

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4690 OF 2018
(Arising out of SLP(C) No.16789 of 2017)**

AMEET LALCHAND SHAH AND OTHERS

...Appellants

Versus

RISHABH ENTERPRISES AND ANOTHER

...Respondents

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the judgment dated 17.04.2017 passed by the Delhi High Court in FAO(OS) (COMM) No.85 of 2017 in and by which the Division Bench affirmed the order of the Single Judge dismissing the application filed under Section 8 of the Arbitration and Conciliation Act, 1996 (the 'Act') by holding that the agreements between the parties are not inter-connected with the principal agreement dated 05.03.2012 and therefore, the parties cannot be referred to arbitration as per the decision in ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and another*** (2003) 5 SCC 531.

3. Brief facts which led to filing of this appeal are as follows:-

On 01.02.2012, the first respondent – Rishabh Enterprises (the ‘Rishabh’), the sole proprietorship concern of the second respondent – Dr. A.M. Singhvi entered into two agreements with M/s Juwi India Renewable Energies Pvt. Ltd. (Juwi India) namely:- (i) Equipment and Material Supply Contract for purchase of power generating equipments to the tune of Rs.8,89,80,730/-; and (ii) Engineering, Installation and Commissioning Contract for installation and commissioning of the Solar Plant for Rs.2,20,19,270/-. Both these agreements contain arbitration clause.

4. The first respondent - Rishabh entered into Sale and Purchase Agreement dated 05.03.2012 with the second appellant company – Astonfield Renewables Private Limited (Astonfield) for purchasing CIS Photovoltaic products to be leased to appellant No.3 – Dante Energy Pvt. Ltd. (Dante Energy) to be installed at the Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. As per the agreement, these products were valued for Rs.25,16,00,000/-. The second appellant – Astonfield received Rs.21,40,49,999/- from the respondents under various cheques issued by the Rishabh. This agreement dated 05.03.2012 does not contain the arbitration clause. According to the appellants, an amount of Rs.10,00,00,000/- by cash was paid back to the sons of Dr. A.M. Singhvi i.e. Rs.2,50,00,000/- to Mr. Avishkar Singhvi and Rs.7,50,00,000/- to

Mr. Anubhav Singhvi. An Equipment Lease Agreement (ELA) dated 14.03.2012 was entered into between the Rishabh and Dante Energy whereby Dante Energy agreed to pay the Rishabh Rs.13,50,000/- as lease rent for March, 2012 and from April, 2012 onwards, the said rent payable was Rs.28,26,000/-. The Solar Plant at Jhansi has been commissioned and energized on 16.03.2012.

5. Gist of the agreements are as under:-

S.No.	DATE OF CONTRACT	CONTRACTING PARTY	PURPOSE OF CONTRACT	ARBITRATION AGREEMENT
1.	01.02.2012	Rishabh Enterprises entered into two agreements with M/s. Juwi India Renewable Energies Pvt. Ltd.	(i) Rishabh to purchase power generating equipments - Rs.8,89,80,730/- (ii) Engineering, Installation and commission of the plant at Jhansi - Rs.2,20,19,270/-	Both agreements contain arbitration clause - Parties agreed that the seat of arbitration shall be at Bombay
2.	05.03.2012	Rishabh entered into agreement with M/s. Aston Renewables Pvt. Ltd. (appellant no.2)	(i) Purchasing CIS Photovoltaic products to be leased to Dante Energy (Appellant no.3) for energizing solar plant installed at Jhansi - Rs.21,40,49,999/-	This agreement does not contain arbitration clause.
3.	14.03.2012	Rishabh entered into agreement with M/s. Dante Energy Pvt. Ltd. (appellant no.3)	Dante agreed to pay Rs.13,50,000/- as lease rent for the equipment for March, 2012 and from April, 2012 onwards, Rs.28,26,000/- per month.	This agreement contains arbitration clause. Parties have agreed that the seat of arbitration shall be at Bombay.

6. Dispute arose between the parties when respondents alleged that appellant No. 3 – Dante Energy has defaulted in payment of rent and that Astonfield committed fraud by inducing the Rishabh to purchase the Photovoltaic products by investing huge amount. The respondents have

also alleged that the appellants have committed misrepresentation and criminal breach of trust so far as the equipments procured and leased to Dante Energy. The respondents have also filed a criminal complaint before the Economic Offences Wing at Delhi against the appellants, based on which, FIR No. 30 of 2015 was registered. The appellants have filed writ petition bearing CWP No.619 of 2016 before the High Court of Delhi seeking quashing of the said FIR which is *sub judice*. There was also an enquiry by the Income Tax Authorities seeking explanation from the appellants regarding transfer of money to the sons of Dr. A.M. Singhvi i.e. Rs.2,50,00,000/- to Mr. Avishkar Singhvi and Rs.7,50,00,000/- to Mr. Anubhav Singhvi. Appellant No.1 – Ameet Lalchand Shah was summoned by the Income Tax Authorities seeking explanation with regard to transfer of the said money to the sons of Dr. A.M. Singhvi.

7. Owing to the dispute between the parties, appellant No.3 – Dante Energy issued notice dated 13.02.2016 invoking arbitration clause and nominated Justice Sujata Manohar, former Judge, Supreme Court of India as the Arbitrator. The respondents namely the Rishabh and its sole proprietor preferred a Civil Suit (Commercial) No.195 of 2016 before the High Court on 11.03.2016 against all the appellants levelling various allegations including fraud and misrepresentation. In the suit, multiple

reliefs were claimed:- (i) for a declaration that Sale and Purchase Agreement dated 05.03.2012; Equipment and Material Supply Contract, Engineering, Installation and Commissioning Contract both dated 01.02.2012 and Equipment Lease Agreement dated 14.03.2012 are vitiated by serious fraud committed by the appellants and that the agreements are void; (ii) for recovery of a sum of Rs.32,22,80,288/- which the appellants are jointly and severally liable to pay to the respondents; (iii) to pay a sum of Rs.19,31,74,804/- as the interest on the aforesaid amount of Rs.32,22,80,288/- at the rate of 18% per annum from the date of the agreement i.e. 01.02.2012 till the date of the realization; and (iv) to pay arrears of lease rent.

8. On receipt of notice and summons in the suit, the appellants/defendants preferred application I.A. No.4158 of 2016 under Section 8 of the Act seeking for reference of the dispute between the parties to arbitration pertaining to all the four agreements. The appellants sought for reference to arbitration of all the four agreements by contending that the Sale and Purchase Agreement (05.03.2012) is the main agreement and that other three agreements are inter-connected as they are executed between the same parties and the obligations and the performance of the terms of the agreements are inter-connected viz. commissioning of the Photovoltaic Solar Plant at Dongri, Raksa, District

Jhansi, U.P. The respondents Rishabh and Dr. A.M. Singhvi resisted the application by contending that the suit is for declaration that the agreements are vitiated due to fraud and misrepresentation and while so, the matter cannot be referred to arbitration. It was further averred that the suit is neither concerned about the agreement dated 01.02.2012 with Juwi India nor concerned about Equipment Lease Agreement (14.03.2012); whereas the suit is concerned about the false assurances and fraud played by the appellants Ameet Lalchand Shah and Dante Energy regarding which a criminal case has also been registered and hence, the dispute is not referable to arbitration.

9. The learned Single Judge by order dated 15.03.2017 dismissed the application filed under Section 8 of the Act holding that the Equipment Lease Agreement (14.03.2012) between Rishabh and Dante Energy cannot be treated as the mother/principal agreement and the agreements between the respondents and Astonfield and Juwi India cannot be said to be ancillary agreements to the same. The learned Single Judge further held that not only the respondents accuse the appellants of fraud but appellants also accuse the respondents of fraud, concealment and suppression of material facts and that there was also a registration of a criminal case based on the complaint filed by the respondents and also the enquiry by the Income Tax Authorities regarding transfer of

Rs.10,00,00,000/- to the sons of Dr. A.M. Singhvi and when there are such serious issues between the parties, they cannot be referred to arbitration.

10. Being aggrieved by the dismissal of the application, the appellants preferred appeal before the Division Bench which came to be dismissed. The Division Bench pointed out the difference in the language between Section 8 and Section 45 of the Act and after referring to ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and others*** (2013) 1 SCC 641, observed that ***Sukanya Holdings*** was not overruled. The Division Bench further pointed out that in spite of amendment brought in under Section 8, since the main/principal agreement–Sale and Purchase Agreement (05.03.2012) does not contain an arbitration clause, the matter cannot be referred to arbitration. After referring to ***A. Ayyasamy v. A. Paramasivam and others*** (2016) 10 SCC 386, the Division Bench held that in view of serious allegations of fraud, arbitration of such dispute is excluded.

11. We have heard Mr. Shanti Bhushan, learned senior counsel appearing for the appellants and Mr. Kapil Sibal, learned senior counsel appearing for the respondents. Upon consideration of the rival submissions, the following points arise for consideration in this appeal:-

1. Whether all the four agreements viz. – (i) Equipment and Material Supply Contract (01.02.2012) between Rishabh and Juwi India; (ii) Engineering, Installation and Commissioning Contract (01.02.2012) between Rishabh and Juwi India; (iii) Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield; and (iv) Equipment Lease Agreement (14.03.2012) between Rishabh and Dante Energy are interconnected to refer the parties to arbitration though there is no arbitration clause in the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield?

2. Whether reference of the dispute between the parties to arbitration is to be refused on the ground of allegations of fraud levelled against the appellants by the respondents in the plaint or whether the agreements ought to be taken as commercial undertaking of the parties “*with a sense of business efficacy*” as held in **Ayyasamy case**?

12. First, the Rishabh entered into two agreements with Juwi India dated 01.02.2012:- (i) Equipment and Material Supply Contract; and (ii) Engineering, Installation and Commissioning Contract. The first agreement-Equipment and Material Supply Contract (01.02.2012) contains arbitration clause (**Clause 19.4**). The second agreement –

Engineering, Installation and Commissioning Contract (01.02.2012) also contains arbitration clause (**Clause 25**). Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield for Rs.25,16,00,000/- does not contain the arbitration clause. The fourth agreement namely Equipment Lease Agreement (14.03.2012) between Rishabh and Dante Energy contains arbitration clause (**Clause 29**). A careful perusal of all the four agreements that is:- (i) Equipment and Material Supply Contract; (ii) Engineering, Installation and Commissioning Contract; (iii) Sale and Purchase Agreement; and (iv) Equipment Lease Agreement shows that all the four agreements were for the single purpose to commission 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh to be purchased by Rishabh and leasing the equipments to Dante Energy.

13. The averments in the plaint also *prima facie* indicate that all the four agreements are inter-connected and that appellant No.1 – Ameet Lalchand Shah is stated to be the promoter and controlling man of both Astonfield as well as Dante Energy. We may usefully refer to the relevant averments in the plaint which read as under:-

“Defendant No.1, Mr. Ameet Lalchand Shah, is the Promoter of the Defendant Nos. 2 and 3 Companies. Through his other group companies, Defendant No.1 is also the controlling shareholder of Defendant Nos. 2 and 3. He is involved in running the day to day affairs of the said companies and it is

on his instructions and directions and under his overall control and dictation that the said companies are run. He is the co-founder and the co-chairman of the “Astonfield Group” consisting of various companies incorporated both outside of and in India (www.astonfield.com). Defendant No.1 is the main brain behind the serious fraud that has been perpetuated upon the Plaintiffs and the prima donna, mind, body, soul and controlling entity of all other defendants to this suit. If the corporate veil is lifted by this Hon’ble Court (and, this is an appropriate case for lifting of the corporate veil), it will be found that it is, in fact, Defendant No.1 only who is the real entity behind all the other defendants and it is on his directions that the others have made, played their respective roles in and/or participated in the transactions in question..... Further, Defendant No.1 has also been corresponding with the plaintiffs on behalf of Defendant Nos. 2 and 3. **The said Defendant No.1 is also responsible for running the day to day affairs of this Company which is run on his directions and under his control. Defendant No.2 entered into a Sale and Purchase Agreement with the Plaintiffs, the transaction under which is vitiated by serious fraud.”**

Though there are two agreements, individual parties to the Sale and Purchase Agreement (05.03.2012) and the Equipment Lease Agreement (Dante Energy) are one and the same,. Though Juwi India is not the defendant, as discussed infra, Equipment and Material Supply Contract and Engineering, Installation and Commissioning Contract with Juwi India itself were for the purpose of commissioning Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh.

14. The clauses in the Equipment and Material Supply Contract (01.02.2012) between Rishabh and Juwi India clearly indicate that the Rishabh has entered into Lease Agreement with Dante Energy and that the Rishabh proposes to source Photovoltaic products/panels etc. and similar Solar Power generating equipments for onward lease of those

goods to Dante Energy. The following clauses in the said Equipment and Material Supply Contract would clearly establish the link of Equipment and Material Supply Contract with the main Lease Agreement with Dante Energy:-

“This Equipment and Material Supply contract is between

M/s Rishabh Enterprises..... (the ‘Client’)

AND

Juwi India Renewable Energies Private Limited(the ‘Supplier’)

Whereas:-

- A. **The Client (*Rishabh*) is entering into Lease Agreement with M/s Dante Energy Pvt. Ltd. (‘Lessee’) and the Lessee (*Dante Energy*) has necessary authorizations to develop, own, operate and commercially exploit a 2 MWp thin-film photovoltaic solar plant at Dongri, Raksa, District-Jhansi, UP (Plant Site), transmission line from power plant to the Grid Substation, bay extension work at the Grid Substation, including all of the infrastructure and relevant installations required to connect the electricity-producing equipment to the distribution/transmission grid at the Grid Substation in UP, India (the ‘Facility’).**
- B. **The Client (*Rishabh*) proposes to source Photovoltaic Products/Panels, Inverters, Transformers and similar solar power generating equipments, etc. for sale of goods to the Client (*Rishabh*) and the Client (*Rishabh*) will onward lease these goods to M/s Dante Energy Pvt. Ltd. (Lessee).**
- C. The Client (*Rishabh*) wishes to engage the Supplier (*Juwi India*) for supply of Equipment (as defined below) and materials with respect to the development of the Solar Park.
- D. The M/s Dante Energy Private Limited (Lessee) will have the right to inspect the respective goods to be sourced by the Client (*Rishabh*) and based on the confirmation from the M/s Dante Energy Private Limited (Lessee), the respective goods will be purchased by the Client (*Rishabh*) for onward sale to M/s Dante Energy Private Limited (Lessee) and will be consigned to the project site.

- E. The Supplier (*Juwi India*) is aggregable to supply the Equipment and Materials to the Client (*Rishabh*) in accordance with the terms of this Contract.”

15. Likewise, clauses in the agreement for Engineering, Installation and Commissioning Contract between Rishabh and Juwi India (01.02.2012) also clearly indicate that the agreement was entered into for the purpose of commissioning Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Clause (A) of the agreement that the Rishabh has entered into Equipment Lease Agreement with M/s Dante Energy (Lessee) reiterates that the second agreement with Juwi India for engineering, installation and commissioning is integrally connected with Equipment Lease Agreement (14.03.2012). The relevant clauses in the agreement read as under:-

“This Engineering, Installation and Commissioning Contract Agreement is between

M/s Rishabh Enterprises..... (the ‘Client’)

AND

Juwi India Renewable Energies Pvt. Ltd.....(the ‘Contractor’)

Whereas:-

- A. **The Client (*Rishabh*) is the owner of certain Photovoltaic products/Panels, Inverters, Transformers and similar solar power generating equipments etc. and is entering into an Equipment Lease Agreement with M/s Dante Energy Pvt. Ltd. (*Lessee*).**
- B. **The Lessee (*Dante Energy*) has necessary authorizations to develop, own, operate and commercially exploit a 2 MWp thin-film photovoltaic solar plant at Dongri, Raksa, District-Jhansi, UP (Plant Site), transmission line from**

- power plant to the Grid Substation, bay extension work at the Grid Substation, including all of the infrastructure and relevant installations required to connect the electricity-producing equipment to the distribution/transmission grid at the Grid Substation in UP, India (the 'Facility').
- C. The Client (*Rishabh*) proposes to purchase the Client's Equipment as required by the Lessee (*Dante Energy*) for onward lease to the Lessee (*Dante Energy*).
 - D. The Lessee (*Dante Energy*) requires the services for design, engineering, construction, erection, testing, commissioning and handing over of the Facility to the Client (*Rishabh*) and accordingly **the Client (*Rishabh*) has agreed to identify the competent Contractor (*Juwi India*) for undertaking the above work.**
 - E. The Contractor (*Juwi India*) has represented to the Client (*Rishabh*) and the Lessee (*Dante Energy*) that the Contractor (*Juwi India*) has the requisite experience, expertise, resources and skills for undertaking and performing all the activities and services required for design engineering, construction, erection, testing, commissioning and handing over of the Facility and has submitted an offer to the Client (*Rishabh*) in response to the Technical Specifications as set out by the Client (*Rishabh*).
 - F. Based on the offer submitted by the Contractor (*Juwi India*) and relying on the Contractor's representations and warranties herein, and on the concurrence and approval of the Lessee (*Dante Energy*), **the Client (*Rishabh*) wishes to appoint the Contractor (*Juwi India*) to undertake the Services and (except for purchase of the Client's Equipments) to perform all the activities and services required for design, engineering, construction, erecting, testing, commissioning and handing over of the Facility and the Contractor (*Juwi India*) has agreed to such appointment and to undertake such other duties and obligations as mentioned in this Contract."**

The above clauses in the very commencement of the agreement with Juwi India dated 01.02.2012 clearly state that the agreement itself was for the purpose of commissioning Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh for which Dante Energy (Lessee) has necessary authorizations. The above quoted clauses in the

Engineering, Installation and Commissioning Contract (01.02.2012) establish that this agreement is inter-connected with Equipment Lease Agreement (14.03.2012) with Dante Energy.

16. Equally, the Sale and Purchase Agreement (05.03.2012) between M/s Astonfield and Rishabh is also for the purpose of onward leasing of goods to Dante Energy as seen from the following clauses:-

“Sale and Purchase Agreement

Astonfiled Renewable Pvt. Ltd. (Seller) AND Rishabh Enterprises..... (Buyer) agree to sell and to purchase the following products, which are required for onwards leasing of goods by the Buyer (*Rishabh*) to Dante Energy Private Limited..... (Lessee) under the terms and conditions stated below (Transaction), effective as of the date of last signature below (Effective Date):-

1. Buyer: Rishabh Enterprises
2. Seller: Astonfield Renewables Private Limited
3. Transaction: The parties agree that this Transaction shall be governed by this Sale and Purchase Agreement and its appendices.

The products under this Agreement shall be used for the 2 MWp grid connected solar PV power project being set up by the Lessee (*Dante Energy*) at Dongri, Raksa, District-Jhansi, Uttar Pradesh (Plant Site)

The Buyer (*Rishabh*) is purchasing the above goods for onward supply/lease to lessee (*Dante Energy*). Lessee (*Dante Energy*) will have the right to inspect the respective goods and based on the confirmation from the Lessee (*Dante Energy*), the respective goods will be purchased by the Buyer (*Rishabh*) for onward sale to Lessee (*Dante Energy*) and will be consigned to the Project Site.”

Though the Sale and Purchase Agreement (05.03.2012) does not have any arbitration clause, by the above clauses, it is clearly linked with the

main agreement - Equipment Lease Agreement (14.03.2012). Sale and Purchase Agreement was entered into between Astonfield and Rishabh only for the purpose of onward transmission of leasing of the goods by Rishabh to Dante Energy. There is no merit in the contention that the Sale and Purchase Agreement is not connected with the Equipment Lease Agreement with Dante Energy.

17. Equipment Lease Agreement (14.03.2012) between Rishabh and Dante Energy is only a follow-up of all the above three agreements as is clear from the various clauses in the Equipment Lease Agreement. The relevant clauses of Equipment Lease Agreement (14.03.2012) are as under:-

“Equipment Lease Agreement

M/s Rishabh Enterprises..... (Lessor) AND M/s Dante Energy Pvt. Ltd..... (Lessee) is setting up a 2 MWp grid connected solar PV power project at Dongri, Raksa, District-Jhansi, Uttar Pradesh (Plant Site).....

Whereas the Lessor (*Rishabh*) is the owner of certain Photovoltaic products/Panels, Inverters, Transformers and similar solar power generating equipments etc. (herein referred to as “Equipments”), more particularly described in the First Schedule hereunder written.

And whereas the Lessee (*Dante Energy*) has necessary authorizations to develop, own, operate and commercially exploit a 2 MWp thin-film photovoltaic solar plant on the Site (“SPY Power Plant”), transmission line from power plant to the Grid Substation, bay extension work at the Grid Substation, including all of the

infrastructure and relevant installations required to connect the electricity-producing equipment to the distribution/transmission grid at the Grid Substation in Jhansi, Uttar Pradesh, India as specified in the Second Schedule (“Facility”) and for this purpose, they are in requirement of the Equipments as mentioned in the First Schedule hereunder written.

And whereas the Lessee (*Dante Energy*) being desirous of obtaining from the Lessor (*Rishabh*) on lease the specified nature of Equipments more particularly described in the First Schedule hereunder written, has approached the Lessor (*Rishabh*) and has requested the Lessor (*Rishabh*) to lease out the Equipments to the Lessee (*Dante Energy*) on the terms, covenants and conditions herein contained/specified.

.....

Article 4

Delivery, Commencement and disbursement:

- (i) It is expressly understood by the Lessee (*Dante Energy*) and Lessor (*Rishabh*) that in the present case, the respective Equipments are being sourced from the supplier of Solar Photovoltaic Modular-located in the State of Maharashtra i.e. Astonfield Renewables Private Limited and supplier of other solar power generating equipments like inverters, transformers, etc. in the State of Karnataka i.e. Juwi India Renewable Energies Private Limited. These goods have been inspected by the Lessee (*Dante Energy*) and are found suitable for its commercial use of the same.
- (ii) Pursuant to this lease agreement, the respective Equipments, will be purchased by the Lessor (*Rishabh*) from the respective Supplier and accordingly, the Equipments will be consigned directly to the project site in the State of Uttar Pradesh. Accordingly, in the present case, the delivery of respective Equipments will be effected by Endorsement of the consignment Note in the favour of Lessee (*Dante Energy*) by the Lessor (*Rishabh*).
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- (v) **Irrespective of how and by whom the delivery is effected, it is hereby agreed that the entire risk, cost or any outgoing pertaining to the said delivery and installation shall be at the cost and risk of the Lessor (*Rishabh*).**”

The above extracted clauses clearly demonstrate that all the four agreements are inter-connected. Clause (v) in Article 4 in the Equipment

Lease Agreement that delivery and installation shall be at the cost and risk of Rishabh (Lessor) is clearly linked with the Engineering, Installation and Commissioning Contract between Rishabh and Juwi India.

18. The High Court placed reliance upon **Sukanya Holdings** for dismissal of the application filed under Section 8 of the Act. In **Sukanya Holdings**, the suit was filed for dissolution of the partnership firm and accounts and *inter alia* challenged the conveyance deed executed by the partnership firm in favour of M/s West End Gymkhana Limited. An application filed under Section 8 of the Act was opposed by respondent No.1 thereon by contending that the subject matter of the suit was not between the contracting parties and that the reliefs claimed are not only against respondents No. 1 and 2 who are the contracting parties but are claimed against the remaining twenty-three parties who are the purchasers/tenants of disputed flats. This Court held that if all the parties to the suit are not parties to the agreement then the matter cannot be referred to arbitration since there is no provision in the Act for partly referring the dispute to arbitration. This Court noted that the buyers were not parties to the arbitration agreement and that the non-signatories cannot be referred to arbitration. In **Sukanya Holdings** in paras (15) and (16), this Court held as under:-

“15. The relevant language used in Section 8 is: “*in a matter which is the subject of an arbitration agreement*”. The 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*” indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. 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.”

19. Mr. Sibal, learned senior counsel for the respondents submitted that the High Court rightly relied upon ***Sukanya Holdings*** as it relates to Part-I of the Act that the parties who are not signatories to the arbitration agreement (in this case, Astonfield under Sale and Purchase Agreement) cannot be referred to arbitration. It was further submitted that ***Chloro Controls*** arises under Part-II of the Act and was rightly distinguished by the High Court and ***Sukanya Holdings*** was not overruled by ***Chloro Controls*** and hence, the appellants cannot rely upon ***Chloro Controls***. It was contended that the Sale and Purchase Agreement (05.03.2012) under which huge money was parted with, is the main agreement having

no arbitration clause cannot be referred to arbitration. It was submitted that the subject matter of the suit cannot be bifurcated between the parties to arbitration agreement and others.

20. In ***Chloro Controls***, this Court was dealing with the scope and interpretation of Section 45 of the Act - Part-II of the Act and in that context, discussed the scope of relevant principles on the basis of which a non-signatory party also could be bound by the arbitration agreement. Under Section 45 of the Act, an applicant seeking reference of disputes to arbitration can either be a party to the arbitration agreement or any person claiming through or under such party. Section 45 uses the expression “....at the request of one of the parties or any person claiming through or under him.....” includes non-signatory parties who can be referred to arbitration provided they satisfy the requirements of Sections 44 and 45 read with Schedule I of the Act. In para (73) of ***Chloro Controls***, this Court held as under:-

“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.” (Underlining added)

21. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project namely operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement – Equipment Lease Agreement (14.03.2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India:- (i) Equipment and Material Supply Contract (01.02.2012); and (ii) Engineering, Installation and Commissioning Contract (01.02.2012) and the Rishabh’s Sale and Purchase Agreement with Astonfield (05.03.2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (Lessee). Even though, the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and appellant No.1 – Ameet

Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14.03.2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per clause(v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (Lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.

22. Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease Agreement (14.03.2012). All the four agreements are interconnected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by

the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14.03.2012).

23. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (05.03.2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement namely Equipment Lease Agreement (14.03.2012) and the impugned order of the High Court cannot be sustained.

Amendment to Section 8 of the Arbitration and Conciliation Act, 1996

24. Arbitration and Conciliation (Amendment) Act, 2015 has brought in amendment to Section 8 to make it in line with Section 45 of the Act. In view of the observation made in ***Sukanya Holdings***, Law Commission has made recommendation for amendment to Section 8 of the Act. Consequent to 2015 Amendment Act, Section 8 is amended as under:-

“8. Power to refer parties to arbitration where there is an arbitration agreement. - (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 when 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 sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

25. “Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments - (i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming "through or under" such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "*prima facie*" basis; (iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not

possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same.” (**Ref: Justice R.S. Bachawat’s Law of Arbitration and Conciliation, Sixth Edition, Vol. I (Sections 1 to 34) at page 695 published by LexisNexis).**

26. Amendment to Section 8 by the Act, 2015 are to be seen in the background of the recommendations set out in the 246th Law Commission Report. In its 246th Report, Law Commission, while recommending the amendment to Section 8, made the following observation/comment:-

“LC Comment: The words “such of the parties.... to the arbitration agreement” and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.* (2003) 5 SCC 531, - in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be

a conclusive determination as to whether the arbitration agreement is null and void.

(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 or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified thereof in circumstances where the original arbitration agreement or duly certified copy is retained only by the other party.

LC Comment: In many transactions involving Government bodies and smaller market players, the original/duly certified copy of the arbitration agreement is only retained by the former. This amendment would ensure that the latter class is not prejudiced in any manner by virtue of the same" (**Ref: 246th Law Commission Report, Government of India**)

27. The language of amendment to Section 8 of the Act is clear that the amendment to Section 8(1) of the Act would apply notwithstanding any prayer, judgment, decree or order of the Supreme Court or any other Court. The High Court laid emphasis upon the word "*.....unless it finds that prima-facie no valid agreement exists*". The High Court observed that there is no arbitration agreement between Astonfield and Rishabh. After referring to **Sukanya Holdings** and the amended Section 8 and Section 45 of the Act, the High Court pointed out the difference in language of Section 8 and Section 45 of the Act. The High Court distinguished between **Sukanya Holdings** and **Chloro Controls**, and observed that **Sukanya Holdings** was not overruled by **Chloro Controls**. In para (23) of the impugned judgment, it was held as under:-

"23.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."

28. **Re: contention: allegations of fraud disable an arbitration:-** Yet another ground based on which the High Court declined to refer the parties to arbitration is the allegations of fraud levelled by respondents/plaintiffs in their plaint against Astonfield and appellant no.1. The High Court held that the respondents levelled allegations of fraud against the appellants which raise serious triable issues of fraud and hence, the matter cannot be referred to arbitration.

29. According to the respondents, it is not a case where "*fraud is alleged merely to disable an arbitration*". Mr. Sibal, learned senior counsel for respondents contended that the plaint is based on the averments that from inception, the intention of appellants/defendants was to cheat the respondents and the respondents were made to part with large sums of money on the basis of the misrepresentation made by the appellants. It was submitted that alternative prayer in the plaint will not *convert the fraud suit to a regulatory suit* because of alternative prayer since alternative prayer – '*lease rental*' has been projected only as an

alternative remedy. Placing reliance upon **Arundhati Mishra (Smt) v. Sri Ram Charitra Pandey** (1994) 2 SCC 29, it was submitted that it is settled law that it is open to the parties to raise mutually inconsistent pleas and the relief could be granted on the alternative plea so raised.

30. Refuting the above contentions, Mr. Shanti Bhushan, learned senior counsel for the appellants placed reliance upon **Ayyasamy case** to contend that there are no serious allegations in the plaint to decline reference of the matter to arbitration. It was submitted that mere allegations of fraud were not sufficient to detract from the performance of the obligation of the parties in terms of the agreement and refer the matter to arbitration.

31. Under the Act, an arbitration agreement means an agreement which is enforceable in law and the jurisdiction of the arbitrator is on the basis of an arbitration clause contained in the arbitration agreement. However, in a case where the parties alleged that the arbitration agreement is vitiated on account of fraud, the Court may refuse to refer the parties to arbitration. In **Ayyasamy case**, this Court held that mere allegation of fraud is not a ground to nullify the effect of arbitration agreement between the parties and arbitration clause need not be avoided and parties can be relegated to arbitration where merely simple allegations of fraud touched upon internal affairs of parties is levelled.

Justice A.K. Sikri observed that it is only in those cases where the Court finds that there are serious allegations of fraud which make a virtual case of criminal offence and where there are complicated allegations of fraud then it becomes necessary that such complex issues can be decided only by the civil court on the appreciation of evidence that needs to be produced. In para (25) of **Ayyasamy case**, Justice Sikri held as under:-

“25.....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.”

32. While concurring with Justice Sikri, Justice D.Y. Chandrachud pointed out that the duty of the Court is to impart “*sense of business efficacy*” to the commercial transactions pointing out that mere allegations of fraud were not sufficient to decline to refer the parties to arbitration. In para (48) of **Ayyasamy case**, Justice D.Y. Chandrachud held as under:-

“48. The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a

knowledge of the efficacy of the arbitral process. **The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy.**” (Underlining added)

33. When we apply the aforesaid principles to the facts of the present case, as discussed earlier, both parties have consciously proceeded with the commercial transactions to commission the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. The first respondent has proceeded to procure the materials, entered into agreement with Juwi India for engineering, installation and commissioning and the sale and purchase agreement with Astonfield, were all the conscious steps taken in the commercial understanding to commission the Solar Plant at Dongri, Raksa, District Jhansi, U.P. Even though Juwi India and Astonfield are not parties to the main agreement - Equipment Lease Agreement (14.03.2012), all the agreements/contracts contain clauses referring to the main agreement. It is the duty of the Court to impart the commercial understanding with a “*sense of business efficacy*” and not by the mere averments made in the plaint. The High Court was not right in refusing to refer the parties on the ground of the allegations of fraud levelled in the plaint.

34. It is only where serious questions of fraud are involved, the arbitration can be refused. In this case, as contended by the appellants

there were no serious allegations of fraud; the allegations levelled against Astonfield is that appellant no.1 - Ameet Lalchand Shah misrepresented by inducing the respondents to pay higher price for the purchase of the equipments. There is, of course, a criminal case registered against the appellants in FIR No.30 of 2015 dated 05.03.2015 before the Economic Offences Wing, Delhi. The appellant no.1 – Ameet Lalchand Shah has filed Criminal Writ Petition No.619 of 2016 before the High Court of Delhi for quashing the said FIR. The said writ petition is stated to be pending and therefore, we do not propose to express any views in this regard, lest, it would prejudice the parties. Suffice to say that the allegations cannot be said to be so serious to refuse to refer the parties to arbitration. In any event, the Arbitrator appointed can very well examine the allegations regarding fraud.

35. Main agreement - Equipment Lease Agreement (14.03.2012) for leasing and commissioning of Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh contains arbitration clause (Clause 29). As discussed earlier, other three agreements - two agreements between Rishabh and Juwi India (01.02.2012) and Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield are integrally connected with the commercial understanding of commissioning the Solar Project at Dongri, Raksa, District Jhansi, Uttar Pradesh and to resolve the dispute

between the parties, they are to be referred to arbitration. The order of the High Court declining to refer the parties to arbitration cannot be sustained and is liable to be set aside. The four agreements namely:- (i) Equipment and Material Supply Contract (01.02.2012) between Rishabh and Juwi India; (ii) Engineering, Installation and Commissioning Contract (01.02.2012) between Rishabh and Juwi India; (iii) Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield; and (iv) Equipment Lease Agreement (14.03.2012) between Rishabh and Dante Energy and the parties thereon are referred to arbitration.

36. As per the terms of Equipment Lease Agreement (14.03.2012), appellant No.3 - Dante Energy has to pay lease rentals of Rs.13,67,500/- for the month of March, 2012 and with effect from April, 2012 to pay lease rentals of Rs.28,26,000/- per month for a period of fifteen years. Learned Senior Counsel for respondents, Mr. Sibal has submitted that appellant No.3 - Dante Energy has not paid the rentals as per the terms and conditions of Equipment Lease Agreement. Mr. Sibal has also drawn our attention that Astonfield Solar Rajasthan Pvt. Ltd. has transferred 99.99% of its shares to ARRL (Mauritius) Ltd. (Holding Company) and Ameet Lalchand Shah has only one share (0.01%). Our attention was also drawn to Astonfield Solar Gujarat Pvt. Ltd., which has also transferred 99.99% of its shares to ARRL (Mauritius) Ltd. (Holding

Company) and that Ameet Lalchand Shah has only one share (0.01%). It was also submitted that the appellant No.1 - Ameet Lalchand Shah was subsequently removed from the Board of Directors of Astonfield Solar Gujarat Pvt. Ltd. by the shareholders by EGM dated 17.12.2016. We do not propose to go into the merits of this contention; however, keeping in view that Astonfield has transferred its shareholdings qua Rajasthan and Gujarat Solar Power units, in our view, the interest of the respondents is to be protected till the matter is resolved by the arbitrator by directing the appellants to pay the arrears of lease rent and also to pay the future lease rent for the equipments at the rate of Rs.28,26,000/- per month.

37. The impugned order of the High Court is set aside and this appeal is allowed. All the aforesaid four agreements and the parties thereon are referred to arbitration. By notice dated 13.02.2016, appellants have nominated Justice Sujata Manohar, former Judge of the Supreme Court of India as their Arbitrator. We leave it open to the parties as to the choice of the Arbitrator. If the parties are not in a position to arrive at consensus as to the Arbitrator, the parties shall approach the appropriate High Court for appointment of the Arbitrator. Appellants are jointly and severally liable to pay the arrears of lease rent and also to pay the future lease rent for the equipments of the PV Solar Power Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh at the rate of Rs.28,26,000/- per

month till the disposal of the arbitration proceedings. Such payment of lease rent shall be without prejudice to the contentions of both parties and shall be subject to the final outcome of arbitration proceedings. Since parties are referred to arbitration, commercial Suit No.85 of 2017 filed by the respondents on the file of Delhi High Court shall stand disposed of. No cost.

.....J.
[RANJAN GOGOI]

.....J.
[R. BANUMATHI]

**New Delhi;
May 03, 2018**