Injunction against arbitration proceedings to be not maintainable.

> 21. A conjoint reading of Sections 5, 8 and 16 of the Act, in my view, point to the legislative intent that the Civil Court must keep well away from the turf of arbitration proceedings. Section 9, Section 37 and Section 34 are the only Sections where under the Civil Court is allowed to interject. The intervention of the Civil Court under Section 9 of the Act is, however, confined to the domain of interim orders alone and that too, with a view to ensure preservation of the property which forms or may be forming the subject matter of the arbitration proceedings. Sections 37 and 34 invest the Civil Court with appellate powers in a manner of speaking. Indubitably, the Civil Court also entertains applications under Sections 8 and 11, but this is in consonance with the provisions of the Act itself. Thus, simply because while interpreting Sections 8

and 11 of the Act, it has been held by the Supreme Court that the Court before referring the parties to arbitration, must satisfy itself of the existence and validity of the arbitration agreement, is not reason enough to hold that a suit for the declaration of the same relief would also be maintainable. There is no provision in the Act enabling the filing of such a suit. It also cannot be lost sight of that an application under Section 8 is filed in a case where a suit is already before the Court; while an application under Section 11 is envisaged by the Act merely for the reference of the disputes to arbitration by appointment of the Arbitrator. Thus, in my considered opinion, merely because the Court must satisfy itself about the existence and validity of an arbitration agreement when faced with an application under Section 11 of the Act or one under Section 8 of the Act, is not good enough reason to hold that it would be open to a party to the arbitration agreement to file a suit challenging the validity or existence of the arbitration agreement.

22. The aforesaid position of law is no longer susceptible to challenge after a Bench of three-Judges of the Supreme Court in KV Aerner Cementation India Ltd. (supra) has laid down that it is not open to the Civil Court to go into the question of non-existence of an arbitration agreement in a suit for declaration, both in view of the stringent provisions of Section 5 of the Arbitration Act and the power bestowed upon the Arbitral Tribunal to rule on its own jurisdiction by Section 16 of the Act,

more so, as the decision of the Arbitral Tribunal would be amenable to be assailed within the ambit of Section 34 of the Act.

(ix) Another Single Bench expressed a divergent opinion in *ITE India Private Ltd.-vs- Shree* ***Mukesh Sharma***, 127 (2006) DLT 62 : 2006(1) Arb LR 155. By piercing the corporate veil, the Court went into the issue of whether the Plaintiff Company was a party to Arbitration Agreement and held that, in light of ***Kvaerner***, the Court must refer these questions to the Arbitral Tribunal. In this case, Plaintiff, a registered Company, approached the Court with a Suit for Declaration and Injunction against the Defendant from proceeding with the Arbitration under ICC Rules in terms of shareholders agreement between Defendant No.1, Defendant No.2, a company and Defendant No. 3; Defendant No. 1 being the major share holder in Plaintiff Company. An ad interim injunction was sought in that matter and the stand taken by the Plaintiff was that since the Plaintiff Company was not a party to the Arbitration Agreement, the claims could not be referred to Arbitration. *Per contra*, Defendant No.2 adopted the stance that Plaintiff Company was only an alter ego of Defendant No.1 who is the major share holder in the Company. ***Bharti*** was distinguished on the point that unlike ***Bharti***, in this case the Court could not come to the

conclusion that the agreement was null, void or inoperative. ***Sukanya*** was distinguished on the posit that there was no question of bifurcation of claim, partially governed by the Arbitration Agreement and partially falling out of it.

(x) ***Roshan Lal*** was also decided on the basis of observations in ***Kvaener*** which is pre ***SBP***. (xi) In ***Spentex***, the very Single Bench decided maintainability of a Suit for Declaration and injunction against a foreign award. Hon'ble Single Judge, relying on his own judgment of ***Roshan Lal*** and the dictum of Supreme Court in ***Kvaener***, held that a Suit for declaration and injunction against an Arbitration Proceeding is not maintainable. Reliance was also placed on *Venture Global Engineering –vs- Satyam Computers*, AIR 2008 SC 1061 to hold that a Suit for declaration against an international award is not maintainable and the Plaintiff instead should have filed objections under Section 34. In addition, learned Single Judge also held that relief of Declaration and Injunction are in the species of specific relief which are discretionary in nature and the Courts will not grant such discretionary reliefs if any alternate efficacious remedy is available, which in that case was available under the provisions of A&C Act. This Judgment was affirmed by the Division Bench. However, the distinction of Sections 8 and 45 and the maintainability of Suit for Declaration

and Injunction against the arbitration agreement itself was not found germane by the Division Bench. (xii) Again, in *Shree Krishna Vanaspati Industries –vs- Virgoz Oils and Fats*, 2009(6) R.A.J. 511, the same Single Bench held a Suit for Declaration and Injunction to be not maintainable. The claim of the Plaintiff was that there was no concluded contract between him and the Defendant and the Defendant sent a unilaterally signed agreement containing a clause stipulating international Arbitration with its seat at Malaysia. Learned Single Judge, following his Judgment in ***Roshan Lal*** and Supreme Court's **Kvaerner**, held that Sections 8 and Section 45 are almost similar and thus the ratio of ***Kvaerner***, though given in context of Section 8 and 16 of A&C Act, should be extrapolated on Section 45 and, therefore, the Suit to impede the process of arbitration by seeking declaratory and injunctive relief was held not maintainable. Learned Single Judge expressly refused to follow ***Bharti*** in light of ***Kvaerner***. The impugned Judgment discusses *Chemical Sales Agencies –vs- Naraini Newar*, 114(2004) DLT 272 where another learned Single Judge had concluded that "in the absence of the existence of a "defined legal relationship", there is no question of there being an arbitration agreement between the parties to submit their disputes to arbitration. The disputes which are referable to

arbitration are those disputes which are in respect of a "defined legal relationship", whether contractual or not. It does not relate to all kinds of disputes. Therefore, it is the duty of the judicial authority, before it passes an order referring the parties to arbitration under Section 8 of the said Act, to satisfy itself that there exists an arbitration agreement of the nature described in Section 7 of the Act". Fortunately, these discordant opinions have been put in a crucible by several judgments of the Apex Court and the maelstrom has ceased to exist.

6. In ***Kvaerner*** *Cementation India Ltd. –vs- Bajranglal Agarwal*, 2001(6) Supreme 265, their Lordships had specifically taken pains to observe that – "there cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal". The facts in that case were that a suit had been filed seeking a Declaration that there does not exist any arbitration clause between the parties. The High Court ruled that in view of Section 5 of the A&C Act read with Section 16 thereof, since the Arbitral Tribunal possesses power to rule on its own jurisdiction, civil courts ought not to pass an injunction restraining the arbitral proceedings. A study of the brief Order does not reveal the precise nature of the Plaintiff's contention. We must, therefore, perforce assume that the factual matrix in ***Kvaerner***

carved out an exception to the categorical statement that the existence of an arbitration clause is unquestionably the foundation for a reference to arbitration.

7. *P. Anand* ***Gajapathi Raju*** *–vs- P.V.G. Raju*, [2000] 2 SCR 684 propounds that one of the four conditions which are required to be satisfied under sub-sections(1) and (2) of Section 8 before any Court can exercise its powers "to refer the parties to arbitration" is that there is an arbitration agreement between the parties. This requirement was also found to be peremptory in ***Sukanya*** *Holdings (P) Ltd. –vs- Jayesh H. Pandya*, (2003) 5 SCC 531 which was decided without reference to ***Gajapathi Raju.*** The following paragraphs justify reproduction:-

> 12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, the judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if: (*1*) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (*2*) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (*3*) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean

that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections (1) and (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is: "*in a matter which is the subject of an arbitration agreement*". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "*a matter*" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced —

> "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "*a matter*" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

8. In ***Shin-Etsu***, the majority had held that a *prima facie* finding by the judicial authority is mandatory before parties can be referred to arbitration. The following passage bears out this view:-

> 84. 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, J. 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.

9. The Seven Judge Bench in ***SBP*** has also preferred this interpretation of the statute, as will be evident from a perusal of this extract from the celebrated Judgment:-

> 19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see Fair Air Engineers (P) Ltd. v. N.K. Modi). When the Defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement

produced before it, and mechanically refer the parties to an arbitration.

10. Our research has revealed *Andhra Pradesh Tourism Development Corporation Limited –vs-* ***Pampa Hotels*** *Limited*, (2010) 5 SCC 425 which, indeed, is an interesting precedent relevant and germane to the controversy before us. The facts were that an application under Section 11 had been filed during the regime of *Konkan Railway Corporation Ltd. –vs- Mehul Construction Co.*, (2000) 7 SCC 201 and hence, taking the exercise to be merely administrative in nature, without more, the parties been referred to arbitration by the High Court. Consequent on ***SBP***, their Lordships opined that it was necessary for the Court, prior to the appointment of the arbitrators, to come to a *prima facie* finding, *inter alia*, of the existence of an arbitration clause between the parties. However, in view of the fact that the parties were already before the Arbitrator, their Lordships ruled that the arbitrator would have to decide the issue as to the existence of an arbitration agreement. Their Lordships, however, clarified that the facts of the case had resulted in a peculiar position. The following extract from ***Pampa Hotels***, containing a narration of facts, discloses the relevance of this decision to the controversy before us.

16. Section 7 of the Act as noticed above, defines an arbitration agreement as an agreement by *the parties* to submit to arbitration. The word "party" is defined in Section 2(1)(*h*) of the Act as a party to an arbitration agreement. An agreement enforceable by law is a contract. An agreement has to be between two or more persons. Therefore if one of the two parties to the arbitration agreement was not in existence when the contract was made, then obviously there was no contract and if there was no contract, there is no question of a clause in such contract being an arbitration agreement between the parties.

17. The two agreements dated 30-3-2002 categorically refer to Pampa Hotels Ltd. as an existing Company (promoted for the purpose of implementing the project by Sudalagunta Hotels Ltd.) incorporated under the provisions of the Companies Act, having its registered office at 209, T.P. Area, Tirupathi and represented by its Managing Director Shri S. Jayarama Chowdary. The agreements are not entered by the promoters of the Company, but purportedly by the Company itself, represented by its Managing Director. Admittedly on 30-3-2002 there was no such company in existence. Admittedly there was no such company having its registered office at 209, T.P. Area, Tirupathi on that date. Admittedly, S. Jayarama Chowdary was not the Managing Director of any company of that name on that date. When one of the parties to the lease agreement and management agreement, was a non-existent imaginary party, there is no contract.

18. This is not a case of one of the parties being in existence, but being under some legal disability to enter into contracts. This is a case where there was no "party" at all, but someone claiming that there was an existing company capable of entering into contracts. The position would have been different, had the agreement been entered into by the promoters of the respondent Company before its incorporation for the purposes of the Company and such contract was warranted by the terms of incorporation.

19. Section 15 of the Specific Relief Act, 1963 provides as follows:

"15. *Who may obtain specific performance.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—*

* * *

(*h*) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

(emphasis supplied)

20. It is evident from Section 15(*h*) of the Specific Relief Act that if the lease agreement and the management agreement had been entered into by the promoters of the Company stating that they are entering into the contract for the purpose of the Company to be incorporated, in their capacity as promoters and that such contract is warranted by the terms of the

incorporation of the Company, the agreement would have been valid; and the term regarding arbitration therein could have been enforced. But for reasons best known to themselves, the agreement was entered not by the promoters of Pampa Hotels Ltd., on behalf of a Company proposed to be incorporated by them, but by a non-existing Company claiming to be an existing Company. This clearly shows that there is no arbitration agreement between the respondent (applicant in the application under Section 11 of the Act) and A.P. TDC against whom such agreement is sought to be enforced.

Re: Question (ii)

21. Let us next consider the question as to who should decide the question whether there is an existing arbitration agreement or not. Should it be decided by the Chief Justice or his designate before making an appointment under Section 11 of the Act, or by the arbitrator who is appointed under Section 11 of the Act? This question is no longer res integra.

22. It is held in *SBP & Co.* v. *Patel Engg. Ltd.* (2005) 8 SCC 618 and *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.* (2009) 1 SCC 267 that the question whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his designate under Section 11 of the Act before appointing an arbitrator. Therefore there can be no doubt that the issue ought to have been decided by the learned designate of the Chief Justice and could not have been left to the arbitrator.

11. Our attention has been drawn to *S.N.Prasad –vs-* ***Monnet Finance*** *Ltd.*, (2011) 1 SCC 320 obviously for the reason that the facts appear to have been cast in the same mould. Their Lordship enunciated the legal position in these words:

> 8. Thus there can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.
>
> 9. There is no dispute that the loan agreements among the first respondent (lender), the second respondent (borrower) and the third respondent (guarantor) contained a provision for arbitration. The said provision for arbitration is extracted below:
>
> "In the event of any dispute, question or difference *arising out of or in connection with this agreement* and the *respective rights and obligations of the parties hereunder*, the same shall be referred to the arbitration in accordance with the provisions of the Arbitration Act, 1940."
>
> But the appellant was not a party to the same. In fact the appellant's letter of guarantee for Rs. 75 lakhs was

given on 27-10-1995, prior to the dates of the two loan agreements. It is also not in dispute that the letter dated 27-10-1995 given by the appellant to the first respondent did not contain a provision for arbitration; and that except the said letter dated 27-10-1995, the appellant did not execute any document or issue any communication.

10. An arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement. Therefore, there was no arbitration agreement as defined under Sections 7(4)(*a*) or (*b*) of the Act, insofar as the appellant was concerned, though there was an arbitration agreement as defined under Section 7(4)(*a*) of the Act in regard to the second and third respondents. As the letter dated 27-10-1995 does not refer to any document containing an arbitration clause, there is also no arbitration agreement between the first respondent and the appellant as contemplated under Section 7(5) of the Act.

12. We are in the post ***SBP*** era where it is incumbent on the Court to at least come to a *prima facie* conclusion that an arbitration agreement exists between the parties. We are aware that piquant situations can arise, such as where a party alleges that the signatures on the Memorandum of Understanding containing an arbitration clause are forgeries, such a defence

would tantamount to the non-existence of a arbitration clause and must be distinguished from defences where it is pleaded that the arbitration compact has been rendered null and void or ineffective. Fortunately, for us, such a situation has not manifested itself before us. In *Hero Exports –vs- Tiffins Barytes*, MANU/DE/2562/2008 decided on 02.09.2008, the learned Single Judge had come to the conclusion that the objection pertaining to forgery had not been substantiated and hence the parties were referred to arbitration. We must immediately mention another Division Bench Judgment in *Oval Investment P. Ltd. –vs- Indiabulls Financial Services Ltd.*, 2009 X AD(Delhi) 705 upholding the decision of the learned Single Judge to the effect that a suit under Section 34 of the Specific Relief Act, 1963 was barred inasmuch as the grievance pertained to the issuance of a notice and its legitimacy even though the notice was a pre-condition to the exercise of jurisdiction by the Arbitral Tribunal. *Secur Industries Ltd. –vs- Godrej & Boyce Mfg. Co. Ltd.*, (2004) 3 SCC 447 had been taken into consideration.

13. In the impugned Judgment, the learned Single Judge has applied the Division Bench Judgment in ***Spentex*** as also the Single Judge decision in ***Roshan Lal*** *Gupta –vs- Parasram Holdings Pvt. Ltd.*, 2009(157) DLT 712. The first feature to be noted is that ***Roshan Lal*** deals with a domestic arbitration and,

therefore, Section 45 of the A&C Act was not in contemplation. The learned Single Judge, *inter alia*, concluded that the word 'party' in Section 8 of the A&C Act refers to a party to the suit in contradistinction to a party to the arbitration agreement. The learned Single Judge, in the impugned Judgment, has dismissed the applications seeking interim relief but inexplicably has kept the Suit alive for further consideration. The learned Single Judge was statutorily bound to return a finding with regard to whether or not the action or suit was the subject matter of an arbitration agreement. In the facts of the case before us, since we are dealing with an international commercial arbitration, Section 45 of the A&C Act comes into play. After considering all the complexities in the case, one of us had concluded in ***Bharti*** that a formal application under Section 45 of the A&C Act was not necessary, since it is incumbent for a Court seised of an action in a matter in respect of which the parties have made an arbitration agreement as envisaged in Section 44, to refer the parties to arbitration except if the Court finds that the said agreement is null and void, inoperative and incapable of being performed. The dismissal of the Suit or the rejection of the application for interim relief under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) has the effect of referring the parties to arbitration. By sagaciously not making a

statement under Section 8 of the A&C Act, the Defendant has achieved indirectly what he could not have achieved directly, namely, making it inevitable for the Plaintiff to join arbitral proceedings without any consideration or adjudication of its plea that no arbitration agreement exists between the parties. It is for this reason that it seems to us essential that the Court should have proceeded under Section 8 or Section 45 of the A&C Act, as the case may be and with a view to return a finding on the existence of an arbitration agreement between the parties. If the *prima facie* finding is in favour of the existence of an arbitration agreement, the Court would rightly leave it to the Arbitral Tribunal to go into and determine the details and the minute objections raised by the Plaintiff. The Court ought not to skirt this issue, as it would tantamount to running counter to the decisions of the Supreme Court in ***Kvaerner***, ***SBP*** and ***Sukanya***.

14. We would also like to clarify that the provisions of Section 34 and Section 41 of the Specific Relief Act, 1963 may not apply so far as the prayers of Declaration or Injunction are concerned. We say this for the reason that both these reliefs are actively and specifically contemplated in the A&C Act itself in terms of Section 8 and Section 45 thereof. The proposition that Section 5 of the A&C Act bars the jurisdiction of civil courts may be too

widely stated, especially on a consideration of Section 8 of the A&C Act for the reason that an arbitration agreement may perforce be nullified or given a goby and abandoned consequent on the failure of the Defendant to bring its existence to the notice of the Court. This important feature is often lost sight of.

15. What course is to be chartered by us, is the next vexed question. Since the learned Single has not conformed to the compulsions of Section 8 and Section 45 of the A&C Act and has dismissed the applications under Order XXXIX Rules 1 and 2 of the CPC on the premise that the jurisdiction of a civil court is barred under Section 5 of the A&C Act, should the matter be remanded for returning at least a *prima facie* finding as to the existence of an arbitration agreement between the parties. In ***SBP*** as well as ***Bharti*** , the expenses that would inevitably have to be incurred in an arbitration where the venue was outside India weighed heavily in the mind of the Court leading Justice Sabharwal (as the learned Chief Justice of India then was) in ***Shin-Etsu*** (minority opinion) to conclude that in such matters a final conclusion as to the maintainability of arbitral proceedings ought to be returned. We must always be mindful of the maxim *ubi jus ibi remedium*. The maxim can be appeased, it seems to us, by the consideration that the Plaintiff could avail his remedy by canvassing pertaining to the non existence of an arbitration

clause before the Arbitral Tribunal itself. However, in an international arbitration where the venue is outside India and costs are indeed prohibitive, it is our opinion, predicated on pronouncements of the Supreme Court, that the responsibility to return at least a *prima facie* finding on the existence of an arbitration agreement and is operative and capable of being performed, cannot be diverted by the Court to the Arbitral Tribunal.

16. In *Abdul Gafur –vs- State of Uttarakhand*, (2008) 10 SCC 97, their Lordships have recently clarified that there is always a presumption in favour of the jurisdiction of the civil court. Unfortunately, the A&C Act does not provide a remedy to a person claiming the non-existence of an arbitration agreement except by submitting to the jurisdiction of the Arbitral Tribunal under Section 16. In the event that the Arbitral Tribunal does not return a determination negating its own jurisdiction the statutory remedy is only by way of Objections under Section 34 of the A&C Act. Yet, paradoxically, the Act mandates this adjudication under Section 8 and Section 45 of the A&C Act as well as under Section 11(6) thereof. It appears to us wholly incongruous that when such a curial investigation is invited by the filing of a civil suit, it should be rendered nugatory by simply holding that a civil court has no jurisdiction. The matter has

been discussed at great length and all its complexities have been laid bare before us. We, therefore, think it vexatious and idle to remand the matter back to the Single Bench for returning a specific finding as to the existence of an efficacious arbitration agreement as well as the parties bound by it. A situation, similar to the one at hand, had arisen in ***Pampa Hotels*** as well as ***Monnet Finance***.

17. The impugned Judgment proceeds on the basis that a civil suit seeks a declaration to the effect that the Plaintiff does not have to submit to the jurisdiction of an arbitral tribunal. Accordingly, it does not even question or consider whether an arbitration agreement subsists between the parties. A Written Statement has not been filed and instead, the Defendant/Respondent had verbally pressed for the dismissal of the suit as not maintainable. The uncontroverted position is that the Appellant/Plaintiff is personally not a party to the arbitration agreement, albeit he has signed on behalf of the Company in the capacity of its Managing Director. ***Monnet Finance*** and ***Pampa Hotels*** irresistibly and immediately comes to mind. The Plaintiff/Appellant does not expostulate that the Company of which he is the Managing Director is not privy to the arbitration agreements. Indeed, the Company has already submitted to the arbitration of the American Arbitration Association (AAA). The

Plaintiff's postulation is that he has wrongly, illegally and mischievously sought to have been made *privy* to those proceedings. It is at least latent that the reason for this would be to transform the limited liability of the Company into unfettered and unrestricted boundaries. The claimant can indeed press all the reliefs available against the Plaintiff in his status as a guarantor. But the Plaintiff cannot be forced into the arbitration, for the simple reason that he did not agree to be personally bound by the Arbitration Clause. In the backdrop of his refusal to participate in the arbitration conducted by AAA in New York, the claimant could have resorted to Section 11 of the A&C Act, and in that event the Court would have been obliged to pronounce on this point. A perusal of Section 45 of the A&C Act makes it palpably clear that the Court must refer the parties to the arbitration if it finds that an efficacious, operative and performable agreement for arbitration exists. It matters little if this exercise is supplicated for by the party asserting the non-existence of the Arbitration Agreement or, as in the present case, by a Plaintiff praying for a Declaration to like effect. It is fortunate that the Judge has, whether exercising jurisdiction as a civil judge or under the A&C Act, power to return the requisite finding. Since we are of the unequivocal opinion that an Arbitration Agreement did not come about *vis-a-vis* the

Petitioner, we must accept the Appeal and in exercise of powers under Section 45 of the A&C Act restrain Realogy Corporation, Respondent No.1, from preferring or prosecuting any claim against the Plaintiff/Appellant in proceedings under the aegis of the American Arbitration Association.

RFA(OS) No.112/2010 & CM No.20283/2010

18. By the impugned Order, the learned Single Judge has *suo moto* invoked the provisions of Order VII Rule 11 of the CPC. Thereafter, he has not considered it necessary to go into the question of whether Part-I or Part-II of the A&C Act would apply since he found Section 45 of the A&C Act to be directly attracted and efficacious. In his opinion, the Defendants had already effectively invoked the Arbitration Clause. Accordingly, the learned Single Judge has vacated the interim Orders, leaving the parties to first submit to Conciliation proceedings in terms of Clause 17.1 of the Shareholders' Agreement. In Realogy Corporation [FAO(OS) No.268/2011], the Suit has not been dismissed and only the application under Order XXXIX came to be rejected. Perhaps for that reason, since the dismissal of an application under Order XXXIX of the CPC is unquestionably and uncontrovertibly appealable, an objection on the maintainability of the Appeal had not been raised by the Respondent. It has, however, been vociferously argued in the

present case by Mr. N.K. Kaul, learned Senior Counsel for the Respondent that the Appeal is not permitted by law. The argument is that the learned Single Judge, having specifically predicated the impugned Order on Section 45 of the A&C Act, and having adjured the parties to comply with further steps postulated in the Arbitration Agreement, an Appeal under Section 50 of the A&C Act is not available. Reliance has been placed on ***Shin Etsu***, ***Usha*** *Drager Pvt. Ltd. –vs- Dragerwerk AG*, 170(2010) DLT 628 and ***Mukesh Sharma*** where our learned Brother, Manmohan Singh, J., speaking for the Division Bench, had remained steadfast to his analysis of the law in ***Usha.*** Support has also been drawn from *Shivnath Rai Harnarain India Co. –vs- Glencore Grain Rotterdam*, AIR 2010 Delhi 31 wherein one of us (Sen, J.), speaking for the Division Bench, had held that Letters Patent are not available. Finally and insurmountably, reference is made to ***Fuerst*** *Day Lawson Ltd. –vs- Jindal Exports Ltd.*, MANU/SC/0761/2011 wherein the Hon'ble Supreme Court has set all controversies at rest by holding that Letters Patent cannot be invoked to sustain an Appeal assailing order falling in the realm of arbitration unless this right is specifically bestowed. The entire Judgment in ***Fuerst*** requires to be read carefully. We, however, shall only mention that Their Lordships had taken note of the fact that,

contrary to Section 37 of the A&C Act, Section 50 of the A&C Act does not contain the words "and from any others". Despite this departure in Section 50 of the A&C Act, ***Fuerst*** nevertheless holds that Letters Patent will not be available.

19. The contention in support of the maintainability of the Appeal is that wherever a decision proceeds on Order VII Rule 11 of the CPC, an appeal will be maintainable under Section 96 read with Order XLI Rule 1 of the CPC. This is also the contention raised in RFA(OS) No.59/2010 and FAO(OS) No.698/2010. This is because Section 2 of the CPC ordains that the consequence of allowing an application under Order VII Rule 11 of the CPC is the drawing up of a decree. If this argument is taken on face value, only a Regular First Appeal on which *ad valorem* court fees must be affixed, and certainly not an FAO (First Appeal from Order), may be maintainable. In our opinion, it appears to us that even an RFA is not available. So far as the present Appeal is concerned, the learned Single Judge has ubiquitously referred to Order VII Rule 11 as well as Section 45 of the A&C Act. The decision, however, is found predicated particularly and squarely on Section 45 of the A&C Act which reposes responsibility on the Court confronted with an international commercial arbitration to refer the parties to arbitration unless it finds that the said agreement is null and

void, inoperative or incapable of being performed. After due cogitation, the learned Single Judge has not found cause or reason to refuse to refer the parties to arbitration; instead, he has directed them to first resort to Conciliation in terms of Arbitration Agreement. The provisions of Section 50 of the A&C Act state that an appeal shall lie from an Order refusing to refer the parties to arbitration. A holistic reading of the impugned Order will make it apparent that it is not predicated on the CPC but rather essentially on the provisions of the A&C Act. In *Union of India –vs- Chadha Engineering Works*, MANU/DE/3552/2010, a Division Bench has opined, in substantially similar circumstances, that "since the suit was filed under the provisions of Arbitration Act, 1940, the same would govern the lis and a dismissal of the suit under Order VII Rule 11 of the Code of Civil Procedure will not obviate the bar of Section 39 which allows only those appeals emanating from the particular orders enumerated therein". Coincidentally, Mr. A.S. Chandhiok, the learned Additional Solicitor General, had argued that case also. The verdict has not been challenged before the Hon'ble Supreme Court till date. In the present Appeal, even in the face of submission made by Dr. A.M. Singhvi, learned Senior Counsel for the Appellant, we remain steadfast in our opinion that regardless of any reference to Order VII Rule 11, the

present Appeal is not maintainable since the Order avowedly is one passed under Section 45 of the A&C Act. We think it is inconsequential and irrelevant whether it is the Defendant or the Plaintiff who draws the attention of the Court to Section 45 of the A&C Act. So far as the present case is concerned, one of the prayers in the Plaint is for a Declaration that the subject Arbitration Clause is uncertain, null and void, inoperative and incapable of being enforced, words which are remarkably reminiscent and redolent of Section 45 of the A&C Act. If the Suit were to continue, an Issue would have to be struck on this aspect, which would stand comprehensively and completely covered by Section 45 of the A&C Act. Therefore, it cannot be gainsaid that the investigation and determination by the Court, so far as this aspect is concerned, is not fully comprehended and consumed by Section 45 of the A&C Act. As we have already observed above, the Plaintiff, therefore, must be held to have invoked Section 45 of the A&C Act by filing the plaint, and the Court is immediately duty-bound to return a finding thereon. It has done so, and has referred the parties to pursue channels of remedy envisaged in the Arbitration Agreement. An Appeal is, therefore, not maintainable. We must, however, clarify that in terms of ***SBP*** and ***Shin-Etsu***, this is only a *prima facie* opinion on the jurisdiction of the Arbitral Tribunal which is always

subject to the detailed discussion and verdict of the Arbitral Tribunal.

20. The Appeal is dismissed. CM No.20283/2010 is also dismissed.

RFA(OS) No.59/2010 & CM No.11380/2010 and FAO(OS) No.698/2010 & CM No.22313/2010

21. The Defendant being the Respondent in these Appeals had filed an application under Order VII Rule 11 of the CPC for rejection of the Plaint. He has drawn support from ***Kvaener*** and ***Roshan Lal***. The finding of the learned Single Judge is contained in Paragraph 46 of the impugned Order dated 4.6.2010 which is to the effect that "I do not prima facie find that the impugned clause is null and void or inoperative or incapable of being performed due to the reason that the plaintiff itself has relied upon this clause and has taken advantage of it". Facially, the learned Single Judge has proceeded under Section 45 of the A&C Act as the use of the words employed cannot justifiably be perceived as coincidental, unintentional or serendipitous. The next paragraph, however, is palpably irreconcilable to the gravamen of the Judgment. It led to the filing of a Review in which the learned Single Judge clarified that the word 'not' should have been typed into the said paragraph between the words "parties by agreement have …… expressly and impliedly". The clarificatory Order dated

30.11.2010 has led to the filing of FAOA(OS) No.698/2010. We think it unnecessary to go into the dialectics preferred by the learned Single Judge. What is of significance and substance is that the learned Single Judge has returned the finding that "it is evident that the parties by agreement have not expressly and impliedly excluded the provisions of the Arbitration Act, 1996. This suit is not maintainable". Earlier, he had expressed the opinion that the Arbitration clause was not null and void or inoperative or incapable of being performed, which phraseology is in sync with Section 45 of the A&C Act. We are in complete agreement with the learned Single Judge that the parties have agreed to resolve or adjudicate their disputes through arbitration. The learned Judge has correctly rejected the Plaint so as to compel the Plaintiff to raise its Claims before the Arbitral Tribunal. We again hasten to clarify that without referring the parties to the Arbitral Tribunal or the Conciliator, as the case may be, the learned Single Judge has only proceeded on a *prima facie* view. All questions can be raised before the Arbitral Tribunal which will have to answer them definitively. In particular, the Appellant will be fully entitled to argue that inasmuch as the Arbitration Clause refers to 'International Law', it may be vague and thus incapable of being performed. A plausible explanation has, however, been

proffered by Mr. Sandeep Sethi, learned Senior Counsel for the Respondent by drawing our attention to the factual position obtaining in Singapore. Mr. Sethi has argued that unlike in India, there is an International Arbitration Act concerning international commercial arbitrations as well as an Arbitration Act dealing only with domestic arbitration. According to him, the reference to International Law is quite obviously to the International Arbitration Act. This question will also have to be unequivocally ruled upon by the Arbitral Tribunal, if the Appellant/Plaintiff chooses to agitate in that forum also.

22. The Appeals are dismissed. CM Nos.11380/2010 and 22313/2010 are also dismissed.

RFA(OS) No.43/2009

23. The Appellant/Plaintiff had filed a Suit seeking the following Reliefs:-

> a) issue a permanent injunction restraining defendant No.1 from encashing the bank guarantee dated 22.9.2004 issued by defendant No.4;
>
> b) issue a permanent injunction restraining defendant No.4 from paying out any monies under the Bank Guarantee dated 22.9.2004;
>
> c) issue a mandatory injunction directing defendant No.1 to return the Bank Guarantee dated 22.9.2004 to the plaintiff;
>
> d) issue a mandatory injunction directing defendant No.2 to submit a bank guarantee of 1% of the

contractual amount in terms of the tender dated 20.6.2004 and the Joint Deed of Undertaking dated 18.8.2004;

or in the alternative

issue a mandatory injunction directing defendant Nos.2 and 3 to secure the defendant No.1/plaintiff for the bid security being the bank guarantee amount issued by defendant No.4;

e) issue a mandatory injunction directing defendant No.1 to permit it, in place of defendant No.2, to furnish the bank guarantee of 1% and to perform the obligations under the tender along with defendant No.5;

f) declare that Clause 32.4 of the ITB as invalid and liable to be struck down;

g) award costs;

h) pass such other further order(s) as may be deemed fit and proper in the facts and circumstances of the case.

24. Defendant No.1, NTPC, thereupon filed an application under Section 8 of the A&C Act drawing the attention to the existence of an Arbitration Clause between Plaintiff and NTPC.

25. Defendant No.2, Alstom resorted to Section 45 of the A&C Act which, in effect, could have the same consequence, putting a halt to the civil proceedings by directing the concerned parties to submit to arbitration as per the Arbitration Clause in their respective contract. We may mention that there were other defendants in the arena of parties with whom avowedly there was no Arbitration Clause. We advert to this fact for the reason

that the Appellant had unsuccessfully relied on the decision of the Supreme Court in ***Sukanya*** to contend that a partial reference was impermissible in law. The learned Single Judge, in our view, has rightly concluded that the impleadment of other parties was malafide. Order I and II of the CPC refers to misjoinder of causes of action as well as misjoinder of parties and contains an explanation that courts would react to misjoinder, especially where it may lead to a miscarriage of justice or a complication so far as Trial is concerned. These principles impel us to affirm the conclusion of the learned Single Judge in this regard. It is in these circumstances that the learned Single Judge has rejected the Plaint. This is obviously because by virtue of Section 8 of the A&C Act, the Court was duty-bound to refer the parties to arbitration. To like effect, since a commercial arbitration had uncontrovertibly been entered into between the Plaintiff and Defendant No.1 (domestic commercial arbitration) and Defendant No.2 (international commercial arbitration, the venue of which is Paris), the Suit could not be proceeded with. *Swenska Handels Banken –vs- Indian Charge Chrome Limited*, 1994(2) SCC 155 has not been discussed hereinabove. Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, which was incorporated in law because of treaty obligations in connection

with The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (The New York Convention), came to be reflected upon. The following paragraphs from the celebrated Judgment, where Their Lordships had emphasized on the duty of the Court to refer the parties to arbitration, are reproduced below:-

> 40. The only ground given by the High Court for refusing the stay of the suit against defendants 1 to 3 is as mentioned earlier. The High Court has also pointed out that since the plaint does not make severable allegations against different defendants who are parties to different contracts, with different arbitration agreements and the allegations made by the plaintiff against different defendants are such that they cannot be separated from each other and since the arbitrations between the plaintiff and different defendants may have to go to different arbitrators, all the arbitration clauses must be treated as having become inoperative. It has further been observed by the High Court that if all the agreements containing arbitration clauses with different defendants had envisaged only one arbitrator for adjudicating all the disputes, the fact that there were several agreements with the different defendants would not have affected the matter and the award given by the common arbitrators could have bound all the parties in the suit.
>
> 41. It appears to us that the aforesaid reasoning of the High Court is strained and totally erroneous. It also

amounts to disregarding the mandatory provision of Section 3 of the Foreign Awards Act.

42. For purposes of the present case we are, for the present, considering merely the applications for stay of the suit filed on behalf of the lenders. It is clear from their applications that all the conditions envisaged for the applicability of Section 3 of the Foreign Awards Act are fully complied with.

43. The plaintiff by merely entering into other contracts with different parties cannot prejudice or defeat the rights of the different party under the different contract, particularly when the right of the foreign arbitration has been provided by Parliament as an indefeasible right in which the court, does not have any kind of discretion.

44. The arbitration is contemplated as per Section 3 of the Foreign Awards Act. The plaintiff by filing a plaint cannot make the arbitration clause invalid or inoperative. Therefore, the finding of the High Court that the arbitration agreements have become inoperative and incapable of being performed or invalid is erroneous in law and, therefore, must be set aside.

26. The learned Single Judge has also correctly rejected what was seen as "bogey of unworkability due to separate arbitration clauses embedded in two different agreements". The observations of the Court of Appeal in *Janos Paczy –vs- Haendler & Natermann GmbH*, 1981(1) Lloyds LR 302 are apposite and justify extraction:

> In my judgment, on the true construction of these words, "incapable of being performed" relates to the arbitration agreement under the consideration. The incapacity of one party to that agreement to implement his obligations under the agreement does not, in my judgment, render the agreement one which is incapable of performance within the section any more than the inability of a purchaser under a contract for purchase of land to find the purchase price when the time comes to complete the sale could be said to render the contract for sale incapable of performance. The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it…

27. The duty of the Court to refer the parties to arbitration under Section 45 of the A&C Act was again emphasized by the Hon'ble Supreme Court in CA 7055/1996 titled **M/s. AEG Aktiengesellschaft –vs- Insotex (India) Ltd.**, decided on 10.4.1996. The Order is extracted below as it is not reported:-

> Leave granted.
>
> We have heard learned counsel elaborately on all facets of this litigation. After so we have decided to sum it up in this manner.
>
> Without adverting to the correctness or otherwise of the decision of the High Court, it becomes otherwise plain that it has refused to interfere in the orders of the Company Law Board dated 9th July, 1993 and the

dispute is kept within the domain of the said Board for the disposal. One of the questions which is it supposed to decide is about the title to the share in dispute. While so, the Arbitration and Conciliation Ordinance, 1996 has appeared on the scene effective from January 25, 1996, which Ordinance before its lapse has been re-promulgated. Section 45 thereof enjoins a judicial authority (the Company Law Board being one such judicial authority) when requested by any one of the parties or any person claiming through or under him, where the parties have made an agreement referred to in Section 44, to refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Undisputably, there exists an arbitration agreement between the parties whereby their disputes arising out of the contract would be referable to an arbitrator having his legal seat at Zurich, Switzerland, and to which disputes the substantive law of contract as prevalent in India would apply. The Company Law Board would thus be obliged to proceed in accordance with Section 45 and refer the parties to arbitration, because the agreement is neither null and void, nor inoperative or incapable of being performed. Incapability, of course, has not to be understood as being inconvenienced. When the parties enter into such agreement with open eyes they are presumed to have incurred on themselves the inconveniences inherent in the deal. Thus, only an application by any of the parties is required to be made, which would set the judicial authority to act in the manner provided. The appellant

> before us has given out in unequivocal terms that it hereby makes an oral application before us to refer the parties to arbitration as conceived of in the contract and on our entertainment of such application we get to the view, and accordingly find, that the judicial authority cannot prevaricate in any manner in granting the relief. We thus direct the judicial authority to ministerally draw such reference in accordance with law as its own and in that way the matter be put to an end. Before we do that, we record the statement of learned counsel for the second respondent AEG-NGEF Limited, the Indian company, that it is undertaken on its behalf that whatever be the result of the arbitration regarding the title to the shares, that would be binding and adopted by the said respondent in respect to the transfer or otherwise of the shares.
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> On these terms and directions, the appeal stands disposed of. No costs.

28. Learned Counsel for the Respondent had raised threshold objections on the maintainability of the Appeal. Mr. T.K. Ganju, learned Senior Counsel for the Appellant, has raised contentions similar to those which we have already answered above. We think that in order to avoid prolixity, we should not traverse those arguments again since our conclusion remains that an appeal is not maintainable. Again, we reiterate that in referring the parties either under Section 8 or Section 45 of the A&C Act, a *prima facie* view is expressed by the Court. We have no reason

to believe that if the Plaintiff chooses to resort to alternative dispute resolution mechanism postulated by the Arbitration Clause, so far as NTPC is concerned, the venue would be domestic. As far as Alstom is concerned, it would be international and in consonance with the international compact under the aegis of Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris.

29. This Appeal is also rejected accordingly.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

July 25, 2011