IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

IA No. G.A. 2 of 2017

(Old GA No. 174 of 2017)

With

IA No. G.A. 3 of 2017
(Old GA No. 175 of 2017)
In
C.S. No. 2 of 2017

LINDSAY INTERNATIONAL PRIVATE LIMITED & ORS.

Versus

LAXMI NIWAS MITTAL & ORS.

For the Applicants/ Defendant nos. 41, 42: Mr. Anindya Kr. Mitra, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Soumabho Ghose, Adv.
Mr. Arunabha Deb, Adv.
Mr. Ayush Jain, Adv.
Ms. Arti Bhattacharya, Adv.

For the Respondents/ Plaintiffs : Mr. S.N. Mookherjee, Sr. Adv.
Mr. S. R. Kakrania, Adv.
Mr. Rudraman Bhattacharyya, Adv.
Mr. Shaunak Mitra, Adv.
Ms. Priyanka Prasad, Adv.
Mr. Tanuj Kakrania, Adv.
Mr. Aviroop Mitra, Adv.

Last Heard on : 22.12.2021.

Delivered on : 21.01.2022.

Moushumi Bhattacharya, J.

1. The issue in these applications for reference of the disputes to arbitration, is whether the dictum of the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya; (2003) 5 SCC 531* – non-permissibility of bifurcation of subject-matter or causes of action in the suit – should be considered by a court in an application under section 8 of The Arbitration and Conciliation Act, 1996, as amended in 2016.

2. The applicants**,** IFGL Refractories Limited, have filed two applications for reference of claims, disputes and differences made by the first plaintiff against the applicants to arbitration. The applicants are the defendant nos. 41 and 42 in the suit filed by Lindsay International Private Limited (plaintiff no.1) and its majority shareholders and directors.

3. Both the applications are being considered and disposed of by this judgment.

4. Lindsay has filed the suit for a decree for specific performance of a pre-incorporation agreement against the defendant nos. 1-38 and for specific performance of a non-competition agreement against the defendant nos. 39-42 and for declaration and injunction. The applicants IFGL Refractories – the defendant nos. 41 and 42 in the suit – want all claims, disputes and differences made by the plaintiff no.1 Lindsay against IFGL

which are the subject matter of the suit to be referred to arbitration in terms of the arbitration agreement contained in Purchase Orders issued by Lindsay upon IFGL. The applicants also pray for stay of all further proceedings in the suit as against the applicants IFGL. The arbitration clause refers to IFGL as the 'Seller' and Lindsay as the 'Buyer' and covers any dispute, controversy or interpretation of any terms or claims arising out of or in connection with the Purchase Orders.

5. Mr. Anindya Mitra, learned Senior Counsel appearing for the applicants IFGL, argues that the arbitration clause has not been disputed and is identical in all the Purchase Orders executed between the plaintiff Company and IFGL. Counsel submits that arbitration proceedings are pending between the parties pursuant to a successful application filed by IFGL under section 11 of the Act. Counsel relies on the amendment to section 8 as being evident from the section itself and the Law Commission Report read with the relevant case-law on the subject.

6. Mr. S.N. Mookherjee, learned Senior Counsel appearing for the plaintiffs, opposes the reference on the ground that the disputes against the different defendants are inextricably interlinked and are incapable of piecemeal adjudication. Counsel submits that the reliefs prayed for by IFGL are geared to bifurcate composite causes of action and split necessary and proper parties. It is submitted that the disputes forming the subject matter of the suit are not covered by the arbitration agreement and do not arise out of the limited scope of the Purchase Orders to which the arbitration agreement relates. Counsel places reliance on *Sukanya Holdings* and the

recent pronouncement of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation ; (2021) 2 SCC 1* in support of these contentions.

7. Upon considering the submissions made on behalf of the parties and the relevant material on the question to be answered, this Court proposes to structure the judgment in the following manner:

A. The import of section 8, post-amendment.

B. The case made in the plaint against the applicants/defendant nos. 41-42.

C. Whether the cause of action can be bifurcated.

D. The relevance of *Sukanya Holdings* at the stage of reference.

….***….

A. The legislative intent apparent in the amendment to section 8 of the 1996 Act

8. The overall import of section 8, as amended with effect from 23.10.2015, would best be assessed from a plain reading of the section itself together with the Law Commission Report and the Arbitration and Conciliation (Amendment) Bill, 2015 which would give a composite picture of what the framers intended.

9. From a plain reading of the provision:

Section 8(1) mandates a judicial authority before which an action is brought to refer a matter which is the subject matter of an arbitration agreement to arbitration. If the existence of the arbitration agreement is admitted, all that the Court is required to look into is whether the matter which is going to be

referred to arbitration has a valid arbitration agreement. The statutory mandate is subject to the Court ascertaining

a) Whether any valid arbitration agreement exists;

b) Whether the matter is arbitrable;

c) Whether the party, who seeks reference, has applied before submitting its first statement on the subject matter of the dispute.

If the Court can tick all of the above conditions, the Court must refer the parties to arbitration "*unless it finds that prima facie no valid arbitration agreement exists*."

10. The relevant part of section 8 is set out:

> "*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 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)……"*

11. The unambiguous mandate on the court is to refer the parties to arbitration, regardless of any judgment, decree or order of the Supreme Court or any Court. The only exception that the court can make to the above is if and only if it is *prima facie* established that no valid arbitration agreement exists. The onus of establishing that the valid arbitration clause does not exist rests squarely on the party who seeks to resist the reference.

12. In terms of semantics *per se*, from a reading of section 8(1), it is evident that the clause *"…. unless it finds that prima facie no valid arbitration agreement exists."*, is conditionally-nested under the mother clause *"…. notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration…."*. Hence, it is crystal clear that if a valid arbitration agreement exists, the court must refer the parties to arbitration even if there are judgments, decrees or orders of the Supreme Court or any other court pronounced before 2016.

13. The Law Commission Report No. 246:

The Note to the proposal for amendment to section 8 makes a specific reference to *Sukanya Holdings* and to cases where all the parties to the dispute are not parties to the arbitration agreement. The Law Commission recommends rejection of the reference to arbitration where such parties are '*necessary parties to the action*'. Hence, the recommendation of the Law Commission was to restrict the rigour of *Sukanya Holdings* only to 'necessary parties'. The expression "Necessary Parties" has been defined in Wharton's Law Lexicon, 15th Edn., as those parties in the absence of who no effective order can be passed. However, this recommendation did not find place in the final amendment which instead brought *'…notwithstanding* any *judgment, decree or order of the Supreme Court or any Court…'* in section 8(1).

14. With reference to the above, a reckoner of what was proposed and what finally was retained/rejected or inserted dehors the recommendation in

the amendment to section 8 may be easier to appreciate from the statement below:

The parts in **BOLD** in Column 2 are what was proposed by the Law Commission and the parts in **BOLD** and within **( )** in Column 3 are what was inserted in section 8(1), post-amendment.

Before Amendment	*Amendments to Section 8 as mentioned in Report No. 246 of the Law Commission of India Dated August 2014*	*Post 2015 Amendment* *(Additions are bracketed and underlined)*
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.	**In Section 8 of the Act:** **(i) In sub-section (1), after the words "substance of the dispute, refer" add "to arbitration, such of" and after the words "the parties to" add "the action who are parties to the" and after the word "arbitration" add the word "agreement".** **(ii) after sub-section (1), add "Provided that no such reference shall be made only in cases where –** **(i) the parties to the action who are not parties to the arbitration agreement, are necessary parties to the action.** **(ii) the judicial authority finds**	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 the date of submitting his first statement on the

	that the arbitration agreement does not exist or is null and void. **[Note: 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.**	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***.)

15. The Objects and Reasons to The Arbitration and Conciliation (Amendment) Bill, 2015:

The objects indicate that the Act was enacted to provide speedy disposal of cases relating to arbitration with least court intervention since the

interpretation of the provisions of the Act by courts in some cases have resulted in delay in disposal of arbitration proceedings and an increase in the interference by courts in arbitration matters which tend to defeat the object of the Act.

16. Recent Case-law on the subject:

The interpretation of the various facets of the amended section 8 as given by the Supreme Court can be summarized as follows-

Sukanya Holdings was referred to by the Supreme Court in *Ameet Lalchand Shah v. Rishabh Enterprises; (2018) 15 SCC 678* on the issue of amendment to section 8 wherein it was held that arbitration can be refused only where a serious question of fraud is involved. In *Emaar MGF Land Limited v. Aftab Singh (2019) 12 SCC 751*, the Supreme Court interpreted *"…notwithstanding any judgment, decree or order of the Supreme Court or any Court"* in section 8 (1) as being a clear departure from fulfilling the conditions as noticed in *P. Anand Gajapathi Raju v. P.V.G. Raju (2000) 4 SCC 539*, *Sukanya Holdings* and other judgments prior to the 2016 Amendment. A 3-Judge Bench of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1* noted the intrinsic limits of arbitration when it affects the rights and liabilities of persons who are not bound by the arbitration agreement – the *erga omnes* effect. The decision however propounded a test to determine when the subject- matter of a dispute is not arbitrable and held that the Arbirtal tribunal is the preferred first authority to decide all questions of non-arbitrability. The Supreme Court further commented on section 8 being a positive mandate on the judicial authority to refer parties to arbitration in

terms of the arbitration agreement and dispensed with the element of judicial discretion in the matter of holding down the parties to the terms of the arbitration agreement. In the later part of the judgment, the Court concluded that judicial interference at the reference stage, post-amendment, has substantially been curtailed and the structure of the Act was changed to bring it in tune with the 'pro-arbitration approach'. In the last paragraph of the judgment (para 244 of the SCC Report), the succinct advice on the prima facie evaluation of the validity of the arbitration agreement is "*when in doubt, do refer*".

17. Another 3-Judge decision in *N.N. Global Mercantile vs. Indo Unique Flame Ltd.; (2021) 4 SCC 379* explored the doctrine of separability of an arbitration agreement from the underlying contract. Recent decisions of the Bombay and the Delhi High Courts have also considered the effect of the amendment on section 8; *Taru Meghani v. Shree Tirupati Greenfield 2020 SCC Online Bom 110, Knowledge Podium Systems Pvt. Ltd. vs S.M. Professional Services Pvt. Ltd. 2021 SCC OnLine Del 136* and *Hero Electric Vehicles Private Limited vs Lectro E-Mobility Private Limited; 2021 SCC Online Del 1058*.

18. Although the plaintiffs have relied on *Vidya Drolia* and parts of *Hero Electric* to urge that the Supreme Court has called for a centralized adjudication of disputes where the disputes are interlinked with each other and the cause of action cannot be bifurcated, the said contention has to be seen in the proper perspective. Paragraph 28 of *Vidya Drolia* refers to the dictum in *Sukanya Holdings* and instances where such dictum would apply

but does not say that *Sukanya Holdings* is still good law and would cover all instances where a party applies for reference of the dispute to arbitration. This would be clear from para 154 -court not to enter into a mini trial so as to usurp the jurisdiction of the arbitral tribunal and para 159 where the Supreme Court leaves the issue of arbitrability to be decided by the arbirtal tribunal. *Vidya Drolia* hence cannot be cited only for the proposition that a centralized adjudication is the preferred route in all cases. Further, *Vidya Drolia* has also to be seen against the other pronouncements of the Supreme Court in *Emaar MGF* and *N.N.Global* which reinforced the legislative intention of minimizing judicial interference in matters of reference. The pointers set out in para 41 of *Hero Electric* which the plaintiffs have relied on are in the context of arbitrability and *in rem* disputes.

19. The only conclusion which emerges from the above interpretations and decisions is this: a Court must keep a hands-off approach – as opposed to a face-off with the arbitration process − and give a decisive push to the arbitral process once the court is satisfied, prima facie, that a valid arbitration agreement exists in a matter which is arbitrable. The Court's enquiry is limited only to this and no more.

B. The case made in the plaint against the applicants/defendant nos. 41 and 42

20. The case made out against the applicants/ defendant Nos. 41 and 42, IFGL would appear from paragraph 42 onwards. In Paragraph 42, the plaintiffs have pleaded a negative covenant incorporated in the agreements

between the plaintiff no. 1 and the defendant nos. 41-42 by implication to the effect that the defendant nos. 41-42 would not enter into competition with the plaintiff Company by selling its materials to any of the Arcelor Mittal Companies. Paragraph 45 pleads breach of contract on the part of the defendant nos. 41-42 and also sets out the entire cause of action against the said defendants. Paragraph 45 (ee) admits that applications under section 9 of the Act were filed by the defendant nos. 41-42 for various injunctive reliefs against the plaintiff Company. Paragraph 45(gg) alleges breach of contract by the defendant nos. 41-42 and paragraph 51 alleges loss and damage suffered by the plaintiff Company on account of the repudiation of the non-competition agreement by the defendant nos. 41-42. The reliefs claimed against the defendant nos. 41-42 are in paragraphs 64 and 65 of the plaint; namely the said defendants are liable to pay substantial damages to the plaintiff Company. The other relevant paragraph would be paragraph 12 of the plaint which refers to the Purchase Orders issued by the plaintiff Company to the defendant nos. 41-42 and states that the defendant nos. 41-42 along with the defendant no. 39 simply acted as suppliers/vendors of the plaintiff Company without having any contractual privity with any of the Mittal Companies. Paragraph 29 also states that defendant nos. 39 to 42 were amongst four of the existing suppliers/vendors used by the plaintiffs to supply refractory materials and other allied goods to the Mittal Companies. Paragraph 41 pleads an oral agreement with each of the defendant nos. 39 to 42 and states that apart from the express stipulations, which were essential and fundamental terms agreed upon between the plaintiff Company and the said four defendants, certain general terms and

conditions were also mutually agreed upon which were routinely followed by the plaintiff Company while purchasing from the said defendants. Moreover, the allegations in para 50 of the plaint in relation to procurement of breach of contract is against the defendant nos. 1-38 and not against the defendant nos. 39-42 (the vendor defendants). Therefore, no case of procurement of breach of contract has been made out against the vendor defendants in the plaint. The allegations contained in para 45(ii) of the plaint with reference to the defendant nos. 1-42 acting in collusion and conspiracy with each other to deny the rights of the plaintiff lacks the particulars required for pleadings of such nature under Order VI Rule 4 of The Code of Civil Procedure, 1908.

21. The statements made in the plaint do not plead or reject any collusion or conspiracy between the defendant nos. 41-42 and other vendors and the Mittal Companies or any common agreement between the defendant nos. 41-42 and other vendors and the Mittal Companies. The schematic arrangement of the paragraphs separate the cause of action pleaded against the defendant nos. 41-42 and the other vendors being the defendant no. 39. The cause of action against the defendant nos. 41-42 can hence be segregated from the cause of action made out against the Mittal Companies. The prayers in the plaint also indicate independent reliefs claimed against the defendant nos. 39-42: namely prayers b, e, o, r and t. The prayer for a decree of specific performance of the non-competition agreement, declaration in that regard and perpetual injunction restraining the defendant nos. 39-42 from selling their goods directly to any of the other defendants have only been sought against the defendant nos. 39-42.

22. The pleadings in the plaint belie the plaintiffs' contention of the disputes against the different defendants being inextricably interlinked or being incapable of piecemeal adjudication. The argument of composite causes of action discouraging the splitting-up of necessary and proper parties is also rejected since the cause of action pleaded against the defendant nos. 41-42 and the other vendor/defendant no. 39 as well as the reliefs claimed against them are clearly separable from the cause of action pleaded and the reliefs claimed against the Mittal Companies and can easily be demarcated on that basis.

23. The case made out is also of an agreement between the plaintiff Company and the vendor group of defendants on a principal to principal basis, independent of any agreement with the Mittal group of defendants. The plain(t) case is that there was no contractual privity between the vendors and the Mittal companies at all (paras 10, 12 of the plaint). Moreover, the Purchase Orders are issued by the plaintiff Company and the Mittal group of defendants are not parties to the said Purchase Orders.

24. It is thus evident from the statements made in the plaint that the suit has been filed against two groups of defendants with separate claims and causes of action which has been claimed and pleaded against each of the said groups; more specifically, (a) the Mittal group consisting of defendant nos. 1-38 to who the plaintiff no.1 was selling goods and (b) the Vendors group – defendant nos. 39-42 from who the plaintiff Company was buying goods.

C. Can the cause of action in the suit be bifurcated?

25. Order II Rule 6 of The Code of Civil Procedure, 1908, gives an option to the Court to order separate trials where there is joinder of causes of action in one suit which has a potential of delaying the trial or otherwise cause inconvenience to the proceedings. The aforesaid provision hence provides for cases where bifurcation and separate trials are called for by reason of joinder of causes of action and parties (Ref: *Taru Meghani vs Shree Tirupati Greenfield; 2020 SCC OnLine Bom 110*). As discussed in the preceding section of this judgment, the reliefs claimed against the two groups of defendants, namely the Mittal Group and the vendors group (of which the applicants, defendant Nos. 41 and 42 are a party) are separate and independent of each other. The disputes and reliefs as claimed in the suit are hence bifurcable.

26. It is also to be noted that the suit was filed after receipt of notices under section 21 of the 1996 Act for commencement of arbitral proceedings. It is also relevant that the existence and validity of the non-competition agreement said to exist between Lindsay and the vendors is the basis of the reliefs claimed against the vendor defendants which are in turn consequential upon the determination of the existence and validity of the non-competition agreement.

27. It can fairly be assumed that the plaint has been prepared with the object of avoiding the arbitration agreement between the plaintiff no. 1 and the vendor group of defendants.

28. In *N.N. Global*, the Supreme Court held that all civil and commercial disputes, either contractual or non-contractual, which can be adjudicated by a Civil Court, in principle, can be adjudicated and resolved through arbitration unless it is excluded either expressly, by a statute or by necessary implication. The Supreme Court further proceeded to hold that the 1996 Act does not exclude any category of disputes as being non-arbitrable. The Supreme Court reiterated the categories recognized in *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd; (2011)5 SCC 532* as instances of disputes which are not arbitrable. In that case, the Supreme Court held that the civil aspect of fraud can be adjudicated by an arbitral tribunal with the only exception being where the arbitration agreement itself is vitiated by fraud or fraudulent inducement and goes to the validity of the underlying contract and impeaches the arbitration clause itself.

29. Hence, this Court does not find any merit in the argument made on behalf of the plaintiffs that the disputes, if referred, would result in bifurcation of composite causes of action or split-up necessary and proper parties. This interpretation is in any event destructive of the legislative intent to promote arbitration as noticed in the earlier part of the judgment. The view of this Court is bolstered by the fact that none of the decisions cited, including *Vidya Drolia*, have held that an application under section 8 will only succeed if the entire suit is capable of being referred to arbitration.

D. Is *Sukanya Holdings* relevant at the stage of reference, post-amendment?

30. The recommendation of the Law Commission of discouraging reference where the parties to the action, who are not the parties to the arbitration agreement, are necessary parties to the action, read with the Note referring to *Sukanya Holdings*, did not serve as a trailer in the final cut of the 2016 Amendment. The legislature, in fact, jettisoned the entire portion on "necessary parties" as well as *Sukanya Holdings* to declare, with unequivocal intent, that a judicial authority shall refer the parties to arbitration "notwithstanding any judgment, decree or order of the Supreme Court or any Court". The amended section 8 hence does not contain any remnant of the recommendation with reference to *Sukanya Holdings* and has thrown out any impediment in connection with the dictum in *Sukanya Holdings*, or any other judicial pronouncements before the amendment, in its entirety. (Ref: *Emaar MGF*)

31. The dictum in *Sukanya Holdings* that bifurcation of causes of action and parties cannot be permitted in adjudicating an application under section 8 has been rejected in *N.N. Global* (see the preceding section of this judgment). *Vidya Drolia* also cannot also be used as a proposition to support the plaintiffs' argument that the entire cause of action in the suit must be capable of being referred to arbitration in a section 8 application. In fact paragraph 225 of *Vidya Drolia* recognizes that judicial interference at the reference stage has been substantially curtailed and the 2015 amendment has altered the structure of the Act to make it pro-arbitration. Paragraph 154.3 of the said judgment further reinforces the principle of severability,

competence-competence and that the Arbitral tribunal is the preferred first authority to determine all questions of non-arbitrability. In paragraph 244.4, the advice of the Supreme Court is *"when in doubt, do refer"*.

32. The conclusion, without a doubt, is that *Sukanya Holdings* is no longer a relevant factor for the Court to consider at the stage of reference in an application under section 8 of the Act. The Court is not even under a mandate, post amendment, to adjudicate on the bifurcability of the causes of action or the presence of parties who are necessary parties to the action but not to the arbitration. The only brake in the momentum of reference is the court finding, prima facie, that no valid arbitration agreement exists.

33. The rejection of the Law Commission's recommendation in the Note to section 8 with regard to *Sukanya Holdings* was considered in *Emaar MGF* where the Supreme Court opined that pronouncements made prior to the amendment were not to be adhered to as the legislative intent was to move away from the conditions in *P. Anand* and *Sukanya Holdings.* The Court proceeded to explain that the object of the amendment was to minimise the scope of the judicial authority to refuse reference to arbitration.

34. Besides, the argument that *Sukanya Holdings* continues to hold the field would, in effect, result in the amended section 8 looking somewhat like this;

> "… *notwithstanding any judgment, decree or order of the Supreme Court or any Court* <u>*save and except the judgment in Sukanya Holdings*</u>…" (the added bit is underlined).

35. This Court is of the view that adding to the plain and unambiguous words of the provision in the pretext of interpretation cannot be the permitted course of action.

36. It is also important to bear in mind that the issue is not whether the dictum in *Sukanya Holdings* is correct, as the law laid down in that decision may continue to be relevant for deciding applications under section 8 filed prior to the amendment of 2016 but not where the suit or application is filed after 23.10.2015 when the amendment came into force (underlined for emphasis).

D1. The bar to reference under the amended Section 8 of the 1996 Act:

37. Existence of a valid arbitration agreement:-

According to the applicants/defendant nos. 41-42, the Purchase Orders, placed by the plaintiff no. 1 Lindsay on the applicants, contained terms and conditions relating to the purchase of refractory items from the applicants each one of which Orders contained an arbitration clause worded in identical terms. This contention has not been disputed by the plaintiffs. The relevant part of the arbitration clause- Clause 15- is set out below—

> *"15.1. The BUYER and SELLER agree that any dispute or difference which may arise out of or in connection with this ORDER, shall be amicably settled through mutual discussion.*
>
> *In case BUYER and SELLER fail to reach an agreement on any dispute, controversy, interpretation of any terms, claim arising out of or in connection with this ORDER or the breach,*

termination shall be settled by arbitration in accordance with the Rules of the Indian Arbitration & Conciliation Act, 1996.

15.4. The venue of arbitration shall be at Kolkata, India and the Courts in Kolkata shall have the exclusive jurisdiction."

38. All the Purchase Orders contain the above arbitration clause. It is also undisputed that the plaintiff Company accepted the invoice of the applicants in terms of the Purchase Orders without demur. The plaintiffs have also not disputed the arbitrability of the dispute or the existence or validity of the arbitration clause. Notably, the General Terms & Conditions of Supply dated 1st September, 2010 issued by the plaintiff Lindsay on the vendor defendants also contain an arbitration clause (Clause 19) and record that the Terms shall remain valid for all the Purchase Orders issued by Lindsay after 1st September, 2010 unless Lindsay confirms to the Seller/vendor defendants of any modification or amendment to the Terms.

39. It is relevant that by an order dated 22nd January, 2019 a learned Single Judge of this Court allowed an application filed by the applicants under section 11. The Special Leave Petition filed by the plaintiffs against the order passed in the section 11 filed by the defendant nos. 41 and 42 has been dismissed by the judgment and order in *Vidya Drolia*.

40. By reason of the free-ranging width of the arbitration agreement, all disputes arising out of or in connection with the Purchase Orders are clearly covered by the arbitration clause; Ref: *Giriraj Garg Vs. Coal India Limited; (2019) 5 SCC 192*, where the Supreme Court held that disputes *'in*

connection with' or in similarly-worded terms are to be given a broad meaning and quoted *Russell* from his commentary on Arbitration (24th Edn., 2015) to note that such clauses may also be sufficient to catch disputes arising under another contract related to the contract containing the arbitration clause.

41. In this context, reference may also be made to *Ameet Lalchand Shah* where the Supreme Court referred all the four agreements which formed the subject matter of the suit to arbitration, although one of the agreements did not contain any arbitration clause, on the ground that this particular agreement was connected with the others which had the arbitration clause.

42. The factual difference between the case made out by the defendant nos. 41-42 as compared to defendant no. 39 is that the alleged agreement for exclusivity/non-competition agreement is contained in written contracts of sale contained in 24 Purchase Orders issued between August to October, 2016 which are also expressly covered by the arbitration agreement.

43. In any event, the question whether the contract with the vendor defendants is intertwined with the contracts between the plaintiff and the Mittal defendants is a matter of interpretation of the contract as recorded in the Purchase Orders and falls within the domain of the arbitrator. It is also relevant that defendant nos. 1-38 (the Mittal group of defendants) have not opposed the present application for reference to arbitration.

44. The requirement of a valid arbitration agreement involves a dispute which is arbitrable and was clarified by the Supreme Court in *N.N. Global.* In the said decision, all civil or commercial disputes which are capable of being adjudicated by a Civil Court in principle were held to be capable of being resolved unless specifically excluded by statute or by necessary implication. The Arbitration and Conciliation Act, 1996 does not contain any provision by which any particular category of disputes are held to be non-arbitrable. section 2(3) of the Act saves certain prevalent laws under which disputes may not be submitted to arbitration. The Supreme Court also clarified that actions *in personam* which determine the rights and interest of the parties to the subject matter of the dispute are clearly arbitrable.

45. The present case squarely falls within the dictum of *N.N. Global*. It is not a *lis in rem* or a claim to exercise a right against the world at large. The claims and disputes are entirely between private parties for determination of their rights and obligations as contained in the Purchase Orders containing the arbitration clause. It is also not a case where the cause of action and subject-matter of the dispute require centralized adjudication or would have the effect of binding third parties thereby rendering piecemeal adjudication inappropriate and unenforceable. It may also be noted that, even before the amendment was effected to section 8 in 2016, once the existence of a valid arbitration agreement was admitted, the judicial authority was statutorily mandated to refer the matter to arbitration; *Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Co.; (2006) 7 SCC 275.*

46. *Prima facie* finding:

A *prima facie* finding necessarily implies a first assessment of a matter as opposed to a full review of the merits of the case. Borrowing an expression from *Vidya Drolia,* a *prima facie* review at the reference stage is to *"cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage."* The rejection of the reference in such case is only premised on the absence or non-existence of a valid arbitration agreement or where the dispute or subject matter is not arbitrable. In *Vidya Drolia,* the Supreme Court clarified that exercise of the limited power of *prima facie* review only ensures that frivolous matters are shed at the initial stage and does not in any way interfere with the principle of competence-competence or impede arbitration proceedings.

47. The decisions relied upon on behalf of the plaintiffs proceed on the conditions required for reference before the amendment to section 8. *Bengal Immunity Company Limited Vs. State of Bihar*; *AIR 1955 SC 661* has been cited for the proposition that judgments prior to an amendment remain good law unless overruled. This decision along with *Sukanya Holdings* is no longer relevant in view of the reasons given in the earlier part of this judgment, namely, that *Sukanya Holdings* has not been accepted in the final amendment and the subsequent clarification of the legislative intent by the Supreme Court in *Emaar MGF*.

48. It should also be added that bifurcation of parties and of the cause of action, as recommended by the Law Commission, was restricted only to "necessary parties". However, even this restricted recommendation was done away with and replaced by *"...notwithstanding any judgment, decree or order of the Supreme Court or any Court,..."*.

49. In any event, the statements in the plaint reflect that the cause of action as pleaded against the vendor defendants including the defendant Nos. 41-42 and the reliefs prayed against the said defendants render the other parties wholly unnecessary for adjudication of the dispute. The cause of action against the defendant Nos. 41-42 is essentially for breach of an alleged non-competition clause contained in the agreement where none of the other Mittal defendants are signatories or parties. Hence the other defendants are not necessary or even proper parties, which is also reiterated in paragraph 12 of the plaint. This paragraph states that the plaintiffs have independent agreements with each of the vendors and further that the vendors have no contractual privity with any of the Mittal Companies at all. With regard to bifurcation of cause of action, Paragraph 28 of *Vidya Drolia* defines the expression "cause of action" in relation to the subject matter to mean as one which relates to the scope of the arbitration agreement and whether the dispute can be resolved by arbitration. *Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited; (2019) 9 SCC 209* placed reliance on *SMS Tea Estates (P) Ltd. Vs. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66* and has been overruled by the Supreme Court in *N.N. Global*. Certain other views expressed in *Garware Wall Ropes* which

were noted with approval in *Vidya Drolia* (Paragraph 147.1) have now been referred to a larger bench in *N.N. Global*. The judgments of the Supreme Court in *Duro Felguera S.A. Vs. Gangavaram Port Limited; (2017) 9 SCC 729* and *Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited; (2020) 2 SCC 455* were in the context of applications under section 11 of the Act and considered the effect of the amendment on *National Insurance Co. Ltd. Vs. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267* and *S.B.P & Co. Vs. Patel Engg. Ltd. (2005) 8 SCC 618,* respectively. *Pravin Electricals Pvt. Ltd. Vs. Galaxy Infra and Engieering Pvt. Ltd. (2021) 5 SCC 671* was also in the context of section 11(6). The Supreme Court however left the question with regard to existence of arbitration agreement to be decided by the arbitrator. The judgment of a learned Single Judge in *Emirates Grains Products Co. LLC Vs. L.M.J. International Ltd.*; *(2009) 4 CHN 125* has been challenged and the appeal is pending. The said judgment is also of an application filed under section 45 of the 1996 Act and not under section 8. The unreported judgment of a learned Single Judge of this Court in *G.A. No. 820 of 2020 with C.S. No. 02 of 2017*: *Lindsay International Private Limited Vs. Laxmi Niwas Mittal* involved an application filed by one of the parties seeking reference under section 8 after filing the written statement. This has been specifically made statutorily impermissible under the amended section 8. The said judgment also does not concern the applicants or any of the vendor defendants.

50. Therefore, none of the decisions cited assist the plaintiffs or persuade the Court that the present application under section 8 must fail either on the ground of *Sukanya Holdings* or otherwise.

51. This Court is hence of the view that the applicants/ defendant nos. 41-42 have successfully made out a case for reference of the disputes to arbitration in terms of the arbitration agreement contained in the Purchase Orders. The only question which remains is the fate of the suit as far as defendant nos. 41 and 42 are concerned. As held in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums; (2003) 6 SCC 503*, once an application under section 8 is allowed, the Civil Court does not retain jurisdiction to entertain the suit as against the defendants who filed the application for reference.

52. G.A. nos. 174 and 175 of 2017 are accordingly allowed in terms of prayers (a) and (b). All claims made by the first plaintiff against the defendant nos. 41 and 42 and all disputes, differences and controversies raised against the said defendants, which are the subject matter of the suit, shall be referred to arbitration in terms of the arbitration agreement. There shall also be a stay of all further proceedings in CS No. 2 of 2017 as against the defendant nos. 41 and 42.

53. The applications are disposed of.

54. Learned counsel appearing for the plaintiffs prays for stay of operation of the judgment. Considering the law on the subject as discussed in the judgment, the prayer for stay is considered and refused.

Urgent Photostat certified copy of this Judgment, if applied for, shall be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)