



2025:DHC:5640-DB



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 09.07.2025***Judgment pronounced on: 16.07.2025***

+ RFA(COMM) 54/2022, CM APPL. 36812/2022 (O-20 R-6A CPC) & CM APPL. 3397/2025 (Delay 52 days in filing Reply to CM 36810/2022)

CANARA BANK

.....Appellant

Through: Ms. Rekha Rustagi, Advocate.

versus

SANJEEV SHARMA & ORS.

.....Respondents

Through: Mr. Vinod Kumar and Mr.
Sparsh Jhamb, Advocates for
R-1 & R-2.

CORAM:**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD****HON'BLE MR. JUSTICE HARISH VAIDYANATHAN****SHANKAR****J U D G M E N T****HARISH VAIDYANATHAN SHANKAR, J.**

1. The present regular first appeal under Section 13(1A) of the Commercial Courts Act, 2015 read with Section 96 of the Code of Civil Procedure, 1908¹ has been filed against the **Judgment dated 06.05.2022²** passed by the learned District Judge, Commercial Court-05, Central District, Tis Hazari, Delhi in CS (Comm) No. 4274/2021 titled as ***Canara Bank vs. Sanjeev Sharma And Ors.***, for remanding the case back to the learned District Judge for trial and adjudication on merits.

¹CPC

² Impugned Judgment



2. By the judgment impugned herein, the learned District Judge has dismissed the suit and held as follows:

“....

4) Defendants no. 1 & 2 executed the loan application, mortgaged deed of the allotted flat on 24.07.2008, which was still under construction and no possession of the same was handed over to them by the builder defendant no.3. Since, the mortgage could not take place and it could not be treated as a security for repayment of the loan so the bank required one tripartite agreement to be executed by the borrower as well as the builder also and ultimately this additional tripartite agreement was executed on 18.11.2008. This fact is not in dispute that whatever payment was released by the plaintiff bank was credited in the account of the defendant no.3 builder. In this agreement dated 18.11.2008, certain more obligations were put upon the defendant no. 1 borrower and defendant no. 3 builder. The clause 10 on page no. 3 of this agreement clearly mention that the payment is to be disbursed by the plaintiff bank even if the borrower is unable to create mortgage on the strength of this tripartite agreement. On the basis of this agreement, it was decided that the bank will disburse the sanctioned loan amount to the builder directly, the builder will have no objection in creating the mortgage of the allotted flat in favour of the bank which will have also a lien on the same and the builder will also complete the necessary formalities regarding completion of the mortgage of the flat, handing over the documents to the bank etc. In case of the cancellation of the allotment, the builder was to return the amount to the bank including the amount deposited by the borrower with it. The money which the builder will receive from the bank will be held in the capacity of trust and separate account of the same has to be maintained etc. Certain more conditions were agreed upon by the plaintiff bank with the borrower and the builder relating to allotted flat, to secure the money given as loan etc. Clause 16 and 17 of this tripartite agreement mention that in case of a dispute, the matter will be sorted out through arbitrator. It was also agreed upon in the tripartite agreement that in case of non payment of the installments by the defendant no. 1 borrower, plaintiff bank will issue a letter to the defendant no.3 for cancellation of the allotment and to enforce the lien till the amount is returned by the builder.

5) The tripartite agreement dated 18.11.2008 has to be treated as a part and parcel of the original loan agreement dated 24.07.2008 executed between the plaintiff and defendants no. 1 & 2 because certain formalities regarding mortgage, release of payment, creation of lien, terms and conditions regarding non payment and its consequences etc. were finalised later on with the consent of the plaintiff bank and builder. Mere fact that in the original loan



application form signed by defendants no. 1 & 2 were not containing any such arbitration clause is of no consequences. Similarly, the fact that defendant no.2 guarantor has not signed this tripartite agreement is an immaterial fact. Hon'ble Supreme Court in **Chloro Controls India Ltd. vs. Severn Trent Water Purification (2013) 1 SCC 641** held that in exceptional cases, the reference can be made against non-signatory or third party to the agreement containing an arbitration clause. Where there are various agreements constituting a composite transaction relating to and connected with main agreement, then dispute between signatory and non signatory to arbitration clause can be referred to arbitrator on the basis of principle of composite performance. Delhi High Court also in case **Global Infonet Distribution Pvt. Ltd. vs. Lenovo (India) Pvt. Ltd. 2019 SCC online Del 9980** held that in some cases, non signatory of the agreement containing an arbitration clause can be referred to arbitration proceedings. Hence, non joining of defendant no.2 guarantor in the tripartite agreement cannot be treated as invalid arbitration clause.

6) If the terms and conditions of this tripartite agreement are taken into consideration, then it can be safely said that it was executed in pursuance to and in furtherance to the main loan agreement and is a supplement to the original agreement. The defendant no.3 builder has become liable for return of the loan amount qua which defaults have been committed in payment of installments by the defendants no. 1 & 2. The builder has also to cancel the allotment in favour of defendant no. 1 and to assist the bank for recovery of payments either by returning the amount itself or by allowing another buyer to step into the shoes of the defendant no. 1 but the bank has not taken any such steps against the builder for recovery of the loan amount or to enforce the security as per terms of the tripartite agreement.

7) The bank has transferred the part of the sanctioned loan amount to the builder and now the responsibility of the builder comes into picture for returning the said amount under the tripartite agreement. A dispute has arisen in respect of the return of the loan amount as well as to enforce the security and mortgaged property which only can be sorted through arbitration clause existing in this agreement. The arbitration clause of this tripartite agreement has to be read in existence for original loan agreement also. The filing of the civil suit is, thus, barred due to such arbitration clause. The plaintiff bank was required to invoke the arbitration clause before coming to the court and the suit is liable to be rejected being not maintainable. Application of the defendant under Section 8 of Arbitration & Conciliation Act r/w Order 7 Rule 11 CPC is allowed. Suit is dismissed with liberty to the plaintiff bank to get the dispute sorted out through the arbitration proceedings as per law. File be consigned to record room."

**BRIEF FACTS:**

3. The relevant facts, which led to the filing of the present appeal, are set out in the paragraphs that follow.
4. The Respondent No. 1 herein had entered into an agreement for the purchase of a flat from Respondent No. 3 *via* an Allotment letter dated 24.07.2008.
5. *Vide* Sanction Letter dated 26.08.2008, the Appellant herein sanctioned a Housing Loan for the sum of Rs. 22,50,000/- in favour of the Respondent No. 1, wherein the Respondent No. 2 stood as a guarantor.
6. In pursuance of the same, the Respondent Nos. 1 and 2, thereafter, executed further documents, inter alia, an agreement titled “Agreement to Mortgage” and some other Documents. An agreement, being a Tri-partite Agreement dated 18.11.2008, was entered into as between the Appellant and Respondent Nos. 1 and 3.
7. It is stated that the loan account of the Respondent No. 1 was declared a Non-Performing Asset on 02.05.2018, and a notice dated 05.05.2018 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, was issued to the Respondent No. 1.
8. It is stated that despite the said notice, the Respondents have failed to pay their dues.
9. It is stated that for the purpose of recovery of the amounts due to it, the Appellant herein applied for 'Pre-Institution Mediation' against the Respondents and thereafter, a Non-starter Certificate dated 17.07.2021 was issued by the Delhi State Legal Services Authority, Central District, Tis Hazari, Delhi. The Appellant herein, then,



preferred a suit being CS (Comm) No. 4274/2021, and prayed for the following reliefs:-

“i)To pass a decree in favour of the plaintiff and against the defendants (jointly & severally) for the recovery of ₹7,95,406/- (Rs. Seven Lacs Ninety Five Thousand Four Hundred Six Only) along with interest pendent-lite and future interest @ 11.95% per annum (to be compounded monthly) and penal interest @ 2% p.a. in respect of A/c No.- 90717200003631 from the date of filing of the suit till the date of realisation.

ii)To direct the defendant no. 3 to sell/ transfer the said property measuring 1495 sq. ft., bearing Flat no.- 1407, Tower No.- T-23, 14th Floor, Triveni Galaxy, Sector- 78, Faridabad, Haryana; or in alternatively, to direct the defendant no. 3 to refund the entire amount received on account of the flat in question to the Plaintiff with interest @ 11.95% per annum (to be compounded monthly) and penal interest @ 2% p.a. till the date of realisation, for realisation of the decretal amount as may be ordered by the Hon'ble Court in favour of the Plaintiff -Bank and against the defendants,”

10. The Respondent Nos. 1 and 2 herein preferred an application under Section 8 of the Arbitration and Conciliation Act, 1996³ read with Order VII Rule 11 and Section 151 of the CPC, praying that since the Tri-partite Agreement dated 18.11.2008 as between the parties contained therein arbitration clause being clauses 16 and 17, the suit was not maintainable and as such, was likely to be either dismissed or referred to an independent arbitrator as provided for in the arbitration agreement. Clauses 16 and 17 of the Tri-Partite Agreement held as follows:-

“16. In Respect of any dispute arising in connection with the tripartite agreement, the same will be referred to the sole arbitrator to be nominated by the Bank through its Chief Manager of the concerned Branch and the Award published by the sole arbitrator shall be final and binding on all the parties.

17. The Arbitrator so appointed by the Bank may be an officer of the Bank and/ or any outside person, but parties of the first and

³ A&C Act



second part here to will not have any objection on the choice of Arbitrator nominated by the Bank unless, the person is legally barred to be the sole arbitrator. The arbitration shall be in accordance with the provisions of Arbitration and Conciliation Act, 1996 or any other law in substitution thereof.”

11. The Appellant herein filed a reply to the said application denying that the suit was not maintainable and that the suit filed was primarily based on the documents signed by the Respondent Nos. 1 and 2 and was only relying upon the Tri-partite Agreement to show its right for the flat in question, title of which has not been transferred by the Respondent No. 3 to the Respondent No. 1.

ANALYSIS:

12. At the outset, we would like to observe that the plaint was drafted as a composite one as against all the Respondent Nos. 1 to 3. A reading of the averments and the reliefs sought thereof clearly shows that the Appellant/Bank had sought to file a suit wherein what was primarily sought was the recovery of the loan amount advanced by it; meaning thereby that the subject matter of the Suit was essentially the recovery of the amount advanced towards the purchase of the apartment which was also mortgaged to the Appellant herein. The said mortgage formed an integral and essential part of the condition of the advancement of the loan, and the same was sought to be ensured by the Tri-Partite Agreement between the Appellant and the Respondent Nos. 1 and 3.

13. The fact that the said Suit was a composite one is evidenced not only from the memo of parties but also by the composite nature of the reliefs as sought for and as extracted hereinbefore. The same is also evidenced from the Pleadings in the Plaint and more particularly paragraph Nos. 13 and 14 of the Suit, which read as follows:



“13. That now, the Defendant no. 1, being the borrower, Defendant no. 2, being the guarantor and defendant no. 3 being the builder are therefore, jointly and severally liable to pay a sum of ₹7,92,551.99 rounded off as ₹7,92,552/- as on 06.10.2021, which is inclusive of interest upto 30.09.2021, in respect of A/c No.- 90717200003631, as per statement of Account duly certified under Banker's Book of Evidence Act. The defendants are also liable to pay unapplied interest of ₹2,854/- from 01.09.2021 till 11.10.2021 i.e. the filing of the suit. Therefore, the defendants are liable to pay total sum of ₹7,95,406/- (Rs. Seven Lacs Ninety Five Thousand Four Hundred Six Only) till the date of filing of the suit.

14. That defendants are also liable to pay pendent-lite and future interest at the rate @ 11.95% p.a., at monthly rest, and penal interest @ 2% p.a. i.e. from the date of filing of suit till the realisation of amount claimed.”

14. In our opinion, the learned District Judge has rightly concluded that the Tri-partite Agreement is an intrinsic part of the composite Loan arrangement that was agreed upon as between the parties. It would be difficult to assume, given the nature of the pleadings as well as the reliefs sought, to isolate the Agreements as sought to be done at this stage. The Appellant cannot, at this stage, seek to contend that what was sought was, in fact, only to claim the loan amount from the Respondent Nos. 1 and 2 and that the Tri-partite Agreement was only *“relied upon to show its right over the flat in question, title of which has not been transferred by the Defendant No. 3 to defendant No.1 and the liability of defendant No. 3.”* Paragraph No. 5 of the reply to the Application under Section 8 of the A&C Act dated 25.03.2022 reads as follows:

“5) That the contents of para 5 of the Application, as stated, are wrong, vague, baseless, misconceived, and hence, specifically denied. It is specifically denied that the present suit filed by the plaintiff is barred by the provisions of section- 8 of Arbitration and Conciliation Act and deserves to be rejected under Order 7 Rule 11 of CPC. It is respectfully submitted that the plaintiff bank has filed the present suit to claim the loan amount due on the basis of loan documents signed by the defendant no. 1 & 2 and has relied upon the tripartite agreement to show its right over the flat in question,



title of which has not been transferred by the defendant no. 3 to defendant no. 1 and the liability of the defendant no. 3.”

15. The Appellant, in the averments made in the Appeal, has sought to further improve upon the case originally sought to be canvassed in the Reply under Section 8 of the A&C Act, by making the following averments:

“VI) BECAUSE Ld. District Judge, Commercial Court has failed to appreciate that the relief sought for recovery of entire amount due from the respondent no. 1 & 2 on the basis of Housing Loan Agreement cannot be barred any other law including section 8 of Arbitration and Conciliation Act, 1996, merely on the ground that the Tri-partite Agreement contains Arbitration clause. Therefore, the order of rejection of suit i.e. the impugned order dt. 06.05.2022 under Order 7 Rule 11 CPC is not maintainable and liable to be set aside.

VII) BECAUSE Ld. District Judge, Commercial Court has misinterpreted the Judgments passed by the Hon'ble Supreme Court in ‘Chloro Controls India Ltd. Vs Severn Trent Water Purification (2013) 1 SCC 641’ and ‘Global Infonet Distribution Private Ltd. Vs Lenovo (India) Pvt. Ltd. 2019 SCC online Del 9980’. It is pertinent to mention here that the appellant has nowhere challenged the arbitration clause of the Tri partite Agreement. In fact, the Appellant has claimed that the liability of respondent no. 1 & 2 to pay the amount due to the bank cannot be decided on the basis of Tri partite Agreement. The Judgments referred to by the Ld. Trial Court are not applicable to the facts of present matter.

VIII) BECAUSE Ld. District Judge, Commercial Court has wrongly considered that the Arbitration Clause of Tripartite Agreement has to be read in existence for Loan Agreement also. The Ld. Trial Court has failed to appreciate that the very purpose of the Tripartite Agreement is to bind the builder since the building was under construction and mortgage under Transfer of Property Act could not be created.

IX) BECAUSE the Ld. District Judge, Commercial Court, has failed to appreciate that the suit can only be rejected if prima facie appears that the suit is not maintainable. The Ld. Trial Court has failed to appreciate that the Appellant has filed the suit against respondent no. 1 & 2 on the basis of Housing Loan Agreement and cannot be dismissed on the ground of Arbitration clause of Tripartite Agreement U/o 7 Rule 11 CPC.”



16. This Court is of the view that the Appellant is now trying to argue against the original pleadings as made in the Plaint, which was in the nature of a composite Suit, as against all the Respondents and not only against Respondent Nos. 1 and 2. The relevant paragraphs of the Plaint as well as the Prayers sought have already been extracted hereinbefore.

17. The Appellant, in fact, rightly contends that there can be no bifurcation of the Cause of Action. In the present case, the purport of the Appellant and the intent of the Appellant are clearly evidenced by the pleadings and the Prayer as sought for, which are directed towards the recovery of the loan as against all the Respondents named therein. The Judgment relied upon by the Appellant to this effect, namely ***Sukanya Holdings Vs. Jayesh H. Pandya***⁴, is against the Appellant and would squarely apply to the case, in particular paragraph Nos. 15 to 17, which read as under:

“15. The relevant language used in Section 8 is: “in a matter which is the subject of an arbitration agreement”. The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of “a matter” which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced — “as to a matter” which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words “a matter” indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is — even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit

⁴ (2003) 5 SCC 531



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 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 to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.”

(Emphasis supplied)

Given the facts of the present case, it is apparent that what was the subject matter of the proceedings was the recovery of the loan amount.

18. The matter, which has been referred to Arbitration, is not one that was alien to the subject matter of the Arbitration Agreement. In fact, as clearly seen, the entire subject matter of the Suit would fall wholly within the purport of the Arbitration Agreement. In any event, the various documents and Agreements form a composite whole and cannot be sought to be separated in the manner as claimed.

19. The learned District Judge records the fact that the Respondent No. 3/builder was liable to return the amounts that were disbursed to the Appellant/Bank. A perusal of the Tri-partite Agreement would also show that any money that the Respondent No. 3 was to receive from the Bank was to be held in the capacity of a trustee, and a separate account with the Bank had to be maintained. All the amounts disbursed under the Loan agreement were directly credited to the account of the Bank, in accordance with the purport of the Tri-partite



Agreement and the manner in which the loan was effectuated by the Appellant Bank.

20. The framing of the Suit and the Prayers does not support the understanding that the reliefs sought were confined solely to the enforcement of the Loan Agreement against the Respondent Nos. 1 and 2, and that nothing was claimed as against the Respondent No.3.

21. The nuanced difference that the Appellant seeks to make through its averments to this effect in the Appeal, as respects the separate claims as against Respondent Nos. 1 and 2 on the one hand, as respects Respondent Nos. 1 and 3 on the other, as well as, as against Respondent No. 3 are not made out from, or supported by a holistic reading of the contents of the Complaint or the Prayers therein. The same, in any event, is not even permissible as held in *Sukanya Holdings (supra)*. If the same were to be accepted, the Suit as framed would have to be separated into at least two different proceedings; One as against the Respondent Nos. 1 and 2, by way of a Suit and another as against Respondent Nos. 1 and 3, by way of an Arbitration proceeding.

22. In our opinion, the learned District Judge has rightly held that the mere fact that the agreement by which the Respondent No. 2 was made a surety to the loan, not containing an arbitration clause, would not be of much significance. The most important observation made by the learned District Judge, and in our opinion, rightly so, is that the agreements must be read as a whole to ascertain their composite intent and given that the loan amount was disbursed directly to the builder, and in view of the clauses in the Tri-partite agreement making the builder directly liable to return the said amount, the same would have to form the basis for adjudicating the dispute between the parties.



23. The Hon'ble Supreme Court in the judgment of **Ameet Lalchand Shah v. Rishabh Enterprises**⁵, while examining a situation where multiple inter-connected agreements, involving various parties, were executed as part of a single commercial project, emphasized that even where certain agreements did not contain an arbitration clause or involved non-signatories to the principal contract, the composite nature of the transaction and the common commercial intent could warrant reference of all parties and agreements to arbitration. The relevant paragraphs of the said judgement read as follows:

“24. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project, namely, operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement — Equipment Lease Agreement (14-3-2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India: (i) Equipment and Material Supply Contract (1-2-2012); and (ii) Engineering, Installation and Commissioning Contract (1-2-2012) and the Rishabh's Sale and Purchase Agreement with Astonfield (5-3-2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (lessee). Even though, the Sale and Purchase Agreement (5-3-2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and Appellant 1 Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14-3-2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per Clause (v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and

⁵(2018) 15 SCC 678



leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.

25. Parties to the agreements, namely, Rishabh and Juwi India: (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement, namely, Equipment Lease Agreement (14-3-2012). All the four agreements are inter-connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14-3-2012).

27. Arbitration and Conciliation (Amendment) Act, 2015 has brought in amendment to Section 8 to make it in line with Section 45 of the Act. In view of the observation made in Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531], Law Commission has made recommendation for amendment to Section 8 of the Act. Consequent to the 2015 Amendment Act, Section 8 is amended as under:

“8. Power to refer parties to arbitration where there is an arbitration agreement.—(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

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

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the



arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.

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

(emphasis supplied)

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

LC Comment:

“The words “such of the parties ... to the arbitration agreement” and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya* [*Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (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 [Ed.: Emphasis in original.] parties to the action — and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.

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



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

(emphasis supplied)

LC Comment:

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

30. The language of amendment to Section 8 of the Act is clear that the amendment to Section 8(1) of the Act would apply notwithstanding any prayer, judgment, decree or order of the Supreme Court or any other court. The High Court laid emphasis upon the word “... unless it finds that prima facie no valid agreement exists”. The High Court observed that there is no arbitration agreement between Astonfield and Rishabh. After referring to Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] and the amended Section 8 and Section 45 of the Act, the High Court pointed out the difference in language of Section 8 and Section 45 of the Act. The High Court distinguished between Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] and Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , and observed that Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] was not overruled by Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] . In para 29 of the impugned judgment, it was held as under: (Ameet Lalchand case [Ameet Lalchand Shah v. Rishabh Enterprises, 2017 SCC OnLine Del 7865] , SCC OnLine Del)

“29. The change in Section 8 is that the court is to — in cases where arbitration agreements are relied on — to refer the disputes in the suit, to arbitration, “notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists”. The Court is of opinion that Sukanya [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] is not per se overruled, because the exercise of whether an arbitration agreement



exists between the parties, in relation to the disputes that are the subject-matter of the suit, has to be carried out. If there are causes of action that cannot be subjected to arbitration, or the suit involves adjudication of the role played by parties who are not signatories to the arbitration agreement, it has to continue because “prima facie no valid arbitration agreement exists” between such non-parties and others, who are parties.””

(Emphasis supplied)

24. It is apparent that the payment was made to Respondent No. 3, and the Tri-partite Agreement provides for the Respondent No. 3 to ensure that the said amounts that were credited to it, are to be held in the capacity of a trustee, and the Respondent No. 3/builder would have to repay the same. It is precisely this aspect that the Appellant chose to enforce by way of prayer no. 2 in the plaint.

25. The pleadings and the prayer, read holistically, indicate that the Appellant, in fact, confirms that all the Agreements are an integral part of the entire transaction and that is the reason why the Suit makes express reference to all the Agreements which formed a part of the Transaction, inter alia, the Tri-partite Agreement, which contained the Arbitration Clause. This further supports the conclusion that there can be no bifurcation sought.

26. The underlying principle regarding a non-signatory party not being subjected to an Arbitration Proceeding is the absence of consent by such a non-signatory. The “exceptional circumstance” principle that is sought to be relied upon by the Appellant, and as espoused in the Cox & Kings Ltd. v. SAP India (P) Ltd.⁶, while impugning the Judgment, and averring that the Respondent No. 2 cannot be subjected to Arbitration, as she is a non-signatory, in our opinion, is not available to the Appellant at all.

⁶ (2024) 4 SCC 1



27. In our opinion, the “exceptional circumstance” principle is primarily for the protection of the non-signatory party and a defence for the said non-signatory. The same cannot be used by the Appellant for contending that the Respondent No. 2 was not a signatory to the Arbitration Agreement and resultantly, contend that the suit was maintainable as against the Respondent Nos. 1 and 2 and that the impugned Judgment is erroneous in so far as it refers all the parties to the Suit to Arbitration. This is all more so in view of the manner in which the Plaint and reliefs have been framed. Reference may be made to paragraph Nos. 83 and 84 of the Judgment of the Hon’ble Supreme Court in Cox & Kings Ltd. (*supra*), which in our view, support this conclusion and are reproduced hereinbelow:

“83. Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions : first, arbitration agreements arise out of a legal relationship between or among persons or entities which may be contractual or otherwise; second, in situations where the legal relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; third, it is not necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it; fourth, in case of non-signatory parties, the important determination for the Courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; fifth, the requirement of a written arbitration agreement has to be adhered to strictly, but the form in which such agreement is recorded is irrelevant; sixth, the requirement of a written arbitration agreement does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and seventh, once the validity of an arbitration agreement is established, the Court or tribunal can determine the issue of which parties are bound by such agreement.

84. It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement may be held to be bound by such agreement. As mentioned in the



preceding paragraphs, the doctrine of privity limits the imposition of rights and liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in terms of the reliefs and remedies because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the Courts or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an arbitration agreement, the Courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement. [Gary Born, International Arbitration Law and Practice, (3rd Edn., 2021) at p. 1531.]”

(Emphasis supplied)

28. By filing the Application under Section 8 of the A&C Act, the Respondent No. 2 not only evidences the parties’ understanding, but also clearly consents to be subjected to the Arbitration Proceedings. In view of the consent by the non-signatory, the contention of the Appellant in this regard is unsustainable.

29. In view of the foregoing discussion, this Court is of the view that there is no infirmity in the impugned judgment and order. The appeal is consequently disposed of, affirming the Judgment of the learned District Judge dated 06.05.2022, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J.

HARISH VAIDYANATHAN SHANKAR, J.

JULY 16, 2025/nd/er