Bench: K Puj

Swiss Singapore Overseas Enterprises Pvt. Ltd. vs M.V. "African Trader" on 7/2/2005

JUDGMENT

1. The applicant -ori. defendant has filed this application seeking three folds reliefs which are as under:

a) Orders under Sec. 44 and 45 of the Arbitration and Conciliation Act, 1996, referring the parties to arbitration in accordance with the Arbitration agreement between the parties which requires and contemplates an arbitration to be held in Durban, South Africa. Simultaneously, ordering the dismissal of the present suit. In the alternative, an Order for stay of all proceedings in the present suit.

b) Orders vacating the Arrest issued by this Court and for release of the security furnished by the Defendant to obtain the release of the Defendant. In the event of this Court not being inclined to order a complete discharge of the full security, then appropriate orders for reduction of the security furnished, by the Defendant, in such amount as this Court deems fit and proper.

c) Orders for sale of the cargo carried on board of the Defendant which is presently lying in the port and harbor of Kandla, with permission the Defendant to receive the full sale proceeds thereof. In the event of this court not being inclined to permit the Defendant to receive the full sale proceeds, such further and other orders as this Court considers fit and proper having regard to the facts set out in this Civil Application.

2. The parties have mainly addressed the court so far as relief (a) is concerned. The court, therefore, confined its order only in respect of relief (a) claimed in the present application.

3. It is the case of the defendant that Swiss Singapore Overseas Enterprises Pte Ltd. (the plaintiff in the suit) were the charterers of the defendant. and chartered them under a Fixture dated 26.3.2004 for the carriage of a consignment of Gabonese Hard Wood from Gabon to two Safe Berths out of Kandla, Tuticorin and Mangalore, India. It is also the case of the defendant that the Fixture note contains and embodied an arbitration clause mandatorily requiring disputes to be referred to arbitration in Durban. According to the defendant, this clause is extremely wide in import and on a plain reading thereof squarely applies to the present suit. The arbitration clause has also been incorporated into the Bills of Lading by reason of the incorporation clause contained on the reverse of the Bills of Lading. It is also the case of the defendant that in view of the provisions contained in sec. 44 and 45 of the Arbitration and Conciliation Act, 1996, this court should refer the parties to the arbitration in Durban and dismiss the present suit with all interim orders including vacation of orders of arrest and/or furnishing the security. Alternatively, the defendant has prayed for the stay against the further proceedings in the suit.

4. The plaintiff has filed the present suit before this court on 23.11.2004 praying for condemnation of the defendant in the sum of Rs. 1,08,04,815/- together with further interest at the rate of 15% per annum . The plaintiff has further prayed for the arrest, condemnation and sale of the defendant vessel mv "AFRICAN TRADER". The plaintiff has further prayed for discharge and handing over of the Cargo amounting to 1,728.762 CBM to the plaintiff at the Port Alang where the vessel was lying at the time when the suit was filed. This Court has passed an order of arrest of the defendant vessel on 24.11.2004. The court has further passed an order to the effect that if the defendant vessel and/or those interested in her, deposit this court a sum of Rs. 1,08,04,815/- together with interest at the rate of 15% per annum from the date of filing of the suit till paymwent/realisation to the satisfaction of the Registrar of this Court as security towards the satisfaction of the plaintiff's claim in the suit and a sum of Rs. 25,000/towards the cost of the suit, the said warrant of arrest shall not be executed against the defendant. Accordingly, on 9.12.2004, further order was passed by this court recording the fact that the defendant has submitted a demand draft drawn on Standard Chartered Bank bearing No. 401533 dated 8.12.2004 for Rs. 1,08,29815/ in favour of the Registrar of this Court. Since the amount of

security furnished by the defendant, the defendant vessel was ordered to be released.

5. The defendant has further stated that the defendant has filed affidavit of one Mr. Jose John on 9.12.2004, wherein a contention was raised that in view of Fixture Note dated 26.3.2004 this court has no jurisdiction to decide the case upon its merits and that by agreement of the parties, any dispute arising within the fixture note ought to be referred to the Arbitration with venue at Durban, South Africa and English law alone to apply. It was also stated in the affidavit that without prejudice to this contention and under protest, the defendant has deposited the sum of Rs. 1,08,29,815/as security for release of the vessel.

6. The plaintiff has thereafter taken out Chamber Summons being OJ CA No. 19/2005 on 13.1.2005 praying for the direction to the defendant to issue Delivery Order in favour of the plaintiff and offer full co operation and assistance, so that the plaintiff can transship the cargo to the Port of Chennai or such other post, as it may desire. This Chamber Summons was posted for hearing on 17.1.2005. Mr. MV Chokshy ld. advocate originally appearing for the defendant has asked for time to get the instructions and matter was adjourned to 24.1.2005. On 24.1.2005 Mr. AS Vakil ld. advocate has submitted that he has instructions to appear in the matter in place of Mr. MV Chokshy for defendant and prayed for time to get the instructions in the matter. It was, therefore, adjourned to 27.1.2005. On 29.1.2005, it was stated by Mr. AS Vakil ld. advocate for the defendant that the defendant has moved an application for referring the matter to the Arbitrator and, accordingly, the office is directed to place both these matters for hearing on 28.1.2005. It is this application being OJCA No. 23/2005 which is filed by the defendant for referring the matter to the Arbitrator.

7. The application moved by the defendant for referring the matter to the Arbitrator was opposed by the plaintiff and interim reply to this application was filed on 29.1.2005. The application was opposed on the ground that it suffers from vice of delay, latches, acquiesces and estoppel. It is further opposed on the ground that the phrase "Durban Arbitration and English Law to apply" in the Fixture Note is no arbitration agreement at all. The ouster of the civil courts jurisdiction must be clear and unambiguous. Merely stating "Durban Arbitration" without anything further, is vague and not capable of enforcement. It is also opposed on the ground that the subject Bill of Lading in any case do not refer to the fixture Note at all and do not contend any clause regarding arbitration. It is, therefore, contended that in absence of any arbitration agreement the present application is misconceived and untenable at law.

8. The application was further opposed on the ground that it does not meet with the requirements of the provisions contained in Arbitration and Conciliation Act, 1996. The defendant has not annexed the original of the so called arbitration agreement or a duly certified copy thereof. The application was further opposed on the ground that this court has exercised its jurisdiction in an action in rem, upon the MV African Trader, the wrong doing vessel, coming within its admiralty jurisdiction. The purported arbitration clause allegedly contained in the Fixture Note cannot apply to an action in rem or operate to oust the constitutional jurisdiction of territorial High Court under its Admiralty jurisdiction.

9. The application was also opposed on the ground that neither sec. 44 nor sec. 45 of the Arbitration and Conciliation Act, 1996 would apply to the present proceedings. The award which may be passed under the purported agreement would not be enforceable in India and hence, Part-II of the Act would have no application. It was further opposed that even if it is assumed that there was an arbitration agreement and Part-II of the Act is applicable to this agreement, even then, the purported agreement is in any case null and void, inoperative and incapable of being performed.

10. The defendant has filed an affidavit in rejoinder on 31.1.2005 to the interim reply filed by the plaintiff. While dealing with the contentions raised in the affidavit of interim reply, the defendant has stated that there is absolutely clear, complete and binding arbitration agreement between the parties and there is nothing uncertain or ambiguous about the Fixture Note. The clause clearly manifests the intention of the parties, namely; (a) the machinery for adjudication of disputes would be arbitration; and (b) the arbitration would be in Durban [a prominent city in South Africa]. The reference to the Bill of Lading is totally non-issue. The

parties are not required to look at the Bill of Lading at all as the Fixture Note which is admittedly signed by both the parties itself contains the arbitration clause. The arbitration clause is therefore clear and capable of enforcement. With regard to exercise of court's jurisdiction in rem, the defendant has stated that the contention in this regard is nothing but an attempt to confuse a clear factual and legal position. The suit is an action in personam against the defendant-owner. All the requirements of sec. 45 are duly complied with. The mere fact that any award that may be passed may not be enforceable in India, is completely irrelevant and not a consideration whilst considering an application under Sec. 45 of the Act. It is further stated that any award that may be passed in Durban, South Africa, can straight away be executed against the defendant in India either by filing a suit thereon and obtaining a judgment thereon in South Africa or by enforcing the judgment in India. The defendant also objected to the contentions raised by the plaintiff that the defendant has surrendered to the jurisdiction of this court by furnishing the security. It is stated that the objection to jurisdiction and assertion that the matter ought to be referred to the Arbitration at Durban, Sought Africa, was taken at the time when security was furnished and furnishing of security was made "without prejudice" and "under protest".

11. Affidavit-in-sur-Rejoinder was filed by the plaintiff on 2.2.2005 disputing the facts stated and averments made as well as contentions raised in the Affidavit-in-Rejoinder.

12. Since the pleadings of the parties, so far as this application is concerned, are over and complete, the application was taken up for hearing.

13. Heard Mr. SN Soparkar ld. Sr. Counsel for Mr. AS Vakil ld. advocate for the defendant and Mr. Mihir Joshi ld. Sr. Counsel with Mr. Bijal Chhatrapati of Singhi & Co., for the plaintiff.

14. Mr. Soparkar has submitted that in view of the following two clauses contained in Fixture Note, this court has no jurisdiction to entertain the Admiralty Suit filed by the plaintiff and the same will have to be referred to the Arbitration at Durban as per Gencon charter Party and Durban and English Law to apply. By referring to Gencon Charter Party Revised, 1994, parties have agreed to abide by the terms and conditions of Gencon Charter Party. Clause-19 of Gencon Charter Party refers to Law and Arbitration. Special clause-(a) of Clause-19 states that this Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final. For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25 the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association. Clause (c) thereof states that any dispute arising out of this charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party. Clause(d) thereof, states that if Box 25 in Part-I is not filled in, sub-clause (a) of this Clause shall apply. It is also made clear that where no figure is supplied in Box 25 in Part-I, this provision only shall be void but the other provisions of this Clause shall have full force and remain in effect. Based on these two clauses in the Fixture Note as well as clause - 19 of Gencon charter Party Revised 1994, Mr. Soparkar has submitted that there is no ambiguity or vagueness in the arbitration clause. He has further submitted that said clause contained in the Fixture Note are sufficient to bring the case within the purview of the Act.

15. Mr. Soparkar has further submitted that mere reference of arbitration in the Fixture Note is enough and other terms can be inferred from incorporation of reference of Gencon Charter Party Revised, 1994. In support of this contention, he relied on the decision of the Hon'ble Supreme Court in the case of Atlas Export Industries vs. Kotak & Company, (1999)7 SCC 61, wherein, the Court quoted with approval the passage from

Russel on Arbitration (19th Edn., at p. 50) and Halsbury's Law of England (4th Edn. Vol. 2, p. 267, para 522), and referred to its earlier decision in the case of Alimenta S.A. vs. National Agricultural Co-Op. Marketing Federation of Indian [(1987)1 SCC 615], wherein the arbitration clause contained in an earlier contract between the parties was incorporated into a latter contract only by reference and it was held therein that such a referential incorporation was permissible and the clause was binding between the parties unless it was impermissible, unintelligible or was inconsistent with the terms of the present contract. Mr. Soparkar has further relied on the decision of the Hon'ble Supreme Court in the case of Owners and Parties Interested in the Vessel M.V. "Baltic Confidence" and Anr. vs. State of Trading Corporation of India Ltd. & Anr., (2001)7 SCC 473, wherein, it is held that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading , the principal question is, what was the intention of the parties to the Bill of Lading ? For this purpose, the primary document is the Bill of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. Which ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it by giving a literal, pedantic and technical reading of the clause. If a construction of the Arbitration Clause of the Charter Party Agreement as incorporated in the Bill of Lading does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading.

16. Mr. Soparkar further relied on the decision the in the case of Tritonia Shipping Inc. v. South Nelson Forest Products Corporation, [1996] Vol. I, Lloyd's List Law Reports p. 114, wherein the Charter Party in question contains clause "arbitration to be settled in London". This was stated as the sufficient indication of providing place of arbitration in London. Mr. Soparkar has further relied upon the decision of Court of Appeal in the case of Hobbs Padgett & Co. (Reinsurance), Ltd. vs. J.C. Kirkland, Ltd., and Kirkland, [1969] Vol.-2, Lloyd's Law Reports, p. 547, wherein also, the agreement contains the clause namely "suitable arbitration clause", and the court held that an action brought on that agreement by the plaintiffs against the defendants was stayed by Master Diamond on the grounds that Clause 16 contained a valid submission to arbitration. The Court has held that in this type of agreement, "Suitable Arbitration Clause" meant that if any dispute arose under the contract it would be referred to any arbitration which reasonable men in this type of business would consider suitable (the court being empowered to appoint an arbitrator under the Arbitration Act, 1950); the word "suitable" did not add to or detract from that meaning.

17. Mr. Soparkar has further submitted that sec. 44 and 45 fall in Part-II of the Act and they deal with enforcement of certain foreign awards. Sec. 44 defines foreign award, whereas Section 45 deals with the powers of judicial authority to refer parties to arbitration. As per sec. 45 of the Act, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in sec. 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. He further submits that sec. 45 refers only to an agreement and it does not refer to any award that may be passed by the arbitrator. He has, therefore, submitted that since there is an agreement between the parties and a suit is filed by the plaintiff and the defendant has invoked the provision of sec. 45 by preferring this application with a prayer to refer this matter to the arbitrator, the same will have to be referred to the arbitrator and the suit is liable to be dismissed. He has further submitted that there is no dispute about the fact that Durban, South Africa, is a signatory to which Convention set for in the First Schedule, is applicable. He has further submitted that whether in respect of Durban, South Africa, Central Government has issued any notification with regard to reciprocity is not a material factor. The only condition precedent which is laid down in sec. 45 is that there must be an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies. There is no reference with regard to enforcement of the award which may be taken place in future. He has further invited court's attention to Article - I of the first Schedule which states that this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of State other than the State where the recognition and enforcement of such awards are sought and, arising out of differences between the persons, whether physical or legal. It shall also apply to arbitral awards not

considered as domestic awards in the State where their recognition and enforcement are sought. Mr. Soparkar has further submitted that Article- II states that the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Sub-clause (3) of Article -II also states that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative and incapable of being performed.

18. Based on these statutory provisions, Mr. Soparkar has submitted that since there being an agreement for arbitration between the parties, this Court has no jurisdiction to proceed with the suit and must refer the dispute to the arbitration at Durban, South Africa.

19. In support of his submission that future enforceability of award is not the relevant factor at the time of making reference to the arbitration, he relied on the decision of House of Lords in the case of Kuwait Minister of Public Works v. Sir Frederick Snow & Partners (a firm) and others, [1984]1 All England Law Reports p. 733, wherein the court has taken the view that on the ordinary and natural meaning of sec. 7(1) of the Arbitration Act 1975 the question whether a State "is a party to the New York Convention" is to be determined by reference to the time of proceedings for the enforcement under that Act of an arbitration award rather than by reference to the date of the award itself. It follows that an arbitration award made in the territory of a foreign State is enforceable in the United Kingdom as a "Convention award" under sec. 3 of the 1975 Act if the State in which the award was made is a party to the convention at the date when proceedings to enforce the award begin, even if it was not a party at the date when the award was made. Mr. Soparkar has further submitted that even at the time of award if Durban, South Africa, is not a country of reciprocity, in that case, the award can be enforced as the non-convention award. In this connection, he relied on the decision of in the case of Dalmia Cement Ltd. v. National Bank of Pakistan, [1974]3 All England Reports p. 189, wherein the court has held that there was no absolute bar however, to the summary enforcement under sec. 26 of awards which were not foreign awards within the meaning of sec. 35(1) but which were made abroad and/or in arbitrations whose procedure was not governed by English law. Under sec. 26 a judge could, in appropriate cases, give leave for such awards to be enforced in the same manner as a judgment or order to the same effect.

20. Mr. Soparkar has further submitted that simply by furnishing security to get the vessel released, the defendant has not submitted the jurisdiction of this court. The defendant has still not filed its written statement. Even as per sec. 8 of the Arbitration and Conciliation Act, 1996, the judicial authority before whom an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. In sec. 45 of the Act, the parties can move to the court at any time for referring the dispute to the arbitration, as sec. 45 starts with words stating that 'notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908. Sec. 8 falls in part-I of the Act. In support of his contentions, he relies on the decision of this court in the case of Union of India vs. Owner & Parties Interested in Motor Vessel M/V. Hoegh Orchid & Ors., (1983) 24(1) GLR 292, wherein this Court has held that if the pre-requisites as laid down are satisfied, the court has to stay the proceeding unless the agreement containing arbitration clause is null and void or inoperative or incapable of performance. Mr. Soparkar has further relied on the decision of this court in the case of State of Gujarat and others, vs. The Ghanshyam Salt Owrks, AIR 1979 Gujarat 215, wherein this court has held that the real test in order to decide whether a particular step taken in the proceedings was a step in the proceedings as contemplated by Section 34 is to find out whether by taking that step the party displayed an unequivocal intention to get the dispute finally decided by the court in preference to a final decision which may be arrived at by the arbitrators. Mr. Soparkar has further relied on the decision of the Hon'ble Supreme Court in the case of Food Corporation of India and Another vs. Yadav Engineer & Contractor, (1982)2 SCC p. 499, wherein it is held that appearing and contesting petition or notice of motion for interlocutory order and appearing and seeking to vacate an ex parte ad interim injunction granted by the court or to discharge a Receiver appointed by it to the opposite party, held, do not amount to 'steps in the proceedings' so as to bar the stay petition. Mr. Soparkar has further relied on the decision of the Hon'ble Supreme Court in the case of P.

Anand Gajapathi Raju and others vs. P.V.ZG. Raju (Dead) and others, (2000)4 SCC p. 539, wherein, it is held in the context of sec. 8 of the Act that the language used therein is peremptory and court is under an obligation to refer parties to arbitration. Mr. Soparkar has submitted that the ratio of all these decisions is equally applicable to sec. 45 of the Act and, therefore, the provision contained in sec. 45 are mandatory in nature and no discretion is left with the court unless the agreement falls within the exception carved out therein.

21. Based on the aforesaid submissions, provisions of law and the decisions cited before the court, Mr. Soparkar has strongly urged that the dispute raised by the plaintiff in the present suit be referred to the arbitration and the suit be dismissed and the security furnished by the defendant seeking release of the vessel be returned to the defendant. He has further submitted on instructions that the defendant is ready and willing to furnish the same security to the Arbitrator if the same is demanded from the defendant.

22. Mr. Mihir Joshi ld. Senior Counsel for the plaintiff, while opposing this application for referring the dispute to the Arbitrator has submitted that the application is totally misconceived and it is not maintainable at law. He has further submitted that the application is not moved by the proper party and it does not meet with the statutory requirements. He has further submitted that the condition precedents which are laid down in sec. 44 and 45 of the Act, are not complied with so far as the present case is concerned. He has further submitted that Part-II of the Act is not applicable at all and hence, defendant is not entitled to move this application before this court for referring the dispute to the Arbitrator.

23. First of all, he has submitted that the defendant has submitted to the jurisdiction of the court and once having submitted to the jurisdiction to this court, it is not open for the defendant to move such a application before this court. In support of his submission, he has relied on the decision of the Hon'ble Supreme Court in the case of M.V. Elisabeth and others v. Harwan Investment & Trading Pvt. Ltd., AIR 1993 SC 1014, wherein it is held that a personal action may be brought against the defendant, if he is either present in the country or submits to jurisdiction. If the foreign owners of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction. Mr. Joshi has further relied on this decision for the proposition that the admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior court of record, administering justice in relation to persons and owners within its jurisdiction. Power to enforce now against the foreign ship is an essential attributing of admiralty jurisdiction and it is assumed over such ship while they are within the jurisdiction of the High Court by arresting and detaining them.

24. Mr. Joshi has further relied on the decision of the Bombay High Court, in the case of Osprey Underwriting Agencies Ltd. and Others vs. Oil & Natural Gas corporation Ltd. & Others, AIR 1999 Bombay 173, wherein it is held that the proceedings in admiralty suit are proceedings in rem and any finding given therein will be conclusive upon the world. The court has taken a view that the dispute in such suit cannot be referred to arbitration by invoking arbitration clause in insurance cover of vessel in question.

25. Mr. Joshi has further submitted that Part-II of the Act is not at all applicable as the condition precedent laid down in sec. 44 are not satisfied so as to enforce the foreign award. Sec. 44 lays down two conditions namely; signatory to the Convention and the reciprocity. Since Durban, South Africa is one of the signatories to the Convention, the first condition is satisfied, however, the Central Government has not issued any notification whereby reciprocal provisions have been made with South Africa declaring the same as one of the territories to which the said Convention is applied. Mr. Joshi has submitted that Part-II applies enforcement of certain foreign awards even if the reference is made to the arbitrator on the basis of the alleged arbitration agreement. The award that may be passed in Durban, South Africa, cannot be enforce as foreign award and hence, these provisions are not applicable.

26. Mr. Joshi has further submitted that agreement in question is absolutely vague and ambiguous. The pre-requisites of an arbitration agreement are not at all satisfied. simply by writing words "as per Gencon

Charter Party Revised, 1994" and "Durban Arbitration, English Law to apply" it cannot be said that there is a valid arbitration agreement and that it is capable of being performed. He has further submitted that as per clause 19 of Gencon Charter Party Revised 1994, sub-clause (a) talks of arbitration in London, whereas sub-clause (b) says that if Box 25 in Part-I is not filled in, sub-clause(a) of this clause shall apply. Admittedly, Box 25 is not filled in and hence, sub-clause (a) would apply in the present case. However, sub-clause(a) refers to the place of arbitration in London, whereas, the present agreement talks about the place of arbitration in Durban. Because of this unambiguity, the arbitration agreement is not capable of being performed.

27. So far as the essential pre-requisite of arbitration agreement is concerned, Mr. Joshi relied on the decision of the Supreme Court in the case of U.P. Rajkiya Nirman Nigam Ltd. vs. Indure Pvt. Ltd. & Ors., (1996)2 SCC p. 667, wherein, it is held that to constitute an arbitration agreement, there must be an agreement between the parties, viz., the parties must be ad idem. The parties are not ad idem unless they agree to the terms and conditions mentioned in the agreement. Here, there is no agreement so far as the terms and conditions are concerned. This is clearly borne out from the fact that Gencon refers to the place of arbitration in London, whereas, the clause in Fixture Note refers to the place of arbitration in Durban.

28. Mr. Joshi further relied on the case of Bihar State Mineral Development Corporation and anr. v. Encon Builders (I)(P) Ptd. (2003)7 SCC 418, wherein, the Hon'ble Supreme Court has held that the essential elements of arbitration agreement are as follows:

(1) There must be a present or a future difference in connection with some contemplated affairs.

(2) There must be the intention of the parties to settle such difference by a private tribunal.

(3) The parties must agree in writing to be bound by the decision of such tribunal.

(4) The parties must be ad idem.

Since all the four conditions are not satisfied in the present case, the application moved by the defendant for referring the issue to the arbitrator should not be entertained by this court.

29. Mr. Joshi has further submitted that the defendant has moved this application belatedly and only after the filing of the application by the plaintiff seeking directions from this court to permit transshipment of goods to a suitable place. Instead of rendering any cooperation in the said proceedings, the defendant has moved the present application with malafide motive to delay the proceedings. He has, therefore, submitted that it is not just and equitable to grant such an application by driving the parties to the arbitration especially when there is no valid arbitration agreement. Part-II of the Act is not applicable and condition precedent of sec. 44 for invoking the provisions of sec. 45 are not satisfied. He has, therefore, submitted that the application must be rejected with costs.

30. After having heard the ld. advocates appearing for the contesting parties and after having perused their pleadings and after having considered the relevant standard provisions as well as the authorities cited before the court, the issues which arose before the court for its consideration are that :

1) Whether the Defendant has surrendered to the jurisdiction of this court simply because they have furnished the securities for getting the vessel released;

2) Whether Part-II of the Arbitration and Conciliation Act, 1996, applies to the transactions in question entered into by and between the plaintiff and the defendant;

3) Whether section 45 of the Act applies to the arbitration clause contained in the Fixture Note and even if it applies, whether it is capable of being performed;

31. Both the learned Senior advocates, Mr. Soparkar as well as Mr. Joshi have made very strenuous efforts to persuade the court to accept their respective pleas and submissions based on the interpretation of sections 44 and 45 of the Act and First Schedule thereof as well as Arbitration Clauses contained in the Fixture Notes and Gencon Charter Party Revised, 1994.

32. As far as defendant's surrender to the jurisdiction of this court is concerned, Mr. Joshi has heavily replied on the judgment of the Hon'ble Supreme Court in the case of M.V. Elisabeth and other (supra) and forcefully canvassed an argument that by filing the admiralty suit before this court, the plaintiff has invoked the sovereign and constitutional jurisdiction of this court and by furnishing the securities as bail for the release of vessel, the defendant has submitted to the jurisdiction of this court, the proceedings before whom are proceedings in rem. The argument seems to be quite attractive and one may be tempted to accept it. However, no sooner the security is furnished and the vessel is released, the proceedings in rem become the proceedings in personam and normal civil law would apply thereafter. The legal position is well settled by now that mere filing of appearance, asking for time, applying for stay, praying for removal of receiver or furnishing security would not amount to submission of first statement on the substance of the dispute. What is held to be good law under sec. 8 of the Act, can certainly be accepted to be good law, qua, sections 44 and 5 of the Act. The court is, therefore, of the view that mere furnishing of security by the defendant for getting the vessel relieved would not amount to submission of jurisdiction to this court.

33. Now, to appreciate the other submissions of Mr. Joshi, it is necessary to have a close look at the provisions of sec. 44 and 45 of the Act. The said sections read as under:

Sec.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, declare to be territories to which the said Convention applies. Sec.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.

34. Section 44 defines the expression "foreign award" for the purpose of Chapter I of Part- II. This part deals with enforcement of certain foreign awards. Chapter - I deals with New York Convention Awards, whereas, Chapter - II deals with the awards under the Geneva Convention, 1937. Foreign award as contemplated under Section 44 must fulfill the following ingredients:

i) It must be an award on difference arising out of legal relationships considered as commercial under the law in force in India.

ii) It must have been made on or after 11th October, 1960.

iii) It must have been made in pursuance of an agreement in writing for arbitration to which the convention set-forth in the First Schedule (New York Convention) applies, and;

iv) It must have been made in one of the reciprocating contracting States notified by the Central Government;

35. The first three conditions enumerated above are satisfied. However, Durban, South Africa, is not the reciprocating contracting State as the Central Government has not issued any notification in this regard. For enforcement of foreign awards, conditions laid down in section 44(a) and (b) are to be jointly and cumulatively satisfied. Simply because sec. 45 of the Act mentions about an agreement referred to in Sec. 44, it cannot be considered as foreign award passed at a place which is not reciprocating contracting State. Such award is neither foreign award nor domestic award. If a foreign award which may be passed pursuant to an arbitration agreement, at a place which is not reciprocating contracting State and if such an award can not be executed as foreign award at such place, there is no justification in driving the parties to such an arbitration. Because of non-fulfilment of the condition of reciprocity, the court is of the view that present dispute between the parties is not required to be referred to the arbitration and that the suit can not be dismissed on this ground.

36. Even if it is assumed that such an award can be enforced as non-convention award by filing the suit and praying for the decree in terms of award, the present application cannot be entertained even on the ground that arbitration clauses contained in the Fixture Note are absolutely vague, uncertain, ambiguous and self contradictory. For instance, after enumerating certain terms, the Fixture Note says, 'Others as per Gencon Charter Party Revised 1994. Clause 19(d) of Gencon Charter Party says that "if Box 25 in part-I is not filled in, sub-clause (a) of this clause shall apply. Admittedly, Box 25 is not filled in and hence clause 19(a) is applicable which says that Charter Party shall be governed by English Law and dispute be referred to arbitration in London. The Fixture Note states that English Law shall apply, however, place of arbitration is mentioned as Durban. This shows that parties are not ad idem, which is one of the most essential pre-requisites of a valid arbitration agreement. Even otherwise, such an agreement falls within the ambit of exceptions carved out in sec. 45 of the Act as it is not capable of being performed.

37. The English decisions cited by Mr. Soparkar in the case of Tritonia Shipping Inc. (supra) does not render much assistance to the defendant as in the present case, it is difficult to believe that the parties are ad idem. Even otherwise, the reference to Gencon Charter Party Revised, 1994 in the Fixture Note, without there being any reference in Bill of Lading, is misleading and it generates inconsistency. The decisions of the Hon'ble Supreme Court in the case of Atlas Export Industries v. Kotak & Company (supra) and Owners and Parties Interested in the vessel M.V. "Baltic Confidence" and Another (supra), cited by Mr. Soparkar are also not of much assistance as the combined reading of Fixture Note, Bill of Lading and Gencon Charter Party Revised, 1994, leads the parties to inconsistency, insensibility or absurdity.

38. It is important to note that two other Admiralty Suits being Admiralty Suit No. 9 and 11 of 2004, are filed by the other parties against the Defendant vessel. The defendant, however, has not preferred any application, unlike the present one, for referring the dispute to the Arbitration. It is some what incongruous to make the prayer to get the present plaintiff's dispute decided by the Arbitration at Durban and other two suits are to be decided by this court. The defendant has moved the present application only after the plaintiff has filed Civil Application No. 19 of 2005 for delivery and transshipment of the goods. This shows that the defendant was not, otherwise, desirous of referring the dispute to the Arbitration. This is also weighed with the court to some extent, while rejecting the present application.

39. Looking to the peculiar facts of this case and considering the Fixture Note in question, the court is of the view that no case is made out for referring the dispute to the arbitration. The court is not inclined to consider or grant other reliefs prayed for in this application at this stage as the suit is still pending. The plaintiff's application for delivery and transshipment of the goods is pending. The order regarding deposit of securities was passed after bi-parte hearing and only liberty granted by the court was to move an application for furnishing Bank guarantee in lieu of return of cash deposit. The other reliefs prayed for in this application are not considered at this stage.

40. This application is, therefore, rejected without any order as to cost.