IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO.23289 OF 2022
IN
COMMERCIAL IP SUIT NO.457 OF 2022

RBEP Entertainment Private Limited … Applicant

In the matter between

Hungama Digital Media Entertainment Pvt. Ltd. … Plaintiff

Vs.

RBEP Entertainment Private Limited and others … Defendants

WITH
INTERIM APPLICATION (L) NO.22975 OF 2022
IN
COMMERCIAL IP SUIT NO.464 OF 2022

RBEP Entertainment Private Limited … Applicant

In the matter between

Super Cassettes Industries Pvt. Ltd. … Plaintiff

Vs.

RBEP Entertainment Private Limited and others … Defendants

Mr.Navroz Seervai, Senior Advocate a/w Mr. Rohan Kelkar, Mr. Kartikeya Desai, Rashi Shah i/b. Kartikeya and Associates, for Applicant in both the Applications and for Defendant No.1 in both the Suits.

Mr. Aspi Chinoy, Senior Advocate a/w Mr. Harsh Kaushik, Ms. Alya Khan, Mr.Aditya Gupta Ms.Zahra Padamsee and Mr. Kyle Curry i/b Vashi and Vashi, for Plaintiff in COMIP/464/2022 and for Defendant No.6 in COMIP/457/2022.

Mr.Ravi Kadam, Senior Advocate a/w Mr.Rohan Kadam i/b Mr. Arun Panickar, for Plaintiff in COMIP/457/2022 and for Defendant No.7 in COMIP/464/2022.

Mr. Darius Khambata, Senior Advocate and Mr. Vineet Naik, Senior Advocate a/w. Mr. Sameer Pandit and Mr. Anuj Jain i/b.Wadia Gandhy & Co., for Defendant No.3 in COMIP/457/2022. and for Defendant No.5 in COMIP/ 464/2022.

Mr. Rohan Kelkar a/w Mr. Kartikeya Desai and Rashi Shah and Mr.Mangesh i/ b M/s. Kartikeya and Associates for Defendant No.4 in COMIP/464/2022 for Defendant No.5 in COMIP/457/2022.

Mr. Ashwin Bhadang a/w Mr.Ravindra Suryawanshi and Mr. Krunal Mehta for Defendant No.6 i/b Bar & Brief Attorneys in COMIP/464/2022 and for Defendant No.4 in COMIP/457/2022.

CORAM : MANISH PITALE, J.
Reserved on : 23rd NOVEMBER, 2022
Pronounced on : 18th JANUARY, 2023

ORDER :

. By this order, two applications filed by defendant No.1 under Section 8 of the Arbitration and Conciliation Act, 1996, in two suits shall be disposed of. The plaintiff in one suit is defendant No.7 in the other suit and the facts as claimed in the pleadings are being narrated by referring to the relevant events pertaining to both the suits.

2. It is the case of defendant No.1 that in the light of an arbitration clause existing in an agreement, which is the genesis of filing of the suits, the parties ought to be referred to arbitration.

3. Super Cassettes Industries Private Limited is the plaintiff in Commercial IP Suit No.464 of 2022 and Hungama Digital Media Entertainment Private Limited is the plaintiff in Commercial IP Suit No.457 of 2022. The facts in brief leading to filing of the suits are that on 26.10.2009, the plaintiff in the first suit - Super Cassettes Industries Private Limited (hereinafter referred to as 'Super Cassettes'), RBEP Entertainment Private Limited i.e. defendant No.1 in both the suits (hereinafter referred to as 'RBEP') and the plaintiff in the second Suit - Hungama Digital Media Entertainment Private Limited (hereinafter referred to as 'Hungama Digital') entered into a Memorandum of Understanding, whereby the said parties agreed to enter into a Long Form Agreement under which defendant No.1 RBEP was to assign to the plaintiff Super Cassettes 40% and to the plaintiff Hungama Digital 20% of copyright, including audio rights, mobile and digital rights, as also publishing rights in existing music titles held by RBEP, referred to as 'Back Catalogue' and also unreleased future music titles, referred to as 'Fresh Catalogue' for certain films. The three parties were to become joint copyright holders in the ratio of 40:40:20. The sharing of revenues from exploitation of rights by the plaintiffs was to be in the ratio of

40:40:20.

4. In pursuance of the Memorandum of Understanding, on 05.12.2009, the aforesaid three parties entered into a Long Form Agreement, whereby defendant No.1 RBEP assigned to the plaintiff Super Cassettes 40% and to the plaintiff Hungama Digital 20% of the copyrights in the Back Catalogue and Fresh Catalogue and thereby the three parties became joint owners of the copyrights in the aforementioned ratio. The Back Catalogue was to be granted as per the ratio to the plaintiffs under the Long Form Agreement and the Fresh Catalogue was to be granted by entering into separate ancillary assignment deeds.

5. In pursuance of the exclusive and irrevocable licence granted in perpetuity to the plaintiffs, the revenues collected after recouping minimum guarantee amount and deduction of costs incurred by the plaintiffs were to be split between the parties in the aforesaid ratio of 40:40:20. It was also stipulated that if the plaintiffs failed to make payments within 45 days of written intimation by the defendant RBEP, the said defendant would have the right to terminate the agreement and that the rights assigned in favour of the plaintiffs would be re-assigned in favour of the defendant RBEP after receipt of consideration at a valuation arrived at by an auditor. The agreement also provided that termination of the agreement for whatever reason would not affect the existing licences granted in favour of the plaintiffs Super Cassettes and Hungama Digital and that they would continue to exploit such rights. Between 2009 and 2014, the plaintiffs and defendant RBEP entered into 34 assignment deeds pertaining to rights of 34 films under the Fresh Catalogue.

6. During the period between 2014 and 2016, according to the

plaintiffs, independently of the Long Form Agreement, the plaintiff Super Cassettes entered into 6 assignment deeds with the defendant RBEP for 6 films, whereunder the copyright was assigned only to the said plaintiff, distinct from the rights given to the said plaintiff under the Long Form Agreement. The plaintiff Super Cassettes claims that in the years 2003, 2011 and 2016, it separately acquired exclusive copyright from the defendant RBEP concerning 3 films in respect of which 3 assignment deeds independent of the Long Form Agreement were executed.

7. During the period between 2017 and 2021, on the aspect of sharing of revenues and working out the rights and obligations of the parties in the context of the Long Form Agreement and the assignment deeds executed independent of the said agreement, certain disputes appear to have arisen between the parties. On 24.01.2022, the plaintiff Super Cassettes received a letter from defendant No.2 in Commercial IP Suit No.464 of 2022, demanding statement of revenues and payment of 40% revenues under the Long Form Agreement into the bank account of defendant No.5 therein i.e., Madman Film Ventures Private Limited. Another letter was received on 26.03.2022 from the said defendant No.2, claiming that the plaintiff Super Cassettes had not furnished statements as demanded and payments were also not made under the Long Form Agreement. This led to replies being sent on behalf of the plaintiff Super Cassettes, *inter-alia* expressing surprise over the claim made by the said defendant No.2 that he was acting as the constituted attorney of defendant No.1.

8. On 27.04.2022, the said defendant No.2, claiming to be the constituted attorney of the defendant RBEP, sent a letter purportedly terminating the Long Form Agreement and assignment deeds on the ground that the plaintiffs had breached the terms of the agreements. On

the same day, the said defendant No.2 caused public notice to be issued, claiming to be the constituted attorney of the defendant RBEP, in a trade journal as regards termination of the said Long Form Agreement. It was claimed in the said notice that consequent upon termination of the Long Form Agreement, the copyrights covered under the Long Form Agreement and also subsequent assignment deeds, all stood re-assigned to the defendant RBEP and the aforementioned defendant-Madman Film Ventures Private Limited in the ratio of 50:50.

9. On 28.04.2022, the advocates representing the plaintiff responded to the alleged termination letter and they also issued public notice claiming exclusive exploitation rights in respect of the aforementioned films. On 02.05.2022, the advocates of defendant No.2 responded to the letters of the plaintiffs and claimed that the Long Form Agreement had been validly terminated and with this letter for the first time, a copy of the special power of attorney was supplied, purportedly executed by the defendant RBEP in favour of defendant No.2 in his capacity as Director of defendant Madman Film Ventures Private Limited. There were further communications exchanged between the parties wherein the plaintiffs claimed that the Long Form Agreement was validly subsisting. They also wrote letters to their licensees, clarifying the said position.

10. On 17.05.2022, the defendant RBEP, for the first time, sent a letter and confirmed that special power of attorney was executed in favour of the said defendant No.2. On 19.05.2022, a licensee of the plaintiff sent an e-mail forwarding two letters dated 16.05.2022, written by advocates for the defendant RBEP, acting on the instructions of the said defendant No.2 and the advocates for defendant-Madman Film Ventures Private Limited, wherein it was claimed that pursuant to the termination of the Long Form Agreement, the copyrights stood re-assigned to the defendant RBEP and the said defendant. It was further

stated that the defendant RBEP and the said defendant had assigned the very same rights in the music of the subject films, further to defendant Zee Entertainment Enterprises Limited, by way of assignment deed dated 13.05.2022.

11. On the very same day i.e., 19.05.2022, the plaintiffs came across a public notice published in the trade journal by the defendant Zee Entertainment Enterprises Limited, claiming that it had acquired all such copyrights for 42 films, which included 34 films covered under the Long Form Agreement, 6 films for which assignment deeds were independently executed in favour of the plaintiff Super Cassettes and also the 2 films for which such assignment deeds had been executed independently of the Long Form Agreement. In this backdrop, the plaintiff Super Cassettes forwarded a summary and reconciliation of accounts and pointed out the amount receivable and also stated the basis for withholding certain amounts under the Long Form Agreement. The plaintiff Super Cassettes reiterated that the Long Form Agreement was valid and subsisting and that any transactions made in breach thereof were null and void.

12. In this backdrop, the aforesaid two suits came to be filed by the plaintiffs, wherein they have sought decree of permanent injunction against the defendants to restrain them from exploiting the copyrights in respect of which the plaintiffs claim proprietary rights on the basis of the Long Form Agreement as also assignment deeds executed by the defendant RBEP, independent of the Long Form Agreement, to the extent of the shares of the plaintiffs. The plaintiffs also claim damages. They have also moved applications for grant of temporary injunctions.

13. Defendant No.1 RBEP filed applications under Section 8 of the aforesaid Act, relying upon the arbitration clause in the Long Form

Agreement dated 05.12.2009 and prayed for referring the parties to arbitration, stating that in the face of the arbitration clause, the suits cannot proceed further. The defendant no.1 RBEP claims that the parties ought to be referred to arbitration.

14. Mr. Navroz Seervai, learned senior counsel appearing for the applicant / defendant No.1 RBEP, in support of the applications filed under Section 8 of the said Act, submitted that in the face of the arbitration clause, admittedly existing in the Long Form Agreement, which provided for resolution of disputes through arbitration, the suits could not proceed and that the parties ought to be referred to arbitration. It was submitted that even though the other defendants were not parties to the said Long Form Agreement, which contained the arbitration clause, the same could not be a ground for refusing to refer the disputes to arbitration. The learned senior counsel submitted that the other defendants were claiming through and under defendant No.1 RBEP and therefore, even if they were not signatories to the Long Form Agreement, they could all be sent for arbitration in order to resolve the disputes.

15. The learned senior counsel for defendant No.1 RBEP placed reliance on the judgment of the Supreme Court in the case of *Vidya Drolia and others Vs. Durga Trading Corporation*, **(2021) 2 SCC 1,** to contend that after amendment of Section 8 of the said Act, it was made amply clear that the courts ought to adopt a pro-arbitration approach and even if there was some doubt as to whether the parties could at all be referred to arbitration, the Court must hold in the facts and circumstances of the present case that the suits cannot proceed and the parties ought to be referred to arbitration. It was submitted that in the said three-judge bench judgment of the Supreme Court, the position of law in the light of earlier judgments was analyzed and the effect of the

amendment brought in Section 8 of the said Act was discussed in detail to reach the conclusion that an arbitration clause ought not to be interpreted in a restrictive manner and that the Courts ought to refer the parties to arbitration when an arbitration agreement exists between them. According to the learned senior counsel appearing for the defendant RBEP, the exposition of law given by the three-judge bench of the Supreme Court in the aforesaid case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*, effectively overruled the position of law laid down by the Supreme Court in its earlier judgement in the case of *Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya*, **(2003) 5 SCC 531**.

16. It was submitted that the aspect of splitting causes of action and delay in completion of proceedings emphasized in the case of **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya** (*supra*) was rendered irrelevant in the light of amendment to Section 8 of the said Act and judicial notice of the same was taken by the three-judge bench judgment of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*. Much emphasis was placed on the aspect that once an arbitration clause exists in an agreement, the Court while considering an application under Section 8 of the said Act does not have the liberty to go into details of the matter, including the aspect of arbitrability of the disputes and that all such matters have to be left to the arbitral tribunal to decide.

17. The learned senior counsel for the defendant RBEP submitted that the defendants in the suits, who were not parties to the Long Form Agreement, clearly claimed copyrights through and under the defendant RBEP and that therefore, they were all amenable to arbitration proceedings. It was submitted that the central question, in the disputes raised by the plaintiffs, was the validity of the termination of the Long

Form Agreement by the defendant RBEP. The answer to the said question clearly affected the rights of the other defendants, thereby indicating that when the question of correctness of termination of the agreement could be decided only by way of arbitration, there was no question of the two suits proceeding any further. It was further submitted that in terms of the position of law sufficiently clarified in a series of judgments of the Supreme Court, the question of arbitrability of the dispute has to be left to the arbitral tribunal and in very rare cases can the Court delve into the details of the same, in order to render any findings on the said question.

18. In addition to the aforesaid contentions raised on behalf of the defendant RBEP, learned senior counsel further submitted that in the present case, even if the dispute pertained to copyrights, the nature of the disputes between the parties could not be said to be calling upon the arbitral tribunal to decide questions *in rem*. Although the rights claimed by the party while asserting its copyright can be said to be rights *in rem*, but in the facts of the present case, the parties were asserting their rights *in personam* against each other. The question really is of enforcing the rights *in personam* claimed by the rival parties in the context of copyrights for the original works. On this basis, it was submitted that viewed from any angle, the only conclusion that could be reached was that the parties ought to be referred to arbitration and that the suits cannot proceed any further.

19. In support of the aforementioned submissions, the learned senior counsel relied upon the judgments of the Supreme Court in the case of: -

a. *Emaar MGF Land Limited Vs. Aftab Singh*, **(2019) 12 SCC 751**;

b. *Ameet Lalchand Shah and others Vs. Rishabh Enterprises*

and another, **(2018) 15 SCC 678**;

c. *Ananthesh Bhakta Vs. Nayana S. Bhakta*, **(2017) 5 SCC 185**;

d. *Sundaram Finance Limited Vs. T. Thankam*, **(2015) 14 SCC 444**;

e. *Loknath Padhan Vs. Birendra Kumar Sahu*, **(1974) 1 SCC 526**;

20. The learned senior counsel also relied upon judgments in the cases of: -

a. *Eros International Media Limited Vs. Telemax Links India Pvt. Ltd. and others*, **(2016) 6 Bom CR 321**;

b. *Rakesh Malhotra Vs. Rajinder Kumar Malhotra*, **2014 SCC OnLine Bom 1146**;

c. *Tandav Film Enterrainment Pvt. Ltd. Vs. Four Frame Pictures and another*, **2010 (114) DRJ 219**;

d. *Tandav Films Entertainment Pvt. Ltd. Vs. Four Frame Pictures and others*, **2009 Supp (1) Arb LR 22**; and

e. *DE Tchihatchef Vs. The Salerni Coupling Limited*, **[1932] Chancery Division 330**.

21. On the other hand, Mr. Aspi Chinoy, learned senior counsel appearing for the plaintiff Super Cassettes submitted that in the facts of the present case, the disputes between the parties were not limited to the Long Form Agreement, which contained the arbitration clause, but the disputes encompassed facts and issues independent of the Long Form Agreement, involving rights and liabilities of the defendants other than the defendant RBEP, thereby indicating that the applications filed under Section 8 of the Act ought not to be allowed.

22. The learned senior counsel for the plaintiff Super Cassettes specifically submitted that the assignment deeds for 6 films and also specific assignment deeds for 3 other films executed in favour of the said plaintiff granted 100% rights pertaining to the music of the said films and the said disputes were not at all relatable to the Long Form Agreement. The cause of action pertaining to the said 9 films in total was therefore, completely outside the ambit of the Long Form Agreement and hence not amenable to arbitration. Even if the plaintiff Super Cassettes had erroneously referred to the said 9 films in the public notice issued in the context of the disputes pertaining to 34 films relatable to the Long Form Agreement, that in itself would not lead to a conclusion that such disputes independent of the Long Form Agreement could be subsumed in the arbitration proceedings proposed by the defendant RBEP. Such mixing of causes of action in the suits created a situation where referring the parties to the arbitration would amount to splitting of causes of action with parallel proceedings being undertaken, which would be against public policy.

23. Apart from this, it was submitted that defendant Nos.4, 5 and 6 had absolutely nothing to do with the Long Form Agreement and they claimed assignment of the copyrights on the basis of independent commercial transactions executed with defendant RBEP. It was submitted that such independent commercial transactions were executed independent of the Long Form Agreement and therefore, by no stretch of imagination could it be said that the said defendants were claiming through and under the defendant RBEP, as its assignees or successors in respect of rights specified in the Long Form Agreement. Even if there was a dispute between the plaintiffs on the one hand and the defendant RBEP on the other as regards the validity of termination of the Long Form Agreement, that in itself would not give the status to the aforesaid

other defendants, as claiming rights through and under the defendant RBEP, for the said defendant to claim that such disputes would get subsumed under the arbitration clause contained in the Long Form Agreement, for all the parties to be referred to arbitration.

24. It was submitted that the disputes raised in the suits in the present case inextricably linked multiple causes of action, a number of which cannot be said to be related to the Long Form Agreement. In the face of such a situation, where only the parties to the Long Form Agreement i.e. the plaintiffs in the two suits and the defendant RBEP could be referred to the arbitration, it would result in splitting the suit, with part of the disputes being referred to arbitration, wherein the plaintiffs could claim no relief against the other defendants, while their rights would continue to be violated and hampered by such other defendants who cannot be referred to arbitration. It was submitted that such splitting of causes of action is against public policy as it would lead to parallel proceedings. If the parties were forced to arbitration, either the plaintiffs would be left remediless against the other defendants who are not parties to the Long Form Agreement or they would have to file separate suits against the said defendants for their grievances against such parties. It was submitted that the complex nature of the disputes and the peculiar facts of the present case warranted dismissal of the applications filed under Section 8 of the said Act. The learned senior counsel for the plaintiff Super Cassettes relied upon judgments of the Supreme Court in the case of *Cheran Properties Limited Vs. Kasturi & Sons Limited*, **(2018) 16 SCC 413** as also *Oil and Natural Gas Corporation Limited Vs. Discovery Enterprises Private Limited and another*, **(2022) 8 SCC 42**.

25. Mr. Ravi Kadam, learned senior counsel appeared for the plaintiff Hungama Digital. He reiterated the contentions raised by learned counsel appearing for the plaintiff Super Cassettes. In addition, he

submitted that considering the scheme of the Copyright Act, 1957 and the fact that any decision in the disputes raised by the defendant RBEP would necessarily lead to findings on rights *in rem* pertaining to copyrights, the disputes were not arbitrable. It was submitted that even if the thrust of the aforesaid Act is to send the parties to arbitration and in most cases, the question of arbitrability of the disputes is left to the arbitral tribunal, in peculiar cases, like in the present case, the Court itself can go into the question of arbitrability. It was submitted that the scheme of the Copyright Act clearly indicated that when rights *in rem* are being agitated and are to be decided, the remedies provided under the Copyright Act have to be invoked and such a matter can never be sent for arbitration. The learned senior counsel relied upon the following judgements: -

(a) *Innoventive Industries Limited Vs. ICICI Bank and another*, **(2018) 1 SCC 407**;

(b) *Kandla Export Corporation and another Vs. OCI Corporation and another*, **(2018) 14 SCC 715**;

(c) *Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others*, **(2016) 8 SCC 788**; and

(d) *Indian Performing Rights Society Limited Vs. Entertainment Network (India) Limited*, **2016 SCC OnLine Bom 5893**.

26. Mr. Darius Khambata and Mr. Vineet Naik, learned senior counsel appearing for defendant No.3 in COMIP Suit No.457 of 2022 and defendant No.5 in COMIP Suit No.464 of 2022 i.e. Madman Film Ventures Private Limited supported the contentions raised on behalf of the applicant (defendant no.1 RBEP), seeking referral of the parties to arbitration. They submitted that there was no substance in the contention of the plaintiffs pertaining to splitting of causes of action while resisting

the direction for referring the parties to arbitration. It was submitted that with the amendments brought about in the Arbitration and Conciliation Act, 1996, particularly in Section 8 thereof, the role of the Court while considering an application under Section 8 of the said Act was limited to examining the aspect of existence of an arbitration agreement and whether a dispute had arisen between the parties. It was submitted that with the development of law in the context of the aforesaid Act, not only signatories to the arbitration agreement, but non-signatories claiming through and under the signatories to the agreement could certainly be referred to arbitration. The contention raised on behalf of the applicant seeking referral to arbitration was supported and it was submitted that in the facts and circumstances of the present case, the defendants, who were not parties to the Long Form Agreement, were clearly claiming through the defendant RBEP, for the reason that their fate depended squarely on the decision as regards the correctness or otherwise of termination of the said agreement, thereby clearly demonstrating that the matter ought to go to arbitration.

27. It was submitted that in any case, the said defendant in both the suits had filed affidavits in the applications, stating that it would be bound by the arbitral award in the arbitration between the plaintiffs in the two suits and defendant No.1 RBEP, subject to independent rights and remedies that the said defendant may have against the defendant RBEP under consent terms executed between the two. On this basis, it was submitted that the force of contentions raised on behalf of the plaintiffs was taken away.

28. Additionally, the learned senior counsel relied upon the judgment of a learned Single Judge of this Court in the case of *Taru Meghani Vs. Shree Tirupati Greenfield and others*, **2020 SCC OnLine Bom 110**. In the said judgment, after referring to the judgement of the Supreme Court

in the case of **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya** *(supra)*, it was held that if contentions similar to those raised on behalf of the plaintiffs in the present suits were to be accepted, the salutary object of the Act would be defeated. By relying upon the said judgment, learned senior counsel submitted that the object of the said Act, emphasized in the three-judge Bench judgement of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)* must be given due importance and hence, the applications ought to be allowed by referring the parties to arbitration. The other defendants supported the prayers made in the applications.

29. Having considered the rival submissions, the issues that broadly arise for consideration in these applications, are firstly, as to whether the parties to the suit can be referred to arbitration when the arbitration clause contained in the Long Form Agreement is signed only by three parties i.e. the two plaintiffs in the suits and defendant No.1 RBEP. The issue directly connected with the said aspect, is as to whether the defendants in the present suit, who are not signatories to the agreement, can be sent for arbitration by treating them as claiming rights through and under defendant No.1 RBEP. Secondly, whether the frame of the suits and the prayers made therein demonstrate that the reliefs sought by the plaintiffs can be granted only in the suits filed before this Court and there being multiple causes of action, sending only some of the parties to arbitration would amount to splitting causes of action, thereby resulting in parallel proceedings being undertaken for the reliefs claimed by the plaintiffs. Thirdly, whether the plaintiffs are justified in claiming that only the signatories to the Long Form Agreement can at best be sent for arbitration, thereby hampering the plaintiffs from claiming reliefs against non-signatories to the agreement, who are defendants in the suit, against whom the plaintiffs are legitimately raising grievances. Fourthly,

in the light of the judgments referred to by the learned counsel for the rival parties and particularly the three-judge Bench judgment of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*, whether the scope of enquiry as per the amended Section 8 of the said Act limits the jurisdiction of this Court to only examining the existence of the arbitration clause and thereupon referring the parties to arbitration. Fifthly, whether the plaintiffs are justified in claiming that since the disputes between the parties essentially involve determination of proprietary rights concerning intellectual property, in the light of the provisions of the Copyright Act, the determination of the disputes would necessarily involve pronouncement on *in rem* rights, thereby indicating that the disputes are non-arbitrable. Sixthly, whether determination of the disputes between the parties in the present case, would result in pronouncement upon *in rem* rights or rights *in personam* being asserted by the parties. Lastly, whether the object of the Act would stand defeated if, in the facts and circumstances of the present case, the applications filed under Section 8 are rejected.

30. In the context of the issues identified hereinabove, it is crucial that a reference is made to Section 8 of the said Act, since a lot has been submitted by the learned counsel for the rival parties on the impact of the amendment to the said provision, brought into effect from 23.10.2015, particularly in the backdrop of the observations made by the Supreme Court on the effect of the said amendment, including in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*. Section 8 of the Act, as it stands today reads as follows: -

> "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 alongwith 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."

31. The rival parties have emphasized upon the effect of amendment to the said provision after the judgment of the Supreme Court in the case of **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya** *(supra)*. On behalf of the plaintiffs, it was strenuously urged that the aspect of splitting of causes of action and bifurcation of subject matter of actions

brought before a judicial authority was specifically considered and the Supreme Court held in the case of **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya** *(supra)* that such bifurcation cannot be permitted under Section 8 of the Act, wherein some of the parties to a suit are sent for arbitration and the proceeding before the Court is to continue against the others. This would lead to unnecessary delay of proceedings, apart from creating a situation where conflicting decisions may be rendered by the two different fora.

32. In the case of **Sundaram Finance Limited Vs. T. Thankam** *(supra)*, the Supreme Court again considered the aspect of bifurcation of cause of action between a civil court and an arbitral tribunal. After referring to the judgment in the case of **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya** (*supra*), it was held that such bifurcation would defeat the very purpose of speedy justice and the approach to be adopted while considering an application made under Section 8 of the Act was indicated. It was held in the said judgment as follows: -

> "13. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statue, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - *generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

33. It is significant that the said judgment in the case of **Sundaram Finance Limited Vs. T. Thankam** *(supra)* was rendered in February,

2015 i.e. a few months before Section 8 of the Act stood amended with effect from 31.10.2015.

34. In the case of **Ananthesh Bhakta Vs. Nayana S. Bhakta** *(supra)*, the Supreme Court considered the question as to whether a reference of disputes to arbitration could be made when all parties to the suit were not parties to the retirement deed / partnership deed in question. After deliberating upon the effects of precedents and the relevant provisions of the said Act, the Court held that it could not be said that merely because one of the defendants was not party to the arbitration agreement, reference to arbitration could not be made, because the dispute between the parties was essentially relating to benefits arising out of the retirement deed and partnership deed. In the facts of the said case, it was held that there was no question of bifurcation of cause of action or parties, if the reference to arbitration was made.

35. In the case of **Ameet Lalchand Shah and others Vs. Rishabh Enterprises and another** *(supra)*, the Supreme Court specifically considered the effect of amendment to Section 8 of the said Act, brought into effect from 31.10.2015. It was found that in view of the observations made in **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya** (*supra*), a recommendation was made for amendment of Section 8 of the Act and the background of the amendment was taken into consideration. The Supreme Court found the principal amendments in Section 8 to be as follows: -

> "28. Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments - (i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming "through or under" such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a

finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "prima facie" basis; (iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same." (Ref: Justice R.S. Bachawat's Law of Arbitration and Conciliation, Sixth Edition, Vol. I (Sections 1 to 34) at page 695 published by LexisNexis)."

36. The background in which the amendment was brought about was also noticed in paragraph 29 of the said judgment, which quoted from the report of the Law Commission and it reads as follows: -

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

LC Comment:

"The words "such of the parties…. to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr. in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to

> arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof *or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified thereof in circumstances where the original arbitration agreement or duly certified copy is retained only by the other party.* (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)"

37. Thereupon, the Supreme Court applied the principles culled out from earlier judgments, as also the amendment to Section 8 of the said Act and held as follows: -

> "36. When we apply the aforesaid principles to the facts of the present case, as discussed earlier, both parties have consciously proceeded with the commercial transactions to commission the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. The first respondent has proceeded to procure the materials, entered into agreement with Juwi India for engineering, installation and commissioning and the sale and purchase agreement with Astonfield, were all the conscious steps taken in the commercial understanding to commission the Solar Plant at Dongri, Raksa, District Jhansi, U.P. Even though Juwi India and Astonfield are not parties to the main agreement - Equipment Lease Agreement (14.03.2012), all the agreements/contracts contain clauses referring to the main agreement. It is the duty of the Court to impart the commercial understanding with a "sense of business efficacy" and not by the mere averments made in the

> plaint. The High Court was not right in refusing to refer the parties on the ground of the allegations of fraud levelled in the plaint."

38. It is significant that in the facts of the said case various agreements, which were subject matter of the disputes, all contained clauses referring to the main agreement. In other words, the rights of the parties in such agreements and the disputes that arose therefrom appeared to have their source in the main agreement, which contained the arbitration clause. This is significant for the present case.

39. In the case of **Emaar MGF Land Limited Vs. Aftab Singh** *(supra)*, the Supreme Court again took note of the position of law prior to the amendment of Section 8 of the said Act and also the effect of the amendment. After referring to and quoting from the judgment in the case of **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya** (*supra*), the Supreme Court held as follows: -

> "52. The law as declared by this Court in the above cases was in existence when the Law Commission submitted its 246th Report and Parliament considered the Bill, 2015 for Amendment Act, 2016. The Law Commission itself in its Report has referred to amendment in Section 8 in context of decision of this Court in Sukanya Holdings (P) Ltd. (supra), which was clearly noticed in the Note to Section 8 as extracted above. The words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" added by amendment in Section 8 were with intent to minimise the intervention of judicial authority in context of arbitration agreement. As per the amended Section 8(1), the judicial authority has only to consider the question whether the parties have a valid arbitration agreement? The Court cannot refuse to refer the parties to arbitration "unless it finds that prima facie no valid arbitration agreement exists". The amended provision, thus, limits the intervention by judicial authority to only one aspect, i.e. refusal by judicial authority to refer is confined to only one aspect, when it finds that prima facie no valid arbitration agreement exists. Other several conditions, which were noticed by this court in various pronouncements

> made prior to amendment were not to be adhered to and the Legislative intendment was clear departure from fulfilling various conditions as noticed in the judgment of P. Anand Gajapathi Raju (supra) and Sukanya Holdings (P) Ltd. (supra)."

40. The aforementioned judgements were noticed in the three-judge Bench judgement of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*, which was decided on 14.12.2020. In the said judgment, reference was made to a number of earlier judgments, including **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya** (*supra*), which specifically pertained to the aspect of splitting of causes of action and bifurcation of the suit in factual situations where some of the parties to the suit were non-signatories to the arbitration agreement. While examining whether arbitration would be suitable when it has *erga omnes* effect i.e. affecting the rights and liabilities of persons not bound by the arbitration agreement, it was observed as follows: -

> "49. Exclusion of actions in rem from arbitration, exposits the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on 'the parties' to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The arbitral tribunals not being courts of law or established under the auspices of the State cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralized mode of dispute resolution is unsuitable when the subject matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority and

> power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective of arbitration to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise."

41. Although the said observation is made in the context of *in rem* rights and the *erga omnes* effect, it does indicate the limitation of an arbitral tribunal when rights and liabilities of persons, who have not consented to arbitration, are affected.

42. In the said judgment, the Supreme Court considered the amendments brought about to Sections 8 and 11 of the said Act and it was found that the Court while exercising jurisdiction under the two provisions, essentially exercises similar powers. In this context, specifically dealing with the *prima facie* examination to be conducted by the Court while exercising jurisdiction under Section 8 of the Act, in the said judgment in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*, the Supreme Court held as follows: -

> "133. Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the arbitral tribunal. It is restricted to the subject matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide.

> When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged-down would compel the parties to abide unless there are good and substantial reasons to the contrary.
>
> 134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The 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. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of 'plainly arguable' case in Shin-Etsu Chemical Co. Ltd. are of importance and relevance. Similar views are expressed by this Court in Vimal Kishore Shah wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.

43. It is then held in the said judgement that the challenge before the Court is to adopt a balanced approach between acting with restraint while examining the questions under Section 8 of the said Act or entering into details of the matter. It is observed that the Court must discourage arbitration obstructing tactics at such referral stage on the one hand and on the other, protect parties from being forced to arbitrate. It is emphasized that the approach of the Court after amendment of Section 8 of the said Act ought to be to centralize the litigation with the arbitral tribunal as the primary and first adjudicator, as it helps in

quicker and efficient resolution of the disputes. It is necessary to examine as to whether the party opposing arbitration is doing so only as a delaying tactic and for somehow impairing reference of the dispute to arbitration.

44. The following observations made by the Supreme Court as regards the approach to be adopted by the Court while considering an application under Section 8 of the said Act are relevant and they read as follows: -

> "151. What is true and applicable for men of commerce and business may not be equally true and apply in case of laymen and to those who are not fully aware of the effect of an arbitration clause or had little option but to sign on the standard form contract. Broad or narrow interpretations of an arbitration agreement can, to a great extent, effect coverage of a retroactive arbitration agreement. Pro-arbitration broad interpretation, normally applied to international instruments, and commercial transactions is based upon the approach that the arbitration clause should be considered as per the true contractual language and what it says, but in case of doubt as to whether related or close disputes in the course of parties' business relationship is covered by the clause, the assumption is that such disputes are encompassed by the agreement. The restrictive interpretation approach on the other hand states that in case of doubt the disputes shall not be treated as covered by the clause. Narrow approach is based on the reason that the arbitration should be viewed as an exception to the court or judicial system. The third approach is to avoid either broad or restrictive interpretation and instead the intention of the parties as to scope of the clause is understood by considering the strict language and circumstance of the case in hand. Terms like 'all', 'any', 'in respect of', 'arising out of' etc. can expand the scope and ambit of the arbitration clause. Connected and incidental matters, unless the arbitration clause suggests to the contrary, would normally be covered.

> 152. Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.
>
> x x x x x
>
> 154.4 Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non- existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

45. In the supplementing judgment in the said case, it was emphasized that the amendment brought in Section 8 of the said Act indicated a pro-arbitration approach and that examination of the subject matter arbitrability may not be appropriate at the stage of reference under Section 8 of the Act and that it would be more appropriate to be taken up by the Court at the stage of Section 34 of the Act. In other words, it was emphasized that the Court ought to refer the matter to

arbitration under Section 8 of the Act, unless it is found *prima facie* that no valid arbitration agreement exists.

46. Having considered the judgements referred to by the learned counsel for the rival parties in the context of questions raised on behalf of the plaintiffs as regards undesirability of the splitting of the suit, this Court finds that although the position of law appears to have shifted post amendment of Section 8 of the said Act in the year 2015, thereby indicating a departure from the position indicated in the judgement in the case of **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya** (*supra*), it is extremely relevant that if the plaintiffs seek reliefs in the suit against parties, who are not signatories to the arbitration agreement, the matter cannot be mechanically referred to arbitration. On *prima facie* examination, if it is found that such non-signatory parties cannot even be said to be claiming through and under the signatories to the arbitration agreement, the question would still be open as to whether an arbitration agreement exists with such parties. It cannot be said that the law laid down by the Supreme Court in judgements post amendment of Section 8 of the said Act, including the judgement in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)* indicate that once an arbitration agreement is found to be existing between some of the parties to the suit, all the parties would have to be forced to participate in arbitration proceedings pursuant to reference by the Court.

47. At this stage, the contentions raised on behalf of the rival parties on the concept of claiming ‘through and under’ a signatory to the arbitration agreement, assume significance. In all the judgements where non-signatories to arbitration agreements were referred to arbitration, it was found on a *prima facie* examination that either the non-signatories were claiming through and under the signatories to the agreement or that

there were underlying agreements intimately linked with the main agreement, wherein such underlying agreements referred to clauses of the main agreement, leading to such non-signatories to the main agreement being referred to arbitration. Thus, the applicants in the present case would succeed if they are able to show, on a *prima facie* examination that the defendants in the present suit, who are not signatories to the Long Form Agreement, are claiming through and under defendant No.1 RBEP or that the agreements executed by defendant No.1 RBEP in favour of the other defendants who are non-signatories to the Long Form Agreement, can be said to be underlying agreements necessarily linked with the Long Form Agreement. In this context, the Supreme Court in the case of **Cheran Properties Limited Vs. Kasturi & Sons Limited** *(supra)* has held as follows: -

> "23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non- signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non- signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

24. International conventions on arbitration as well as the UNCITRAL Model Law mandate that an arbitration agreement must be in writing. Section 7 of the Arbitration and Conciliation Act, 1996 affirms the same principle. Why does the law postulate that there should be a written agreement to arbitrate? The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts. Where parties have agreed to resolve their disputes by arbitration, they seek to substitute a private forum for dispute resolution in place of the adjudicatory institutions constituted by the state. According to Redfern and Hunter on International Arbitration, the requirement of an agreement to arbitrate in writing is an elucidation of the principle that the existence of such an agreement should be clearly established, since its effect is to exclude the authority of national courts to adjudicate upon disputes.

26. Russell on Arbitration formulates the principle thus:

> "Arbitration is usually limited to parties who have consented to the process, either by agreeing in their contract to refer any disputes arising in the future between them to arbitration or by submitting to arbitration when a dispute arises. A party who has not so consented, often referred to as a third party or a non-signatory to the arbitration agreement, is usually excluded from the arbitration. There are however some occasions when such a third party may be bound by the agreement to arbitrate. For example, …, assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim "through or under" the original party. The third party can then be compelled to arbitrate any dispute that arises.

27. Garry B Born in his treatise on International Commercial Arbitration indicates that:

> "The principal legal bases for holding that a non-signatory is bound (and benefitted) by an

> arbitration agreement … include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego)"

Explaining the application of the alter ego principle in arbitration, Born notes:

> "Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an "alter ego" of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, Id.2.41 page 100 (24th Ed.), 3-025 pages 110-111 15 nd 2 Ed. Volume 1 page 1418 but exceptional, departure from "the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities."

29. The decision in Indowind arose from an application under Section 11 of the Arbitration and Conciliation Act, 1996. Indowind was not a signatory to the contract and was held not to be a party to the agreement to refer disputes to arbitration. Indowind held that an application under Section 11 was not maintainable. The present case does not envisage a situation of the kind which prevailed before this Court in Indowind. The present case relates to a post award situation. The enforcement of the arbitral award has been sought against the appellant on the basis that it claims under KCP and is bound by the award. Section 35 of the Arbitration and Conciliation Act 1996 postulates that an arbitral award "shall be final and binding on the parties and persons claiming under them respectively". The expression 'claiming under', in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest (Advanced Law Lexicon by P Ramanatha Aiyar19). The expression "persons claiming under them" in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to

> those who claim under them, as well. The expression "persons claiming under them" is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement."

48. Subsequently, in the case of **Oil and Natural Gas Corporation Limited Vs. Discovery Enterprises Private Limited and another** *(supra)*, the Supreme Court relied upon its earlier judgment in the case of **Cheran Properties Limited Vs. Kasturi & Sons Limited** *(supra)* and held that the corporate veil could be pierced to bind non-signatories to the agreement, upon a construction of the arbitration agreement and the intention of the parties at the time of entering into the contract and the performance of the underlying contract.

49. This Court finds substance in the contentions raised on behalf of the plaintiffs that defendants Madman Film Ventures Private Limited and Zee Entertainment Enterprises Limited are claiming rights in the works in question on the basis of independent commercial contracts executed with defendant No.1 - RBEP. As regards the relationship between defendant No.1 - RBEP and the defendant - Madman Film Ventures Private Limited, there was an intervening dispute which led to legal proceedings and ultimately consent terms were executed between them. The defendant - Zee Entertainment Enterprises Limited is claiming rights in the very works in question on the basis of an agreement purportedly executed in May, 2022 by defendant No.1 - RBEP and the defendant - Madman Film Ventures Private Limited. These agreements / contracts, on even a *prima facie* examination of the

matter are purely independent and commercial transactions between defendant Nos.1, 5 and 6, with no reference to the Long Form Agreement, to which only the plaintiffs in the suits and defendant No.1 - RBEP are parties. It is this Long Form Agreement which contains the arbitration clause and the rights claimed by the defendant - Madman Film Ventures Private Limited and the defendant - Zee Entertainment Enterprises Limited cannot be said to be underlying contracts or agreements to the Long Form Agreement.

50. Even if there is a dispute as regards termination of the Long Form Agreement between the parties to the said agreement, when the plaintiffs are asserting their rights in the works that are subject matter of the Long Form Agreement as also other works under independent assignment deeds, which are in conflict with the rights being asserted by defendant - Madman Film Ventures Private Limited and the defendant - Zee Entertainment Enterprises Limited, on the basis of independent commercial transactions, to which the plaintiffs are not parties, it cannot be said that such conflict can be resolved on the basis of arbitration clause contained in the Long Form Agreement. It is not even the case of the defendant - Madman Film Ventures Private Limited and the defendant - Zee Entertainment Enterprises Limited that their rights are subservient to those of defendant No.1 – RBEP. The rights that they are asserting are on the basis of business transactions and contracts that are independent and not relatable to or underlying the Long Form Agreement. Thus, it cannot be said that the defendant - Madman Film Ventures Private Limited and the defendant - Zee Entertainment Enterprises Limited are claiming through or under defendant No.1 – RBEP, in the context of the Long Form Agreement.

51. It is significant that only 34 works are subject matter of the Long

Form Agreement and that plaintiff Super Cassettes entered into independent assignment deeds / agreements with defendant No.1 RBEP concerning 6 films in one lot and 3 films in the other, whereby the said plaintiff acquired 100% rights in the said works, as opposed to proportionate rights in the 34 films under the Long Form Agreement. In such a situation, where the plaintiff Super Cassettes is seeking specific reliefs in respect of the two lots of 6 films and 3 films, which have nothing to do with the Long Form Agreement, the disputes pertaining to such works / films cannot be said to be subject matter of the arbitration agreement, even on a *prima facie* examination. In other words, as per the amended Section 8 of the said Act, when this Court is examining at a *prima facie* stage, it is found that insofar as the said two lots of works are concerned, an arbitration agreement does not exist.

52. Similarly, even on a *prima facie* examination, no arbitration agreement exists between the plaintiffs in the suits and the defendants - Madman Film Ventures Private Limited and Zee Entertainment Enterprises Limited. This brings out the complex nature of the present dispute, wherein it would be against public policy and against the object of speedy disposal of cases to refer only the signatories to the Long Form Agreement to arbitration, because if the contentions raised on behalf of the applicant are to be accepted, it would inevitably lead to splitting of the suits, creating a situation where more than one proceeding would continue, resulting in conflicting / contradictory findings before different fora.

53. In this context, the prayers in the present suit become relevant. The plaintiffs are specifically seeking orders of permanent injunction against the defendants, in the context of all the works referred to in the plaints, wherein the defendants other than defendant Nos.1, 2 and 3 are

claiming rights independent of the Long Form Agreement. The complexity of the present suits and the nature of the disputes raised therein indicate that this Court cannot reach a conclusion that the plaintiffs, while opposing the present applications are doing so only to delay proceedings or to somehow avoid reference to arbitration.

54. It cannot be said under the scope of examination under Section 8 of the said Act that centralization of resolution of disputes through arbitration is warranted in the facts and circumstances of the present case. On the contrary, such a step would lead to immense complications, as a consequence of which, the plaintiffs would have to pursue proceedings before the Court against the defendants who are non-signatories to the agreement. As held by the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)*, arbitration as a mode of dispute resolution is unsuitable when the subject matter of a dispute in the factual background, requires collective adjudication before one court or forum. Hence, there is substance in the contentions raised on behalf of the plaintiffs.

55. Much emphasis was placed on behalf of the defendant - Madman Film Ventures Private Limited on the judgment of the learned Single Judge of this Court in the case of **Taru Meghani Vs. Shree Tirupati Greenfield and others** *(supra)* wherein this Court emphasized upon the salutary object of the said Act and in the facts of the said case found that the matter ought to be referred to arbitration. A perusal of the said judgment shows that the case therein is factually distinguishable from the present case. In the said judgement, this Court found that in the peculiar facts of the said case, there were series of transactions between the parties and that there was an arbitration clause pertaining to the dispute concerning the first such transaction. In such a situation, this

Court found that the object of the Act concerning speedy disposal of disputes would be subserved by referring the parties to arbitration because there may be several causes of action but they were against the same defendants. In such circumstances, this Court directed that the parties ought to be referred to arbitration. Such are not the facts in the present case, and therefore, reliance placed on the said judgment of this Court can be of no avail.

56. In this context, the statements made in the reply affidavits filed on behalf of the defendant - Madman Film Ventures Private Limited to the effect that it was ready to be bound by an arbitration award upon the matter being referred to arbitration, can be of no consequence, for the reason that arbitration necessarily requires a consensus on the part of the parties for resolution of their disputes before a private forum, as against the Courts. In the present case, there is nothing to show that the plaintiffs had entered into an arbitration agreement with the said defendant or that they have agreed to do so before this Court. Hence, there is no substance in the aforesaid stand taken on behalf of the defendant - Madman Film Ventures Private Limited.

57. As regards the question as to whether the disputes could be said to be arbitrable as they concern the question of copyrights, the Supreme Court in the aforementioned judgement in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)* has elaborately considered the question of arbitrability and even the question as to who should decide arbitrability. In this context, one of the contentions raised on behalf of the plaintiffs was that since the disputes pertaining to copyrights were involved, which necessarily concerned *in rem* rights having *erga omnes* effect, the disputes even on a *prima facie* examination could not be said to be arbitrable. Reference was made to

judgement of this Court in the case of **Indian Performing Rights Society Limited Vs. Entertainment Network (India) Limited** *(supra)* and judgments of the Supreme Court in the case of **Vimal Kishor Shah and others Vs. Jayesh Dinesh Shah and others** *(supra)* and **Innoventive Industries Limited Vs. ICICI Bank and another** *(supra)*.

58. In this context, an observation made in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)* is significant and it reads as follows: -

> "48. A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment "settles the destiny of the res itself" and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. By contrast, a judgment in personam, "although it may concern a res, merely determines the rights of the litigants inter se to the res". Distinction between judgments in rem and judgments in personam turns on their power as res judicata, i.e. judgment in rem would operate as res judicata against the world, and judgment in personam would operate as res judicata only against the parties in dispute. Use of expressions "rights in rem" and "rights in personam" may not be correct for determining non-arbitrability because of the inter-play between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam. Booz Allen & Hamilton Inc. refers to the statement by Mustill and Boyd that the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite. Therefore, a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem. Arbitration by necessary implication excludes actions in rem."

59. This Court is of the opinion that the judgements on which the plaintiffs have placed reliance cannot be of much assistance for the reason that on facts, it was found that *in rem* rights were sought to be asserted and disputes in that context were sought to be resolved by way of arbitration. As clarified by the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** *(supra)* in paragraph 48 quoted above, a right *in rem* results in an enforceable right *in personam*. It has been held that a claim for infringement of copyright against a particular person is arbitrable. In fact, in the present case, the nature of disputes raised by the plaintiffs concern contractual obligations between the parties, which are rights *in personam*, based on the mutual obligations of the parties as per contract. Thus, to that extent the contentions raised on behalf of the plaintiffs are without any substance.

60. The issues identified in paragraph 29 hereinabove are accordingly answered in favour of the plaintiffs.

61. This Court is of the opinion that in the light of the findings rendered hereinabove pertaining to the nature of the claims raised by the plaintiffs in these suits and it being found on a *prima facie* examination that arbitration agreement does not exist between the plaintiffs and defendant No.1 - RBEP in respect of the two lots of works referred to hereinabove, as also in the light of the admitted position that no arbitration agreement exists between the plaintiffs and the defendant - Madman Film Ventures Private Limited and the defendant - Zee Entertainment Enterprises Limited, the present applications cannot be granted. The nature of disputes and the complexity of the matter warrants centralized resolution of disputes before this Court and consequent continuance of the suits for resolution of the disputes between the parties, in order to pronounce upon their rights and

obligations.

62. In the light of the above, the applications are dismissed.

63. All the other applications filed in these suits shall now be listed for further consideration after three weeks.

(MANISH PITALE, J.)

Minal Parab