

CASE NO.:
Appeal (civil) 5048 of 2005

PETITIONER:
Shin-Etsu Chemical Co. Ltd.

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

DATE OF JUDGMENT: 12/08/2005

BENCH:
D. M. Dharmadhikari

JUDGMENT:
JUDGMENT
[Arising out of SLP(C) No. 3160 of 2005]
Dharmadhikari J.

Leave granted.

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

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

The main issue is regarding the scope of power of any judicial authority including a regular civil court under section 45 of the Act in making or refusing a reference of dispute arising from an international arbitration agreement governed by the provisions contained in Part III Chapter-I of the Act of 1996. I respectfully Agree with learned Brother Srikrishna J only to the extent that if on prima facie examination of the documents and material on record, including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make a reference, it may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is 'null and void' or 'inoperative' or 'incapable of being performed' within the meaning of section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the

question like trial of a preliminary issue on jurisdiction or limitation in regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter, to pass a reasoned order as the same is subject to appeal to the appellate court under section 50(1)(a) of the Act and further appeal to this Court under sub-section (2) of the said section.

Whether such a decision of the judicial authority or the court

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

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

JUDIS