IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 24TH DAY OF APRIL 2018

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

C.S.No. 502 of 2017
and
O.A.Nos. 642 to 644 of 2017
and
A.Nos. 6461 to 6463 of 2017
and
C.S.No.12 of 2018
and
O.A.Nos. 6 and 7 of 2018
and
A.Nos. 477 to 479 of 2018

**C.S.No.502 of 2017**:-
SEI Adhavan Power Pvt. Ltd.,
Menon Eternity, 10th floor,
New No.165, Old No.110,
St.Mary's Road, Alwarpet,
Chennai 600018, Tamil Nadu
Represented by its
Authorised Signatory
Mr.S.Sateesh ... Applicant/Plaintiff
(in O.A.Nos. 642 to 644 of 2017)

-vs-

1.Jinneng Clean Energy Technology Ltd.
No.1 Wenshui Economic Zone,
Lvliang, Shanxi Province, China,
Represented by its Director

2.SunEdison Energy Holding (Singapore) PTE, Ltd.
11 Lorong 3 Toa Payoh
B1k B Jackson Square,
4th Floor, Singapore 319579
Represented by its Managing Director

3.Singapore International Arbitration Centre
32 Maxwell Rd, #02-01, Maxwell Chambers
Singapore 069115
Represented by its Deputy Registrar
Kevin Nash ...Respondents/Defendants
(in O.A.Nos. 642 to 644 of 2017)

Civil suit praying that this Hon'ble Court be pleased to pass a judgment and decree against the defendants to:

a) For a permanent injunction restraining the first defendant from proceeding with the Arbitration against the plaintiff in Arbitration Case No. ARB094/17/AKB before the third defendant pursuant to request for arbitration dated 11.04.2017.

b) For a permanent injunction restraining the third defendant from administering the Arbitration pursuant to request dated 11.04.2017 from first defendant against the plaintiff and others in Arbitration Case No. ARB094/17/AKB.

c) For permanent injunction, restraining the first defendant their men, agents, attorneys, servants, assigns or any person claiming under or through him, jointly or severally from proceeding with and prosecuting the Arbitration proceeding or any other proceedings as against the plaintiff arising out of the Non Disposal Undertaking dt. 17.3.2016 entered in to between the 1st & 2nd defendant.

d) for costs of the suit.

**O.A.No. 642 of 2017**

Original Application praying that this Hon'ble Court be pleased to pass an order of ad-interim Injunction restraining the first Respondent/Defendant from proceeding with the Arbitration against the Applicant/Plaintiff in Arbitration Case No: ARB094/17/AKB before the third Respondent/Defendant pursuant to request for Arbitration dated 11.04.2017 pending disposal of the suit.

**O.A.No. 643 of 2017**

Original Application praying that this Hon'ble Court be pleased to pass an order of ad-interim injunction, restraining the first Respondent/defendant their men, agents, servants, attorneys, assigns or any person claiming under or through him, jointly or severally from proceeding with and prosecuting the Arbitration Proceeding or any other proceedings as against the Applicant/Plaintiff arising out of the Non Disposal Undertaking dt.17.03.2016 entered in to between the 1st & 2nd Respondent/defendant pending disposal of the suit.

**O.A.No. 644 of 2017**

Original Application praying that this Hon'ble Court be pleased to pass an order of ad-Interim Injunction restraining the third Respondent/Defendant from administering the Arbitration proceedings pursuant to request dated 11.04.2017 from first Respondent/Defendant against the Applicant/Plaintiff and others in Arbitration Case No.ARB094/17/AKB pending disposal of the suit.

**A.Nos.6461 to 6463 of 2017**

Jinneng Clean Energy Technology Ltd.
No.1 Wenshui Economic Zone,
Lvliang, Shanxi Province, China,
Represented by its Authorised Signatory
Mr.Robert Pavrey ..Applicant/1st Defendant

Vs

1. SEI Adhavan Power Pvt. Ltd.,
Menon Eternity, 10th floor,
New No.165, Old No.110,
St.Mary's Road, Alwarpet,
Chennai 600018, Tamil Nadu
Represented by its
Authorised Signatory
Mr.S.Sateesh ..Respondent/Plaintiff

2.SunEdison Energy Holding (Singapore) PTE, Ltd.
11 Lorong 3 Toa Payoh
B1k B Jackson Square,
4th Floor, Singapore 319579
Represented by its Managing Director

3.Singapore International Arbitration Centre
32 Maxwell Rd, #02-01, Maxwell Chambers
Singapore 069115
Represented by its Deputy Registrar
Kevin Nash ..Respondents/Defendants

**A.No.6461 of 2017**:-

Application praying that this Hon'ble Court be pleased to Revoke the leave granted in Application No.3270 of 2017 in C.S.D. No.20444 of 2017.

**A.No.6462 of 2017**:-

Application praying that this Hon'ble Court be pleased to refer the parties herein to arbitration in terms of Clause 9 of the Non Disposal Undertaking dated March 17, 2016 in accordance with Section 45 of the Arbitration and Conciliation Act, 1996.

**A.No.6463 of 2017**:-

Application praying that this Hon'ble Court be pleased to reject the plaint in C.S.No.502 of 2017.

**C.S.No. 12 of 2018**

SunEdison Solar Power India (Pvt) Ltd.,
Menon Eternity, 10th floor,
New No.165, Old No.110,
St.Mary's Road, Alwarpet,
Chennai 600018, Tamil Nadu
Represented by its
Authorised Signatory
Mr.N.Ravindra ... Applicant/Plaintiff
(in all Original Applications

-vs-

1.Jinneng Clean Energy Technology Ltd.
Represented through its Director
No.1 Wenshui Economic Zone,
Lvliang, Shanxi Province, China,
Represented by its Director

2.SunEdison Energy Holding (Singapore) PTE, Ltd.
11 Lorong 3 Toa Payoh
B1k B Jackson Square,
4th Floor, Singapore 319579
Represented by its Managing Director

3.Singapore International Arbitration Centre
32 Maxwell Rd, #02-01, Maxwell Chambers
Singapore 069115
Represented by its Deputy Registrar
Kevin Nash ...Respondents/Defendants

Civil suit praying that this Hon'ble Court be pleased to pass a judgment and decree against the defendants to:

a) For permanent injunction, restraining the first defendant their men, agents, attorneys, servants, assigns or any person claiming under or through him, jointly or severally from proceeding with and prosecuting the Arbitration proceeding or any other proceedings as against the plaintiff arising out of the Non Disposal Undertaking dt. 17.3.2016 entered in to between the 1st & 2nd defendant.

b) For a permanent injunction restraining the third defendant from administering the Arbitration pursuant to request dated 11.04.2017 from first defendant against the plaintiff and others in Arbitration Case No. ARB094/17/AKB.

c) for costs of the suit.

**O.A.No. 6 of 2018**

Original Application praying that this Hon'ble Court be pleased to pass an order of ad-interim Injunction restraining the third Respondent/Defendant from administering the Arbitration proceedings pursuant to request dated 11.4.2017 from first respondent/defendant against the Applicant/Plaintiff and others in Arbitration Case No. ARB094/17/AKB pending disposal of the suit.

**O.A.No. 7 of 2018**

Original Application praying that this Hon'ble Court be pleased to pass an order of ad-interim Injunction restraining the first Respondent/Defendant their men, agents, servants, attorneys, assigns or any person claiming under or through him, jointly or severally from proceeding with and prosecuting the Arbitration Proceeding or any other proceedings as against the Applicant/Plaintiff arising out of the Non Disposal Undertaking dt.17.3.2016 entered into between the 1st & 2nd respondent/defendant pending disposal of the suit.

**A.Nos.477 to 479 of 2018**:-

Jinneng Clean Energy Technology Ltd.
No.1 Wenshui Economic Zone,
Lvliang, Shanxi Province, China,
Represented by its Authorised Signatory
Mr.Robert Pavrey ..Applicant/1st Defendant

Vs.

1. SunEdison Solar Power India (Pvt) Ltd.,
Menon Eternity, 10th floor,
New No.165, Old No.110,
St.Mary's Road, Alwarpet,
Chennai 600018, Tamil Nadu
Represented by its
Authorised Signatory
Mr.N.Ravindra ... Respondent/Plaintiff

2.SunEdison Energy Holding (Singapore) PTE, Ltd.
11 Lorong 3 Toa Payoh
B1k B Jackson Square,
4th Floor, Singapore 319579
Represented by its Managing Director

3.Singapore International Arbitration Centre
32 Maxwell Rd, #02-01, Maxwell Chambers
Singapore 069115
Represented by its Deputy Registrar
Kevin Nash ...Respondents/Defendants

**A.No.477 of 2018**:-

Application praying that this Hon'ble Court be pleased to Revoke the leave granted to sue dated 18.12.2017 in A.No. 4758 of 2017 in C.S.D.No. 24371 of 2017.

**A.No.478 of 2018**:-

Application praying that this Hon'ble Court be pleased to reject the plaint in C.S.No.12 of 2018.

**A.No.479 of 2017**:-

Application praying that this Hon'ble Court be pleased to refer the parties herein to arbitration in terms of Clause 9 of the Non Disposal Undertaking dated March 17, 2016 in accordance with Section 45 of the Arbitration and Conciliation Act, 1996.

These Civil suits along with Applications coming on this day before this court for hearing the court made the following order:-

CS.No.502 of 2017 has been filed, by Sei Adhavan Power Private Limited (herein after referred to, in short, as Sei Adhavan), against three Defendants, namely, (1) Jinneng Clean Energy Technology Limited (herein after referred, in short, to as Jinneng), (2) SunEdison Energy Holding (Singapore) PTE Limited (herein after referred to as SunEdison) and (3) Singapore International Arbitration Centre, Singapore, (herein after referred to as SIAC).

2. The relief sought in CS.No.502 of 2017 was for a judgement and decree, against the Defendants, seeking permanent injunction, restraining the 1st Defendant, from proceeding with the arbitration against the Plaintiff in

arbitration case no.ARB94/17/AKB, before the 3rd Defendant, pursuant to the request for arbitration, dated 11.04.2017 and for permanent injunction, restraining the 3rd Defendant, from administering the arbitration pursuant to request dated, 11.4.2017 from the 1st Defendant, against the Plaintiff and others in arbitration case no.ARB94/17/AKB and for permanent injunction, restraining the 1st Defendant or anybody acting under them, from proceeding with and prosecuting the arbitration proceedings or any other proceedings, as against the Plaintiff, arising out of the Non Disposal Undertaking (herein after referred to as NDU), dated 17.3.2016, entered into between the 1st and 2nd Defendants and for costs of the suit.

3. The cause of action for CS.No.502 of 2017 is said to have arisen on 11.11.2016 when the 1st Defendant issued a notice of dispute, on 11.4.2017 when the 1st Defendant sent a request for arbitration to the 3rd Defendant, on 5.5.2017 when the 3rd Defendant had assigned case no.ARB094/17/AKB to request for arbitration filed by the 1st Defendant. The Plaintiff has objected to initiation of the arbitration proceedings as well as the jurisdiction of the 3rd Defendant to administer the arbitration.

4. In CS.No.502 of 2017, it has been stated that the Plaintiff is a Company incorporated under the Companies Act, 2013, having its registered Office at Chennai. The 1st Defendant is a Company incorporated under the laws of the

Peoples Republic of China and has its registered office at Shanxi Province, China. The 2nd Defendant is a Company registered under the law of Singapore, having its Corporate Office at Singapore. The 3rd Defendant is a Company incorporated and registered under the laws of Singapore and is an Arbitral Institution located in Singapore and it has its Office in Mumbai in India.

5. It has been further stated in the plaint that the Plaintiff is engaged in the business of generation and sale of solar power and is operating 50 MW plant at Virudhunagar District, Tamil Nadu. According to the Plaintiff, they received a notice of dispute dated 11.11.2016 from the 1st Defendant, claiming that there was a Non Disposal Undertaking, dated 17.3.2016 entered into between the 1st Defendant and the 2nd Defendant. The 1st Defendant stated that certain disputes regarding payments due from SunEdison Solar Power India Private Limited (in short SSPI), who gave contract for supply of certain equipments to the 1st Defendant and stated that the 2nd Defendant had violated the terms of the Non Disposal Undertaking and consequently, the 1st Defendant had invoked the arbitration under the Non Disposal Undertaking. The Plaintiff had protested to such invocation of the arbitration clause since it claimed that it is not a Signatory or a party to the said Non Disposal Undertaking. The said Non Disposal Undertaking had been executed between the 1st and 2nd Defendants. The 1st Defendant

had issued further notice of dispute dated 8.1.2017. The Plaintiff then received a notice of arbitration dated 11.4.2017 for resolving the alleged dispute relating to Non Disposal Undertaking before the 3rd Defendant. It has been stated that there is no privity of contract between the 1st Defendant and the Plaintiff. A reply was sent to the 1st Defendant by the counsel for the Plaintiff that the notice of arbitration is not valid and that the Plaintiff is not a party or Signatory to the Non Disposal Undertaking.

6. It has been further stated in the plaint that the Non Disposal Undertaking clearly stated that the arbitration is governed by the Rules of Conciliation and Arbitration of the International Chambers of Commerce (ICC) and the 3rd Defendant does not have the power to administer the arbitration. There were further exchange of correspondences between the counsel. Both counsel reiterated their respective stands. It has been the stand of the Plaintiff that the arbitration is invalid and in any event, the 3rd Defendant does not have authority and it was only ICC, who had authority to administer the arbitration. The Plaintiff then received a notice from the 3rd Defendant, dated 5.5.2017, stating that a request for arbitration had been received and arbitration case no.094/17/AKB had been assigned and arbitration was deemed to have been commenced on 11.4.2017. The Plaintiff and the 2nd Defendant were asked to appoint their Arbitrator.

7. It has been further stated in the plaint that the counsel for the Plaintiff once again reiterated their earlier stand regarding jurisdiction of the 3rd Defendant. A further letter was sent on the same aspect. In the mean while, the counsel received an email on 25.5.2017, stating that objections can be conveyed to the Arbitrator, nominated by the 2nd Defendant. The 1st Defendant counsel sent a reply, dated 7.6.2017 to the 3rd Defendant and to the learned counsel for the Plaintiff, stating that the 2nd Defendant had signed the Non Disposal Undertaking on behalf of the Plaintiff and that the 3rd Defendant is competent to administer the arbitration and seeking nomination of an Arbitrator by the 2nd Defendant and the Plaintiff by 19.6.2017. The Plaintiff's counsel sent a letter dated 9.6.2017 once again reiterating their objection that there is no arbitration agreement between the Plaintiff and the 1st Defendant. The Plaintiff claimed that the Defendants are illegally proceeding with the arbitration at Singapore even though the Plaintiff is not a party to the Non Disposal Undertaking or the arbitration agreement. The 2nd Defendant did not have any authority to execute any arbitration agreement on behalf of the Plaintiff. The Non Disposal Undertaking also does not suggest that it was executed on behalf of or with the consent of the Plaintiff. The entire shareholdings in the Plaintiff Company is presently held by Greenko Power Projects (Mauritius) Limited (GPPL) and its

nominees. The entire shares held by the 2nd Defendant were transferred to GPPL as per the share purchase agreement, dated 20.9.2016. They had given Engineering, Procurement and Construction (EPC) contract for supply and erection of solar plant to SunEdison Solar Power India Private Limited, which is an EPC contractor and the Plaintiff paid all the bills of EPC Contractor. It has been further stated that the arbitration is governed by the ICC Rules.

8. It has been further stated in the plaint that Plaintiff would suffer irreparable loss and injury on account of heavy costs, legal fees, foreign travel and time and effort if they were to participate in the arbitration proceedings administered by the 3rd Defendant. The 1st Defendant had sought the relief of mandatory injunction, against the Plaintiff for issuance of shares in favour of the 1st Defendant to an extent of 24% of the Plaintiff's share capital and is also claiming damages. The relief sought by the 1st Defendant against the Plaintiff in the arbitration proceedings is in respect of the Non Disposal Undertaking executed at Chennai and also for issuance of shares at Chennai where their registered office of the Plaintiff is located.

9. It is under these circumstances that the Plaintiff stated that this Court has jurisdiction and power to issue anti suit/ arbitration injunction order and grant the reliefs against the Defendants. It is also claimed that

the 1st Defendant is a World leader in manufacture and sale of Photo Voltaic cells and sell their products throughout the World including India. It has been further stated that the Non Disposal Undertaking containing the arbitration clause was entered into between the 1st and the 2nd Defendants at Chennai on 17.3.2016. It is under these circumstances that the Plaintiff has filed the suit for the reliefs mentioned above.

10. The Plaintiff had filed A.No.3270 of 2017, seeking leave to institute the suit before this Court, primarily on the ground that the Non Disposal Undertaking was executed at Chennai. This Court had also granted leave to institute the suit by order dated 22.6.2017. On receipt of notice, the 1st Defendant had entered appearance and filed A.No.6461 f 2017 to revoke the leave granted in A.No.3270 of 2017.

11. The 1st Defendant has also filed A.No.6462 of 2017 to refer the parties to arbitration in terms of Clause 9 of the Non Disposal Undertaking dated 17.3.2016 in accordance with Section 45 of the Arbitration and Conciliation Act and A.No.6463 of 2017 to reject the plaint in CS.No.502 of 2017 under Order 7 Rule 11 of CPC.

12. Along with the suit in CS.No.502 of 2017, the Plaintiff has filed OA.No.642 of 2017, seeking interim injunction restraining the 1st Defendant from proceeding with the arbitration against the Plaintiff in arbitration case

No.ARB/094/17/ARB before the 3rd Defendant, pursuant to the request of arbitration dated 11.4.2017, pending disposal of the suit. In OA.No.642 of 2017, this Court had granted an order of interim injunction by order dated 29.6.2017 and the said order is still in force.

13. The Plaintiff has also filed OA.No.643 of 2017 in CS.No.502 of 2017, seeking an order of interim injunction, restraining the 1st Defendant or anybody acting under them from proceeding with or prosecuting the arbitration proceedings arising out of the Non Disposal Undertaking dated 17.3.2016, entered into between the 1st and 2nd Defendants, pending disposal of the suit. In OA.No.643 of 2017, this Court had directed notice to be issued on 29.6.2017.

14. The Plaintiff has also filed OA.No.644 of 2017, seeking an order of interim injunction, restraining the 3rd Defendant from administering the arbitration proceedings pursuant to the request, dated 11.4.2017, from the 1st Defendant against the Plaintiff and others in arbitration case No.ARB/094/17/ARB, pending disposal of the suit.

15. In the affidavits, filed in support of the applications filed by the 1st Defendant, the Authorised Signatory of the 1st Defendant has stated that the 2nd Defendant had executed a Non Disposal Undertaking, dated 17.3.2016 in favour of the 1st Defendant in the context of construction of 50MW AC power plant at Virudhunagar District, Tamil Nadu, which called the 'Project'. It is further

stated that under the Non Disposal Undertaking, the Plaintiff was in the process of constructing the Project, in which it engaged SunEdison Solar Power India Private Limited (SSPI) as the Contractor. In turn, SSPI sub contracted the supply of modules for the Project to the 1st Defendant. Under the Non Disposal Undertaking, the 2nd Defendant undertook to legally and beneficially hold and retain at least 24% of the equity in the Plaintiff free from any security interest until complete discharge of obligations assumed by SSPI who had to pay sums outstanding under the invoices issued by the 1st Defendant for supply of photovoltic modules for the Project.

16. It has been further stated by the 1st Defendant that pending the payment by SSPI, the 2nd Defendant was obliged to retain the value of the said equity and the Plaintiff was obliged to prevent any transfer of the value of the said equity. It is stated that the Non Disposal Undertaking contains a binding, valid and subsisting arbitration agreement in Clause 9. However, in breach of the terms of the Non Disposal Undertaking, the 2nd Defendant, SSPI and the Plaintiff sold and transferred the equities to M/s.Greenko Solar Energy Private Limited. Consequently, the 1st Defendant issued a notice of dispute to the Plaintiff and the 2nd Defendant and also to SSPI. As the dispute was not resolved by amicable resolution within 30 days of the notice, the 2nd Defendant filed and served a notice of arbitration dated 11.4.2017 to the 3rd Defendant. The Plaintiff and SSPI

contested the commencement of the arbitration by their letter dated 4.5.2017. Notices were exchanged in this regard. It was under these circumstances that the Plaintiff has filed this suit before this Court. The suit was filed even when the counsel for the Plaintiff was corresponding with the 1st Defendant.

17. It was further stated by the 1st Defendant that this Court does not have jurisdiction to entertain the present suit. The 1st Defendant is not within the territorial jurisdiction of this Court and no part of cause of action arose within the jurisdiction of this Court. The Non Disposal Undertaking cannot confer jurisdiction. If it is to be taken that it provides for resolution through arbitration, leave to institute the suit should be vacated. It has been further stated that the 3rd Defendant had already heard and considered the Plaintiff's objections on jurisdiction and had determined that the said dispute shall be raised and determined by the Tribunal. The sale of shares to GPPL is not a relevant factor. The Plaintiff is bound by the Non Disposal Undertaking. The 2nd Defendant had signed the Non Disposal Undertaking. The idea of Non Disposal Undertaking was proposed by the Asia Operations President of SSPI. This can be evidenced by email dated 15.3.2016. The Non Disposal Undertaking refers to all the parties. The Plaintiff also has an obligation to nominate an Arbitrator. It is also stated that there is no factual basis to the claim

of the Plaintiff. It is further stated that Section 45 of the Arbitration and Conciliation Act has a direct bearing and relevancy on the facts of the case. Consequently, it has been stated that this Court has no jurisdiction to examine the issues in the suit and that the leave granted should be revoked. It is also stated that since the cause of action did not arise within the jurisdiction of this Court, the plaint should be rejected. It is also stated that the parties must be referred to arbitration in terms of the Non Disposal Undertaking.

18. CS.No.12 of 2018 has been filed, by SunEdison Solar Power India (Pvt) Limited (SSPI), which is a Company incorporated under the Companies Act, 1956 and having its registered Office at Chennai. The suit had been filed against the same Defendants in CS.No.502 of 2017. As a matter of fact, the Plaint is also practically a replication of the plaint filed in CS.No.502 of 2017.

19. The 1st Defendant, is Jinneng Clean Energy Technology Limited (in short 'Jinneng'), a Company incorporated under the laws of Peoples Republic of China and having its registered Office at Shanxi Province, China. It is represented by its Director. The 2nd Defendant is the SunEdison Energy Holding (Singapore) PTE Limited, which is a Company incorporated and registered under the laws of Singapore and has its Corporate Office at Singapore and is represented by its Managing Director. The 3rd Defendant is

the Singapore International Arbitration Centre (SICA), which is also stated to be a Company incorporated and registered under the laws of Singapore. It is an arbitral institution functioning from Singapore and it also has an Office at Mumbai.

20. It has been further stated that the Plaintiff is engaged in the business of development and planning and construction of facilities in the field of renewable energy. They claimed that they received a notice of dispute, dated 11.11.2016 from the 1st Defendant, wherein it was alleged that Sei Adhavan, which incidentally is the Plaintiff in CS.No.502 of 2017 and is based at Chennai, had a contract with the Plaintiff herein to provide construction services for 50MW AC plant in Virudhunagar, District, Tamil Nadu. The 1st Defendant had contracted for supply of modules for the said Project to the Plaintiff's holding Company in Singapore and to secure the payment of certain outstanding invoices of the 1st Defendant from the 2nd Defendant, they had executed a Non Disposal Undertaking, dated 17.3.2016. There was an undertaking not to sell, transfer or assign or create any interest over 24% shares of the Plaintiff by the 2nd Defendant until the 1st Defendant receives full discharge of the obligations to it. It was stated that a sum of USD73,48,403/- was still due to the 1st Defendant by the 2nd Defendant. The 2nd Defendant had 99% shares of Sei Adhavan and is also the holding Company of the Plaintiff at the time

of signing the Non Disposal Undertaking. The 1st Defendant had invoked arbitration under the Non Disposal Undertaking. The Plaintiff claimed that they are not Signatory or a party to the Non Disposal Undertaking. However, the 1st Defendant issued a further notice of dispute dated 8.1.2017. The Plaintiff also received a notice of arbitration dated 11.4.2017 for resolving the dispute relating to the Non Disposal Undertaking before the 3rd Defendant. The Plaintiff has submitted that it has no obligation under the Non Disposal Undertaking. A reply to the notice was sent by the learned counsel for the Plaintiff in Singapore. It was pointed out that the Non Disposal Undertaking clearly stated that the proceedings are to be governed by the Rules of Arbitration and Conciliation of the ICC and consequently, the 3rd Defendant did not have the power to initiate or conduct arbitration. There were exchange of notices between the Plaintiff's counsel and the counsel for the 1st Defendant. The Plaintiff received a further notice from the 3rd Defendant dated 5.5.2017 that the request for arbitration was assigned case no.094/17/AKB and the arbitration proceedings were deemed to have been commenced on 11.4.2017.

21. It has been further stated that the 2nd Defendant and the Plaintiff were asked to appoint an Arbitrator. The Plaintiff's counsel sent a reply dated 11.5.2017, once again, reiterating the fact that the 3rd Defendant did not have any authority to initiate or conduct

arbitration. It was made clear that the Plaintiff was not a party to the Non Disposal Undertaking and it was also pointed out that the arbitration clause in the Non Disposal Undertaking provided that under the Rules of ICC, ICC alone has the authority to administer the arbitration. In this manner, letters were exchanged between the parties. Letters were sent on 29.5.2017, 1.6.2017 and 7.6.2017. It was the stand of the 1st Defendant's counsel in their reply dated 7.6.2017 that the 2nd Defendant had signed the Non Disposal Undertaking on behalf of the Plaintiff. The Plaintiff in the present suit reiterated their stand that there is no arbitration agreement between them and the 1st Defendant. It is also the specific stand of the Plaintiff that the 2nd Defendant did not have authority to execute any arbitration agreement on behalf of the Plaintiff. It was further stand that the Plaintiff is a separate legal entity in law. Claiming that there is no privity of contract between the Plaintiff and the 1st Defendant, the Plaintiff had filed the suit as stated above, seeking permanent injunction, restraining the 1st Defendant or anybody acting under them from proceeding with or prosecuting the arbitration proceedings as against the Plaintiff arising out of the Non Disposal Undertaking, dated 15.3.2016 entered into between the 1st and 2nd Defendants and for permanent injunction, restraining the 3rd Defendant from administering the arbitration pursuant to the request dated 11.4.2017, from the

1st Defendant against the Plaintiff and others in arbitration case no.ARB094/17/AKB.

22. Along with the plaint in CS.No.12 of 2018, the Plaintiff had filed an application, seeking leave to institute the suit, within the jurisdiction of this Court. This Court had directed notice in the said application. Notice was served particularly on the 1st Defendant and they entered appearance. Thereafter, arguments were advanced on the issue of leave to sue. On consideration of the facts, this Court had felt that a prima facie case existed to examine the issues between them and the 1st Defendant and that to examine the facts, leave had to be granted and accordingly, granted leave to institute the suit in A.No.4758 of 2017, by order dated 18.12.2017.

23. Along with the suit in CS.No.12 of 2017, the Plaintiff had filed OA.Nos.6 and 7 of 2018, seeking an order of interim injunction, restraining the 3rd Defendant from administering the arbitration proceedings pursuant to the request dated 11.4.2017 from the 1st Defendant against the Plaintiff and others in arbitration case no.ARB094/17/AKB and for interim injunction, restraining the 1st Defendant or anybody acting under them, from proceeding with or prosecuting the arbitration proceedings, against the Plaintiff, arising out of the Non Disposal Undertaking, dated 17.3.2016 entered into between the 1st and 2nd Defendants, pending disposal of the suit.

24. In the affidavits filed in support of OA.Nos.6 and 7 of 2018, the Authorised Signatory of the Plaintiff has stated that the Plaintiff had received a notice of dispute, dated 11.11.2016 from the 1st Defendant, wherein it was alleged that Sei Adhavan, a Company based in Chennai had a contract to provide construction services for 50MW AC Plant in Virudhunagar District, Tamil Nadu and there was a further contract for supply of modules by the 1st Defendant for the said project with the holding Company in Singapore. A Non Disposal Undertaking had been executed to secure payment of certain outstanding invoices of the 1st Defendant. This undertaking was on 17.3.2016. Under the same, the 2nd Defendant had undertaken not to sell, transfer or disburse or create an security interest on 24% shares of the Plaintiff until the 1st Defendant received full discharge of their obligations to a sum of USD73,48,403/-.

25. The deponent of the affidavit claimed that the Plaintiff is not a Signatory or a party to the Non Disposal Undertaking. It was also further claimed that the 2nd Defendant was not authorised to enter into such undertaking agreement with the 1st Defendant by the Plaintiff. It has been further stated that notices were exchanged between the counsel and it was made clear that the Plaintiff was not under any obligation to participate in any arbitration proceedings commenced by the 3rd Defendant. It was also pointed out that under the Non Disposal Undertaking,

arbitration proceedings have to be initiated only under the Rules of ICC. It has been further stated that in spite of exchange of notices, notice to participate in the arbitration proceedings had been received even from the 3rd Defendant and it is under these circumstances that the suit had been filed and after obtaining leave to institute the suit within the jurisdiction of this Court, these two applications have also been filed, seeking injunction, restraining the 1st Defendant from proceeding with and prosecuting the arbitration proceedings as against the Plaintiff and also injunction against the 3rd Defendant from administering the arbitration proceedings in arbitration case ARB094/17/AKB.

26. It has also to be mentioned, at this juncture, that the parallel suit in CS.No.502 of 2017 was already pending on the file of this Court. In that suit, by order dated 29.6.2017, interim injunction on the same lines as sought for in CS.No.12 of 2018 had been granted by this Court in OA.Nos.642 to 644 of 2017. In OA.Nos.6 and 7 of 2018, notice alone was ordered. Notice was served and the 1st Defendant participated in the proceedings and raised objections to both the jurisdiction of this Court and also to grant of any relief in favour of the Plaintiff.

27. The 1st Defendant filed A.Nos.477 to 479 of 2018, to revoke the leave granted in A.No.4758 of 2018 by order dated 18.12.2017, to reject the plaint in CS.No.12 of 2018, to refer the parties to arbitration in terms of Clause

9 of the Non Disposal Undertaking dated 17.3.2016 and in accordance with Section 45 of the Arbitration and Conciliation Act. In the affidavits filed in support of these applications, the Power of Attorney of the 1st Defendant has stated that the 1st Defendant is a Company incorporated under the law of Peoples Republic of China. The Plaintiff is a Company incorporated under the laws of India. The 2nd Defendant is a Company incorporated under the laws of Singapore. The 3rd Defendant is an International Arbitration Centre at Singapore.

28. The deponent of the affidavit has further stated that the 2nd Defendant had executed a Non Disposal Undertaking, dated 17.3.2016 in favour of the 1st Defendant with respect to construction of 50MW AC solar plant at Virudhunagar District, Tamil Nadu. The Plaintiff was the main contractor. The 2nd Defendant was held out to be 99.99% shareholder of Sei Adhavan. Sei Adhavan was in the process of constructing the Project. The Plaintiff subcontracted supply of modules for the project to and in favour of the 1st Defendant. Monies were due to the 1st Defendant owing to supply of goods as required by the Plaintiff.. For security of payment of such money which was already due to the 1st Defendant, the 2nd Defendant undertook to beneficially hold and retain at least 24% shares in Sei Adhavan free from any security, interest till the amounts due to the 1st Defendant completely are discharged. There was also an obligation to

prevent any transfer or encumbrance of the shares.

29. The deponent of the affidavit has further stated that the Non Disposal Undertaking contains a binding, valid and subsisting arbitration agreement in Clause 9. The 1st Defendant subsequently discovered that in breach of the undertaking, there was a transfer of shares to GPPL and a notice of dispute was issued under Clause 9(a) to both the Plaintiff and to Sei Adhavan on 11.11.2016 and again on 8.1.2017, a similar notice was also issued to the 2nd Defendant. Since the disputes were not amicably resolved within 30 days as provided in the agreement, a notice for arbitration and request for arbitration was issued to the 3rd Defendant by request dated 11.4.2017. There were exchange of correspondences between the counsel for the Plaintiff and the 1st Defendant. They both reiterated their respective stands. But, however, it is the stand of the 1st Defendant and the deponent of the affidavit that the agreement entered into by the 2nd Defendant was also binding directly on the Plaintiff herein. It has been specifically stated that the Plaintiff had approached the Court in a mala fide manner and had abused the process of this Court. It was also stated that no part of cause of action arose within the jurisdiction of this Court to enable this Court to retain the suit in its file. It has been, therefore, stated that the leave granted should be revoked and the parties must be referred to participate in the arbitration proceedings already initiated before the 3rd

Defendant.

30. It is also specifically stated that the arbitration agreement specifically provided that the arbitration proceedings shall be held at Singapore International Arbitration Centre, the 3rd Defendant. As a matter of fact, the 3rd Defendant had dismissed the Plaintiff's objection to arbitration on 13.6.2017 and had held that the arbitration was to continue and that the Plaintiff should proceed to nominate their Arbitrator, according to the terms of the Non Disposal Undertaking. The deponent of the affidavit reiterated that there is a valid agreement as between the 1st and 2nd Defendants and that the said agreement extended to an obligation on the Plaintiff also to participate in the arbitration proceedings and also a right on the 1st Defendant to initiate arbitration proceedings as against the Plaintiff.

31. It has been specifically stated that the Plaintiff was covered by the arbitration agreement and that the word 'parties' in the Non Disposal Undertaking indicated ' Plaintiff' also. It has been further stated that Section 45 of the Arbitration and Conciliation Act is directly attracted to the facts of the present case and that there is an obligation on the Plaintiff to participate in the arbitration proceedings administered by the 3rd Defendant. It has been further stated that this court does not have necessary jurisdiction to entertain the suit or to pass any

injunction orders against the 1st Defendant. It has been further stated that as per the Non Disposal Undertaking, the parties have agreed that their contract will be governed by the laws of Singapore and they had also agreed to submit to the jurisdiction of the 3rd Defendant. It has been, therefore stated that the leave granted to institute the suit must be revoked and that the parties must be referred to arbitration and consequently, the plaint must be rejected.

32. This Court heard the arguments of Mr.P.S.Raman, the learned senior counsel for the Plaintiff for M/s.Pushpa Menon, in CS.No.12 of 2018 and Mr.Ravi, the learned counsel for the Plaintiff in CS.No.502 of 2017 and Mr.Sathish Parasaran, the learned senior counsel assisted by Ms.Priyanka Shetty for Mr.P.Giridharan for the 1st Defendant in both the suits. The Defendants 2 and 3 were not represented in the proceedings before this Court.

33. For the sake of convenience, herein after, the Plaintiff in CS.No.502 of 2017 shall be referred to as Sei Adhavan, the Plaintiff in CS.No.12 of 2018 shall be referred to as SSPI and the 1st Defendant in both the suits shall be referred to as Jinneng. The 2nd Defendant in both the suits shall be referred to as SunEdison and the 3rd Defendant in both the suits shall be referred to as SIAC. M/s.Greenko Power Projects (Mauritius) Limited shall be referred to as GPPL.

34. According to Mr.P.S.Raman, the learned senior

counsel for the Plaintiff, both Sei Adhavan and SSPI are companies incorporated under the provisions of Companies Act, 1956 and 2013 respectively. The Project, for which Sei Adhavan obtained a contract ,was at Virudhunagar, Tamil Nadu. To perform their obligations to execute the Project, Sei Adhavan had appointed SSPI as their contractor. Sei Adhavan has its registered Office at Chennai. SSPI also has its registered Office at Chennai. Very interestingly, both the registered Offices are at Menon Enternity, 10th Floor, New No.165, Old No.110, St.Marys Road, Alwarpet, Chennai-18. Even though this could be a coincidence, still the fact to be considered is that though they are two separate entities, they function from one common desk. It is in this connection that even before referring to the further arguments of Mr.P.S.Raman, the role of Pasupathy Gopalan assumes significance.

35. Be that as it may, Mr.P.S.Raman, further stated that SSPI had entered into a subcontract with Jinneng to supply modules necessary for putting up the Project at Virudhunagar. These products were shifted from China to Chennai and were offloaded at Chennai Port Trust. Payments were due at the point of delivery, according to Mr.P.S.Raman, at Chennai. The Non Disposal Undertaking also was entered into at Chennai on 17.3.2016. Consequently, when there is a dispute as between SSPI and Jinneng, over non payment of products shifted to Chennai and when SSPI, which

is separate legal entity recognised as a separate legal entity in October 2013, had not signed any agreement consenting to refer the disputes to arbitration, they cannot be dragged into participating in arbitration proceedings at Singapore. It is the stand of Mr.P.S.Raman that Jinneng can always enforce their claim by filing a suit at Chennai since they had supplied the goods at Chennai.

36. It is also seen that even if the trail of the business transaction is to be traced back to Sei Adhavan, the registered office of Sei Adhavan is at Chennai. The Companies Act provides that institution of suit against a Company shall primarily be at the place where the registered office is located. Consequently, any claim, which Jinneng has against either SSPI or Sei Adhavan, should be enforced at Chennai and when a proceeding is instituted at Singapore, naturally both Sei Adhavan and SSPI have inherent right as Companies registered under the law of India to approach the Court in India, seeking relief and protection against arbitration proceedings initiated without their express consent.

37. Mr.P.S.Raman, has also stated that the fact that SunEdison has 99.99% shares in Sei Adhavan is immaterial. If a shareholder of a Company has to be a deciding factor, then shareholders of any Company would be spread across the globe. . There could never be a situation that litigation can be to the convenience of the shareholders. But, litigations should

be where the registration Office of the Company is situated. He further stated that merely holding 99.99% shares would not amount that Sei Adhavan and SunEdison are one Group Company. Sei Adhavan is still a separate legal entity under Indian law, and the fact that SunEdison holds shares is immaterial. They have been incorporated under the Indian law and their incorporation has been recognised by the Registrar of Companies, who is the only authority to grant such incorporation and who had also done so on 12.1.2015 by granting Certificate of Incorporation. Mr.P.S.Raman, therefore, stated that this Court should grant protection to the Plaintiffs in both the suits, namely, Sei Adhavan and SSPI from any judicial proceedings initiated in SICA. They do not have any obligation to participate in those judicial proceedings.

38. This argument advanced by Mr.P.S.Raman had been met by Mr.Satish Parasaran, the learned senior counsel for the 1st Defendant, who pointed out that a mere look at the composition of Sei Adhavan, SSPI and SunEdison would clearly establish that they are one unit with one object, namely, to ensure completion of the project at Virudhunagar, Tamil Nadu. Though the purchase orders of the said Project was routed through SSPI, further agreement with Jinneng was an immaterial fact. The fact that a Senior Official of Sei Adhavan, SunEdison and SSPI had actually forwarded the Non Disposal Undertaking, which had been signed by Jinneng would

also show that all three have acted in unison. They wanted the Project to move forward. For that purpose, they required supplies to be made. Jinneng is a leading supplier of the products required to complete the project at Virudhunagar, Tamil Nadu. Consequently, they supplied the products. Monies are due to them. There was an apprehension that if shares of Sei Adhavan, who has to execute the project, were to be transferred to a third party, then the monies due to Jinneng would never be repaid. Under those circumstances, acting at the behest of one common individual who represented all the three entities, and who forwarded the Non Disposal Undertaking to be signed, with assurance that the shareholding of Sei Adhavan would not be disturbed, thereby ensuring that the claims would still be made as against the parties, to whom supplies were made, the Non Disposal Undertaking was signed by Jinneng. It was pointed out by Mr.Satish Parasaran that hiding behind a screen and claiming indulgence should not be permitted by this Court.

39. Though it transpired during the course of arguments that GPPL is at present the holding Company of Sei Adhavan, at the time when Jinneng and SunEdison entered into the agreement and into a contractual relationship, SunEdison was the holding Company of Sei Adhavan with 99.99% shares. Sei Adhavan is a Company incorporated on 12.1.2015 under the Companies Act, 2013. SSPI is a Company incorporated on 7.11.2012 under the Companies Act, 1956. SunEdison held

99.99% of the equity capital in Sei Adhavan. Sei Adhavan had a contract to construct 50 MW AC Plant at Virudhunagar District, Tamil Nadu. For execution, they had engaged SSPI as a Contractor to provide construction related services in relation to the said Project. In turn, SSPI had subcontracted part of the supply of modules to Jinneng and in this regard, subcontract agreements were executed in purchase orders nos.924112, 927415 and 927420. These sub contract agreements entered into between SSPI and Jinneng have not been produced for consideration of the Court. The terms of the said subcontract agreements have also not been disclosed by SSPI. They are the Plaintiffs, who since pursuant to such subcontracts and as a direct result of such subcontract, SunEdison had entered into a Non Disposal Undertaking with Jinneng to secure outstanding payments, had the primary obligation before this Court to produce the said subcontract agreements.

40. It is the specific case of the 1st Defendant that a sum of USD73,48,403/- was due and payable in view of the goods already supplied. To secure such payment, they had entered into a Non Disposal Undertaking with SunEdison, who at that point of time, held 99.99% shares in Sei Adhavan.

41. To recount the facts once again, SunEdison was 99.99% shareholder of the equity share capital of Sei Adhavan. When the Corporate veil of Sei Adhavan pierced, it would be evident that their acts were controlled by

SunEdison. Sei Adhavan in turn had the benefit of obtaining a contract to construct 50MW AC Power plant (Project) in Virudhunagar District, Tamil Nadu. To execute this Project, SSPI was nominated as a contractor for Sei Adhavan. SSPI were under the control of Sei Adhavan, who had the benefit of obtaining the contract to construct the Project and that SSPI was only a Contractor under Sei Adhavan. In turn, as stated above, Sei Adhavan was for all practical purposes under the direct control of SunEdison.

42. There are no documents, which had been produced relating to either the Articles of Association or Memorandum of Association of both Sei Adhavan and SSPI.

43. To repeat, an obligation to produce the subcontract agreements was on the Plaintiffs and a reasonable presumption can be drawn that they were not produced only because, if disclosed, the documents would be adverse to the stands taken by the Plaintiffs in both the suits.

44. SSPI had entered into a subcontract with Jinneng. This subcontract ultimately led to execution of three further subcontracts and three purchase orders, bearing nos.924112, 927415 and 927420 and these three purchase orders have also not been produced before the Court. Production of those purchase orders, which have been termed as 'sub contract agreements' in the Non Disposal Undertaking, would have thrown light on the nature of agreement between SSPI and Jinneng and also whether the disputes between them with

respect to supply of goods by Jinneng and non payment of money by SunEdison are arbitrable in nature and if not the jurisdiction of the Court wherein litigation should be initiated.

45. The non production of those subcontracts, breach of which have primarily lead the Jinneng to insist upon execution of Non Disposal Undertaking by SunEdison, has certainly handicapped this Court to the extent that the Court has to proceed only on the basis of the Non Disposal Undertaking and the applicability and enforceability of the same on the Plaintiff in both the suits. This has to be contrasted with the right of Jinneng to seek recovery of money from them as they have now initiated the arbitration proceedings at Singapore administered by SICA. However, Jinneng has claimed that monies are due and payable to them. In order to secure the monies payable to them, SunEdison had entered into a Non Disposal Undertaking. It has been the specific case of the Jinneng that they entered into this Non Disposal Undertaking on the representation made by Pasupathy Gopalan, Asia Operations President of SSPI. It is the specific case of the Jinneng that SSPI was the main operating entity in India and managing all other entities including Sei Adhavan.

46. As a matter of fact, it has been the specific stand of Jinneng that even SunEdison was established to serve as a holding Company with 99.99% shares of Sei Adhavan for

Asian projects. Even though these facts will have to be established at the time of trial, the specific allegation that a named individual, Pasupathy Gopalan, who was a Director of SunEdison, Shareholder of SSPI and Asia Operations President of SSPI, had sent the draft Non Disposal Undertaking on 15.3.2016, had not been controverted in specific terms by both Sei Adhavan and SSPI. This assumes significance. Both Sei Adhavan and SSPI have taken refugee behind a screen claiming incorporation under the Companies Ac. The allegation of Jinneng regarding the role of Pasupathy Gopalan has to be taken into consideration. He is said to be shareholder of SSPI and Director of SunEdison. He had prepared the draft of the Non Disposal Undertaking. From the view point of Jinneng, they had been induced to enter into an agreement called 'Non Disposal Undertaking' and for all practical and legal purposes, they were under the impression or were led into an impression that entering into an agreement with SunEdison would also bind Sei Adhavan and more importantly, SSPI with whom they had a a purchase order and for which supplies were made and monies were due. It is with respect to those monies which were due that this Non Disposal Undertaking had been entered into and SunEdison in very specific terms agreed to ensure that there would be no transfer of the equity of Sei Adhavan till they discharge the payments due to Jinneng.

47. It must be kept in mind that Sei Adhavan had the

contract to construct the Project. SSPI was only the Contractor of Sei Adhavan and SSPI in turn had approached Jinneng to supply material. The email sent by Pasupathy Gopalan on 15.3.2016 had been enclosed as a document by Jinneng. In the said email, Pasupathy Gopalan had stated as follows:-

> "Subsequent to our call this morning, with respect to the 60 MW India project called Adhavan, please find below the following for your review:-
>
> 1. PPA
> 2. Copy of Regulatory Authority's order identifying Mar 30th as the tariff cliff date.
> 3. First few pages of the signed facility agreement for Term loan for this project.
> 4. Draft of the undertaking that SunEdison can provide to Jinergy so that there is comfort that SunEdison cannot Sell the Project without settling your invoice."

48. This email refers specifically and only to construction of 60MW India Project called, 'Adhavan' and a draft of the undertaking that SunEdison can provide to Jinneng so that SunEdison cannot sell the project without settling the invoices, had also been attached as a document. This email was sent on 15.3.2016 at 5.28 p.m.. On 17.3.2016 at 6.13. p.m., a reply was sent as follows:-

> "Please kindly find revised NDU attached.
> It has to be clarified that the NDU shares shall be 57% as that is the payment we have not received of the 60MW solar module supply contract of Adhavan project."

49. The attachment of Non Disposal Undertaking ,

dated 17.3.2016 had also been enclosed as a document by the 1st Defendant. On the face of it, these documents reveal that Sei Adhavan and SSPI were working as one particular group, controlled by SunEdison. SSPI was due and payable monies to Jinneng. They did not make any offer to make the payment. This payment arose out of a contract obtained by Sei Adhavan in Virudhunagar District to put up 60 MW AC Solar Plant. In order to make the payment, instead of the two Plaintiffs, agreeing to pay Jinneng either directly or indirectly, they had permitted SunEdison to stand as their guarantor. There was no obligation on SunEdison to enter into a Non Disposal Undertaking with respect to payments to be made by SSPI directly and by Sei Adhavan indirectly. The products supplied by Jinneng were ultimately to be used only by Sei Adhavan. They had routed the purchase through SSPI. But, in effect, they are the purchasers, because they are to execute the Project. SSPI was only a conduit through which purchase orders were placed on Jinneng. When this trail is established and when it is further seen that to honour the commitments towards the purchase of the products supplied by Jinneng, SunEdison stood as guarantor to ensure that shares of Sei Adhavan would not be disposed of, it is clear that all three, namely, SunEdison, Sei Adhavan and SSPI were working as a group Company. An undertaking to ensure that shares are not disposed of was necessary because if the controlling authority of Sei Adhavan to an extent of 24% of the shares is shifted to a third party, then the obligation towards Jinneng might by denied by the said third party. In order to ensure that the obligation is still kept up, this Non Disposal Undertaking had been entered into.

50. There is also yet another factor. Both Sei Adhavan and SSPI being Companies incorporated under the Companies Act, 1956 and 2013, would naturally have restrictions on entering into such an understanding agreement with a foreign registered Company, namely, Jinneng. To assess whether they had that capacity or had the right to enter into such agreement, their Articles of Association and Memorandum of Association have not been produced by them and have not been disclosed to this Court.

51. The role played by Pasupathy Gopalan is also quite significant, because in some manner or the other, he had a foot in each one of three Companies. Consequently, Jinneng had, with hope in their eyes, executed the Non Disposal Undertaking. They never expected that Sei Adhavan and SSPI would turn and say that they were not signatories to the Non Disposal Undertaking and consequently, they are not bound under the Non Disposal Undertaking.

52. To repeat the facts again, if Sei Adhavan did not obtain the contract to construct the Project, SSPI would not have an occasion to place orders on Jinneng. SunEdison being the 99.99% shareholder of Sei Adhavan was directly interested in ensuring that the Project was executed at

Virudhunagar.

53. The Non Disposal Undertaking dated 17.3.2016 had been signed by SunEdison and Jinneng. SunEdison had been described as follows:-

> "SUNEDISON ENERGY HOLDING (SINGAPORE) PTE LTD a Company incorporated and registered under the laws of the Singapore, having its corporate office at 11 Lorong 3 Toa Payoh Blk B jackson Square, 4th Floor Singapore 319579 (herein after referred to as the "SunEdison" which expression shall, unless repugnant to the context or meaning thereof, be deemed to include its successors and permitted assigns)."

54. The reference to SunEdison also includes its successors and permitted assigns. The fact that reference to 'SunEdison' would also mean reference to its 'successors' and 'permitted assigns' is very significant. In the said agreement, there is a reference to the Project undertaken by Sei Adhavan. There is also reference to the fact that SunEdison holds 99.99% of equity capital in Sei Adhavan. Thereafter, it has been further stated that Sei Adhavan had engaged SSPI as a Contractor and in turn, the Contractor had subcontracted purchase orders with Jinneng. An analysis of the above clauses stated in the Non Disposal Undertaking reveals that the only purpose, for which that undertaking was entered into between the parties, was to secure the interest of Jinneng in so far as the unpaid bills were concerned. These bills related to supply of products for the Project undertaken by Sei Adhavan through SSPI. The interlink among

Sei Adhavan, SSPI and SunEdison is evident on the face of the documents. There would be no necessity for entering into this agreement, but for the above interlink, which will only be evident in 'group companies'.

55. There is also a reference to the invoices. The invoices specifically meant the invoices raised towards supply of products by Jinneng under the agreement with SSPI. It is also stated that the obligations under the undertaking was automatically terminated upon receipt of all outstandings by Jinneng. The contact details have also been given. Very specifically the contact details of SSPI have been given.

56. In Clause 5.1 relating to 'Binding Obligations', it has been specifically provided that SunEdison confirms that its obligations under this Undertaking shall be binding upon its **'successors' and 'permitted assigns'**. I hold that if the undertaking had been given by SunEdison, in their individual capacity, there was no necessity to have this particular clause. The obligation on SunEdison that the undertaking would also be binding on its successors and permitted assigns binds naturally only Sei Adhavan and SSPI as no documents have been placed to indicate presence of any other entity which could qualify as either 'successor' or 'permitted assigns' of SunEdison.

57. Mr.P.S.Raman has stated that since the Non Disposal Undertaking had been executed at Chennai, this Court has jurisdiction to try the issues. He referred to Clause 11

of the Letters Patent, which is as follows:-

> "11. **Local limits of the ordinary original jurisdiction of the High Court::-** And We do hereby ordain that the said High Court of Judicature at Madras shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by the Governor in Council, and until some local limits shall be so declared and prescribed within the limits of the local jurisdiction of the said High Court of Madras at the date of the publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction."

58. In the cause of action for institution of the two suits, the Plaintiffs have claimed that their cause arose only with the receipt of notice of arbitration. The notice of arbitration had been received for arbitration proceedings in Singapore. If that is to be the cause of action, then the Plaintiffs' issues cannot be agitated before this Court and they will have to go to Singapore to raise the issue of jurisdiction before SIAC. However, during the arguments, cause of action has been expanded to include the fact that the Non Disposal Undertaking was executed at Chennai. If the Plaintiffs rely on that fact to maintain the suit within the jurisdiction of this Court, then they cannot in the same breath hold that they are not bound under the Non Disposal Undertaking since they are not signatories to it. The can fall back on the Non Disposal Undertaking as giving rise to the cause of action within the jurisdiction of this Court

only if they admit to the binding nature of all the clauses of the same on them. The Plaintiffs cannot reject the Non Disposal Undertaking as not binding on them, but at the same time, lay a suit on the basis of the Non Disposal Undertaking.

59. The other aspect, which has to be taken into consideration, is that the goods, which Jinneng supplied, actually arrived at the Port of Chennai, thereby allegedly giving rise to cause of action at Chennai. The fact that payments were not made for such goods is the reason why the Non Disposal Undertaking had been entered into between SunEdison and Jinneng. Consequently, the cause of action has to be traced back again to the Project and to the fact that Sei Adhavan, SSPI and SunEdison are jointly in one way or the other interlinked with the common object of completing the project at Virudhunagar District, Tamil Nadu.

60. In this connection, a reference with much advantage can be drawn to **2013 1 SCC 641 (Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others).** Both the learned senior counsel took the Court through the judgement. Mr.P.S.Raman, has stated that one of the main ingredients for application of the ratio laid down in the said judgement is that there must be a mother agreement. The learned counsel drew the attention of this Court to the various agreements which form part and which formed the basis for the finding in the judgement. There

was a shareholders agreement and then this was followed by an international distributors agreement, managing directors agreement, financial and technical know how licence agreement, export sale agreement, trade mark registered user licence agreement and supplementary collaboration agreement. The fact was that there was a primary agreement and the other agreements are subsidiary in nature. In paragraph 26 of the said judgement, it was held as follows:-

> "26. As is clear from the above terms and conditions of this Agreement, it was treated as a principal agreement executed between the parties and other agreements, like the Financial & Technical Know- How License Agreement, Trademark Registered User License Agreement, International Distributor Agreement, Managing Directors' Agreement and Export Sales Agreements were not the only anticipated agreements to be executed between the parties, but their drafts and necessary details had been annexed as Appendix I to VII of the shareholder agreement. The other Agreements were only required to be signed by the parties who, as per the Shareholders Agreement, were required to sign such agreement. The Arbitration Clause of the Shareholders Agreement reads as under:
>
> "Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties, shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The arbitration proceedings shall be held in London, England and shall be governed by and subject to English law. Judgement upon the award rendered may be entered in any court of competent jurisdiction."

61. In paragraph 63, the Honourable Supreme Court

had examined the application of Chapter I of Part II of the Arbitration and Conciliation Act as under:-

> "For proper interpretation and application of Chapter I of Part II, it is necessary that those provisions are read in conjunction with Schedule I of the Act. To examine the provisions of Section 45 without the aid of Schedule I would not be appropriate as that is the very foundation of Section 45 of the Act. The International Council for Commercial Arbitration prepared a Guide to the Interpretation of 1958 New York Convention, which lays/contains the Road Map to Article II. Section 45 is enacted materially on the lines of Article II of this Convention. When the Court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects :
>
> "1. Does the arbitration agreement fall under the scope of the Convention?
>
> 2. Is the arbitration agreement evidenced in writing?
>
> 3. Does the arbitration agreement exist and is it substantively valid?
>
> 4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration?
>
> 5. Is the arbitration agreement binding on the parties to the dispute that is before the Court?
>
> 6. Is this dispute arbitrable?
>
> According to this Guide, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the Court will have to adjudicate any plea, if taken by a non-applicant that the arbitration agreement is null and void, inoperative or incapable of being performed. In these three situations, if the Court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest.

62. At this juncture, a reference may be had from Section 45 of the Arbitration and Conciliation Act and it reads as under:-

> "**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."

63. Thereafter, the Honourable Supreme Court had analysed this in paragraphs 69 to 73 and 76, wherein it was held as under:-

> "**69.** We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the court shall refer them to arbitration. The use of the word "shall" would have to be given its proper meaning and cannot be equated with the word "may", as liberally understood in its common parlance. The expression "shall" in the language of Section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is

a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

**70.** Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (*sic* underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England*(2nd Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

**71.** Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement.

**72.** This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

**73.** A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

**76.**The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such

> agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

64. Each case will differ on facts. In the present case, SunEdison had entered into the Non Disposal Undertaking with Jinneng and Jinneng had in turn been led into an impression, particularly, by the presence of Pasupathy Gopalan that SunEdison was actually representing not only SunEdison, but also Sei Adhavan and SSPI. It would be too late for Sei Adhavan and SSPI to claim exclusivity in nature and character independent to that of SunEdison. All three of them are deeply involved in execution of the Project. For such execution, the services of Jinneng were required to complete the Project. Jinneng supplied products and monies had to be paid. Monies were not paid. Consequently, this undertaking was entered into. Once it is seen that all the three Companies acted in unison, naturally Sei Adhavan and SSPI would be bound by the terms of the Non Disposal Undertaking. If this Court were to hold so, then the reliefs cannot be granted to the Plaintiff.

65. In the same judgement in **2013 1 SCC 641 (Chloro Controls India Private Limited Vs. Severn Trent Water**

**Purification Inc. and others)** the Honourable Supreme Court had further discussed as follows:-

> "**105.**We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.
>
> **106.** The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.
>
> **107.** If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.
>
> **108.** In the present case, the corporate structure of the respondent companies as well as that of

> the appellant companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the lis or persons claiming under them. They have contractual relationship which arises out of the various contracts that spell out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependent on any single agreement but was capable of being achieved only upon fulfilment of all these agreements. If one floats a joint venture company, one must essentially know how to manage it and what shall be the methodology adopted for its management. If one manages it well, one must know what goods the said company is to produce and with what technical know-how. Even if these requisites are satisfied, then also one is required to know how to create market, distribute and export such goods. It is nothing but one single chain consisting of different components. The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main parties to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful by execution of various agreements like in the present case.”

66. In the present case, Sei Adhavan, SSPI and SunEdison are group Companies. The undertaking signed by SunEdison binds both Sei Adhavan and SSPI. The above discussion naturally brings the court to the conclusion that the reliefs sought for by the Plaintiffs cannot be granted.

67. In the result, OA.Nos.642, 643 and 644 of 2017 and OA.Nos.6 and 7 of 2018 are dismissed. A.Nos.6461, 6462 and 6463 of 2017 and A.Nos.477, 478 and 479 of 2018 are allowed. No costs.

Sd/.C.V.K.J

24.04.2018

//Certified to be a true copy//
Dated this the day of 2018

JJ 28/04.2018 COURT OFFICER