

(2013) 07 GUJ CK 0062

In the Gujarat High Court

Case No : Special Civil Application No. 4977 of 2012 and Civil Application No. 5143 of 2012

Kantilal Ambalal Patel and Another

APPELLANT

Vs

Jalaram Land Developers - Prop. of Kamleshkumar
Shankarbhai and Others

RESPONDENT

Date of Decision : 25-07-2013

Acts Referred:

Citation : (2014) 2 ARBLR 192 : (2014) 1 GLR 331

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.L. Soni, J.—In this petition filed under Art. 227 of the Constitution of India, the petitioners, the original defendant Nos. 1 and 2 of Special Civil Suit No. 759 of 2011 pending before the Third Additional Senior Civil Judge, Vadodara, have called in question the order dated 7-4-2012 rejecting the application below Exh. 22 filed by the petitioners under Sec. 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). As could be found from the plaint at Annexure-D, respondent No. 1-original plaintiff has prayed to pass decree for specific performance of development agreement dated 16-8-2003 and for execution of the sale-deed with possession in its favour. Respondent No. 1 has further prayed to declare that the sale-deed registered before the Sub-Registrar, Vaghodiya having registration No. 2550 dated 22-11-2010 executed in favour of defendant No. 2-petitioner No. 2 herein by defendant No. 1-petitioner No. 1 herein in collusion with defendant Nos. 3 to 7 - respondent Nos. 2 to 6 herein be declared as illegal, null and void and further to declare that the defendants have got no right, title or authority to transfer, alienate or create any charge over the suit property or to enter into any transaction, make any writing or agreement or to make any change in the local situation of the suit property. The petitioners have also prayed for permanent injunction of the above said nature.

2. In the said suit, the petitioners filed written statement at Exh. 21 and also an application Exh. 22 under Sec. 8 of the Act on the same day i.e. 16-1-2012. Learned Judge rejected application Exh. 22 by impugned order dated 7-4-2012 on the ground that the application was not maintainable as the same was filed after the written statement at Exh. 21 was filed and also on the ground that the prayer in the application is to reject the suit under Sec. 8 of the Act, but the suit could not be rejected under Sec. 8 of the Act.

3. Initially, learned Senior Advocate Mr. N.D. Nanavaty appeared with learned Advocate Mr. Tirthraj Pandya for the petitioners and made his submissions. Learned Senior Advocate Mr. Nanavaty submitted that the learned Judge has committed serious error in reaching to the conclusion that the petitioners filed application under Sec. 8 of the Act after the first statement was presented by the petitioners. Learned Senior Advocate Mr. Nanavaty submitted that the petitioners filed application at Exh. 22 under Sec. 8 of the Act and the first statement at Exh. 21 on the same day, but the concerned officer of the Court, had given exhibit number on written statement prior in point of time than the application filed under Sec. 8 of the Act, and therefore, the application under Sec. 8 considered as having been filed after filing of the first statement by the petitioners. Learned Senior Advocate Mr. Nanavaty submitted that when the written statement as well as the application under Sec. 8 of the Act both were filed on the same day, learned Judge ought not to have taken too technical a view while dealing with the application Exh. 22 especially when the petitioners have categorically and in unequivocal terms raised issue about arbitration in their written statement on the basis of the Arbitration Clause in the development agreement and made very clear not to submit to the jurisdiction of the Court.

4. Since learned Senior Advocate Mr. Nanavaty could not come to make further submissions, learned Advocate Mr. Unmesh Shukla appeared with learned Advocate Mr. Pandya for the petitioners to make further submissions on behalf of the petitioners.

5. When the Court put to learned Advocate Mr. Shukla that even if the ground for rejection of the application under Sec. 8 of the Act as regards filing the said application after the first statement could not sustain, whether, in view of the fact that the matter brought before the Civil Court since not the subject-matter of the arbitration agreement, the parties to the suit could be referred to the arbitration. Learned Advocate Shri Shukla then submitted that there was no difference in the matter which was brought before the Court and the subject-matter of the arbitration agreement. Mr. Shukla would submit that what is prayed for in the suit is specific performance of agreement dated 16-8-2003 between the parties with further prayer to direct the defendants to execute sale-deed with possession. As per his submission, the prayer to quash and set aside the sale executed in favour of petitioner No. 2 is consequential prayer. Learned Advocate Mr. Shukla submitted that these two prayers made in the suit could as well be granted by the arbitrator as the main prayer is based on agreement dated

16-8-2003.

6. Learned Advocate Mr. Shukla submitted that not only by virtue of the provisions of the Specific Relief Act, but as per the principles settled by Hon''ble the Supreme Court, relief for specific performance with other consequential relief could be granted by the arbitrator in his discretionary jurisdiction. Learned Advocate Mr. Shukla submitted that since the rights transferred to the respondent No. 1 under the development agreement could be enforced under the provisions of the Specific Relief Act, the subject-matter of the suit could well be within the jurisdiction of the arbitration for which the parties have agreed in the said agreement.

7. Learned Advocate Mr. Shukla further submitted that the other defendants joined in the suit were not stranger to the development agreement. Mr. Shukla would submit that the development agreement based on which the suit is filed was in furtherance of the earlier agreement between petitioner No. 1 and respondent Nos. 2 to 6 herein - original defendant Nos. 2 to 7 - Co-operative societies wherein the societies have agreed to further transfer or assign the rights of development to any third party and on the basis of such agreement between the parties, further rights of development have been given to the respondent No. 1 wherefrom dispute between the parties have arisen. Mr. Shukla submitted that petitioner No. 1 and the respondent No. 1 since claiming through other respondents, all the parties to the suit could be said to be the parties to the development agreement. Learned Advocate Mr. Shukla further submitted that not only the matter brought before the Court is the subject of arbitration agreement but the parties before the Court could also be said to be the parties to the development agreement, and therefore, the ingredients of Sec. 8 of the Act are fully satisfied for referring the matter with the parties involved in the suit to the arbitration. He submitted that petitioner No. 2 in whose favour the sale-deed was executed and which is under challenge in the suit also wants the disputes to be referred to the arbitration, and therefore, he has joined in the petition, and thus all the parties to the suit could be referred to the arbitration.

8. In support of his arguments, learned Advocate Mr. Shukla has relied on the following authorities:

- (1) Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others,
- (2) Shyam Singh Vs. Daryao Singh (dead) by Lrs. and Others,
- (3) Rodemadan India Limited Vs. International Trade Expo center Limited,
- (4) Everest Holding Ltd. Vs. Shyam Kumar Shrivastava and Others,
- (5) P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others,
- (6) Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others,
- (7) Tek Chand and Others Vs. Deep Chand and Others,

(8) Lala Durga Prasad and Another Vs. Lala Deep Chand and Others,

9. As against the above arguments, learned Advocate Mr. Tattvam Patel appearing for respondent No. 3-Society submitted that since before respondent No. 3-Society could be served with the notice of the suit, application Exh. 22 under Sec. 8 of the Act was decided, the respondent No. 3 and other societies had no chance to present their case before the learned Judge. He submitted that petitioner No. 1 in collusion with some of the office-bearers of the societies had acted against the interests of the societies and by committing fraud, disposed of the properties of the society and there was mismanagement, malpractices, misappropriation of funds etc. of the society and the Registrar of the Co-operative Societies had to take action under the provisions of the Gujarat Co-operative Societies Act and liquidator was required to be appointed, and thereafter, it could be found that the petitioners and other persons posing themselves to be the office bearers of the society and even criminal proceedings have also been initiated against them. Learned Advocate Mr. Patel submitted that now when the petitioners have filed this petition before this Court, respondents societies came to know that respondent No. 1 and petitioner No. 1 entered into agreement and in connection with such agreement, rights are being claimed. He submitted that the respondents-societies are not only opposing the suit by taking available defences but are desirous to even challenge the development agreement between petitioner No. 1 and respondent No. 1. He submitted that the matter brought before the Civil Court by way of the suit could not be said to be the same subject-matter of arbitration agreement. He submitted that the development agreement is just an agreement for development of the suit land only between petitioner No. 1 and respondent No. 1 and the same cannot be said to be an agreement to sell, and therefore, second part of first prayer made in the suit goes beyond the scope of development agreement. He submitted that the second prayer in the suit is for cancellation of the sale-deed made in favour of petitioner No. 2 by petitioner. No. 1. Learned Advocate Mr. Patel submitted that the execution of sale-deed in favour of petitioner No. 2 was much before the filing of the suit filed on independent development agreement dated 16-8-2003. He submitted that the said prayer for cancellation of sale-deed cannot be said to be subject-matter of arbitration agreement, and therefore, parties to the suit cannot be referred to the arbitration for the disputes connected with the execution of the sale-deed in favour of petitioner No. 2. Learned Advocate Mr. Patel submitted that even the parties to the suit are not the parties to the agreement which is sought to be enforced by filing the suit. He submitted that if the matter brought before the Court is not the same subject-matter of arbitration and if the parties are also different, no reference for disputes involved in the suit could be made to the arbitration. In support of his arguments, learned Advocate Mr. Patel has relied on the decision in the case of N. Radhakrishnan Vs. Maestro Engineers and Others, .

10. Learned Advocate Mr. Parthiv B. Shah appearing for respondent No. 1 submitted that the petitioners intended and decided to submit to the jurisdiction

of the Court by keeping written statement ready on 12-1-2012, and therefore, they first submitted the written statement on 16-1-2012, and thereafter, as an afterthought, they submitted application Exh. 22 under Sec. 8 of the Act. Learned Advocate Mr. Shah submitted that since the written statement was submitted first in point of time, it cannot be said that any error in exhibiting written statement as Exh. 21 and application under Sec. 8 of the Act as Exh. 22 was committed. Learned Advocate Mr. Shah submitted that even the application at Exh. 8 is not for referring the parties to the arbitration but prayer made therein is to reject the suit which is not permissible under Sec. 8 of the Act. He submitted that the learned Judge has, therefore, not committed any error in rejecting the application Exh. 8 on the ground that the same was after filing of the first statement by the petitioners as well as on the ground that the suit cannot be rejected under Sec. 8 of the Act as prayed for in the said application. Learned Advocate Mr. Shah submitted that even otherwise, the matter brought before the Court by the suit filed by respondent No. 1 is not the same in the development agreement dated 16-8-2003 which contained arbitration clause. Mr. Shah submitted that even the parties to the suit are not the same parties to the development agreement, and therefore, requirements of Sec. 8 for referring the parties to the arbitration are not satisfied. Learned Advocate Mr. Shah submitted that for the matters involved in the suit, the arbitrator will be required to deal with various complex issues for which proper forum is the Civil Court. Mr. Shah submitted that since petitioner No. 2 is not a party to the development agreement, it is not open for petitioner No. 2 to join in the petition.

11. Learned Advocate Mr. Shah submitted that even otherwise, petitioners have not complied with the mandatory requirement of attaching the original arbitration agreement with the application under Sec. 8 of the Act, and therefore, it was not maintainable. Learned Advocate Mr. Shah thus urged to dismiss the petition. Mr. Shah has relied on the decision in Union of India (UOI) and Others Vs. Onkar Nath Bhalla and Sons, .

12. Learned Advocate Mr. B.S. Patel appearing for respondent Nos. 3 to 6 - the other Co-operative societies while adopting arguments advanced by learned Advocate Mr. Patel and Mr. Shah, submitted that the suit raises manifold issues, and therefore, arbitration would not be proper forum to go into and decide all such issues. He submitted that unless the requirements of Sec. 8 are fully satisfied, no order for referring the parties to the arbitrator could be made. He submitted that considering the objection as also the prayer made in the suit, same could not be said to be falling within the arbitration clause in the development agreement, and therefore, provisions of Sec. 8 of the Act are not attracted. He thus urged to dismiss the petition.

13. Having heard the learned Advocates for the parties and having perused the record of the petition, it appears that the prayers in suit are not based only on development agreement dated 16-8-2003 but are also on the premise of other transaction amongst the defendants. The respondent No. 1 has, therefore,

prayed that the petitioners and respondent Nos. 2 to 6 be directed to execute sale-deed in its favour and also prayed to cancel sale-deed registered on 22-11-2010 in favour of petitioner No. 2.

14. Respondent No. 1 has given narration in the plaint as to how the development agreement was entered into, and also averred how the petitioner No. 1 has tried to defeat its rights in collusion with other societies.

15. It appears that to oppose the suit, the petitioners though prepared written statement dated 12-1-2012 but submitted to the Court on 16-1-2012. It was given Exh. No. 21. The application under Sec. 8 of the Act was then given Exh. No. 22. But the fact remains that the written statement Exh. 21 and application Exh. 22 were filed on the same day.

16. What is found from the written statement is that the petitioners have taken clear stand for referring the matter to the arbitration as per the arbitration clause in the development agreement and stated that the Court has no jurisdiction to decide the suit, and therefore, the suit should be rejected.

17. From the above, it could be said that the petitioners did not intend to submit to the jurisdiction of the Court, and therefore, even if the application under Sec. 8 of the Act preferred by them was tendered subsequent to written statement but on the same day, it was possible for the learned Judge to take a view that the application under Sec. 8 of the Act in the facts of the case could not be said to be filed after filing of first statement.

18. However, even if such view was possible, then also, unless the requirements of Sec. 8 of the Act were satisfied, parties could not be referred to the arbitration. At this stage, Sec. 8 of the Act is required to be referred. The same reads 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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

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

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

19. What is clearly required by Sec. 8 is that the judicial authority shall refer the parties to arbitration only if the matter brought before it is the subject of Arbitration agreement.

20. In a given case, it may be that the matter brought before the Court is

subject of composite or main agreement to which ancillary or incidental agreements are interlinked just to facilitate or better implementation of the composite or main agreement. If any party makes out such case, then, judicial authority may refer the parties of incidental agreement to the arbitration with the parties of the main agreement.

20.1. In the case of Olympus Superstructures Pvt. Ltd. (supra), the question was whether the disputes and differences arising under the Interior Design Agreement were connected with the disputes arising from the main agreement.

20.2. In the case of Everest Holding (supra) also, the question was whether the disputes and differences arising in respect of the connected agreements could be referred and decided through the process of arbitration with the disputes and differences arising from the main agreement called J.V.A. In this case, Hon''ble Designated Judge exercising powers of the Hon''ble the Chief Justice was dealing with the question about making of reference to arbitration under Sec. 11 of the Act. It is required to be noted that while deciding the question for referring the dispute to arbitration under Sec. 11, the Court is not required to decide arbitrability of the dispute arising from the agreement between the parties whereas the Court while deciding application under Sec. 8 of the Act is required to first decide arbitrability of the matter brought before the Court.

21. Therefore, in the facts of each case, the Court is required to examine whether the requirements of Sec. 8 of the Act are complied with or not. At this stage, following decisions need to be referred.

22. In the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , Hon''ble the Supreme Court has held and observed in Paras 15, 16 and 17 as under:

15. The relevant language used in Sec. 8 is "in a matter which is. the subject-matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Sec. 8. The words "a matter" indicates 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 Sec. 8 of the Act? In our view, it would be difficult to give an interpretation to Sec. 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.

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

23. In the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, , the Hon'ble Supreme Court held and observed in Paras 19, 32, 33 and 34 as under:

19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Sec. 8 stating that the parties should be referred to arbitration, the Court (judicial authority) will have to decide--

- (i) whether there is an arbitration agreement among the parties;
- (ii) whether all parties to the suit are parties to the arbitration agreement;
- (iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;
- (iv) whether the defendant had applied under Sec. 8 of the Act before submitting his first statement on the substance of the dispute; and
- (v) whether the relief's sought in the suit are those that can be adjudicated and granted in an arbitration.

32. The nature and scope of issues arising for consideration in an application under Sec. 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Sec. 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Sec. 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the Arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Sec. 34 of the Act, relying upon sub-sec. (b)(i) of that Section.

33. But where the issue of "arbitrability" arises in the context of an application under Sec. 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the Court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the Court where the

Civil suit is pending, will refuse an application under Sec. 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special Court or Tribunal.

34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (Courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counter-claim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.

24. In light of the above, the Court before which the application under Sec. 8 of the Act is filed will be required to decide the arbitrability of the matter brought before the Court. If the Court finds that the matter brought before the Court is not the subject-matter of arbitration agreement and the subject-matter of the suit is capable of being adjudicated only by public forum or relief claimed can only be granted by the Special Court or the Tribunal, the Court might refuse to refer the parties to the arbitration. As held in the case of Sukanya Holdings (P) Ltd. (supra), the words "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

25. As stated above, respondent No. 1-plaintiff has not simply asked for specific performance of development agreement between him and the petitioners but has also prayed for passing of decree against the defendants for execution of sale-deed in its favour. Under the development agreement, the respondent No. 1 had got rights to develop the suit property subject to the other terms and conditions of the said development agreement. But before the said development agreement could be acted upon, petitioner No. 2-defendant No. 2 could get the sale-deed executed in his favour based on the agreement to sell and consent decree alleged to have been passed between him and other societies. Respondent No. 1

has made averments in respect of such agreement to sell and execution of the sale-deed in favour of petitioner No. 2 and has made prayer for passing of decree of execution of sale-deed in its favour by petitioners and other societies. Therefore, such prayer could not be said to be connected in any manner with the development agreement i.e. subject-matter of arbitration agreement. The respondent No. 1 has also made one more prayer in the suit for cancellation of the sale-deed executed in favour of petitioner No. 2- defendant No. 2. Such execution of sale-deed in favour of petitioner No. 2 - defendant No. 2 was also not in connection with the development agreement or any other agreement between respondent No. 1 and other parties. Therefore, such sale-deed executed in favour of petitioner No. 2 could not be said to be in any way the subject-matter of development agreement. Therefore, it would be beyond the purview of the arbitration to adjudicate upon the disputes concerning the above other matters involved in the suit.

26. Thus, in the case on hand, this Court finds that the matter brought before the Court is not the subject of arbitration agreement. Even otherwise, when reference sought under Sec. 8 of the Act is based on the development agreement dated 16-8-2003, the question to refer the non-parties to the agreement to arbitration does not arise.

27. However, it was submitted by the learned Advocate Mr. Shukla that the respondent No. 1 as also petitioner No. 1 both could be said to be claiming through respondent Nos. 2 to 6 who were parties in the earlier agreement and who had assigned rights of development of the suit land in favour of petitioner No. 1, and therefore, by virtue of Sec. 45 of the Act and as held by the Hon''ble Supreme Court in the case of Chloro Controls India Pvt. Ltd. (supra), reference to the arbitration of the disputes between the petitioners and other parties is permissible.

28. In the case of Chloro Controls India Pvt. Ltd. (supra), the Court was concerned with the reference to arbitration sought under Sec. 45 of the Act and the question posed was whether the non-party to the arbitration agreement could be referred to the arbitration or not. In the said case, there were ancillary agreements relatable to the composite principal agreement and the performance one agreement was found to be intrinsically interlinked with other agreements. In the above fact situation and considering the provisions of Sec. 45 of the Act, the Court found that even when some of the parties were not parties to the composite agreement, still, they could be referred to the arbitration. In the said case, Hon''ble the Supreme Court has observed in Paras 132 to 133.3 as under:

132. Though, rival contentions have been raised before us on the correctness of the judgment of this Court in Sukanya Holdings Pvt. Ltd. (supra), Mr. Salve vehemently tried to persuade us to hold that this judgment does not state the correct exposition of law and to that effect it needs to be clarified by this Court in the present case. On the contrary, Mr. Nariman argued that this judgment states the correct law, and in fact, the principles stated should be applied to the present

case.

133. The ambit and scope of Sec. 45 of the 1996 Act, we shall be discussing shortly, but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of Sukanya Holdings (P) Ltd. (supra). This we say for varied reasons;

133.1. Firstly, Sukanya Holdings (P) Ltd. (supra) was a judgment of this Court in a case arising under Sec. 8 Part I of the 1996 Act while the present case relates to Sec. 45 Part II of the Act. As such that case may have no application to the present case.

133.2. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasised that where the subject-matter of the suit includes subject-matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Sec. 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Sec. 45 of the Act. Thus, the dictum stated in Para 13 of the judgment of Sukanya Holdings (P) Ltd. (supra) would not apply to the present case.

133.3. Thirdly, on facts, the judgment in Sukanya's case (supra) has no application to the case in hand.

29. In the case of P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, , the Hon''ble Supreme Court was confronted with the question as to whether joint arbitration between members of the society and non-members under the bye-laws of the society could be held or not. In that context, Hon''ble the Supreme Court has held and observed in Paras 13, 14 and 17 as under:

13. At the outset, it should be noticed that the arbitration in this case is not an ad hoc arbitration under an arbitration agreement executed between the parties, but was an institutional arbitration under the Bye-laws of the Exchange. All claims, differences, complaints and disputes between two members in relation to any bargain, dealing, transaction or contract is arbitrable by virtue of the parties being members of the Exchange and there is no need for a separate arbitration agreement. In fact, the question whether there was any such bargain, dealing, transaction or contract between members is itself a question that was arbitrable, if there was a dispute.

14. We may in this behalf refer to the relevant bye-laws. Bye-law 248 provides for reference to arbitration of any dispute between a member and non-member. Clause (a) thereof relevant for our purpose is extracted below:

248. (a) All claims (whether admitted or not), difference and disputes between a member and a non-member or non-members (the terms "non-member" and "non-members" shall include a remisier, authorised clerk, a sub-broker who is registered with S.E.B.I, as affiliated with that member or employee or any other person with whom the member shares brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfillment or validity or in relation to the rights, obligations and liabilities or remisiers, authorised clerks, sub-brokers, constituents, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.

17. Reliance is placed on the decision of this Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, wherein this Court held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly "outside and which involves the parties, some of 15 who are parties to the agreement while some are not, Sec. 8 of the Act was not attracted and the subject-matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The decision in Sukanya Holdings (P) Ltd. (supra) will not apply as we are not concerned with a suit or a situation where there is no provision for arbitration in regard to some of the parties.

30. In view of above discussion, the other decisions in the case of Tek Chand (supra), Lala Durga Prasad (supra) and Shyam Singh (supra) relied on by Mr. Shukla to point out that the Arbitrator has jurisdiction to grant specific performance of the contract even against the person who is not a party to the agreement but have acquired interest in the subject-matter of agreement would be of no assistance to the case of the petitioners when matters involved in the suit are not referable to the arbitration.

31. Learned Advocate Shri Patel and Shri Shah drew attention of the Court to the bunch of papers annexed, Civil Application No. 5143 of 2012 filed by the petitioners seeking deletion of respondent Nos. 2 to 6 societies from the proceedings of the present petition. Though, learned Advocate Mr. Shukla stated that the petitioners are not pressing the said civil application, however, while going through several orders passed by the District Registrar, it appears that the society was taken under liquidation and the liquidator was appointed. There is reference about filing of criminal complaint under Secs. 409, 414, 418, 420, 465, 467, 468, 471, 474, 120B of the Indian Penal Code against the petitioners and other persons including respondent No. 1. Both the learned Advocates have also alleged fraudulent acts and illegal transaction against the petitioners in respect of the properties of the society. Be that as it may, what appears is that respondent Nos. 2 to 6 societies were not even served with the notice when the application

under Sec. 8 of the Act was pressed for hearing. Therefore, on respondent Nos. 2 to 6 filing their written statement, the Court will be required to decide various issues including the issues about fraudulent acts and malpractices of the petitioners with other persons in respect of the suit properties. Therefore, viewing the matter from the above angles also, arbitration would not be proper forum to adjudicate upon such disputes.

32. Hon''ble the Supreme Court in the case of N. Radhekrishnan (supra) has held and observed in Para 19 as under;

19. The appellant had cited a catena of judicial pronouncements to contend that when there is an express provision to that effect, the Civil Courts are bound to refer the matter to an Arbitrator in case of any disputes arising between the parties. The appellant had raised various issues relating to misappropriation of funds and malpractices on the part of the respondents and the allegations to that effect have been made in the notice sent to the respondents, and subsequently, in its written statement filed before the Civil Court.

33. One more ground on which learned Judge has rejected application of the petitioners is that the petitioners have prayed for rejection of the suit under Sec. 8 of the Act. Section 8 of the Act clearly provides for making of application for referring the parties to arbitration in respect of the matter brought before the Court. The application has, therefore, to be to refer the parties to the arbitration and not for rejecting the suit. It is required to be noted that the Civil suit always remains maintainable even if the agreement, enforcement of which is prayed, contains arbitration clause. Therefore, simply because there is arbitration clause in the agreement, the suit cannot be rejected. What is intended by the Legislature is that when the action is brought in the matter before the judicial authority in respect of the agreement containing arbitration clause, the judicial authority is required to refer the parties to arbitration before filing of the first statement in the suit if such matter is the subject of Arbitration agreement. Therefore, no application for rejection of the suit under Sec. 8 of the Act can be entertained. If any of the parties want reference to the arbitration, there has to be such prayer in the application under Sec. 8 of the Act. In absence of such prayer, application under Sec. 8 of the Act cannot be entertained. Learned Judge has, thus, rightly rejected the application on this ground also.

34. For the reasons stated above, the petition is dismissed. Notice is discharged. Ad-interim relief, if any, granted earlier stands vacated.

35. Learned Advocate Mr. Shukla, however, requests to stay and suspend this judgment and order for some time so as to enable the petitioners to take recourse to the higher forum. The request made by the learned Advocate Mr. Shukla in the facts of the case, cannot be accepted. Hence the same is rejected. Since, the main matter is disposed of and since the learned Advocate Mr. Shukla for the petitioners stated that the petitioners are not pressing the Civil Application No. 5143 of 2012, the same stands disposed of.