(2013) 08 BOM CK 0112

In the Bombay High Court

Case No : Appeal (L) No. 206 of 2013 in Arbitration Petition No. 1070 of 2011 in Suit No. 2287 of 2011

Mulheim Pipecoatings GmbH. APPELLANT

Vs

Welspun Fintrade Limited and Another RESPONDENT

Date of Decision : 16-08-2013

Acts Referred:

Arbitration Act, 1940 — Section 33
Arbitration and Conciliation Act, 1996 — Section 11, 11(7), 16, 16(1)(a), 16(1)(b)
Companies Act, 1956 — Section 391, 392, 393, 394
Securities Contracts (Regulation) Act, 1956 — Section 16

Citation : (2014) 2 ABR 196 : (2014) 3 ALLMR 838

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Ciccu Mukhopadhya and Ms. Nandini Singh instructed by M/s. Bharucha and Partners, for the Appellant; Virag Tulzapurkar , Mr. Rahul Dwarkadas, Kingshuk Banerjee, Ms. Prachi Dhanani instructed by . M/s. Wadia Ghandy and Co., for the Respondent

Judgement

D.Y. Chandrachud, J.—Admit. The Learned Counsel for the Respondents waive service. On the request of the Learned Counsel appearing for the parties and by consent, the appeal is taken up for hearing and final disposal.

The appeal is from the judgment of a Learned Single Judge which has been rendered on a Petition which was filed by the Appellant u/s 45 of the Arbitration and Conciliation Act, 1996. The Appellant which is a company incorporated in Germany entered into a Share Purchase Agreement (SPA) with the Respondents. By its petition, the Appellant sought a direction u/s 45 for a reference to arbitration in accordance with an arbitration agreement embodied in clause 11.13 of the SPA. The Appellant has in pursuance of the arbitration agreement invoked arbitration by lodging a request for arbitration (RFA) to the International Chamber of Commerce, Paris. The First Respondent instituted a suit in this Court on the Original Side, for seeking a declaration that the SPA had, by mutual agreement between the Appellant and the First Respondent, been terminated/ rescinded, thereby rendering it null and void and that consequently the SPA "is no longer valid, subsisting, binding and/or enforceable". The First Respondent also seeks a declaration that an MOU which was entered into on 17 March 2010 by it with the First Respondent is valid, binding and subsisting, together with consequential reliefs, including an order of restraint preventing the Appellant from alienating the shares held by the Appellant in the Second Respondent which is a joint venture company. The Learned Single Judge has held that by the subsequent MOU between the parties, the earlier SPA is rendered null and void, parties having substituted the former for the latter. Since the SPA was held to be null and void and inoperative, the arbitration clause has in the view of the Learned Single Judge perished with the SPA. The judgment of the Learned Single Judge is called in question in appeal.

Facts:

2. On 10 December 2004, an SPA was entered into between the Appellant described there as a transferee, the First Respondent as transferor and the Second Respondent as a company called WGSRL. A joint venture company by the name of Eupec-Welspun Pipecoatings (India) Limited (EWPL) was promoted inter alia by the Appellant and the First Respondent. EWPL was proposed to be merged with the Second Respondent under and in accordance with the provisions of Sections 391 to 394 of the Companies'' Act, 1956. Pursuant to the merger, the Second Respondent was to issue shares to the shareholders of EWPL, including the Appellant in accordance with an agreed swap ratio. Post merger, the Appellant would hold 77.66 lakh shares of the Second Respondent constituting 5.0777 per cent of the paid up share capital of the Second Respondent. The SPA envisaged that upon the scheme of merger being effective, the First Respondent would transfer to the Appellant 44.69 lakh equity shares of the Second Respondent upon which the holding of the Appellant with the Second Respondent would constitute eight per cent of the paid up share capital, post-merger. Parties envisaged that an application would be made to the High Court of Gujarat under Sections 391 to 394 of the Companies'' Act, 1956.

3. The SPA stipulated that in consideration of a payment of Rs. 22.80 crores by the Appellant, the First Respondent would transfer to the Appellant 44.69 lakh shares of the Second Respondent on a spot delivery basis with a closing date no later than three months from the execution of the SPA or as would be mutually extended by the parties. Clause 5.1(c) of the SPA envisaged conditions precedent to closing; among them being the issuance of equity shares by the Second Respondent to the Appellant in terms of the scheme. Clause 7.2(c) envisaged that on the closing date, a Board meeting of the Second Respondent would be held at which inter alia note would be taken of the transfer of shares by the First Respondent to the Appellant, appropriate resolutions would be passed and the Appellant would be entitled to its nominee being appointed as a director on the Board of the Second Respondent. Clause 7.3 stipulated that the Appellant would

be entitled to appoint one nominee director on the Board until it held at least five per cent of the equity share capital of the Second Respondent.

Pre-emption:

4. Clause 8 of the SPA provided for pre-emption rights and was in the following terms:

8. PRE-EMPTION RIGHTS

8.1 Subject to applicable law, the Parties hereby agree that in the event that the Transferee wishes to sell any of its shares in WGSRL to any third party, the Transferee shall offer the same on the same terms and conditions to the Transferor or any of its associates as may be identified by the Transferor by way of a notice in writing (the "Notice of Offer").

8.2 The Transferor may accept the offer within fifteen (15) days of the Notice of Offer and if the Transferor has accepted the offer, the Transferor and the Transferee shall complete the transaction within fifteen (15) days of such acceptance of the offer subject to compliance with applicable laws. In the event that the Transferor does not accept the offer in accordance with the terms hereof, the Transferee shall have the right to sell the shares (whether in whole or part) to any third party as it may deem fit.

8.3(a) Subject to applicable law, the Parties hereby agree that the price at which the shares are proposed to be transferred by the Transferee in terms of Clause 8.1 above shall be the Market Price.

(b) It is hereby clarified that the Market Price shall mean the highest of the closing prices on the Stock Exchange Mumbai and the National Stock Exchange as on the date on which the Notice of Offer is made by the Transferee to the Transferor (or any of their associates). The valid price of the purchase would be, as on the date of acceptance, the highest closing prices on Stock Exchange Mumbai and National Stock Exchange.

(c) However, if required by law, the Market Price shall be determined as the average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the date of the acceptance of the offer.

(d) If the price as on the date of acceptance is lower than 90% of the Market Price, the Transferee shall have the right to withdraw the Notice of Offer.

8.4 If WGSRL makes any further issue of equity share capital, the Transferee shall have a right, subject to provisions of the law applicable at the time of such further issue, to subscribe to the same in proportion to their shareholding in WGSRL at such time, on the same terms and conditions on which the shares would be offered to the other shareholders of WGSRL.

8.5 Notwithstanding any of the foregoing, the Transferee hereby agrees that it shall not transfer the Sale Shares for a period of two (2) years from the Closing Date.

Essentially, the pre-emption rights envisaged in clause 8 that the Appellant would not transfer the shares sold by the First Respondent to it under the SPA for a period of two years. Thereafter, if the Appellant sought to sell any of its shares in the Second Respondent to a third party, an offer would be made to the First Respondent on the same terms and conditions. The First Respondent had fifteen days either to accept or reject the offer. Clause 8.4 stipulated that if the Second Respondent made a further issue of equity share capital, the Appellant would be entitled to subscribe to it in the same proportion as its shareholding in the Second Respondent.

5. Clause 11.1 of the SPA provided that the governing law of the agreement would be Indian law. Clause 11.11 stipulated as follows:

11.11 Variation: No variation of this Agreement shall be valid unless it is in writing and signed by or on behalf of each of the Parties to this Agreement.

Under Clause 11.12, the First Respondent agreed to execute such documents and to complete such acts as the Appellant or the Second Respondent may require to give the Appellant the full benefit of all the provisions of the agreement. An arbitration agreement was agreed upon by the parties in Clause 11.13 of the SPA in the following terms:

11.13 Dispute Resolution: The Parties shall try and amicably resolve all claims, disputes, questions or controversies or claims arising out of or in connection with this Agreement, or the execution, interpretation, validity, performance, breach or termination hereof. All disputes arising out of or in connection with the present Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by one arbitrator appointed in accordance with the said Rules. The Arbitration shall take place in Dubai. The language of the Arbitration shall be English.

6. There is no dispute about the factual position that the scheme of amalgamation of EWPL with the Second Respondent was sanctioned by the Gujarat High Court. It was in pursuance of the scheme that the Appellant and the Respondents entered into an SPA. Pursuant to the issue of shares of the Second Respondent to the Appellant under the scheme and upon the acquisition of shares by the Appellant from the First Respondent under the SPA, the Appellant came to hold 1.22 crore shares of the Second Respondent constituting approximately eight per cent of the equity capital. Subsequently, the Second Respondent, in keeping with the terms of the scheme, reduced its share capital upon which the holding of the Appellant in the Second Respondent stood reduced to 85.65 lakh shares constituting eight per cent of the reduced share capital of the Second Respondent.

7. On 6 October 2009, the Appellant issued a notice to the First Respondent in

accordance with Clause 8 of the SPA stating that it intended to sell all its shares in the Second Respondent at the market price as defined in the SPA and called upon the First Respondent to exercise its option to purchase the shares within fifteen days in accordance with Clause 8.2. On 21 October 2009, the First Respondent informed the Appellant that the notice of offer was not in accordance with and did not meet the requirements of the SPA and was not a valid notice. Correspondence was exchanged between the parties during the course of which the First Respondent by an e-mail dated 27 October 2009 stated that it was not obliged to explain the reasons for stating that the notice of offer was not in accordance with the terms of the SPA. Moreover, according to the First Respondent, the Appellant had not disclosed the terms and conditions which a third party had offered to the Appellant for the purchase of the shares. The Appellant on 5 November 2009, issued a notice of offer. In response, the First Respondent by its letter dated 20 November 2009 invoked the arbitration agreement contained in Clause 11.13 of the SPA and proposed the nomination of a sole arbitrator to conduct the arbitration under the Rules of Arbitration of the International Chamber of Commerce.

8. The First Respondent moved an application u/s 9 of the Arbitration and Conciliation Act, 1996. On 21 November 2009, an ex-parte order was passed by Mr. Justice Anoop V. Mohta restraining the Appellant from transferring its shares in the Second Respondent.

The MOU:

9. An MOU was entered into between the parties on 17 March 2010.

The MOU is to the following effect:

The Memorandum of Understanding entered into at Mumbai on 17 March 2010 between

Welspun Fintrade Ltd. (formerly known as Welspun Trading Ltd.). (WTL)

and

Mulheim Pipecoatings GmbH ("MPC)

Whereas

1. MPC is holding 85,65,523 equity shares of Welspun-Gujrat Stahl Rohren Limited ("WGSRL")

2. WTL and MPC had entered into Share Purchase Agreement on 10-12-2004 ("SPA")

3. MPC had offered to sell 85,65, 523 equity shares of Welspun-Gujarat Stahl Rohren Limited to WTL.

4. Dispute has arisen in respect of the matter relating to offer to sell the above equity shares by MPC to WTL and WTL invoked arbitration and filed a petition in

the High Court of Mumbai.

5. High Court has granted an injunction on sale of Shares.

Now both the parties has reached to settlement on following terms and conditions

1. In terms of the settlement, out of the 8,565,523 equity shares WTL shall purchase from MPC 5,000,000 equity shares of Welspun-Gujarat Stahl Rohren Limited at a price of Rs. 207/- per equity share from MPC. The sale and transfer of the shares as well as payment of sale proceeds shall be completed by 10 April 2010. Income Tax on the aforesaid sale transaction shall be borne by MPC.

2. MPC may sell the balance 35,65,523 shares in monthly installment of 100,000 equity shares over a period of 3 or more years.

3. Upon signing of this MoU, the Share Purchase Agreement dated 10 December 2004 shall stand null and void and the petition filed by WTL in High Court, Mumbai shall be withdrawn by WTL. WTL shall also withdraw notice of Arbitration sent by WTL.

In witness whereof, the parties hereto have signed this Memorandum of Understanding, on the date first hereinabove written.

10. The terms of the MOU will fall for consideration during the course of the judgment. At this stage, it needs to be noted that the MOU contemplated that out of 85.65 lakh shares of the Second Respondent held by the Appellant, the First Respondent will purchase 50 lakh equity shares at a price of Rs. 207 per share, the sale and transfer of the shares being required to be completed by 10 April 2010. The Appellant was allowed to sell the balance of 35.65 lakh shares over a period of three years or more in monthly instalments each of one lakh equity shares. Clause (3) is the condition upon which the controversy substantially turns and would be elaborately dealt with subsequently.

11. After the execution of the MOU, an e-mail was addressed by the Advocate of the First Respondent on 7 April 2010 forwarding a draft Share Purchase Agreement for the proposed sale of the shares of the Second Respondent. On 7 April 2010, another e-mail was addressed to the Appellant seeking an extension of a further period of one month beyond 10 April 2010 for the completion of the transaction. The Appellant agreed to the extension of one month. In the meantime, by a communication dated 18 March 2010, the Appellant called upon the First Respondent to withdraw the Arbitration Petition instituted before this Court u/s 9 and the notice of invocation of arbitration that was issued by the First Respondent. The Arbitration Petition was withdrawn before the Learned Single Judge on 22 March 2010 together with the notice of the First Respondent dated 20 November 2009 invoking arbitration.

12. Disputes and differences arose between the parties pertaining inter alia to the tax liabilities arising out of the transfer of 50 lakh equity shares of the Appellant to the First Respondent as was envisaged in the MOU. On 2 December

2010, the Securities and Exchange Board of India (SEBI) in pursuance of an ongoing investigation, issued an order of restraint on the sale of the shares of the Second Respondent. The Appellant moved a Request For Arbitration (RFA) before the International Chamber of Commerce on 25 May 2011, seeking inter alia:

(i) A declaration that the Appellant had complied with its obligations under the SPA in relation to the sale of its shares in the Second Respondent and was at liberty to sell its shares to any third party;

(ii) A declaration that the Appellant is entitled to damages from the First Respondent occasioned by the refusal by the First Respondent to accept the lawfulness of the notice of offer under Clause 8 of the SPA and due to the actions of the First Respondent in seeking to prevent the Appellant from exercising its right to sell shares in the Second Respondent and damages in addition which resulted from the breach of contract by the First Respondent.

The suit:

13. The First Respondent instituted a suit on the Original Side of this Court, seeking the following reliefs in prayer clauses (a) and (b):

(a) This Hon''ble Court be pleased to declare that the Plaintiff and Defendant No. 1 have by mutual agreement terminated/rescinded and put an end to the Share Purchase Agreement dated December 10, 2004 thereby rendering it null and void and that accordingly the said Share Purchase Agreement is no longer valid, subsisting, binding and/or enforceable;

(b) This Hon''ble Court be pleased to declare that the Memorandum of Understanding dated March 17, 2010 Exhibit H hereto, entered into between the Plaintiff and Defendant No. 1 is a valid, binding and subsisting contract between the parties;

In addition, the First Respondent sought an order of restraint against the Appellant from dealing with or disposing of its shares and from pursuing the arbitration proceedings before the ICC.

The judgment on the Petition u/s 45:

14. The Appellant thereupon moved a Petition u/s 45 of the Arbitration and Conciliation Act, 1996, seeking a reference to arbitration under Clause 11.13 of the SPA. By a judgment and order dated 20 December 2012, the Learned Single Judge rejected the Petition. The Learned Single Judge has held that the parties have substituted the SPA upon the execution of the MOU "in toto by recording fresh terms". In the view of the Learned Single Judge, on the date on which the Petition u/s 45 was instituted, the SPA which contained an arbitration agreement was already null and void and inoperative and the arbitration agreement had perished along with the SPA. The Learned Single Judge held that once the SPA was rendered null and void and inoperative on the execution of the MOU, the

dispute in the suit filed by the First Respondent is incapable of being arbitrated upon by the arbitration agreement under the SPA.

Submissions:

15. Counsel appearing on behalf of the Appellant submits that:

(i) The MOU did not discharge, modify or vary the SPA;

(ii) The arbitration agreement which is embodied in the SPA constitutes a separate and independent agreement by virtue of the provisions of Section 16 of the Arbitration and Conciliation Act, 1996 and Rule 6(4) of the ICC Rules to which the parties have subjected themselves;

(iii) The MOU has, in fact, been entered into between the parties in exercise of the right of pre-emption under Clause 8 of the SPA;

(iv) Under the MOU the parties agreed to a settlement of the disputes which had arisen between them in regard to the exercise of the right of preemption on the terms and conditions stipulated in the MOU;

(v) Clause (3) of the MOU operates to discharge the performance of the obligation under Clause (8) of the SPA in terms of the agreement that was arrived at between the parties in the MOU;

(vi) The settlement between the parties as reflected in the MOU does not bring an end to the arbitration agreement contained in the SPA for the purpose of resolving claims under or in connection with the SPA prior to the date of the termination of the SPA;

(vii) In any event, the MOU which was arrived at between the parties arises out of or in connection with the SPA and the dispute which is sought to be raised before the arbitral tribunal is for the tribunal to decide;

(viii) The MOU is not enforceable in law and hence, the SPA could not have been validly terminated because: (a) The MOU purports to fix the price for a future sale of shares with a listed company which is prohibited by Section 16 of the Securities'' Contract Regulation Act, 1956 read with SEBI''s Notification dated 1 March 2000; (b) The price agreed is contrary to the provisions of Section 3(b) of the Foreign Exchange Management Act, 2000; and (c) The effectiveness of the MOU was contingent on the grant of permissions of the requisite statutory authorities which were not applied for or obtained.

16. On the other hand, it has been urged on behalf of the First Respondent that:

(i) For a reference to be made u/s 45 of the Arbitration and Conciliation Act, 1996, there must be a valid, binding and subsisting agreement of arbitration between the parties;

(ii) u/s 45, the Court has to finally decide whether there is a subsisting arbitration agreement and there is no question of this issue being adjudicated upon in arbitration;

(iii) Though there was an arbitration agreement in the SPA that agreement perished with the SPA by reason of the MOU being executed and the MOU has no arbitration agreement;

(iv) The MOU put an end to the SPA and completely and irrevocably substituted it by separate obligations inconsistent with those of the SPA. The terms of the SPA and MOU are so inconsistent that the two cannot subsist simultaneously and the MOU specifically provides that on its execution, the SPA has become null and void. The rights and obligations between the parties arise out of the MOU alone and not out of the SPA;

(v) Any dispute under the MOU would have to be resolved without recourse to arbitration as the MOU does not contain an arbitration agreement. The subject matter of the SPA is completely different and the arbitration clause cannot cover disputes under the MOU even if the arbitration agreement subsists;

(vi) Whatever remains to be done under the MOU is in the realm of performance and has nothing to do with the formation of the MOU. Performance presupposes the existence of the contract; and

(vii) Assuming that the MOU has not been performed or is incapable of being performed, that does not result in the revival of the SPA once it has been put an end to.

17. The rival submissions now fall for consideration.

Section 45:

18. The Learned Single Judge was called upon to decide an application u/s 45 of the Arbitration and Conciliation Act, 1996. Section 45 is contained in Part II of the Act which deals with the enforcement of certain foreign awards. Chapter I of Part II deals with awards governed by the New York Convention. Sections 44 and 45 provide as follows:

44. Definition. - In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declares to be territories to which the said Convention applies.

45. Power of Judicial authority to refer parties to arbitration. - Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the

parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

19. Section 45 commences with a non-obstante provision. The provision operates notwithstanding anything contained in Part I or in the CPC. The mandate of Section 45 comes into operation when a judicial authority is seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44. The agreement which is referred to in Section 44, is an agreement in writing for arbitration to which the provisions of the New York Convention set forth in the First Schedule apply. When parties have made an agreement of the nature that is referred to in Section 44, a judicial authority which is seized of an action in a matter in respect of which the parties have made an agreement, shall at the request of one of the parties or a person claiming through or under him, refer the parties to arbitration. The mandate to a judicial authority u/s 45, when these conditions have been fulfilled, is to refer parties to arbitration. Section 45, however, carves out an exception where the judicial authority finds that "the said agreement" is null and void, inoperative or incapable of being performed. By and as a result of the exception, the mandate to refer parties to arbitration is lifted when the judicial authority finds that the said agreement is null and void, inoperative or incapable of being performed. The "said agreement" to which Section 45 refers, is the arbitration agreement. The reference to the said agreement in Section 45 is to the agreement referred to in Section 44 which in turn, as clause (a) of Section 44 indicates, is an agreement in writing for arbitration to which the New York Convention applies. The Court to which an application u/s 45 has been made, has to determine as to whether the parties have made an agreement in writing for arbitration to which the New York Convention applies. If they have, the Court has no discretion, but to refer them to arbitration, unless the case falls in the exception which is carved out by the provision. The exception is that the arbitration agreement must be found to be null and void, inoperative or incapable of being performed. Section 45 incorporates the fundamental principle of the separability of the arbitration agreement, as distinct from the underlying contract between the parties of which the agreement to arbitrate is a part.

The doctrine of separability:

20. The doctrine of separability of an arbitration agreement from the underlying contract (of which the former may be a part) has been recognized by our courts even before the Arbitration and Conciliation Act, 1996 came into force. Whenever an arbitration agreement formed part of a contract, it was always held to stand apart from the rest of the contract, being collateral to the substantial stipulations of the contract. It was considered to be merely procedural and ancillary, and as a mode of settling disputes what the Act of 1996 did was to give the doctrine a statutory recognition. Modelled on the UNCITRAl Model Law, the Act of 1996

incorporates the doctrine of the separability of an arbitration agreement from the underlying contract of which the agreement is a part into the statute. Section 16 of the Act of 1996 empowers the arbitral tribunal to rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement. For that purpose: (a) An arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract; and (b) A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

21. The logic of the doctrine of separability is that when parties to a business transaction agree to resolve their disputes by proceedings before an arbitral tribunal, the business understanding which leads them to take that course must be imparted a robust meaning. In making a choice of an arbitral forum over the municipal courts of a jurisdiction, particularly in a transnational contract, parties place their confidence in the efficiency and procedural flexibility of arbitral proceedings. It would indeed be against the common grain of business expectations to assume that despite a binding agreement on arbitration as a preferred form of dispute resolution, parties yet left some disputes over their substantive rights and obligations under the contract to be resolved by the courts of a municipal jurisdiction. Courts will not imply that parties intended such an exclusion absent an unmistakable expression of intent to the contrary. Though an arbitration agreement is part of the main contract, the law regards it as a collateral and independent part of the contract. And for valid reason, quite apart from the need to preserve the business efficacy of commercial dealings. The main contract defines substantive obligations and corresponding rights. An arbitration agreement is an agreement on dispute resolution which is independently capable of specific enforcement. Hence, an arbitration agreement can and does survive a termination, repudiation or frustration of the contract. The law has evolved the doctrine of separability as the basis for enabling parties to arbitrate, independent of the status of their contract. Judges in the common law world - and we in India are no exception - have advanced the doctrine of separability to ensure that the sanctity of arbitration is not destroyed by disingenuous litigants.

22. Prior to its being statutorily recognised in India by the Act of 1996, the separability doctrine was evolved in the course of judicial decisions. Similarly, in the U.K. the doctrine of separability, which was statutorily codified in Section 7 of the Arbitration Act, 1996, had been evolved prior to the enactment of that law by judicial decisions on the subject. For the purposes of this appeal, it would be necessary to trace the evolution of the doctrine of separability in Indian law. The judgment of three learned Judges of the Supreme Court in The Union of India Vs. Kishorilal Gupta and Bros., dealt with the question. In that case, there were three contracts between a contractor and the Union Government and disputes having arisen, three settlement agreements were entered into. The first settlement agreement stipulated that on the payment of a certain amount, the contract would stand finally determined. The second settlement stipulated that no party

would have any further claim. Thereafter, a third settlement was arrived at under which parties envisaged that the contracts would stand finally settled in terms of the settlement and no party would have any claim against the other. Disputes arose between the parties and the Union Government invoked arbitration, following which the contractor made an application u/s 33 of the Act of 1940 which was dismissed by the High Court. An arbitral award was made by the Arbitrator. The issues which fell for consideration before the Supreme Court were: firstly, what was the effect of the third settlement on the earlier contracts and secondly, whether the arbitration clause in the earlier contracts survived after the settlement contract. The Supreme Court cited the judgment of the House of Lords in the U.K. in Heyman vs. Darwine Ltd. (1942) 1 All ER 337.

The judgment in Heyman had held as follows:

An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen ''in respect of'', or ''with regard to'', or ''under'' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland) such an arbitration clause would also confer authority to assess damages for breach even though it does not confer upon the arbitral body express power to do so.

The principles of law which were formulated in the judgment Mr. Justice Subba Rao, speaking for the majority in the Supreme Court are as follows:

The following principles relevant to the present case emerge from the aforesaid discussion:

(1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it;

(2) However, comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract;

(3) The contract may be non est in the sense that it never came legally into existence or it was void ab initio;

(4) Though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder;

(5) In the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and

(6) Between the two fall many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.

A dissenting judgment was delivered by Mr. Justice Sarkar. However, as has been held subsequently, the dissenting judgment was in regard to the consequence of the settlement agreement and not so much with the principles which were laid down in the judgment of the majority delivered by Mr. Justice Subba Rao. In para 30 of the judgment, Mr. Justice Sarkar held as follows:

It seems to me that the respective nature of accord and satisfaction and arbitration clause makes it impossible for the former to destroy the latter. An accord and satisfaction only releases the parties from the obligations under a contract but does not affect the arbitration clause in it, for as Lord Macmillan said, the arbitration clause does not impose on one of the parties an obligation in favour of the other but embodies an agreement that if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by arbitration. A dispute whether the obligations under a contract have been discharged by an accord and satisfaction is no less a dispute regarding the obligations under the contract. Such a dispute has to be settled by arbitration if it is within the scope of arbitration clause and either party wants that to be done. That cannot be unless the arbitration clause survives the accord and satisfaction. If that dispute is not within the arbitration clause, there can of course be no arbitration, but the reason for that would not be that the arbitration clause has ceased to exist but that the dispute is outside its scope. I am not saying that it is for the arbitrator to decide whether the arbitration clause is surviving; that may in many cases have to be decided by the Court. That would depend on the form of the arbitration agreement and on that aspect of the matter it is not necessary to say anything now for the question does not arise.

23. Another judgment of three learned Judges of the Supreme Court was that in Jawahar Lal Burman Vs. Union of India (UOI), Justice P.B. Gajendragadkar (as

the Learned Chief Justice then was) noted the position in law that while an arbitration agreement constitutes a part of the main contract, it is in a sense distinct from it:

It is true that an arbitration agreement included in the contract itself is in one sense an integral part of the contract and in another sense it may be district from it. As observed by Lord Macmillan in Hayman v. Darwins, Ltd. (1942) A.C. 356 : (1942) 1 All ER 337 at p. 347 "the arbitration clause is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement on both the parties that if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that whereas in any ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts". It is also theoretically possible that the arbitration agreement may be void and yet the contract may be valid; and in that sense there is a distinction between the arbitration agreement and the contract of which it forms a part; but, as we have already pointed out in the present case, the challenge to the contract itself involves a challenge to the arbitration agreement; if there is a concluded contract the arbitration agreement is valid. If there is not a concluded contract the arbitration agreement is invalid. In such a case a prayer for a declaration of the existence of the contract and its validity inevitably leads to the consequential prayer about the existence and validity of the arbitration agreement. If that is so, a suit cannot lie for a declaration that the arbitration agreement is valid because the prayers that the respondent has made in the present case fall directly within the clause "on any ground whatsoever". Indeed, we apprehend that in a very large majority of cases where the arbitration agreement is a part of the main contract itself, challenge to the existence or validity of one would mean a challenge to the existence or validity of the other.

24. The earlier decision in Kishorilal Gupta was considered by the Supreme Court in a judgment of two learned Judges in Damodar Valley Corporation Vs. K.K. Kar, The Supreme Court held as follows:

We have adverted to these several aspects merely to show that contracts being consensual, the question whether the arbitration clause survives or perishes would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself. In other words, where the binding nature of the contract is not disputed, but a difference has arisen between the parties thereto as to whether there has been a breach by one side or the other or whether one or both the parties have been discharged from further performance such differences are "upon", "in relation to" or "in connection with" the contract.

That a contract has come to an end by frustration does not put an end to the contract for all purposes, because there may be rights and obligations which had arisen earlier when it had not come to an end, as it is only the future performance of the contract that has come to an end.

The Supreme Court held that in Kishorilal Gupta, Justice Sarkar did not dissent from the propositions enunciated by Justice Subba Rao, but only disagreed with the majority on the effect of the settlement on the arbitration clause. Noting the view of Justice Sarkar, the Supreme Court in Damodar Valley observed that accord and satisfaction which secures a release from an obligation arising out of a contract, is really based on the existence of the contract instead of treating it as non-existent. The contract is not annihilated, but the obligations under it cease to be enforceable. Consequently, it is that when an action is brought for the appropriate remedy for non performance of these obligations that an accord and satisfaction furnishes a good defence. The Supreme Court noted that the defence was not that the contract has come to an end but, that its breach has been satisfied by accord and satisfaction and the Plaintiff in the action is not entitled to the usual remedy for the breach. It was in these circumstances that Justice Sarkar thought that arbitration clause did survive to settle the dispute as to whether there was or was not an accord and satisfaction. On the other hand, in the case at hand, the Supreme Court in Damodar Valley held as follows:

Where, however, as in this case, there was a termination of the contract due to non-performance, the existence of the contract has been assumed for the purposes of such termination. Similarly the question whether there has been a settlement of all the claims arising in connection with the contract also postulates the existence of the contract. The principle laid down by Sarkar, J., in Kishorilal Gupta Bros''s case (supra) that accord and satisfaction does not put an end to the arbitration clause was not dissented to by the majority. On the other hand proposition (6) seems to lend weight to the views of Sarkar, J. In these circumstances, the question whether the termination was valid or not and whether damages are recoverable for such wrongful termination does not affect the arbitration clause, or the right of the respondent to invoke it for appointment of an arbitrator.

25. In National Agricultural Co-op. Marketing Federation India Ltd. Vs. Gains Trading Ltd., the designate of the Learned Chief Justice of India, while exercising the jurisdiction u/s 11 of the Arbitration and Conciliation Act, 1996, considered the question as to whether an arbitration clause comes to an end if the contract containing such an arbitration agreement is abrogated by natural termination. Mr. Justice R.V. Raveendran held as follows; while holding that the arbitration agreement survives:

The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract (Vide Heyman v. Darwins Ltd., 1942 AC 356 : (1942) 1 All ER 337 (HL) The Union of India Vs. Kishorilal Gupta and Bros., and The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath,)

In the judgment of the Supreme Court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., Mr. Justice R.V. Raveendran dealt with the applicability of the principles enunciated in Kishorilal Gupta (supra), after the enactment of the Act of 1996 and held as follows:

The principle stated in para (i) is now given statutory recognition in Section 16(1)(a) of the Act. The principle in para (iii) has to be now read subject to Section 16(1)(b) of the Act. The principles in paras (iv) and (v) are clear and continue to be applicable. The principle stated in para (ii) requires further elucidation with reference to contracts discharged by performance or accord and satisfaction.

The principle that an arbitration clause is a collateral term of the contract as distinguished from its substantive terms has hence statutory recognition in Section 16(1)(a) (principle (i) of Kishorilal). Principle (iii) of Kishorilal is subject to Section 16(1)(b) now, so that even if the contract is void, that does not ipso jure result in the invalidity of the arbitration agreement. Principle (iv) postulates that (i) parties have put an end to the contract as if it never existed; and (ii) they have substituted it with a new contract solely governing their rights and obligations. If the original contract has no legal existence (as in the case of principle (iii)), the arbitration clause will not operate. In the latter case (principle (iv)), the original contract is extinguished by the substituted one, as Kishorilal holds. The judgment of the Supreme Court in Boghara Polyfab holds that when an application is made u/s 11 before the Chief Justice or his designate, the issues which may fall for determination would fall in three categories:

(i) Issues which the Chief Justice or his designate is bound to decide;

(ii) Issues which the Chief Justice or his designate may choose to decide or leave to the decision of the arbitral tribunal; and

(iii) Issues which should be left for the arbitral tribunal to decide.

Whether there is an arbitration agreement and whether the party, who had applied u/s 11, is a party to that agreement, falls in the first category which the Chief Justice or his designate must decide. On the other hand, issues as to whether parties have concluded the contract by recording satisfaction of their mutual rights or obligations or by a receiving the final payment without objection falls in the second category which the Chief Justice may decide. On the other hand, issues as to whether a claim falls within the ambit of an arbitration clause or the merits of the claim must necessarily be decided by the arbitral tribunal. In that context, the Supreme Court has held as follows:

When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be alterable

In a subsequent decision in The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another, the Supreme Court, in a judgment of two learned Judges, has affirmed the principles which have been laid down in the earlier decisions on the subject. In the judgment delivered by Mr. Justice R.M. Lodha, the doctrine of separability, as a concept, has been held to be confirmed by the modern law on arbitration. A similar principle of law has been laid down in a judgment of a learned designate of the Chief Justice of India in Reva Electric Car Company P. Ltd. Vs. Green Mobil, .

26. Where an application is filed before the Court u/s 45, the issue as to whether the arbitration agreement is null and void, inoperative or incapable of being performed has to be decided by the Court. A decision on this cannot be relegated to the arbitral tribunal. This principle has been laid down in the recent judgment of three learned Judges of the Supreme Court in Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, This principle has been enunciated in the following observations:

The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II Chapter I is suggestive of the requirement for the court to determine the ingredients of Section 45, at the threshold itself. It is expected of the court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the court in accordance with law would certainly attain finality and would not be open to question by the Arbitral Tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and reagitating of same issues over and over again. The underlining (sic underlying) principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Section 8 and 45. Further, it may be noted that even the judgment of this Court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application u/s 45 of the 1996 Act.

27. Section 45 requires the Court to focus upon whether the arbitration agreement is null and void, inoperative or incapable of being performed. Parliament has carefully, in selecting the language of the statutory provision, required the Court to apply its mind to the subsistence and validity of the arbitration agreement and not to whether the main contract of which the arbitration agreement is but a collateral part is valid or continues to subsist. This must, with the evolution of the law on the subject, necessarily be so because an arbitration agreement is capable of surviving the invalidation or termination of the main contract between the parties. Undoubtedly, there may be cases where the arbitration agreement may perish with the main contract itself. For instance, where the main contract between the parties is held not to have been executed at all as for instance when a party to the agreement asserts that its signature on the contract is forged, it is but evident that the arbitration agreement would not exist, if the signature of the executant on the contract itself is found to be forged. But even in such a case, the reason why the arbitration agreement perishes is because, in the finding of the Court, the arbitration agreement itself is found not to have been executed by both the parties.

28. The doctrine of separability which now is an established part of Indian law has statutorily been codified in Section 7 of the Arbitration Act of 1996 in the U.K. Section 7 provides that "unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and it shall for that purpose be treated as a distinct agreement". The consequence of the doctrine of separability has been explained in Russell on Arbitration 1 as follows:

Consequences of separability. The doctrine of separability underlines the potential width of an arbitration agreement because it establishes that an arbitration agreement has a separate life from the matrix contract for which it provides the means of resolving disputes. This enables the arbitration agreement to survive breach or termination of the matrix contract of which it forms part. The consequence of this separate existence is that even if the matrix contract has been brought to an end, for example by accepted repudiation or frustration, the arbitration agreement continues in being in order to deal with any disputes in respect of liabilities under the matrix contract arising before or after termination.

Russell on Arbitration restates the position that Section 7 of the Arbitration Act, 1996 in the U.K. enables the arbitration agreement to survive not just the termination or breach of the matrix contract but even if the contract in which it is contained is regarded as invalid, non-existent or ineffective. Moreover, even where the matrix contract is held to be void, the arbitration agreement may still be upheld as a valid and independent agreement so that any dispute must be referred to arbitration.

29. The leading judgment in the U.K. is the decision of the House of Lords in Fili Shipping Co. Ltd. vs. Premium Nafta Products Ltd., 2 Lord Hoffmann lucidly expounded on the normative principle of separability:

The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the partners claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, is a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatsoever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

The Learned Law Lord also held that "the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement."3 The doctrine has been elucidated in the judgment of Lord Hope of Craighead in the following words:

The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do.

30. We now formulate the essential features of the doctrine of separability. These are:

(i) The arbitration agreement constitutes a collateral term in the contract which relates to the resolution of disputes and not to the performance of the contract. Whereas the substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;

(ii) Upon the termination of the main contract, the arbitration agreement does not ipso facto or necessarily come to an end;

(iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself; (iv) If the nature of the controversy is such that the main contract would itself be treated as non est in the sense that it never came into existence or was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder. Even in such a case, since the original contract is extinguished or annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the arbitration clause would operate for those purposes;

(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the existence of the contract is itself brought to an end, the arbitration clause would not survive.

The present case:

31. In the present case, the SPA between the parties contemplated, in the first instance, a transfer of shares by the First Respondent to the Appellant. There is no dispute about the factual position that this part of the contract was duly fulfilled. The transfer of shares by the First Respondent to the Appellant took place. Disputes and differences arose between the parties over the performance

of the remaining obligations. The pre-emption clause, Clause 8, envisaged that in the event that the Appellant sought to transfer its shares after the period of moratorium of two years was over, the Appellant would have to offer the shares to the First Respondent on the same terms and conditions on which it proposed to sell the shares to a third party. The disputes and differences which arose over the performance of the obligation of the Appellant and the pre-emptive right of the First Respondent to purchase, led to the invocation of Section 9 by the First Respondent and an injunctive order of a Learned Single Judge of this Court restraining the Appellant from transferring the shares to a third party. But what is material is that the disputes which arose between the parties were disputes arising out of the performance of the contract and the working out of the rights of preemption. These disputes, as the MOU states, were settled and it is in that context, that the MOU casts certain obligations on the parties. The obligations which the MOU cast were obligations in the performance of the right conferred upon the First Respondent to assert an entitlement of preemption with a corresponding obligation that was cast upon the Appellant. Hence, the MOU, envisaged that the Appellant would sell to the First Respondent and the First Respondent will purchase from the Appellant, 50 lakh equity shares at a stipulated consideration, while the Appellant was at liberty to sell the balance of 35.65 lakh equity shares. The latter was subject to the restriction that the Appellant would do so only in stipulated monthly instalments each of one lakh shares so that entirety of the balance would be sold upon the expiry of a period of three years or more. In other words, what the MOU between the parties has sought to achieve is to provide for the discharge of the remaining obligation under the SPA by an altered or substituted performance. It is in that sense that the SPA is stated by the parties to have been rendered null and void. Clearly, it is not that the SPA was regarded as having never come into existence at all or for the matter of being non est or void at its inception. The SPA evidently was a contract which was duly agreed upon between the parties and which had in so far as the obligation of the First Respondent to transfer the shares to the Appellant was concerned, been fulfilled. What the MOU did was to substitute the obligation to perform the right of pre-emption by a substituted or altered obligation, but that was to be in performance of the obligation which emanated from Clause 8 of the SPA. Hence, though the parties have used the expression that the SPA would be treated as null and void, their language must be imported a business or common sense understanding which meant that the parties envisaged that the obligation in relation to the balance performance under the SPA would stand altered or substituted by the terms of the MOU.

32. Some of the questions which have been raised in the matter are the following:

(i) Whether the alleged variation or rescission of the SPA by the MOU is invalid by reason of non-joinder of the Second Respondent to the MOU having regard to the provisions of Clause 11.11 of the SPA which mandated that any variation and rescission would have to be agreed by all the parties;

(ii) Whether the SPA continues to be operative by reason of the MOU being void u/s 16 of the SCRA or for breach of the RBI circular u/s 3(b) of the FEMA; and

(iii) Whether the MOU was a contingent contract and upon its performance being rendered impossible or illegal, the SPA continues to be enforceable.

33. All these questions pertain to the rights and liabilities which have arisen between the parties to the SPA before the SPA has come to an end. They raise a controversy as to whether those rights and liabilities continue to hold good or are discharged by reason of the MOU. This controversy can in our view only be decided by resorting to the arbitration agreement under the SPA and the arbitration clause is wide enough to cover the same. The expression "all disputes arising out of or in connection with" the agreement are, it is well settled, words of width and amplitude Renusagar Power Co. Ltd. Vs. General Electric Company and Another, .

34. The Learned Single Judge was, in our view, in error in coming to the conclusion that by agreeing to the MOU, parties had given a go by to the SPA "in toto" and that the SPA, on the date of the institution of the proceedings u/s 45, was null and void and inoperative. In holding that the arbitration clause had perished with the SPA in toto, the Learned Single Judge has, with respect, overlooked that u/s 45 what the Court was called upon to decide is not whether the main contract had been discharged, terminated or extinguished but whether the arbitration agreement has been rendered null and void, inoperative or incapable of performance. For that, the ground of challenge must be based on facts which are specific to the arbitration agreement. The arbitration agreement is distinct from the main contract of which it is an independent and separable part. Parties when they arrived at the MOU sought to settle the manner in which the pre-emptive rights under the SPA would be discharged by performance. When by their mutual agreement they purported to resolve the modalities for working out the performance of the clause on pre-emption, that did not render the arbitration agreement null and void, inoperative or incapable of performance.

35. In these circumstances, we allow the appeal and set aside the impugned judgment of the Learned Single Judge dated 20 December 2012. The mandate of Section 45 is clear. The efficacy and sanctity of international commercial arbitration must be preserved. Once the exclusion contained in Section 45 is not attracted, parties must be referred to arbitration. The Arbitration Petition filed by the Appellant is accordingly made absolute in terms of prayer clause (a). Since the arbitral proceedings before the arbitral tribunal constituted by the ICC, Paris are pending, we find no reason to stay the operation of this order.

1 Twenty Third Edition page 33

2 (2007) UKHL 40 On appeal from Fiona Thrust and Holding Corpn and other vs. Privalov and others

3At para 19

