

(2017) 03 DEL CK 0207

In the Delhi High Court

Case No : 195 of 2016

RISHABH ENTERPRISES & ANR

APPELLANT

Vs

AMEET LALCHAND SHAH & ORS

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

Constitution of India, Article 30, Article 29 - Right of minorities to establish and administer educational in-stitutions - Protection of Interests of minorities
Arbitration a

Citation : (2017) 03 DEL CK 0207

Hon'ble Judges : Rajiv Sahai Endlaw

Bench : SINGLE BENCH

Advocate : C.S. Vaidyanathan, Amit Sibal, Saif Mahmood, Anish Dayal, Amit Bhandhari, Sumant De, Vivek Agarwal, Ishwar?Mohanty, Yatindra Singh, S.K. Dubey, Udit Malik, Varun Mathur, Aman Singh

Judgement

1. The application of the five defendants, under Section 8 of the Arbitration and Conciliation Act, 1996 for reference of the parties to this suit to arbitration, is for adjudication.

2. The two plaintiffs have instituted this suit inter alia pleading: (i) that the defendants No.1,4&5 proposed that the plaintiffs should invest in the defendants? business of solar energy plant and represented that the plaintiffs would not only be able to earn hefty lease rentals but also be entitled to get other lawful and statutory benefits like accelerated depreciation etc.;

(ii) that it was specifically represented that the defendant No.3 Company, which was under the control and direction of the defendants No.1,4&5, had the necessary authorisations to develop, own, operate and commercially exploit a 2 MWp thin film Photovoltaic Solar Plant, transmission line from power plant to the Grid Substation, Bay Extension Work at Grid Substation including all 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;

(iii) that it was also represented to the plaintiffs that the vendors, from whom various equipment and products had to be procured, had already been identified and the defendant No.2 Company, also owned and controlled by the defendant No.1, would procure CIS Photovoltaic Products from third party vendors in India and resell the same to the plaintiffs for further being given on lease to the defendant No.3 Company;

(iv) that the defendants jointly and severally assured that the agreed lease rentals would become payable without any demur and contestation and shall be paid and also specifically guaranteed and warranted that the same shall be paid by the defendant No.3 Company;

(v) that the plaintiffs were so induced to purchase highly expensive equipment from the defendant No.2 Company owned and controlled by the defendant No.1 and to give it on lease to defendant No.3 Company, also owned and controlled by the defendant No.1;

(vi) that the plaintiffs were so deceived by the defendants No.1,4&5 into making investment to the tune of more than Rs.32 crores and to purchase the equipment and lease it back to the defendant No.3 Company, thereby investing and owning the entire solar equipment installed at the site;

(vii) that on the aforesaid assurances and representations, the plaintiffs entered into:

(A) Equipment and Materials Supply Contract for a value of Rs.8,89,80,730/- whereunder Juwi India Renewable Energies P. Limited (hereinafter referred to as ? Juwi India?) was to supply to the plaintiffs some of the equipment and material to be installed at the power plant at Jhansi, Uttar Pradesh;

(B) Engineering, Installation & Commissioning Contract for a value of Rs.2,20,19,270/- where Juwi India was to engineer, install and commission, equipment and material so purchased by the plaintiffs at the power plant at Jhansi, Uttar Pradesh, at the cost of the plaintiffs;

(C) Sale and Purchase Agreement dated 5th March, 2012 with the defendant No.2 Company for purchasing CIS Photovoltaic Products to be leased to defendant No.3 Company and installed at the said power plant at Jhansi, Uttar Pradesh; the said products were valued at Rs.25,16,00,000/-;

(viii) that while the last of the aforesaid agreement was being executed, the plaintiffs asked defendant No.1 who was acting on behalf of the defendant No.2 to provide some guarantee to ensure that the equipment so purchased from one of the companies of the defendant No.1 to be leased to another company of the defendant No.2 would actually yield the lease rentals; the defendant No.1 proposed that the plaintiffs withhold some amount from the payment to be made

to the defendant No.2 Company and pay the same to the defendant No.3 Company, subject to the defendant No.3 Company making timely payment of lease rentals, with the said amount being not payable, if the lease rentals were not so paid; the defendant No.2 Company, accordingly placed with the plaintiffs a sum of Rs.3,75,50,001/- out of the sum to be paid by the plaintiffs to the defendant No.2 Company, to be retained as forfeitable security by the plaintiffs;

(ix) that the plaintiffs paid a total amount of Rs.32,22,80,288/- for purchase and installation of equipment at the power plant aforesaid;

(x) that a Equipment Lease Agreement (ELA) dated 14th March, 2012 was entered into by the plaintiffs with the defendant No.3 Company, wherein it was confirmed that the plaintiffs are the sole and absolute owners of equipment leased; under the ELA, defendant No.3 Company was 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;

(xi) that the defendants No.1,4&5 personally agreed to ensure that the lease rentals shall be paid as and when they fell due;

(xii) that the defendants did not make payment of the lease rentals and defaulted in payment of the month of March, 2012 itself; consequently the sum of Rs.3,75,50,001/- held by the plaintiffs as forfeitable security was forfeited;

(xiii) that a sum of Rs.13,97,51,418/- had become due from the defendants to the plaintiffs towards lease rentals and which the defendants had failed to pay despite repeated requests and reminders of the plaintiffs;

(xiv) that the equipment purchased by the plaintiffs and leased to the defendant No.3 Company was specially made to order for the Jhansi Plant and cannot be used for any other purpose; the plaintiffs would never have purchased the said equipment from the defendant No.2 Company or from Juwi India or entered into the agreement for installation with Juwi India but for the representations of the defendants of payment of lease rentals;

(xv) that the plaintiffs thus are entitled to recover the monies due jointly and severally from the defendants;

(xvi) that the defendants however instead of paying the dues of the plaintiffs, vide letters dated 6th July, 2015 and 10th July, 2015 of the defendant No.1 on behalf of the defendant No.2 demanded the amount of Rs.3,75,50,001/- aforesaid which had been forfeited by the plaintiffs;

(xvii) that the plaintiffs, inspite of spending more than Rs.32 crores on purchase of equipment which remains with the defendants and is being used by the defendants, are not getting any return;

(xviii) that the plaintiffs have been fraudulently made to sponsor the business of the defendants;

(xix) that the defendant No.1 made the sons of the plaintiff No.2 subscribe to some debentures in the Group Companies of the defendant no.1 and to establish his credibility, paid back the said debentures well ahead of their expiry period;

(xx) that the corporate veil ought to be lifted to unearth the serious fraud and cheating committed jointly and severally by the defendants; a criminal complaint has been registered and is pending before the Economic Offences Wing, Delhi Police;

(xxi) that the defendant No.2 Company, on 17th December, 2015, suddenly transferred an amount of Rs.17,53,000/- to the plaintiffs' account;

(xxii) that the defendants no.1,4&5 are jointly, severally, separately and personally liable to make good the plaintiffs' claims because they have individually defrauded and cheated the plaintiffs by inducing the plaintiffs to purchase the equipment in question and then parting with its possession to defendant No.3 Company on the assurance that the same will yield the agreed lease rentals; each of them also is liable under their personal assurances to the plaintiffs;

(xxiii) that though Clause 29 of the ELA dated 14th March, 2012 between the plaintiffs and defendant No.3 Company contains an arbitration agreement but the plaintiffs, instead of invoking the arbitration clause, have invoked the remedy of suit because the arbitration agreement is only between the plaintiffs and the defendant No.3 Company, though the entitlement of the plaintiffs to the reliefs claimed in the suit is jointly against defendant No.1,2,4&5 as well with whom there is no arbitration agreement and because the plaintiffs are also seeking a declaration that the entire transaction between the plaintiffs and the defendants being vitiated by serious fraud committed jointly and severally by the defendants. The plaintiffs, besides the relief of declaration as aforesaid, have sought recovery of Rs.32,22,80,288/- and Rs.19,31,74,804/- with interest and costs and in the alternative, a money decree for recovery of Rs.13,97,51,418/- and a decree for mandatory injunction for payment of future lease rentals.

3. The suit was entertained and vide ex-parte ad-interim order dated 15th March, 2016, the defendant No.3 Company was restrained from creating any third party rights with respect to 2 MW Solar Plant at Dongri, Raksa, Jhansi, Uttar Pradesh and the defendants No.1&4 from creating any third party rights with respect to the Solar Power Plants at District Patan, Gujarat and at District Jodhpur, Rajasthan.

4. The defendants, in the application under Section 8 of the Arbitration Act, have pleaded: (a) that on the averments in the plaint, the transactions under the four agreements between the plaintiffs and the three different legal entities are interlinked; (b) that Article 30 & 29 of the Agreement dated 5th March, 2012 are as under: "Article 30 Jurisdiction: i. The courts of Mumbai alone shall have exclusive jurisdiction to try any arbitration and / or legal proceedings in respect of any matter, claim or dispute arising out of this agreement or in any way

relating to this agreement. Article 29 Arbitrator:

ii. In the event of any dispute or difference arising by any between the parties out of this Agreement or in the interpretation, construction or meaning thereof or any of the terms and conditions of this Agreement, the same shall be referred to a Sole Arbitrator, to be mutually agreed upon by the Parties hereto, and in the absence of any agreement regarding Sole Arbitrator or the arbitration shall be governed by the provisions of the Arbitration and Conciliation Act 1996 in force or any subsequent amendment and re-enactment thereof. All arbitration procedures shall take place in Mumbai and the courts in Mumbai shall alone have jurisdiction in the matter. The award of the arbitrator shall be final, conclusive and binding on all parties. The arbitrator shall be competent to decide whether any matter of dispute or difference referred shall be competent to decide whether any matter of dispute or difference referred to him falls within purview of arbitration as provided for above and / or any matter relating to arbitration.

iii. xxxx xxxx xxxx xxxx iv. xxxx xxxx xxxx xxxx v. xxxx xxxx xxxx xxxx vi. xxxx xxxx xxxx xxxx

vii. The parties hereby agree that the arbitrator need not give reasons in award and it is also agreed that the Courts of Mumbai alone shall have jurisdiction to entertain any application or other proceedings in respect of anything under this agreement and any award or awards made by the sole arbitrator hereunder shall be filed in the concerned Courts in the city of Mumbai only."

(c) that the Agreement dated 1st February, 2012 also contains an arbitration clause;

(d) that the plaintiffs have deliberately, consciously made false plea of serious fraud for invoking the jurisdiction of this Court;

(e) denying the other claims in the suit on merits;

(f) that the defendant No.3 Company has already vide letter dated 13th February, 2016 nominated an Arbitrator.

5. The plaintiffs in reply to the application aforesaid have pleaded (I) that the application is not accompanied with the original arbitration agreement or a duly certified copy thereof and is liable to be rejected on this ground alone;

(II) that the issue in this suit is the validity of the agreements in question being vitiated by serious fraud committed jointly and severally by the defendants;

(III) that serious fraud of the kind perpetrated by the defendants is not arbitrable; issues of fraud can only be decided by a Civil Court;

(IV) that the Agreement dated 5th March, 2012 of Sale and Purchase, whereunder out of the total amount of Rs.32.22 crores, Rs.25.16 crores was paid, admittedly has no arbitration clause;

(V) that the existence of an arbitration clause in an agreement which is a part of

the transaction cannot ipso facto and ipso jure drag the principal agreement into an arbitration or deem to incorporate an arbitration clause in the principal agreement;

(VI) that the suit is not for a simple or mere recovery of money or of rentals under the lease agreement;

(VII) that the cause of action cannot be split into various separate proceedings;

(VIII) that the defendants also in their letter dated 13th February, 2016 have admitted that the agreement dated 5th March, 2012 is a related contract;

(IX) that the relief claimed in the suit is against the defendants no.1,2,4&5 also, besides the defendant No.3 Company with whom the contract containing the arbitration clause was executed;

(X) that in fact it is the plea of the plaintiffs that it is the defendant No.1 who is the perpetrator of the fraud.

6. The senior counsels for the plaintiffs and the senior counsel for the defendants/ applicants were heard on 17th August, 24th August, 1st September, 11th November and 25th November, 2016.

7. The senior counsel for the defendants: (A) drew attention to the Equipment and Material Supply Contract dated 1st February, 2012 between the plaintiffs and Juwi India and to the arbitration clause therein;

(B) drew attention to the Engineering Installation and Commissioning Agreement dated 1st February, 2012 between the plaintiffs and Juwi India, also containing an arbitration clause;

(C) however stated that since Juwi India is not a party to the present suit, the arbitration clauses in the agreements aforesaid are meaningless;

(D) drew attention to ELA dated 14th March, 2012 between the plaintiffs and the defendant No.3 Company and the arbitration clause contained therein and as reproduced above;

(E) argued that the ELA dated 14th March, 2012 is the mother agreement;

(F) drew attention to the Sale and Purchase Agreement dated 5th March, 2012 between the plaintiffs and the defendant No.2 Company and in which there is no arbitration clause;

(G) however according to the plaint also, all the four agreements are intertwined;

(H) argued that the defendants No.2&3 Companies (of which defendants No.1,4&5 are Directors) are sister-concerns;

(I) argued that the arbitration clause in a contract is independent of the contract and survives, even if the agreement is fraudulent, unless the signatures thereon are denied;

(J) drew attention to paras 69 & 107 of Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. (2013) 1 SCC 641 noticing the difference between the language of Section 8 and Section 45 of the Arbitration Act and contended that with effect from the amendment of the Arbitration Act on 23rd October, 2015, the said difference has disappeared and thus what has been held in the said judgment in relation to Section 45 of the Act applies to Section 8 of the Act also;

(K) contended that all the five defendants are willing to make a statement that they will be bound by the arbitration agreement contained in ELA dated 14th March, 2021 between the plaintiffs and the defendant No.3 Company.

8. Per contra, the senior counsels for the plaintiffs argued: (i) that only Court can decide the question of fraud;

(ii) that with the coming into force of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the suit will be tried by the Commercial Court and no prejudice would be suffered by the defendants;

(iii) relied on N. Radhakrishnan Vs. Maestro Engineers (2010) 1 SCC 72, wherein the contention of the respondents, that when a case involved substantial question relating to facts, where detailed material evidence, both documentary and oral is needed to be produced and serious allegations pertaining to fraud and malpractices were raised, then the matter must be tried in Court and the Arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claim relating to fraud and criminal misappropriation, was upheld and it was held that Civil Court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegations of fraud are made;

(iv) relied on State of West Bengal Vs. Associated Contractors (2015) 1 SCC 32 holding that an order / judgment under Section 11 of the Arbitration Act is not a precedent; thus Swiss Timing Limited Vs. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677 cannot be treated as a precedent;

(v) that in World Sport Group (Mauritius) Limited Vs. MSM Satellite (Singapore) PTE. Limited (2014) 11 SCC 639, N. Radhakrishnan supra was not applied in the case of international arbitration;

(vi) reliance was placed on RRB Energy Limited Vs. Vestas Wind Systems 219 (2015) DLT 516 where inter alia finding serious questions of fraud, arbitration proceedings were injuncted;

(vii) that in Chloro Controls India Private Limited supra, there were several agreements with different companies of the same group and it was in that context held that the arbitration clause in the principal agreement shall govern the other agreements also; it is not so here; here the arbitration clause is contained only in the agreement between the plaintiffs and the defendant No.3

Company and there is no agreement containing arbitration clause between the plaintiffs and any of the other defendants; defendant No.1 is not even a Director in defendant No.3 Company;

(viii) that the present suit is not for recovery of lease rentals but for declaration that the agreements are void and for restitution;

(ix) that Juwi India is not controlled by the defendant No.1;

(x) that the offer today of the senior counsel for the defendants, of a statement of all the defendants to be bound by the arbitration clause, is not relevant for the purposes of Section 8 of the Arbitration Act;

(xi) that in fact, there is no privity of contract even of the plaintiffs with the defendant No.1 and the claim against the defendant No.1 is on the basis of his representations, actions and assurances.

9. The senior counsel for the defendants in rejoinder argued: (a) that N. Radhakrishnan supra does not apply to the facts of the present case;

(b) that under the amended Arbitration Act, Arbitral Tribunal is the preferred forum;

(c) attention was drawn to the amendments to Section 11 of the Act;

(d) that N. Radhakrishnan supra relies on judgments under the old Act;

(e) that N. Radhakrishnan supra also does not refer to P. Anand Gajapathi Raju Vs. P.V.G. Raju (2000) 4 SCC 539;

(f) that similarly Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums (2003) 6 SCC 503 has also not been considered in N. Radhakrishnan supra; N. Radhakrishnan also does not consider Section 16 of the Act and is per incuriam;

(g) that Chloro Controls India Private Limited supra, in para 66 thereof, overrules N. Radhakrishnan supra;

(h) that the averments in the plaint are of the defendants No.1,4&5 not acting in their personal capacity but on behalf of the defendants No.2&3 Companies;

(i) that the averments in the plaint do not constitute a plea of fraud;

(j) that the arbitration agreement cannot be defeated by cleverly drafting the plaint;

(k) that the plaint does not disclose any fraud;

(l) that, rather, it is the plaintiffs who have committed a fraud.

(m) has handed over copies also of

(i) Reliance Industries Limited Vs. Union of India (2014) 7 SCC 603;

(ii) Premium Nafta Products Limited Vs. Fili Shipping Company Limited [2007] UKHL 40;

(iii) World Sport Group (Mauritius) Limited Vs. MSM Satellite (Singapore) Pte. Limited (2014) 11 SCC 639; and,

(iv) Buckeye Check Cashing, Inc. Vs. Cardegna 546 U.S. 440 (B).

10. Both counsels contend that the recent judgment of the Supreme Court in A. Ayyasamy Vs. A. Paramasivam (2016) 10 SCC 386 is in their favour.

11. I have considered the rival contentions and am, for the reasons following, of the view that no case for referring the parties to arbitration under Section 8 of the Arbitration Act is made out: (A) The offer of the senior counsel for the defendants, of statement on behalf of all the defendants to be bound by the arbitration clause contained in the ELA dated 14th March, 2012 between the plaintiffs and the defendant No.3 Company and the arbitral award in pursuance thereto, needless to state is of no avail for the determination. The same is an offer of entering into a fresh agreement today. What Section 8 of the Arbitration Act on the contrary requires is, the action / matter brought before the Court being subject matter of a prior arbitration agreement between the parties.

(B) Though the counsels have laboured mostly on, whether in the face of the averments in the plaint, of fraud, arbitration should be ousted and which requires the Court (as held in A. Ayyasamy supra) to inter alia enquire and decide,

(a) whether "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";

(b) whether the allegations of fraud "are serious that in normal course, these may even constitute criminal offence" and "are also complex in nature and the decision on these issues demands extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal";

(c) whether the allegations of fraud are merely to avoid the process of arbitration;

(d) whether the "disputes relating to rights and liabilities which give rise to or arise out of criminal proceedings" and "which make a virtual case of criminal offence";

(e) whether the allegations of fraud are inter se the parties and have "no implication in the public domain", but in my opinion before adverting to the said enquiry and decision, it needs to be adjudicated, whether the action / matter brought before the Court by way of suit is the subject matter of arbitration agreement.

(C) Though there is a clause for arbitration also in the two agreements between the plaintiffs and Juwi India but we are here not concerned therewith, as Juwi India is not a party to these proceedings. The only thing to be seen is, whether

the subject matter of the suit is covered by the arbitration clause contained in the ELA dated 14th March, 2012 between the plaintiffs and the defendant No.3 Company.

(D) ELA dated 14th March, 2012 between the plaintiffs and the defendant No.3 Company in its recitals records

(i) that the plaintiffs are the owners of certain Photovoltaic Products, Panels, Inverters, Transformers and similar solar power generating equipments etc.;

(ii) that the defendant No.3 Company has necessary authorisation to develop, own, operate and commercially exploit a 2 MWp thin-film photovoltaic solar plant, transmission line from power plant to the Grid Substation, bay extension work at the Grid Substation, including all the infrastructure and relevant installations required to connect the electricity-producing equipment to the distribution / transmission grid at the Grid Substation at Jhansi, Uttar Pradesh;

(iii) that the defendant No.3 Company for this purpose requires the equipment in the ownership of the plaintiffs;

(iv) that the defendant No.3 Company was desirous of obtaining from the plaintiffs on lease the said equipment.

(E) By the operative part of the ELA dated 14th March, 2012, the plaintiffs as owners of the equipment gave on lease and the defendant No.3 Company took on lease the aforesaid equipment for a period of fifteen years, subject to the payment of the lease rentals and performance of other terms and conditions as contained therein.

(F) Under the ELA dated 14th March, 2012

defendant No.3 Company expressed satisfaction vis-a-vis the equipment taken on lease and confirmed that the same had been purchased by the plaintiffs from the defendant No.2 and Juwi India after inspection and approval thereof by the defendant No.3 Company;

(ii) the defendant No.3 Company agreed to pay the lease rentals at the rate as prescribed therein;

(iii) the parties agreed to the Lock-in period of 24 months and to termination thereafter in case of breach of any terms and conditions by the other party by giving thirty days notice;

(iv) the defendant No.3 Company as lessee agreed that since the plaintiffs had sourced the equipment being leased after inspection by the defendant No.3 Company, the defendant No.3 Company would not at any time raise a claim of the equipment being not as per specifications;

(v) the defendant No.3 Company agreed to maintain and repair the equipment at its own cost;

(vi) the defendant No.3 Company agreed to give inspection of the equipment to the plaintiffs or their representatives;

(vii) the defendant No.3 Company agreed to keep insured the equipment taken on lease from the plaintiffs at its own cost and to bear the risk of loss and damage thereto;

(viii) the defendant No.3 Company agreed not to sell or encumber in any way the said equipment taken on lease from the plaintiffs;

(ix) the defendant No.3 Company agreed to keep the plaintiffs indemnified against any claim with respect to the said equipment;

(x) the defendant No.3 agreed to, on termination of the lease, surrender the equipment to the plaintiffs;

(xi) the parties agreed to confidentiality.

(G) The clause in the ELA dated 14th March, 2012 between the plaintiffs and the defendant No.3 Company whereunder the plaintiffs and the defendant No.3 Company agreed that "any dispute or difference arising by and between" them "out of this agreement or in the interpretation, construction or meaning thereof or any of the terms and conditions of the agreement shall be referred to a sole Arbitrator" has to be seen in the context of the agreement as aforesaid. The language of the arbitration clause confines the operation thereof to a dispute or difference between the plaintiffs and the defendant No.3 Company and arising out of that agreement or with respect to the interpretation, construction or meaning thereof or any of the terms and conditions thereof.

(H) Before taking up the aspect of, whether the clause aforesaid of arbitration of disputes between the plaintiffs and on the one hand and the defendant No.3 on the other hand can include disputes between the plaintiffs and the other defendants also, even if be related, in my view, the dispute subject matter of the suit cannot be said to be arising out of the ELA dated 14th March, 2012 or out of any of the terms and conditions thereof.

(I) ELA dated 14th March, 2012 is not concerned with the price paid by the plaintiffs to defendant No.2 Company and to Juwi India for purchase of the equipment being leased thereunder by the plaintiffs to the defendant No.3 Company. The reference in the ELA to the said purchase is only in the context of the defendant No.3 Company absolving the plaintiffs from claims of the equipments given on lease being not as per the requirements and needs of the defendant No.3 Company. For this purpose, it has been recorded in the agreement that the equipment has been purchased by the plaintiffs from the defendant No.2 Company and Juwi India as per the specifications prescribed by the defendant No.3 Company and after inspection and satisfaction expressed by the defendant No.3 Company. (J) The disputes arising out of or in the interpretation, construction, meaning of any of the clauses of the ELA dated 14th March, 2012 can be only with respect to the payment of lease rental or

termination thereof or of a claim under any other clause thereof (though, I am unable to find any).

(K) However, when we look at the suit filed by the plaintiffs, though one of causes of actions for the dispute raised therein undoubtedly is non-payment of lease rentals by the defendant No.3 to the plaintiffs but the plaintiffs in the suit are not claiming lease rentals and have not sought return of the equipment but are averring having been induced by the defendants to pay the price to Juwi India and are seeking to recover the said amount from the defendants jointly and severally. I fail to see, as to how the said claim of the plaintiffs can be said to arise out of the ELA dated 14th March, 2012 or can be said to be entailing interpretation of any terms and conditions thereof. The ELA dated 14th March, 2012, save for the satisfaction expressed therein as to the quality and specifications of the equipment, is not concerned with the transaction of purchase of equipment by the plaintiffs from Juwi India and defendant No.2 Company. The claim of the plaintiffs for recovery of Rs.32,22,20,288/- is not at all arising out of or relating to any term of the ELA dated 14th March, 2012. It is a different matter that if the plaintiffs are unable to substantiate such a claim, they would not be entitled thereto.

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

(M) As far back as in Union of India Vs. Birla Cotton Spinning & Weaving Mills Ltd. AIR 1967 SC 688 it was held that where a suit had been instituted for recovery of price under a contract for sale of goods which contained an arbitration clause, the refusal of the defendant to pay the agreed price in order to appropriate the same to its claim under a separate contract was not a dispute arising under or in connection with the said contract for sale and as such the suit instituted thereon could not be stayed under Section 34 of the Arbitration Act, 1940.

(N) Under the 1996 Act also, Supreme Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya (2003) 5 SCC 531 held

(i) for Section 8 to apply, 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;

(ii) 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;

(iii) 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; and

(iv) such bifurcation of a suit in two parts, one to be decided by the Arbitral Tribunal and the 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 of the parties and may also occasion a possibility of conflicting judgments and orders by two different forums.

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

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

(Q) That brings me to Chloro Controls India Private Limited supra which permits joinder of non-signatories or third parties to arbitration even without consent of such non-signatories or third parties and to see whether the defendants no.1,2,4&5 from whom also the plaintiffs seek to recover can also be joined in the arbitration to which reference of the disputes in this suit is sought by this application under Section 8 of the Act. At the outset, the same was held to be permissible only in exceptional cases. It was held that 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 where performance of the principal or 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. I am afraid, the claim of the plaintiffs in the suit of recovery of the entire investment made by them cannot be relatable to the ELA and it cannot be said that ELA is the mother agreement in the transaction. It cannot be lost sight of that it is the undisputed fact that the investments and lease rentals were entitled to get other lawful and statutory benefits like accelerated depreciation etc. Though there admittedly is a link between defendant no.2 and the defendant no.3 and also between the defendants no.1,4&5 and the defendants no.2&3 but it cannot be said that the performance of ELA is in dispute or for the purposes of which performance agreement between the plaintiffs and the defendant no.2 and the plaintiffs and Juwi India are supplementary or ancillary agreements. At least on a bare reading of the agreements they do not appear to be so. Thus no case for directing the plaintiffs to arbitrate also with the defendants no.1,2,4&5 without the consent of the plaintiffs is made out.

(R) Thus, irrespective of the pleas of fraud, I am of the view, that the subject matter of the suit is not the subject matter of the arbitration agreement between the plaintiffs and the defendant No.3 Company and that the plaintiffs, against their consent, cannot be compelled to arbitrate with defendants no.1,2,4&5 for their claims.

(S) Interestingly not only do the plaintiffs accuse the defendants of fraud but the defendants also as aforesaid accuse the plaintiffs of fraud, concealment and suppression of material facts. It is the plea of the defendants in IA No.4157/2016 under Order XXXIX Rule 4 of the CPC that invocation of jurisdiction of this Court is a fraud upon the defendants as the plaintiffs have invoked discretionary jurisdiction by concealing vital documents having a bearing on the proceedings of this Hon'ble Court with unclean hands. It is further the plea of the defendants therein that the plaintiffs have committed perjury. The defendants in their pleadings have also referred to the raid by the Income Tax Authorities at the office premises of the defendant no.2 and defendant no.3 in relation to the plaintiff no.2's Income Tax Returns and to the questions asked by the Income Tax Authorities in relation to the accounts of the defendant no.2 and a transfer of Rs.10,00,00,000/- to the sons of the plaintiff no.2 from the subsidiary of defendants no.2&3. It is further the case of the defendants that the FIR filed by the plaintiffs is false. All the said averments do indeed satisfy the tests laid down in A. Ayyasamy supra, of the disputes relating to rights and liabilities giving rise to or arising out of criminal proceedings and/or which make virtual case of criminal offence and the allegations of fraud having implication in the public domain. I highlight that the sector in which investment has been done is admittedly entitled to statutory benefits like accelerated depreciation etc. It will thus have to be seen whether the parties have entered into the transaction to illegally deprive the State of the revenue. I am thus of the opinion that the allegations of fraud are serious enough to merit adjudication by the Court rather than by an arbitral tribunal.

12. The application of the defendants is accordingly dismissed.