

\$~54

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON:17.04.2017**

+ **FAO (OS) (COMM) 85/2017, CM Nos.14329-14330/2017 and CAV
No. 368/2017**

AMEET LALCHAND SHAH & ORS

..... Appellants

Through **Mr. Yatinder Singh, Sr. Advocate
with Mr. Sanjeev Kumar Dubey and
Mr. Rajmangal Kumar, Advocates**

versus

RISHABH ENTERPRISES & ANR

..... Respondents

Through **Mr. Amit Sibal, Sr. Adv. with Dr.
Saif Mahmood, Mr. Anish Dayal, Mr.
Namit Suri and Mr. Amit Bhandari,
Advocates**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE I.S. MEHTA

S.RAVINDRA BHAT, J.(OPEN COURT)

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is directed against an order of the learned single Judge declining an application under Section 8 (of the Act) to refer the subject matter of the suit filed by the respondent/plaintiffs to arbitration.

2. The brief facts are that on 01.02.2012, M/s Juwi India Renewable Energies P. Ltd. (hereinafter referred to as 'the Juwi') entered into two

agreements with the first respondent (hereinafter referred to as 'the Rishabh'), the sole proprietorship concern of the second plaintiff i.e. Dr. A.M. Singhvi. The two agreements entered into on 01.02.2012 were, one, for the purchase of power generating equipments to the tune of ₹8,89,80,730/- and the other for installation and commissioning of the plant for ₹2,20,19,270/-. Both these agreements contained arbitration clause.

3. On 05.03.2012, the plaintiff entered into Sale and Purchase Agreement dated 5th March, 2012 with the second defendant company (Astonfield) for purchasing CIS Photovoltaic Products to be leased to defendant No.3 company (Dante) and installed at the said power plant at Jhansi, Uttar Pradesh; these products were valued at ₹25,16,00,000/-, the second appellant i.e. Astonfield received ₹21,40,49,999/-. This agreement (hereinafter referred to as 'the third agreement') did not contain an arbitration clause.

4. Another agreement dated 14.03.2012, the fourth agreement was entered into between Dante and Rishabh whereby Dante agreed to pay the latter ₹13,50,000/- as lease rent for March, 2012 and from April, 2012 onwards, the said rent was ₹28,26,000/-.

5. Disputes arose between the parties i.e. Rishabh and Dante. This was sought to be referred to arbitration. Rishabh and its sole proprietor - Dr.A.M. Singhvi preferred a suit being CS(Comm.)No.195/2016 before this Court, leveling various allegations against all the appellants who were arrayed as defendants in the suit.

6. It may be stated, at the outset, that the first, fourth and fifth defendants (also arrayed as appellant nos. 1, 4 and 5) were not parties to any of the agreements. In the suit, multiple reliefs were claimed including a declaration that all transactions between the parties such as execution of the four agreements were vitiated by serious fraud; the suit further claimed a money decree of ₹32,22,80,288/- towards refund of the principal amount; it also claimed ₹19,31,74,804/- towards damages by way of interest @ 18% per annum. The alternative relief claimed was a money decree for ₹13,97,51,418/- and a decree of mandatory injunction against Dante directing it to pay further lease rental and contractual interest @12% per annum.

7. Upon being served with notice and summons in the suit the appellants/defendants preferred an application being IA No. 4158/2016 under Section 8 of the Act highlighting that firstly, all agreements had to be treated as part of one transaction and therefore, were arbitrable in accordance with the express provisions contained in the three agreements. Secondly, the appellants /defendants denied the plea of fraud and argued that in any case, on 13.02.2016, an arbitrator had been nominated. The respondents/plaintiffs resisted the application contending that the suit was based upon allegations of serious fraud committed jointly and severally by the appellants/defendants and the said issues were not arbitrable but rather have to be decided by the civil Courts.

8. It was further stated by the respondents/plaintiffs that existence of an arbitration clause in some of the agreements could not *per se* drag the

dispute arising out of the principal agreement into arbitration when no such stipulation was agreed to by the parties.

9. In any case, the respondents/plaintiffs contended that the cause of action could not be split so as to refer the dispute that could be treated from those that could not and that the relief claimed in the suit against the individual party/defendant nos. 1, 4 and 5 could not be covered by any arbitration clause.

10. The learned single Judge heard the contentions of the parties and considered the decisions of the Supreme Court reported as *N.Radhakrishnan vs. Maestro Engineers* (2010) 1 SCC 72; *Chloro Controls India Private Ltd. vs. Severn Trent Water Purification Inc.* (2013) 1 SCC 641; and the agreements between the parties.

11. The single judge, *inter alia* was of the opinion that the Equipment Lease Agreement (ELA) dated 14.03.2012 alone was not the subject matter of the action. The learned single Judge observed that a look at the suit filed by the plaintiffs revealed that though one of causes of actions therein undoubtedly was non-payment of lease rentals by the defendant No.3 (Dante) to the plaintiffs but the latter, in the suit did not claim lease rentals and had not sought return of the equipment but alleged to having been induced by the defendants to pay the price to Juwi India and were seeking to recover the said amount from the defendants jointly and severally. It was observed that

"when we look at the suit filed by the plaintiffs, though one of causes of actions for the dispute raised therein undoubtedly is non-payment of lease rentals by the defendant No.3 to the plaintiffs but the

plaintiffs in the suit are not claiming lease rentals and have not sought return of the equipment but are averring having been induced by the defendants to pay the price to Juwi India and are seeking to recover the said amount from the defendants jointly and severally. I fail to see, as to how the said claim of the plaintiffs can be said to arise out of the ELA dated 14th March, 2012 or can be said to be entailing interpretation of any terms and conditions thereof. The ELA dated 14th March, 2012, save for the satisfaction expressed therein as to the quality and specifications of the equipment, is not concerned with the transaction of purchase of equipment by the plaintiffs from Juwi India and defendant No.2 Company. The claim of the plaintiffs for recovery of Rs.32,22,20,288/- is not at all arising out of or relating to any term of the ELA dated 14 th March, 2012. It is a different matter that if the plaintiffs are unable to substantiate such a claim, they would not be entitled thereto.

(L) Though the plaintiffs undoubtedly in the alternative to the aforesaid have also claimed payment of lease rentals and which claim would be covered by the arbitration clause in the ELA dated 14 th March, 2012 but merely because the claim made in the alternative is covered by the arbitration clause, would not make the subject matter of the suit, subject matter of the arbitration agreement between the parties. For the parties to be referred to arbitration under Section 8 of the Act, the entire subject matter of the suit has to be the subject matter of arbitration."

12. Relying upon *Union of India vs. Birla Cotton Spinning and Weaving Mills Ltd.* reported as AIR 1967 SC 688 and *Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya* reported as (2003) 5 SCC 531, the Court was of the opinion that the subject matter of the suit covered non-arbitrable disputes:

"(O) I am conscious that a party to an arbitration agreement may want to wriggle out there from by making a claim in the suit in addition to the claim covered by the arbitration agreement. The same cannot be permitted. The test, in my opinion, to be applied in such cases is, whether the plaint discloses a cause of action for the claim

outside the arbitration agreement and if so, whether the claim outside the arbitration agreement can be segregated from the claim subject matter of arbitration agreement."

(P) I have perused the plaint in the present case and am unable to hold that the same does not disclose a cause of action for the claim therein of recovery of Rs.32,22,80,288/- and Rs.19,31,74,804/-. Law permits a person who has been induced by another to part with monies to a third party, to recover such monies from the person who has so induced and who is availing the benefits of the monies so parted with by the first person. I am also of the view that the claim of the plaintiffs for recovery of Rs.32,22,80,288/- and Rs.19,31,74,804/- is intertwined with the claim of the plaintiffs in the alternative for recovery of lease rentals. It is not possible to segregate the two and the same may result in conflicting findings of fact.

13. The learned single Judge then dealt with *Chloro Controls (supra)* and was of the opinion that the plaintiffs' suit for recovery of their entire investment was not relatable to ELA. After considering if there was a link between the defendants, the court held that *per se* did not render the dispute as one relatable to the parties of the ELA. The Court was further of the opinion that the five tests articulated in the principles enunciated in *A.Ayyasamy vs. A. Paramasivam* 2016 (10) SCC 386 were attracted in the facts of this case because of the allegation of serious fraud leveled by the plaintiffs.

14. Mr. Yatindra Singh, learned senior counsel arguing on behalf of the appellants/defendants urged that the impugned order is in clear error. Elaborating on this, learned senior counsel contended that the subject matter of the three agreements that contained arbitration clauses, within the one dated 05.03.2012 were inseparable and twined. By reason of linkage between the subject matter and the parties, the plaintiffs could not through

clever drafting of the pleadings, escape the clear implication arising out of the document i.e. a singular intention of the parties to facilitate procurement of equipment on the one hand and payment of lease rent on the other for the business. In the circumstances, the transaction being one, the Court had to treat it as encompassed in one whole. Since the intention of the parties clearly was that the disputes were arbitrable, the circumstance that one of the agreements did not contain an arbitration clause, should not have entailed the dismissal of the application under Section 8 of the Act.

15. Refuting the reasoning with respect to the applicability of fraud, learned counsel submitted that even in *A.Ayyasamy (supra)*, the Supreme Court held that mere allegation of fraud did not render the dispute beyond the purview of arbitration. The appellants also submitted that the previous ruling in *N. Radhakrishnan (supra)* was to the same effect. It was submitted that the pleadings of the parties clearly showed that the amounts were, in fact, returned by way of an irrecoverable loan in the facts of this case, to the sons of the sole proprietor of Rishabh, which had leveled allegations of fraud. In other words, learned counsel submitted that the fraud was committed by the respondents/plaintiffs, who did not even mention about these essential facts.

16. It was argued by Mr. Singh that mere iteration of the expression “serious fraud” in the facts of the present case did not mean that there actually were such allegations. Relying upon the observations of the concurring judgment in *A.Ayyasamy (supra)*, learned senior counsel stressed that the burden to establish serious fraud was heavy and the plaintiffs had not discharged it in the facts of this case.

17. It was urged that the impugned judgment cannot be sustained because of the learned single Judge's reasoning that the suit was based upon a cause of action that was not arbitrable; apart from the fact that there was one transaction but recorded in several agreements, the essential nature of the claim was for the return of money that could be proceeded with and the other matters relating to the three agreements for procuring supply etc. left for decision in arbitration. Learned senior counsel submitted that the decision in *Chloro Controls (supra)* and the observations in the decision with respect to *Sukanya Holdings (supra)* were in the context of the un-amended Section 45 of the Act. He submitted that with the 2015 amendments to the Act, there is a drastic change in the phraseology as both Sections 8 and 45 are identically phrased. Learned senior counsel submitted that when two provisions use identical expressions or words in a statute, they have to be interpreted in a like and identical manner. Consequently, with the change in law, the reasoning in *Sukanya Holdings (supra)*- that if a suit encompasses a cause of action which is *per se* not arbitrable or impleads someone who is not a party to the arbitration agreement, the matter cannot be referred under Section 8 - is no longer a good law. Lastly, it was urged that an arbitration agreement is deemed severable from the underlying principal agreement and therefore, allegations of fraud too can be adjudicated by the tribunal.

18. Mr. Amit Sibal, learned senior counsel appearing on advance notice on behalf of the respondents/plaintiffs, submitted that the appeal should be dismissed at the threshold. It was highlighted that the suit impleaded not just the parties to the arbitration agreement but also individual third parties such

as the first, fourth and fifth defendant. In fact, the suit allegations are categorical with respect to the role played by the first defendant, whom learned senior counsel termed as ‘principal fraudster’. Laying emphasis on the suit allegations, the learned senior counsel submitted that the role played by the three individuals in inducing the plaintiffs to part with substantial amounts and thereafter, the reneging from the agreement, clearly revealed their dishonest intent. Therefore, the tests in *A.Ayyasamy (supra)* were specific and the learned single Judge correctly did not refer the application to arbitration.

19. It was submitted that *Sukanya Holdings (supra)* laid the proposition that when third parties who have not signed an arbitration agreement are impleaded in civil proceedings along with other defendants, who have so signed the arbitration agreement, and the subject matter of the arbitration agreement encompasses both arbitrable and non-arbitrable issues, then an application under Section 8 of the Act cannot lie. That holding or view was not overruled in *Chloro Controls (supra)*. Learned senior counsel for the respondents submitted that mere identity of language or expression in the two previous sections i.e. Sections 8 and 45, because of the new amendment, changed nothing with respect to jurisdiction under Section 8. *Chloro Controls (supra)* had, at the outset, formulated one of the points for decision, concerning the correctness of the holding in *Sukanya Holdings (supra)*. However, the fact remains that *Sukanya Holdings (supra)* was not overruled or even departed from. In the circumstances, the interpretation with respect to the suit allegations, given by the learned single Judge and refusal by him to refer dispute to arbitration was clearly warranted.

20. The defendant/appellants are correct in saying that allegations of fraud are *per se* not excluded from an arbitral tribunal's jurisdiction and it would have -facially at least, competence to adjudicate them. Ayyasami articulated the tests which are to be kept in mind, when a court is to decide whether the allegations in a given case are arbitrable. The court stated them as follows:

"we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of

non- arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public for a, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.

When we apply the aforesaid principles to the facts of this case, we find that the only allegation of fraud that is levelled is that the appellant had signed and issued a cheque of Rs. 10,00,050/- dated 17.06.2010 of 'Hotel Arunagiri' in favour of his son without the knowledge and consent of the other partners i.e. the respondents. It is a mere matter of accounts which can be looked into and found out even by the arbitrator. It does not involve any complex issue. If such a cheque is issued from the hotel account by the appellant in favour of his son, it is easy to prove the same and then the onus is upon the appellant to show as to what was the reason for giving that amount from the partnership firm to his son and he will have to account for the same. Likewise, the allegation of the respondents that daily collections are not deposited in the bank accounts is to be proved by the respondents which is again a matter of accounts."

Therefore, the plaintiff has to cross a high threshold so successfully set up a defense in a Section 8 proceeding that the dispute is not arbitrable. The rule spelt out by the court is in the nature of an added reason to be considered by courts in deciding applications for reference to arbitration. Courts have to

analyze if fraud is directed at the arbitration agreement, undermining it (and the arbitration proceeding, which is subject of the arbitration agreement) in contrast to the principal agreement. The ruling is a safety value, which accounts for the principle of *kompetenz kompetenz*, and severability as well.

21. Do the plaintiffs satisfy that condition in the present case? The first fifteen paragraphs in the suit outline the factual circumstances and the series of meetings between the first defendant/appellant and the plaintiff, whereby he assured that the arrangements could be worked out with Dante (of which he claimed to be the principal decision maker) and Astonfield, the other company, where he was a director. The other two individuals were directors of the companies and were also alleged to have been present during the meetings. The plaint contains several allegations of fraud; some of them leading to the factual narrative that led to filing of the suit are extracted below:

"32...When, on the one hand, the Defendants kept buying time from them to fulfill their promises and obligations and kept them engaged in talks, on the other, Defendant No. 1 made grossly false statements against Plaintiff No. 2 in an income tax proceeding, did the Plaintiffs discover the fraud for the first time and that entire transaction in question was completely fraudulent and sham and was devised by the Defendants as a well-considered stratagem only to cheat the Plaintiffs and dupe the Plaintiffs and play serious fraud upon them. Till then the Plaintiffs had not discovered that the transactions were actuated by serious fraud as the Defendants were incessantly promising and undertaking to pay. In fact, in his statement to the Income Tax authorities Defendant No. 1 also disclosed, for the first time, that the equipment that Defendant No. 2 had sold to the Plaintiffs under the Sale & Purchase Agreement dated 05.03.2012 for Rs. 25,16,00,000/- (Rupees twenty five crores sixteen lacs only) was actually purchased by Defendant No. 2 for only approximately Rs. 8,00,00,000/- (Rupees Eight Crores Only). It was then the Plaintiffs realized that they had

been doubly defrauded inasmuch as they were made to pay more than thrice the value of the equipment to Defendant No. 2. In case it is contended and held that since the equipment belong to the Plaintiffs and have been leased out to Defendant No.3, in that eventuality, Defendants No. 1 and 2 are jointly and severally liable to pay the difference in the price, i.e., Rs.25 crore minus Rs.8 crore, to the Plaintiffs.

33. The Defendants continued to fail to meet their contractual obligations and the total amount of arrears of lease rental along with contractual interest payable by them to the Plaintiffs under the Equipment Lease Agreement dated 14.03.2012, as on 31.12.2014, was Rs. 8,05,59,241/- (Rupees eight crores five lacs fifty nine thousand two hundred forty one only] which they were not paying despite repeated reminders.

34. Since the acts of commission and omission committed by the Defendants and others constituted various offences, on 30.12.2014, the Plaintiffs made a complaint against them to the Deputy Commissioner of Police, Economic Offences Wing, New Delhi. Upon preliminary inquiry, the police found that the Plaintiffs' complaint disclosed cognizable offences committed by the Defendants and others and, accordingly, a First Information Report being FIR No. 0030 of 05.03.2015 was registered against them under Sections 406, 420 and 120-B of the Indian Penal Code, 1860. The said FIR is pending. Defendant No. 1 has filed a petition seeking quashing of the said FIR in this Hon'ble Court and has sought a number of interim orders. However, he has failed to get any order from this Hon'ble Court so far.

35. The Defendants have neither returned the equipment nor paid the lawful dues of the Plaintiffs and continue to use the equipment and benefit from the same without paying any lease rental to the Plaintiffs.

36. That being shocked and frustrated with these lame and frivolous excuses, the Plaintiffs visited the website of "Astonfield Group" and therein the Jhansi Power Plant has been showcased as one of the achievements of the group and it is being claimed that:

"The 2MW:solarPVplant inJhansi, Uttar Pradesh sits on 18 acres of land in theJhansi District of southwest Uttar Pradesh, India's most populous state. The power from this plant feeds

directly into the residential distribution grid, powering over 5,200 Indian homes.

Germany's Juwi served as the engineering, procurement, and construction (EPC) contractor, and Japan's Solar Frontier provided the thin-film modules for the plant. The combination of these partners' global expertise and Astonfield's local experience allowed the team to build and complete this plant in a record 77 days".

37. The Plaintiffs submits that the equipment purchased, by them and subsequently leased by them to the Defendant No. 3 company under the Equipment Lease Agreement dated 14.03.2012 was specially made to order for the Defendants' aforesaid Jhansi plant. The said tailor-made equipment cannot be used for any purpose by the Plaintiffs or anyone else other than for running the said plant. The Plaintiffs further submits that they would never have purchased the said equipment from Defendant No. 2 or from Juwi India Renewable Energies Private Limited or entered into any agreement with Juwi India Renewable Energies Private Limited for engineering, installation and commissioning, had the Defendants. not induced, promised, agreed and undertaken to take the equipment on lease from them and pay them lease rentals on the same, which would also lead to various statutory tax benefits. The Plaintiffs are, thus, entitled to recover from the Defendants - jointly and severally - all the amounts paid by the Plaintiffs to Defendant No. 2 and to Juwi India Renewable Energies Private Limited for purchase of equipment and / or towards engineering, installation and commissioning."

These as well as the other previous allegations are not "mere" allegations of fraud, leveled with the motive of ensuring return of monies or settling accounts. They can be termed "serious" to say that arbitration is excluded - of such disputes, in view of *Ayyasami*.

22. In *Sukanya Holdings* (supra) the Supreme Court held that:

"The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a

matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

The above rule was not disapproved, or overruled in *Chloro Controls*. Therefore, the appellants' argument is unmerited.

23. The defendant/appellant's submission that the identity of language between the present Section 8 and Section 45, renders *Sukanya* academic and irrelevant, is insubstantial. The court is of opinion that mere identity of language between two provisions that may be similarly worded cannot lead

the court to hold that same considerations prevail. The amended section 8 relied on by the appellant, is as follows:

"8. Power to refer parties to arbitration where there is an arbitration agreement.—2 [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Section 45 continues to read as follows:

"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.

The change in Section 8 is that the court is to - in cases where arbitration agreements are relied on- to refer the disputes in the suit, to arbitration, *"notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists"* . The court is of opinion that *Sukanya* is not *per se* overruled, because the exercise of whether an arbitration agreement exists between the parties, in relation to the disputes that are the subject matter of the suit, has to be carried out. If there are causes of action that cannot be subjected to arbitration, or the suit involves adjudication of the role played by parties who are not signatories to the arbitration agreement, it has to continue because *"prima facie no valid arbitration agreement exists"* between such non parties and others, who are parties.

24. For the foregoing reasons, the appeal is unmerited; it is consequently dismissed without any order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**I.S. MEHTA
(JUDGE)**

**APRIL 17, 2017
sd**