



Sawant

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO.35545 OF 2025

M/s. Space Master Realtors

.....APPLICANT

: VERSUS :

Mulund Sandhyaprakash CHS Ltd. & Anr.

.....RESPONDENTS

Mr. Mayur Khandeparkar with Mr. Vikramjit Garewal, Mr. Vishwanath Patil and Ms. Nidhi Chauhan i/b Mr. Akshay Naidu for the Applicant.

Mr. Karl Tamboly with Mr. Ryan D'souza, Mr. Meezan Patel and Ms. Harshada Kamble for Respondent No.2.

Mr. Dhruvin J. Modi for Respondent No.1-Society.

CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 03 FEBRUARY 2026.
PRONOUNCED ON : 06 MARCH 2026.

JUDGMENT:**ISSUE FOR CONSIDERATION**

1. This Application, filed under Section 11 of the Arbitration and Conciliation Act, 1996, raises an issue of seminal importance about permissibility to arbitrate the disputes between developer and a dissenting member of cooperative society, who has not signed the development agreement. In the present Application, the developer is

seeking appointment of arbitrator for adjudication of disputes with a non-signatory member to the development agreement. Developer's right to seek interim measures under Section 9 of the Arbitration and Conciliation Act, 1996 against a non-signatory member is well settled. Even though a dissenting member of a society has not signed the development agreement, Court can make interim measures against him as his individual rights remain subservient to the society's obligations under the development agreement. The issue here is entirely different. Whether developer, who has executed development agreement with the cooperative society, can seek appointment of an arbitrator by invoking arbitration clause in the development agreement, for adjudication of disputes with a member of such society, who is not a signatory to such development agreement? Though in the present case, reference to arbitration is sought by the developer, decision of the issue involved in the present Application would also provide an answer to the converse situation of right of individual member of a cooperative society to arbitrate against the developer, even though such member has not signed the development agreement. The Court is also tasked upon to decide whether subsequent participation by the dissenting member in redevelopment process by execution of Permanent Alternate Accommodation Agreement with the developer, containing arbitration clause, can enable the developer to arbitrate the disputes arising out of the development agreement, not signed by such member.

FACTS

2. Mulund Sandhyaprakash Cooperative Housing Society Limited (**Society**) is registered under the provisions of Maharashtra Co-operative Societies Act, 1960. It is formed in respect of a single building having 11 members at Mulund (West), Mumbai. Since the building of the society had become old, it resolved to opt for redevelopment thereof and adopted a resolution in special general body meeting held on 15 April 2017. The Society began scouting for developers to redevelop its building. Applicant is a developer, who submitted a proposal dated 23 July 2019 which was deliberated upon and after negotiations, Applicant tendered Offer Letter dated 5 October 2019. Memorandum of Understanding dated 26 February 2020 was executed between the Applicant and the Society. Thereafter, Redevelopment Agreement dated 2 July 2021 (**DA**) was executed by the Society in favour of the Applicant, which was registered in the office of Sub-Registrar of Assurance, Kurla. On the same day registered Power of Attorney was also executed in favour of the Applicant-Developer.

3. Respondent No.2 is the owner and occupier of Flat No. 10 in society's building and a member of the society. According to the Applicant, Respondent No. 2 has opposed to the redevelopment process undertaken by the Society and has obstructed the process of redevelopment right since the beginning. He filed complaints with local police station and other authorities. Applicant was issued Intimation of Disapproval (**IOD**) by Municipal Corporation of Greater Mumbai on 28 November 2023. Accordingly, the Applicant issued letters to the

members to vacate flats in their occupation. According to the Applicant, 10 out of 11 members agreed to vacate possession of their respective flats on or before 30 January 2024. However, Respondent No.2 refused to vacate possession of his Flat No.10. Applicant addressed notices dated 9 January 2024 and 30 January 2024 to Respondent No.2, which were responded to by him. Applicant served Rejoinder dated 13 February 2024.

4. In the above background, Applicant filed Arbitration Petition No.491 of 2024 in this Court under Section 9 of the Arbitration Act seeking interim measures against Respondent No.2 to vacate possession of Flat No.10. This Court passed order dated 19 August 2024 recording that IOD for the 8th floor was not issued and directed the Applicant to issue intimation to Respondent No.2 upon receipt of IOD for the 8th floor with corresponding direction to Respondent No.2 to vacate possession of Flat No.10 within 30 days. Court Receiver was appointed to take possession of the flat in case Respondent No.2 failed to vacate the possession thereof. Respondent No.2 filed Appeal (L) No.28831 of 2024 before the Division Bench of this Court challenging order dated 19 August 2024, which came to be disposed of by order dated 24 October 2024 granting liberty to Respondent No.2 to agitate the issue sought to be raised by him before the appropriate forum.

5. Respondent No.2 has accordingly filed Long Cause Suit No.19354 of 2024 before the City Civil Court at Bombay. He also sought temporary injunction, which, according to the Applicant, was denied by order dated 11 November 2024. It appears that possession of Flat No.10 was secured by the Applicant through Court Receiver on 15 November

2024. Respondent No.2 has executed Permanent Alternate Accommodation Agreement (**PAAA**) with the Applicant on 14 November 2024, which has been registered in the office of Sub-Registrar of Assurances, Kurla-5. Under the PAAA, Applicant has agreed to grant to Respondent No. 2 Flat No.8001 on 8th floor admeasuring 642.83 square feet (MOFA carpet area) equivalent to 665 square feet (RERA carpet area) in the proposed new building named Chandan Heights to be constructed in place of the old building of the Society. It appears that the old building has accordingly been demolished.

6. Applicant alleges that the acts of Respondent No.2 has led to substantial monetary losses to it since the project is indefinitely delayed. The Applicant accordingly issued notice dated 28 July 2025 to the Respondent No.2 demanding a sum of Rs.13,13,46,245/- and invoking Clause 38 of the Development Agreement dated 2 July 2021 and nominated a mediator as well as an arbitrator. By Reply dated 6 August 2025, Respondent No.2 rejected the claim of the Applicant and also denied existence of arbitration agreement. Respondent No.1-Society however accepted arbitration through the proposed arbitrator. Since Respondent No.2 has refused to submit to arbitration, the Applicant has filed the present Application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) seeking appointment of Arbitrator for adjudication of disputes that have arisen between Applicant and Respondents under the Development Agreement dated 2 July 2021. Respondent No.2 has filed Affidavit-in-Reply opposing the Application.

SUBMISSIONS

7. As the hearing of the Application progressed, this Court noticed that there is no judgment directly dealing with the issue involved. This Court also noticed that several applications for constitution of arbitral tribunal at the instance of dissenting members, who are non-signatories to the DA, keep getting filed. Considering the importance of the issue involved in the Application, this Court requested Mr. Mayur Khandeparkar and Mr. Karl Tamboly, the learned counsel to assist the Court in answering the issue. Mr. Khandeparkar was requested to present the case on behalf of the Applicant whereas Mr. Tamboly was requested to present the case on behalf of Respondent No.2. Accordingly, this Court has heard extensive submissions canvassed by Mr. Khandeparkar on behalf of the Applicant and Mr. Tamboly on behalf of Respondent No.2. It would be apt to record the gist of submissions canvassed by them.

SUBMISSIONS ON BEHALF OF APPLICANT

8. Mr. Khandeparkar, the learned counsel appearing for the Applicant submits that there is arbitration agreement both in Development Agreement dated 2 July 2021 as well as in the PAAA dated 14 November 2024. That the DA and PAAA are inextricably connected and intertwined in relation to the subject matter and hence there ought to be a composite reference to arbitration in relation thereto. That though the arbitration is invoked only in respect of Clause 38 of the DA, the Apex Court has held in M/s Bhagheeratha Engineering Ltd. Versus.

State of Kerala¹ that failure to issue notice under Section 21 of the Arbitration Act is not fatal to a party in arbitration if claim is otherwise valid and dispute is arbitrable. That therefore, mere failure to invoke Clause 32 of PAAA would not be fatal to a case involving multiple documents which are inextricably connected and contours of dispute which are to be arbitrated would unfold in the eventual arbitral proceedings after the Tribunal is constituted.

9. Mr. Khandeparkar further submits that Respondent No.2, in his capacity as member of the first Respondent-Society, is ultimately the beneficiary under the DA. Various covenants agreed between the Society and the Developer for their mutual benefits are actually beneficial to Respondent No.2. Therefore, the DA ultimately provides for and/or outlines rights and obligations pursuant to which the deal was struck between the Society and the Developer. That arrangement in the DA stipulates the terms on which consideration is agreed to be provided to each member of the Society and that individual members are beneficiaries of such terms. That it cannot be suggested by any individual member that he/she would be entitled to reap benefits under the PAAA without having to fulfil any obligations under the DA. That obligations under the DA, such as vacating of flats, are required to be discharged by the individual members. That therefore any obligation that arises against the Society is enforceable against not just the society but also individual member being its constitute. He invites attention of the Court to introductory title of the DA in which the expression 'society' is defined

¹ Civil Appeal No.39 of 2026, decided on 5 January 2026

to mean and include not just the society, but also all its existing members.

10. Mr. Khandeparkar would further submit that it is the case of the Applicant that Respondent No.2 has caused losses to the Developer on account of failure to vacate the flat and such loss is attributable only to Respondent No.2 as a member of the Society. He relies on Section 35 of the Arbitration Act in support of his contention that an arbitral award is final and binding on the parties and persons claiming under them and that therefore every member of the Society would be bound by the Award. That since Respondent No.2 is the affected person, it would not be prudent to seek adjudication in his absence and that therefore his presence to the arbitral proceedings would be material. He relies on judgment of the Apex Court in **M.C. Chacko vs. State Bank of Travancore, Trivandrum**² in support of his contention that third-party beneficiary under the terms of the contract is entitled to seek its enforcement. That the case in hand involves a converse situation where Developer is seeking to enforce an agreement against the third-party beneficiary. That it cannot be countenanced that a beneficiary can enforce a term of contract but cannot seek redressal of those grievances under the adjudicatory mechanism available under the contract.

11. Mr. Khandeparkar would further submit that Respondent No.2 is otherwise a veritable party to the contract which concept is evolved by the Apex Court in its judgment in **Cox and Kings Limited Versus. SAP India Private Limited and another**³. That by applying the

² (1969) 2 SCC 343

³ (2024) 4 SCC 1

principle of veritable party, a non-signatory can be subjected to arbitration without prior consent on the basis of (i) mutual intent of parties, (ii) relationship between non-signatory and signatory, (iii) communality of subject matter, (iv) composite nature of transaction and (v) performance of the contract. That Respondent No.2 is fully involved in performance of DA, as PAAA is executed by him towards performance of the DA. That therefore mere absence of signature of Respondent No.2 on the DA does not mean that arbitral proceedings cannot be conducted between Petitioner and Respondent No.2. He relies on judgment of the Apex Court in *Ajay Madhusudan Patel and others vs. Jyotrindra S Patel and others*⁴ in support of his contention that courts should not adopt a conservative approach to exclude all persons, who are intended to be bound by underlying contract containing arbitration agreement and that if conduct of non-signatory is in harmony with conduct of others, it may lead the other party to believe that non-signatory becomes a veritable party. He submits that DA and PAAA are executed in respect of subject matter, which is common and overlapping. That DA and PAAA are inextricably connected in the context of nature of transaction. That PAAA has been executed in accordance with Clause 6C(ii) of DA. That PAAA is executed to give effect to the terms of DA and performance of PAAA is premised and predicated on the basis of DA and vice versa. That DA and PAAA cannot be performed or enforced in isolation of one another. He therefore submits that Respondent No.2 is a veritable party to the DA and therefore arbitration agreement in the DA would bind Respondent No.2 as well.

⁴ (2025) 2 SCC 147

12. Mr. Khandeparkar further submits that on account of inextricable interconnection between DA and PAAA, there is otherwise incorporation of arbitration clause by reference. That PAAA specifically refers to DA and the same is executed towards performance of obligations under the DA. That reference to the DA is not merely as and by way of narration but has been made with a view to incorporate terms thereof as a part and parcel of PAAA. That in any case, DA and PAAA are multi-party documents, which are inextricably connected in the context of subject matter. He relies on paragraph 132 of the judgment in **Cox and Kings Limited** (supra) in support of his contention that Respondent No.2, by virtue of his relationship with Society and active involvement in performance of obligations, which are intricately linked to the subject matter, is not a stranger to the disputes between the signatory parties. That even otherwise arbitration clauses contained in DA and PAAA are widely worded to include any and every dispute that may arise between parties in relation thereto. He relies on judgment of the Apex Court in **Giriraj Garg Versus. Coal India Limited and Ors.**⁵ in support of his contention that the expression '*any dispute arising out of or in connection with*' needs to be given the widest amplitude and context. That the peculiarity of Clause 38 of the DA would not include only disputes in context of the developer and the society but would also extend to individual disputes, which would arise on account of defaults committed by the member in performance of obligations stipulated under the DA.

13. Mr. Khandeparkar distinguishes the judgments of this Court in **Ketan Champaklal Divecha Versus. DGS Township Private Limited**

⁵ (2019) 5 SCC 192

and another⁶ and Shankar Vithoba Desai Versus. Gauri Associates⁷, contending that the arbitration agreement in the present case does not stipulate that the reference to arbitration would only be in respect of dispute between developer and society. That Clause 32 of the PAAA also provides for resolution of disputes after making reference to DA dated 2 July 2021. That since PAAA is executed in pursuance of the DA, Respondent No.2 cannot be heard to say that he would secure benefits under the DA but would not be bound by terms and obligations contained therein. That therefore adjudicatory mechanism contained in PAAA would also extend to the disputes arising out of contractual obligations under the DA with individual member of the Society.

14. Mr. Khandeparkar submits that DA and PAAA are multiple documents arising out of same transaction. He relies upon judgment of this Court in Adityaraj Builders Versus. State of Maharashtra⁸ in support of his contention that PAAA is a part and parcel of DA and an instrument executed to complete the transaction.

15. Mr. Khandeparkar would further submit that member of the Society loses his individuality *qua* the Society and has no independent right as held by the Apex Court in Daman Singh and Others. Versus. State of Punjab and Others⁹. Though this position would not obfuscate any arbitration agreement which may arise between developer and individual member relating to dispute involving breach of failure to perform obligations arising out of DA. That the judgment in Daman

⁶ Arbitration Petition (L) No.20483 of 2023, decided on 2 January 2024

⁷ Commercial Arbitration Application (L) No.21070 of 2023, decided on 16 July 2024

⁸ 2023 SCC OnLine Bom 540

⁹ (1985) 2 SCC 670

Singh (supra) recognizes two exceptions in respect of rights which are provided to an individual member under the statute or bye-laws. That right of adjudication by arbitration is a statutory right which can be availed even by a contract. That in Uday Dalal vs. Divisional Joint Registrar Co-operative Societies¹⁰ this Court has recognized exceptions to the otherwise applicable rules prescribed under the judgment of Daman Singh. That the society is competent to execute agreement not just on behalf of itself, being a juristic entity, but also on behalf of the members individually especially where the agreement governs rights and obligations of individual members as well. That individual members therefore can avail of benefits under the arbitration agreement for adjudication of their individual grievances. Conversely a Developer can also invoke adjudicatory mechanism against individual member, who has breached the obligations under the agreement executed on his behalf by the Society. He relies on judgment of this Court in Harshad B. Shah and another Versus. AVS Realtors and another¹¹ in support of his contention that reference is done at the behest of individual member applying the doctrine of veritable party even in absence of an arbitration clause contained in PAAA. He submits that judgment cited on behalf of Respondent No.2 would not come in the way of making reference to Arbitral Tribunal because the issues raised in the present application were neither raised nor this Court had any occasion to decide the same.

16. Lastly, Mr. Khandeparkar would submit that once existence of arbitration agreement is noticed both in the DA and PAAA, this Court needs to adopt 'hands off' approach, since the scope of scrutiny while

¹⁰ Civil Writ Petition No.15089 of 2025 decided on 5 December 2025

¹¹ Commercial Arbitration Application No. 372 of 2025 decided on 25 September 2025

deciding application under Section 11 of the Arbitration Act is only about *prima facie* existence of arbitration agreement. He relies on judgment of the Apex Court in ASF Build-tech Private Ltd. Versus. Shapoorji Pallonji & Co. Pvt. Limited¹² in support of his contention that Arbitral Tribunal is fully empowered to rule on existence of arbitration agreement between veritable parties and this Court need not finally adjudicate that issue in the light of remedy under Section 16 of the Arbitration Act. He would therefore urge this Court to make a reference to Arbitral Tribunal and leave the issue of existence of arbitration agreement open to be decided under Section 16 of the Arbitration Act.

17. Since the Society broadly supports the case of the Applicant, Mr. Modi has not separately canvassed any submissions.

SUBMISSIONS ON BEHALF OF RESPONDENT No.2

18. Mr. Tamboly, the learned counsel appearing for Respondent No. 2 opposes the Application submitting that the arbitration clause contained in the development agreement does not bind Respondent No.2. He takes me through the clauses of the DA in support of the contention that the arbitration clause therein can never bind Respondent No.2. That DA contains list of members in which name of Respondent No.2 is conspicuously missing. Respondent No.2 is also not a signatory to the DA. He submits that Clause 19 dealing with specific performance of DA makes a conscious distinction between the default

¹² (2025) 9 SCC 76

committed by Society and default committed by individual members. That under Clause 19(1), the developer is entitled to enforce agreement and claim damages in the event of default committed by the societies. That on the other hand, if the delay is caused by any individual member, the developer is only entitled for extension of time for completion of development. That therefore no dispute could ever arise between developer and member *qua* damages or compensation against an individual member. That Clause 20 provides for indemnity only on behalf of developer and the society. That Clause 30 provides for addresses only of developer and society for the purpose of correspondence and notices.

19. Mr. Tamboly further submits that Clause 38 of the development agreement dealing with arbitration indicates that the same is binary in nature as it refers to 'both the parties' in multiple cases. That it also makes reference to senior representatives of both the parties which expression cannot be applied to individual members. That the clause makes it clear that there is no intention to arbitrate between the developer and individual member. That therefore Respondent No.2 is not bound by the arbitration clause in the DA. That there are no obligations imposed on individual members *de horse* the Society and the arbitration clause does not contemplate or cover any dispute between the developer and individual member.

20. Mr. Tamboly would further submit that it is otherwise impermissible for a developer to invoke arbitration clause in the DA against individual member of the society. He relies upon order of this Court in **Ketan Champaklal Divecha** (supra) in which this Court, while

dealing with the reverse situation, has ruled that the society can alone act and speak for individual members as a member loses his/her independent rights. That this Court has concluded that reference to 'parties' means society and its members as collective on one hand and developer on the other. That the ratio of the order in **Ketan Champaklal Divecha** squarely applies to the present case. That since Clause 38 of the DA also refers to the expression 'both the parties' at multiple places. He submits that in **Shankar Vithoba Desai** (supra) this Court has followed the judgment in **Ketan Champaklal Divecha** holding that fundamental requirement under Section 7 of the Arbitration Act is not fulfilled in a case where individual member is not a signatory to the arbitration agreement. He also relies upon Division Bench judgment in **Avenues Seasons Properties LLP Versus. Nissa Hoosain Nensey and others**¹³ in which it is held that the plaintiff, who opposed development and had not signed the DA, was not bound by the arbitration clause. That this Court has held that the ratio of the judgment in **Adityaraj Builders** (supra) does not apply to the issue of existence of arbitration agreement as the same dealt with the issue of levy of stamp duty under the provisions of the Maharashtra Stamp Act, 1958. He also relies on judgment of this Court in **Ningbo Aux Imp and Exp Co. Limited Versus Amstrad Consumer India Pvt. Limited**¹⁴ in which the judgment in **Girish Mulchand Mehta Versus. Mahesh S. Mehta and another**¹⁵ and of Kerala High Court in **Shoney Sanil Versus. Coastal Foundation P. Ltd. And others**¹⁶ are followed holding that even for exercise of power under

¹³ Appeal No. 42 of 2024 decided on 22 October 2024

¹⁴ Comm. Arbitration Petition No. 983 of 2025 decided on 28 January 2026

¹⁵ 2009 SCC Online Bom 1986

¹⁶ AIR 2006 Ker 206

Section 9 of the Arbitration Act, twin conditions need to be satisfied viz. (i) party must be claiming through or under the arbitration agreement and (ii) the party is in possession of subject matter of arbitration. That however such third party cannot be made a party to the main reference to the arbitration. That in the present case, Respondent No.2 is a member and non-signatory to the DA.

21. Mr. Tamboly submits that Respondent No.2 is not a veritable party to the arbitration agreement merely because he happens to be the beneficiary under the DA. That Respondent No.2 is in fact a dissenting member and has filed the suit before the City Civil Court challenging certain clauses of PAAA. He submits that in **Cox and Kings Limited** (supra) the Apex Court has held that the nature or standard of involvement of non-signatory in performance of the contract should be such that non-signatory has actively assumed obligations or performance upon itself under the contract. That there needs to be positive, direct or substantial involvement of non-signatory in the negotiations, performance and termination of the contract. That mere incidental involvement in the negotiations, performance or termination of contract is not sufficient to infer consent of non-signatory to be bound by the arbitration agreement in the contract. That Respondent No.2 has not been a party to the DA since its very inception and therefore he cannot be treated as a veritable party. He relies on judgment of Apex Court in **Ajay Madhusudan Patel** (supra) in support of his contention that conduct of non-signatory needs to be in harmony with the conduct of others. That in the present case, conduct of Respondent No. 2 has not been in harmony with the conduct of the society. That in **ASF Buildtech**

Private Ltd. (supra) the Apex Court has held that existence of arbitration agreement *qua* non-signatory is in substance and issue of consent. That by no stretch of imagination, any consent can be inferred on the part of Respondent No.2 in the present case where he has deliberately and intentionally not signed the DA. He relies on judgment of the Apex Court in **HPCL Versus. BCL Secure Premises Pvt. Ltd.**¹⁷ in support of the contention that referral courts need to record a *prima facie* finding as to whether third party is a veritable party and that there exists arbitration agreement.

22. Mr. Tamboly further submits that there is a collusion between the Applicant and the Society, and the Applicant is harassing Respondent No.2 on account of raising of objections to the conduct of development process. That the society has unfortunately colluded with the developer. He submits that since there is no agreement to arbitrate between the Applicant and Respondent No.2, the present Application deserves to be dismissed.

REASONS AND ANALYSIS

23. The Applicant-Developer has invoked Clause 38 of the DA against Respondent No.2, who is a member of the first Respondent-Society for reference of disputes relating to its claim for recovery of amount of Rs.13,13,46,245/- against Respondent No.2. The claim is sought to be raised by the developer against Respondent No.2, who was the lone dissenting member of the society and was opposed to the development process. Applicant believes that it has suffered losses on

¹⁷ C.A. 14647 OF 2025 decided on 9 December 2025

account of delay on the part of Respondent No.2 in vacating the possession of Flat No.10, which has delayed the process of redevelopment of the society. As observed above, the Applicant was required to file petition under Section 9 of the Arbitration Act for seeking possession of Flat No.10 from Respondent No.2. This Court passed order dated 19 August 2024 in Arbitration Petition (L.) No. 6559 of 2024 directing Respondent No.2 to vacate possession of Flat No.10 upon receipt of intimation from the Applicant-Developer after issuance of IOD and appointing Court Receiver to take possession in the event of failure of Respondent No.2 to vacate the same. In the Appeal preferred by Respondent No.2 against Section 9 order, the Division Bench refused to interfere and relegated him to alternate remedy to air his grievances relating to redevelopment prayers. It appears that Respondent No.2 has accordingly filed Long Cause Suit No. 19354 of 2024 before the City Civil Court. In the meantime, the Court Receiver took away possession of Flat No.10 from Respondent No.2 and handed it over to the Applicant for redevelopment. Respondent No.2 has executed PAAA with the Applicant on 14 November 2024. Thus, there is some contractual relationship between the Applicant and Respondent No.2 in the form of PAAA though Respondent No.2 admittedly is not a signatory to the DA. The DA has been executed not just between the Applicant and the Society, but 9 members of the Society are also parties thereto, who have signed the DA. It appears that Respondent No.2 was also sought to be included in the DA, but his name was ultimately scored off on account of his refusal to sign the DA. Respondent No.2 has not signed the DA as he is opposed to the redevelopment process. Though he has executed the PAAA, he has

challenged the redevelopment process in a suit filed before the City Civil Court.

24. There is no dispute about the position that the DA contains arbitration Clause 38, which reads thus:

38. ARBITRATION:

(i) if any dispute arises out of or in connection with this Agreement including its interpretation, application or performance or any alleged breach of any provision of this Agreement the Parties shall in the first instance attempt to resolve such dispute through mutual discussion between senior representatives of each Party.

(ii) In the event that the Parties are unable to resolve the dispute or difference by mutual discussion within thirty days of it being referred to such senior representatives, then either Party may refer the dispute for resolution to a sole arbitrator who shall be jointly appointed by both Parties or, in the event that the Parties are unable to agree on the person to act as the sole arbitrator within thirty days after any Party has claimed for an arbitration in written form, by three arbitrators, one to be appointed by each Party with power to the two arbitrators so appointed, to appoint a third arbitrator.

(iii) The arbitration will be governed by the Arbitration and Conciliation Act 1996 including any statutory amendments or re-enactments there of for the time being in force and rules made there under by the Bombay High Court.

(iv) The arbitration proceedings will be conducted in English language at Mumbai.

(v) The costs of arbitration will be initially paid jointly by Parties hereto in equal shares. The Arbitrator shall be entitled to determine by the award as to who will finally bear the cost and in what proportion.

(vi) All issues those may be referred for arbitration shall be resolved in maximum time period of 3 months.

(vii) The Award of the Arbitrator shall be binding on both Parties.

25. Thus, Clause 38 provides for adjudication of disputes arising out of or in connection with the DA between the '*parties*' through arbitration and '*either party*' can refer the dispute for resolution to a sole arbitrator, which needs to be jointly appointed by '*both the parties*'. In the event of failure to reach agreement on the person to act as sole arbitrator, three arbitrators can be appointed, one to be appointed by '*each party*' with power to the two arbitrators to appoint the third arbitrator. The Award of the Arbitral Tribunal is agreed to be binding on '*both the parties*'. In the present case, Clause 38 uses various expressions '*parties*', '*either party*', '*both the parties*', '*any party*', etc.

26. It must however be observed here that use of the expression '*both parties*' appears to be slightly inconsistent as there are three parties to the DA viz.

- (i) the Society as 'party of first part'
- (ii) Nine members of the Society as 'party of the second part' and
- (iii) Applicant-Developer as 'party of the third part'.

It is therefore difficult to accept the contention of Respondent No. 2 that it is a binary contract. The DA does contemplate adjudication of disputes between the developer and signatory members as well. The nine members, who have signed the DA, have agreed to resolve their disputes with the developer through the mechanism of private arbitration. Ordinarily, therefore Clause 38 of the DA, which contains arbitration agreement would bind only the three parties to the DA. Respondent No.

2 is not a signatory to the DA and claims that he has not agreed for resolution of disputes with the developer through arbitration.

27. In the present case, the developer wants to arbitrate against individual non-signatory member. There are converse cases where the members want to arbitrate against the developer. In my view, this difference is immaterial and what needs to be decided is the broad principle as to whether disputes relating to development process can be agitated through private arbitration where one of the parties to the dispute is not a signatory to the DA. Whether a member, who is opposed to redevelopment process and has consciously not signed the DA, can either initiate arbitration, or can be made party to the arbitral proceedings, is the issue that arises for consideration. Here again, there can be difference in fact situation in individual cases because every DA need not include all members of the society as independent parties thereto. This particularly happens where the society comprises of large number of members, who are neither indicated separately as parties to the DA nor are required to sign the same. In such a case, the act of non-signing the DA is not voluntary act by the members, and it is more a matter of convenience where the society acts on behalf of all members and signs and executes the DA. On the other hand, there are cases, like the present one, where individual members are also made parties to the DA and are required to sign and execute the same. In such case, the act of non-execution or non-signing of DA by a dissenting member is a conscious choice made by him since he is opposed to the redevelopment process. Thus, opposition or support to the redevelopment process cannot be inferred only on the basis of the act of not signing the DA.

What constitutes dissent by a member thus does not depend solely on the act of failure to sign the DA. Thus, a non-signatory to the DA can both be supporting, as well as dissenting member of the society. In the present case, Respondent No.2 was required to sign the DA but has made a conscious choice not to sign the same.

28. Faced with the difficulty that Respondent No. 2 is not a signatory to the DA, the Applicant-Developer seeks to rope in Respondent No.2 as a party to arbitration by invoking two principles of (i) Respondent No.2, being a veritable party to the DA, is bound by arbitration agreement and (ii) DA and PAAA constitute multiple documents for giving shape to the same transaction and since there is arbitration agreement in both the instruments, a common reference can be made for adjudication of disputes arising out of both the instruments. I propose to examine both the propositions sought to be advanced by the Applicant. However, before I do so, it would be necessary to quickly deal with another submission that the disputes between the Applicant and Respondent No. 2 emanate out of DA and PAA and that since both documents have arbitration clauses, arbitral tribunal can be constituted in the present case.

WHETHER ANY ARBITRABLE DISPUTES HAVE ARISEN OUT OF PAAA

29. As observed above, though Respondent No. 2 is not a signatory to the DA, he has signed and executed the PAAA with the Applicant-developer. PAAA essentially governs the contractual relationship between the parties post vacation of the old flat and deals

with aspects *inter alia* of payment of transit rent during construction period, allotment of new flat on ownership basis, etc. upon demolition of the old building, the identity of the old flat is lost. The new building often is much larger than the old one. There is change in flat number, size of flat, number of rooms, floor number etc. PAAA therefore becomes the title documents and source of ownership of the new flat in the reconstructed building. Therefore, once a dissenting member is required by the Court to vacate the old flat, irrespective of his disputes with the society and developer, many times, he /she executes the PAAA on a without prejudice basis. This appears to be the reason why Respondent No. 2 has executed PAAA with the Applicant even though he has disputes with Applicant and the society and has filed a Suit before City Civil Court.

30. There is arbitration agreement in the PAAA executed by Respondent No.2 with the Applicant-Developer. Clause 32 of PAAA provides thus:

32. If Any disputes arise between the parties, then it shall be settled amicably between the parties and if the parties fail to settle the dispute amicably then it shall be referred to the Arbitrator appointed with the consent of all the parties and it shall be governed by the arbitration and conciliation act, 1996. Any difference or dispute regarding any matter, things, deed or term of this Agreement shall be exclusively subject to the Jurisdiction of the competent Courts in Mumbai.

31. There is thus no dispute to the position that there is arbitration agreement between the Applicant, Society and Respondent No.2 in the PAAA. However, in invocation notice dated 28 July 2025, the Applicant has invoked Clause 38 of the DA. It has not invoked Clause 32

of the PAAA. Relevant part of the invocation notice dated 28 July 2025 reads thus:

In view of all that is stated herein above my client calls upon you'll to pay the total amount of Rs. 13,13,46,245/- (Rupees Thirteen Crore, Thirteen Lakh, Forty Six Thousand, Two Hundred and Forty Five Only) within the period of 7 days from the receipt of this notice failing which my client will be compelled to take further legal recourse as available to him as per the law. Should you not accept this claim, **my client invokes the clause 38 of the Development Agreement 02/07/2025** my client proposes to Appoint Mr. Ravi Punj of Mulund (E), Mumbai, as the mediator and should you not accept mediation then my client proposes to appoint Advocate Hitendra Gandhi - Advocate Bombay High Court as the Arbitrator.

(emphasis added)

32. Faced with the difficulty that arbitration clause in the DA (and not in the PAAA) is invoked by the Applicant, Mr. Khandeparkar has attempted to salvage the situation by contending that the disputes between the Applicant and Respondent No. 2 are inextricably interconnected and that they arise both out of DA and PAAA and that therefore separate invocation of Clause 32 of PAAA is not necessary. He has relied upon judgment of the Apex Court in ***Bhagheeratha Engineering Ltd.*** (supra) in support of the contention that failure to issue notice under Section 21 of the Arbitration Act is not fatal to a party in arbitration if the claim is otherwise valid and the dispute is arbitrable. In my view reliance by Applicant on the judgment in ***Bhagheeratha Engineering Ltd.*** is inapposite. The judgment is an authority on the proposition that the arbitral award is not rendered invalid merely because there was no invocation notice under Section 21 of the Arbitration Act if the claim is otherwise valid and the dispute is arbitrable. In the present case, the issue is whether the Applicant is seeking to espouse any dispute arising out of PAAA, the arbitration

clause of which is not invoked. The answer, to my mind, appears to be in the emphatic negative. The case does not involve an eventuality of Applicant raising disputes under the two agreements, containing arbitration clauses, but inadvertently omits to mention the clause in one of the agreements in the invocation notice. Here, no dispute has arisen out of performance of PAAA. The Applicant knows this and has consciously invoked Clause 38 of the DA and has therefore not invoked Clause 32 of the PAAA.

33. Perusal of PAAA would indicate that though it is executed in pursuance of the DA and though the same contains repeated references to the DA, the broad agreement between the parties in the PAAA is for provision of alternate accommodation in the new reconstructed building. PAAA provides for payment of transit rent from the date of vacation of Flat No.10 and the date of handing over of alternate accommodation. It also provides for security deposit, shifting charges etc. Thus, PAAA essentially governs contractual obligations between the parties after vacation of possession of Flat No.10. As against this, the invocation notice dated 28 July 2025 raises grievance relating to the period when Respondent No.2 had refused to hand over possession of Flat No.10. According to the Applicant-Developer, the IOD was received on 30 November 2023, which was valid only for one year and was required to be renewed and the renewed IOD was received on 21 January 2025. Applicant-Developer has claimed that he has suffered losses since 1 February 2024 till securing of new IOD on 21 January 2025 and has raised following claims against Respondent No.2:

8. My client states that, he has suffered since 1st February 2024 till 21st January 2025, as detailed herein:-

Sr. No.	Particulars	Amount in INR
1.	Additional Rent Rent: 2,21,580/- pm = 607/- per day (2,21,555) * 341 + Interest on rent @ 18 % =	2,06,987/- + 37,258/-
2.	Loss of interest on advance interest free corpus.	2,52,000/-
3.	Cost of delay for renewal of IOD dated 21/01/2025 including lesioning IOD revision	4,00,000/-
4.	Increased in cost of construction [36,000 sq. ft. * 300 = (2,350 – 2050 =300) revised construction cost]	1,08,00,000/-
5.	Increased Excavation Cost from 10 lakh to 14 lakh	4,00,000/-
6.	Loss of business opportunity (sale component+parking)(1/3 of total estimate sales)	10,00,00,000/-
7.	Loss of Interest @ 18 on loss of business opportunity	2,16,00,000/-
8.	Harassment	20,00,000/-
9.	Litigation	10,00,000/-
	Total	13,13,46,245/-

34. Thus, the claim sought to be agitated by the Petitioner broadly arises out of failure on the part of Respondent No.2 to adhere to the terms and conditions of the DA, under which the members were supposed to vacate possession of their respective flats within 30 days of receipt of notice by the Developer after obtaining the IOD. Clause 4(b) of the DA provided thus:

b) On obtaining IOD, the Developers will serve 30 days, notice upon the Society/Existing members to vacate their respective existing flats. The Existing member s shall vacate their respective flats and hand over the same to the Developers for demolition strictly within the said notice period of 30 days.

35. Since the Applicant-Developer has taken a position that the alleged losses suffered by him emanate out of failure on the part of Respondent No.2 to perform contractual obligations under the DA, it has consciously invoked Clause 38 of the DA and has not invoked Clause 32 of the PAAA. Even in the present Application, it is not the pleaded case of the Applicant that it is seeking a composite reference under the DA and PAAA. On the contrary, the pleadings in the Application also refer only to Clause 38 of the DA. Para-7(f) and paragraphs 8, 9, 10, 11 of the Application reads thus :-

7.

F. That there is no dispute that exists an arbitration clause at clause 38 of the Development Agreement dated 2nd July 2025 and the said clause has been duly invoked in view of the dispute.

8. Hence the current Petition is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment Arbitrator in view of the forgoing facts and circumstances.

9. Clause 38 of the DA dated 2nd July 2021, referred to the arbitration clause in case of any dispute rising out of the DA in accordance with the provisions of Arbitration and Conciliation Act, 1996.

10. Clause 41 of the DA dated 2nd July 2021, referred to the Jurisdiction is case of dispute being the courts in Mumbai. Hence, it is submitted that this Hon'ble Court has the jurisdiction to entertain and dispose of the present petition.

11. That the DA was executed in Mumbai for the subject matter property situated Mumbai between the parties in Mumbai hence the cause of action has a rising in Mumbai; therefore, this Hon'ble Court has jurisdiction to entertain, try and dispose off this Petition.

36. Even the prayers in the Application make it explicitly clear that the reference is sought for adjudication of disputes between

Applicant and Respondents under the DA. The prayers in the Application read thus:-

- a) That this Hon'ble Court be pleased to allow this Application;
- b) That this Hon'ble Court be pleased to invoke powers under Section 11 of the Arbitration & Conciliation Act, 1996 and appoint an Arbitrator from the notified list of Advocates as the sole arbitrator and to adjudicate the disputes that have arisen between the Petitioner and the Respondents under the Development Agreement entered into between them on 2nd July 2021.
- c) This Hon'ble Court be pleased to pass such further orders that it may deem fit in view of the circumstances of the case.

37. It is therefore difficult to accept oral submission made on behalf of the Applicant that reference is sought for adjudication of disputes arising out of DA and PAAA and that contours of the dispute which are sought to be arbitrated would unfold only after the Arbitral Tribunal is duly constituted.

38. Thus, it is difficult to hold that any disputes have arisen between Applicant and Respondent No. 2 out of PAAA, which can be arbitrated by constitution of arbitral tribunal. All the disputes between Petitioner and Respondent No. 2 emanate out of the DA, to which Respondent No. 2 is not a signatory. Accordingly I proceed to examine whether arbitration clause in the DA executed between the Applicant-Developer and the Society would bind Respondent No. 2.

VIEWS OF THIS COURT ABOUT ARBITRABILITY OF DISPUTES BETWEEN NON-SIGNATORY MEMBER AND DEVELOPER

39. Before proceeding to decide the issue as to whether Respondent No.2 is a party to arbitration agreement in the DA in his capacity either as a third-party beneficiary or as a veritable party, it would be necessary to first take note of the views expressed by this Court on the issue.

40. In *Ketan Champaklal Divecha* (supra), the DA was apparently signed by the society and all the 216 members, which contained arbitration clause. The building was to be constructed as per DCPR 33(7)(B) with provision for sharing of additional FSI beyond the one permissible under the Regulation. The society however permitted the developer therein to execute the project under DCPR 33(11) leading to execution of supplemental DA. Petitioner and other members felt aggrieved by such decision of the society and developer and invoked arbitration clause in the DA. Appointment of arbitrator was opposed by the developer and society contending that the arbitration clause in the DA postulated resolution of only disputes between the society and developer and not between an individual member and developer. It was contended on behalf of the Applicants therein that the DA was executed by the society on behalf of its 216 members and that therefore all members were covered by the term 'parties' used in the DA. This Court however upheld the objection raised by the society and the developer and held that 'society and the members' represented one party and the 'developer' was the other party and that therefore there was no scope for

individual member participating in appointment of arbitrator. This Court also relied on judgment of the Apex Court in **Daman Singh** (supra) and held that the society can alone speak on behalf of the members and that member loses its individuality *qua* the society having no independent rights. This Court held that for valid invocation of arbitration, notice could be issued only by the Society and individual member did not have capacity to invoke arbitration. This Court held in paragraphs 13 to 15, 20 and 21 as under:-

13. In the present case, since the petitioner has emphasized upon individual members of the respondent - society being signatories to the development agreement and hence, being entitled to invoke arbitration, it would be appropriate to refer to the relevant sections of the Arbitration Act. Section 2(1)(h) of the said Act defines 'party'. Section 7 thereof defines an 'arbitration agreement', as an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship. The arbitration clause in the present case has to be interpreted on the basis of the aforesaid definition of 'party' and 'arbitration agreement'. The arbitration clause in the present case, contained in the development agreement, reads as follows:

"35.1 All disputes, claims and questions whatsoever which may arise with respect to this Agreement between the Parties hereto touching or relating to or arising out of these presents or the construction or application thereof or any clauses or thing herein contained or in respect of the duties responsibilities and obligations of either party hereunder or as to any act of omission of any party or as to any other matter in anywise relating to these presents or the rights, duties. and liabilities of either party under these presents shall be referred to arbitration under Arbitration and Conciliation Act, 1996 or any statutory modification and/or re-enactment thereof in the following manner:

35.2 The Society and the Members as one Party and the Developer as the other Party may forward a panel of names to facilitate the task of selection of the Sole Arbitrator, and a Sole Arbitrator shall then be appointed jointly by the Society and the Developer;"

14. The above quoted arbitration clause does indicate that the disputes, claims and questions arising with respect to the agreement between the 'parties', shall be referred to arbitration under the Arbitration Act. It is relevant that in the aforesaid clause, the expression either 'party' is used more than once. Clause 35.2 of the Development Agreement specifically stipulates that the 'Society and the members' as one party and the 'developer' as the other party, can forward a panel of names to facilitate selection of a sole arbitrator. What is of significance is that under the aforesaid clause 35.2, a sole arbitrator can be appointed 'jointly by the Society and the developer'. The peculiar stipulation under the said clause clearly indicates that an eventual appointment of a sole arbitrator can take place only when the society on the one hand and the developer on the other jointly agree for such an appointment.

15. The aforesaid clause has to be read in the backdrop of the settled position of law that when a Co-operative Housing Society enters into a development agreement with a developer, the will of the majority members prevails. The individual desire or identity of the member is subsumed within the will of the Co-operative Housing Society, which collectively represents the aspirations and the cause of its members. There is substance in the contention raised on behalf of the respondents, by placing reliance on the judgment of the Supreme Court in the case of Daman Singh & Ors. vs. State of Punjab & Ors. (supra), wherein it is specifically laid down that the Society alone can act and speak for an individual member and that the member loses his individuality qua the Society, having no independent rights. Clause 35.2, quoted herein above, clearly encapsulates the said status of a member of a co-operative housing society and thereby indicates that even if clause 35.1 uses the plural 'parties', the same has to be interpreted as referring to the society and members on the one hand and the developer on the other. Clause 35.2 cannot be relegated to being merely a mechanism because the very invocation of arbitration and appointment of a sole arbitrator is governed by the said clause. **For a valid invocation of arbitration, in the facts and circumstances of the present case, notice will have to be issued by the society along with its member or members on the one hand or the developer on the other. An individual member simply does not have the capacity to invoke arbitration under clause 35.2 of the development agreement. Once this conclusion is reached, it becomes clear that the arbitration clause in the development agreement signifies an arbitration agreement for resolution of disputes between the society with its members on the one hand and the developer on the other.** The society espouses the cause of its own members, which in turn, as per settled law, is based on the will of the majority members of the Society.

20. This Court is of the opinion that the petitioner may have a grievance against the respondent No.1 - developer and even the respondent No.2 - society, of which he is a member, but such a grievance and the dispute arising therefrom, is not amenable to arbitration under the peculiar arbitration clause contained in the development agreement. There is substance in the contention raised on behalf of the respondents that 216 arbitration proceedings may arise if each individual member was to invoke arbitration for perceived grievances in the context of the development agreement. Clauses 35.1 and 35.2 have to be read together and the only conclusion that this Court can reach upon a conjoint reading of the two, is that an individual member like the petitioner cannot invoke arbitration for redressal of grievances. Arbitration can be resorted to only upon a proper invocation of arbitration under clause 35.2 of the development agreement for disputes that may arise between the society and its members on the one hand, espousing the cause of its members on the basis of the will of majority of its members, and the developer on the other hand. In other words, the grievance of the petitioner as an individual member, without the society joining in, cannot give rise to an arbitrable dispute with the developer.

21. **Therefore, this Court finds that the invocation of arbitration in the present case itself is rendered defective.** The arbitration agreement is not for each individual member of the respondent - society to raise a dispute and seek appointment of an arbitrator, thereby indicating that neither the petition under Section 9 nor the application under Section 11 of the Arbitration Act, can be entertained by this Court. This goes to the very root of the matter. In this context, the respondents are justified in relying upon the judgement of this Court in the case of *Arohi Infrastructure Private Ltd., & Ors. vs. Tata Financial Services Limited, Mumbai* (supra). The petitioner may initiate such steps as available in law to seek redressal of his grievance, but in the facts and circumstances of the present case, he or other minority members of the Society cannot invoke arbitration.

(emphasis added)

41. Thus, in *Ketan Champaklal Divecha*, all 216 members of the society were signatories to the DA. Thus, there was arbitration agreement as such between developer and members. However, this Court interpreted the arbitration clause therein to mean that the parties did not agree for arbitration of disputes between individual member with the developer. The invocation of arbitration clause was found to be faulty,

and it has been held that one individual member did not have a right to invoke the arbitration clause by separating himself from the society. It is held that the arbitration agreement envisaged that only society could have invoked the arbitration clause.

42. No doubt, the Applicant in ***Ketan Champaklal Divecha*** was a signatory to the DA, however the judgment is rendered by taking into account the peculiar language of the arbitration clause and it is held that though individual member was signatory to the DA, he could not invoke arbitration in his individual capacity and only society could do the same.

43. In ***Shankar Vithoba Desai*** (supra), an attempt was made by 11 members of the society to seek reference under Section 11 of the Arbitration Act against the society and the developer. It appears that those 11 members were not signatories to the DA, which is clear from the following observation in Para 2 of the Order:

This is for the simple reason that individual members are not parties to the arbitration agreement contained in the Development Agreement

44. In ***Shankar Vithoba Desai***, this Court has taken into consideration the twin factors of individual members not being parties to the DA and also the peculiar language of the arbitration clause and held that Applicants therein could not have invoked the arbitration clause. This Court also note of the views expressed in ***Ketan Champaklal Divecha***. This Court held in paragraphs 4 to 12 of the order as under:

4. The arbitration agreement contained in Clause 28 of the Development Agreement, is reproduced below, for convenience:-

All disputes, differences and / or claims, arising out of this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of Arbitration and Conciliation Act, 1996 or any other statutory amendments or re-enactment thereof as applicable and shall be referred to the arbitration of arbitrator or arbitrators nominated by the parties herein. In the event of disarrangement in nomination of Sole Arbitrator each party shall appoint one Arbitrator and then all the Arbitrators with each other's consent appoint presiding Arbitrator meaning that there shall be an Arbitral Tribunal of three Arbitrators. The venue of the arbitration proceedings shall be exclusively at Mumbai as agreed by and between both the parties.

[Emphasis Supplied]

5. Even a plain reading of the foregoing would show that the disputes and differences arising out of the Development Agreement can be referred to arbitration by a sole arbitrator to be appointed by consent of the "parties". If there is no consent among the parties, an Arbitral Tribunal "of three Arbitrators" with "each party" appointing one arbitrator and all the arbitrators "with each other's consent" appointing the presiding arbitrator.

6. The very usage of the phrase "each other" and the concept of "an Arbitral Tribunal of three Arbitrators", would point to the arbitration agreement being a bilateral contract between two parties – the Society and the Developer. The term "all Arbitrators" is a reference to two arbitrators. The Development Agreement itself is between two parties – the Society and the Developer. Indeed, the Development Agreement is signed by only two parties. Every member of the Society is neither an independent party nor an independent signatory to the Development Agreement.

7. Faced with this situation, the Learned Counsel for the Applicants submitted that the expression "THE SOCIETY" in the title clause of the Development Agreement is deemed to mean and include, among others, all its members.

8. This Court is unable to be persuaded by this novel argument. The very same title clause also makes it clear that such deeming inclusion of members within the meaning of the expression "THE SOCIETY" would apply unless it is repugnant to the context and meaning of the term. Indeed, if this phrase used in the title clause is to be interpreted

in the manner canvassed, it would mean that the arbitration agreement in Clause 28 would be among 42 parties, namely, the Society, the Developer, and 40 members. Such a meaning would be belied by the phrase “each other”, and the concept of the Arbitral Tribunal of three arbitrators, as analysed above. The import of having 42 parties to the arbitration agreement and the scheme of two parties envisaged in the arbitration agreement, would lead to the inclusion of each of the members into the import of the arbitration agreement, resulting in such meaning of the term “THE SOCIETY” to be repugnant to its context and meaning.

9. Therefore, the reference to the term “each Party” in the arbitration agreement would never be able to partake the meaning of each of the 42 parties. The position obtaining from having 42 parties cannot co-exist with the position of two arbitrators, (one of which is nominated by each party), appointing the presiding arbitrator to form a three-member Arbitral Tribunal.

10. **It being an admitted position that the individual members are not signatories to the arbitration agreement**, the fundamental requirement under Section 7 of the Arbitration Act, that the arbitration agreement has to be in writing among the parties to the arbitration proceedings, has also not been met.

11. In this view of the matter, to avoid prolix elaboration on a rather short issue, no further discussion is warranted. A near-identical situation emerged in the case of **Ketan Champaklal Divecha vs. DGS Township Pvt Ltd. and Another** (“Divecha”) in which, a Learned Single Judge of this Court (Manish Pitale J.) has declared the law on the subject and articulated it threadbare, including facets of how individual members give up their individual desires and identity by submitting to the collective will of a housing society. This Court is in respectful agreement with the position articulated in paragraphs 13, 15, 19 and 21 in Divecha.

12. Consequently, the Applicants would not be able to invoke the jurisdiction of this Court under Section 11 of the Arbitration Act. Therefore, the Application being incapable of being considered by this Court, stands rejected and disposed of. No costs.

45. Thus, the Order in **Shankar Vithoba Desai** appears to be closer to the controversy at hand since the members were not signatories to the DA. However, here again the Order of this Court concentrates

more on the aspect of language of the arbitration clause and holds that individual member of society was not covered by the expression 'each party' used in the arbitration clause. Though this Court has noted the aspect of members not being signatories to the arbitration agreement contained in the DA, there is no elaborate discussion on that point. Also, the argument of non-signatory not being veritable party was not raised for consideration before this Court in **Shankar Vithoba Desai**.

46. Thus, both the judgments in **Ketan Champaklal Divecha** and **Shankar Vithoba Desai** turn on peculiarity of language in the arbitration clauses. In both the cases, the members took positions contrary to the one taken by the society and wanted to challenge the redevelopment process by raising claims against the developer. One of the issues before the Court was whether it was permissible for individual members to have their grievances against the redevelopment process arbitrated by taking a stand different than that of the society. The principle of impermissibility for individual members to separate themselves from the society by relying on judgment of the Apex Court in **Daman Singh** was pressed into service in both the cases essentially to find out whether the language of the arbitration clauses therein included individual members in the expression 'party' used under Section 7 of the Arbitration Act.

47. The Division Bench of this Court in **Avenues Seasons Properties LLP** (supra) also had an occasion to decide whether an individual member of a co-operative society, who is not a signatory to the arbitration agreement, can be roped in the arbitral proceedings by

invoking arbitration clause in the DA. In case before the Division Bench, the members had filed suits seeking a declaration that their bungalows were separate and independent and that resolution passed by the Society for redevelopment was illegal. The developer filed application under Section 8 of the Arbitration Act for seeking reference to arbitration by relying on Clause 23 of the DA. The developer's application was rejected, which led to filing of Appeal by the developer before the Division Bench. It was urged on behalf of the developer that there was mutual intention between the parties to bind signatories as well as non-signatories to the arbitration agreement and that member's identity is lost to the society. It was further urged that the term 'existing members' occurring in the arbitration agreement included the society and all its members, and not merely those who had signed the DA. This Court took note of the decisions in *Ketan Champaklal Divecha* and *Shankar Vithoba Desai*. The Division Bench has concluded that the plaintiffs in the suit had not signed the DA and were therefore not bound by the arbitration agreement. The Division Bench held in paras-14, 16, 21, 25 and 26 as under :-

14. We have gone through the Development Agreement. In the Preamble of the Development Agreement, the party of the First Part is the society and thereafter, a list of the members have been mentioned who are described as party of Second Part. The developer is described as party of Third Part. The names of the plaintiffs in both the suits are not mentioned in the Development Agreement. So also, the Development Agreement, apart from the society has been signed by all other members and admittedly, there is no signatures of both the plaintiffs. All the members have also inserted their initial on each and every page of the Development Agreement. Whereas the plaintiffs have admittedly not signed on each and every page of the Development Agreement neither their names are mentioned in the Development Agreement. In this background, it has to be seen whether the plaintiffs would be bound by the clauses of the Development Agreement.

16. Section 7(4) (a) of the Arbitration Act mentions that the Development Agreement must be signed by the parties. Section 8 of the Arbitration Act has been amended in the year 2016, by which Section 8 has been further clarified. In our view, it would have been a total different case if any of the member who has signed the Development Agreement, or society who has signed the Development Agreement would have filed the suits against the developer, and in such a suit the developer could have preferred an application under Section 8 of the Arbitration Act, for referring the dispute to arbitration.

21. The citation referred by the appellant of *Girish Mehta* (supra) lays down preposition of law that interim measures of protection may be granted against the Third Parties who are not parties to the Arbitration Agreement in a Petition under Section 9. **However, it does not extend its ratio to hold that arbitration proceedings can be commenced against Third Parties who are not parties to the Arbitration Agreement.** *Adityaraj Builders* (supra) reaffirms the said preposition of law laid down in *Girish Mehta* (supra). Even in *Adityaraj Builders* (supra), the Court was not dealing with an application filed under Section 8 of the Arbitration Act and it instead dealing with Writ Petition raising question of law with respect to stamping under Maharashtra Stamp Act. Hence, according to us, the ratio laid down in these two judgments does not in any event help the appellant.

25. Therefore, sum and substance of all these judgments is that either developer or the society, who has signed Development Agreement can invoke the arbitration agreement in case of dispute.

26. In the background of these facts, we are of the view that at this stage where a party who is not mentioned in the Development Agreement and who has not signed the contract, can not be referred to arbitration.

48. Thus, after the judgment of the Single Judge in *Shankar Vithoba Desai*, the Division Bench judgment in *Avenues Seasons Properties LLP* is directly on the point that a non-signatory to the DA cannot be made to arbitrate based on arbitration agreement contained in the DA. However again the propositions of ‘third-party beneficiary’ and ‘veritable party’ were not canvassed before the Division Bench in *Avenues Seasons Properties LLP*.

49. Also to be noted is the aspect that in **Ketan Champaklal Divecha** and **Shankar Vithoba Desai**, a converse situation was involved where individual members sought reference to arbitration against the society and the developer. However, in **Avenues Seasons Properties LLP** the reference was sought, *albeit* in Section 8 proceedings, by the developer.

50. There is one more judgment of Single Judge of this Court in **Harshad B. Shah** (supra) in which the members had invoked arbitration and had sought appointment of arbitrator under Section 11 for adjudication of disputes and differences arising in connection with redevelopment of the two flats owned by them. They were aggrieved by shortfall in payment of transit rent, shortfall in the area handed over to them and non-provision of amenities. It appears that the Applicants therein had not executed the DA while all other members of the society were apparently signatories thereto. However, the act of Applicants not signing the DA was not voluntary or conscious but the same was owing to practical difficulties since they were residents of USA and were not physically present to sign the DA. But they executed PAAA, which did not contain arbitration clause. This Court held that though they did not sign the DA, they had signed PAAA which contained incorporation of arbitration clause by reference. In the light of the peculiar facts, this Court held that it could not be discerned that the Developer and the society intended to arbitrate with every other member, save and except those members who were not physically present and could not sign the DA. This Court held that commitment to arbitration was writ large. It is

in the light of the above peculiar facts that this Court proceeded to appoint arbitrator. The relevant findings in *Harshad B. Shah* are extracted below for facility of reference:

5. On the face of it, these Applicants have not executed the Development Agreement while all other members of the Society have. This is sought to be explained by stating that the Applicants are residents (not nationals) of the United States of America, and therefore, they were not physically present to sign the PAAA, but they have bound themselves and conducted themselves in accordance with the Development Agreement.

6. In the peculiar factual matrix of this case, both the agreements being tripartite in the manner they were envisaged, although the Applicants are not physically signatories to the development agreement, they have indeed signed the PAAA which contains an incorporation by reference. Not only are the two agreements interlinked and complementary to each other, but also the privity of the parties is identical. Therefore, this is not a case that rests solely on the existence of the arbitration agreement in terms of incorporation by reference, the original Development Agreement containing the arbitration clause is the instrument that entails flow of specific benefits to the Applicant and that is firmed up further in the PAAA.

8. **In the peculiar facts and circumstances of the case, since the intended execution of both the agreements were meant to be by the same parties, it cannot be discerned that the Developer and the Society intended to arbitrate with every other member save and except for those who were physically unavailable and could not sign.** That they had a commitment to arbitrate is writ large on the record. Hypothetically even if the Applicants were to affix their signatures on the Development Agreement today, in the placeholders where their signatures are missing, it would complete execution of that agreement on their part and merely being a non-signatory ought not to stand in the way in the specific factual matrix of this case.

10. For the aforesaid reasons, I am satisfied that a case has been made out to refer the parties to arbitration in the specific and peculiar facts of this case without the need to be bogged down by whether the non-incorporation of the arbitration agreement in the PAAA has any adverse consequence for the Applicants. The non-incorporation of the explicit clause in the PAAA is also attributable to the fact that although all the members were in any case meant to be signatories to the

Development Agreement, these Applicants could not affix their signature merely because of their physical absence from the country.

11. Merely being a non-signatory despite being bound by the Development Agreement and conducting themselves in accordance with the Development Agreement, in my opinion, it cannot be said, applying the principles in *Cox and Kings* to hold that there was never an intention to arbitrate with any member.

(emphasis added)

51. Thus, in *Harshad B. Shah* this Court applied the principles in *Cox and Kings* and has held that a non-signatory who is bound by the Development Agreement and who conducted himself in accordance with the Development Agreement, it could not be said that there was never an intention to arbitrate with any member. Thus, the judgment in *Harshad B. Shah*, to some extent, recognizes the principle that intention to arbitrate can be inferred from conduct of members in consonance with the terms of DA. Ofcourse the judgment itself makes it clear that the appointment of arbitrator is done therein because of periciliary of facts of that case where failure to sign the DA was owing to non-presence of the Applicants in India and was not a conscious act.

52. Having considered the views expressed in various judgments of this Court on the issue of permissibility to adjudicate the disputes between signatory and non-signatory members to DA and the developer by invocation of arbitration clause in the DA, I now proceed to examine the various propositions canvassed on behalf of the Applicant including capacity of Respondent No.2 as a third party beneficiary under the DA and that Respondent No. 2 is otherwise a veritable party to the DA.

THIRD PARTY BENEFICIARY

53. The Applicant has sought to rope in Respondent No.2 in the arbitration on the ground that though Respondent No.2 is not a signatory to the DA, he is a beneficiary thereunder. It is contended that though the DA is signed and executed by the society, the members also stand benefited by execution and performance thereof. It is therefore contended that Respondent No. 2 cannot selectively seek to take benefits under the DA, but conveniently avoid the arbitration clause thereunder.

54. In the present case, the DA imposes a contractual obligation on the Applicant-Developer to demolish society's building, reconstruct new building and to provide to the members flats in the new building with 25% additional carpet area free of costs. The Applicant-Developer has also undertaken the obligation to pay transit rent and other benefits such as security deposit, shifting charges, etc. Though the society has executed the DA, the benefit of securing permanent alternate accommodation with 25% additional carpet area free of cost, transit rent, security deposit, shifting charges, etc. would ultimately be availed by the individual members. Respondent No.2, though has opposed the redevelopment process, would also stand benefited through the DA. Issue for consideration is whether a third party, who receives benefits under an agreement, which he has not signed, or has refused to sign, would be bound by all contractual stipulations in that Agreement, particularly the arbitration agreement contained therein ?

55. It is well settled position that an arbitration agreement is a separate and distinct agreement within an agreement. Thus, the arbitration agreement under Clause 38 of the DA constitutes a separate agreement than the DA itself. Merely because arbitration agreement finds itself incorporated in the form of a clause in the DA, it does not lose its existence as a separate and distinct agreement. Following this principle, it is difficult to accept the proposition that merely because an individual member may be a beneficiary of the DA executed on his behalf by the society, the same would automatically result in creation of arbitration agreement between such member and the Developer. Being bound by obligations under the DA in the capacity as a member of the society is a different and distinct concept than being party to the arbitration agreement.

56. In *Cox & Kings* (supra), the Constitution Bench has reiterated settled law that an arbitration agreement is a distinct and separate agreement from substantive commercial contract. It is held that to join a non-signatory to arbitration it must be answered whether non-signatory consented to the arbitration agreement as distinct from underlying contract containing arbitration agreement. It is held in paragraph 128 as under:-

128. **An arbitration agreement is a distinct and separate agreement from the substantive commercial contract which contains the arbitration agreement.** An arbitration agreement is independent of the other terms of the contract, to the extent that nullification of the contract will not lead to invalidation of the arbitration agreement. The concept of separability of the arbitration agreement from the underlying contract ensures that the intention of the parties to resolve the disputes through arbitration does not vanish merely because of a challenge to the legal validity of the underlying

contract.[Enercom (India) Ltd. v. Enercom GmbH,(2014)5 SCC1]. **To join a non-signatory to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the underlying contract containing the arbitration agreement** [Gary Bom. International Arbitration Law and Practice (3rd Edn.2021) at p.1545.]

(Emphasis added)

57. Therefore, merely because Respondent No.2 happens to be a beneficiary under the DA or that he is bound to act in terms with the principal agreement in the DA, the same would not create arbitration agreement between him and developer.

58. Reliance by Mr. Khandeparkar on judgment of the Apex Court in **M.C. Chacko** (supra) does not cut any ice. In that judgment, the Apex Court has held that there are well recognised exceptions to principle that a person not party to a contract cannot enforce the terms of contract. One of the recognised exceptions is where there are beneficiaries under the terms of contract. The Apex Court has held in paragraph 9 of the judgment as under:

9. Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. **It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, cannot enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant.** In Krishna Lal Sadhu v. Pramila Bala Dasi 2 Rankin, C.J. observed:

"Clause (d) of Section 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on

the ground of nudum pactum. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rightly excluded by the definition of 'promisor' and 'promisee'."

Under the English common law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: *Dunlop Pneumatic Tyre Co. v. Selfridge and Co.* **It has however been recognised that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual.** The Judicial Committee applied that rule to an Indian case *Khwaja Muhammad Khan v. Husaini Begam* 4 In a later case *Jamna Das v. Ram Autar* the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. **It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.**

(emphasis added)

59. Thus, in *M.C. Chacko*, the exception to the rule of impermissibility to enforce contract by non-party is recognised only where a trust is created under the contract and there are beneficiaries under the trust. Therefore, the judgment cannot be read to mean that in every case, a beneficiary under the contract can sue for enforcement of that contract, though not party thereto. However even if the judgment in *M.C. Chacko* is read the way Mr. Khandeparkar wants me to read, still it does not assist his case. The principle of beneficiary's right to enforce contract in relation to the DA can be applied, at the highest, for the purpose of enforcing contractual obligations arising out of the DA against Respondent No.2 on the basis of the recognised exception that he is beneficiary under the DA. However, as observed above, making the

contractual obligations applicable to a beneficiary is a concept different than extending arbitration agreement to such beneficiary.

60. Arbitration agreement creates an exception to common law remedies where parties agree to resolve disputes and differences through mechanism of private arbitration. However, this private dispute resolution mechanism cannot be enforced in absence of express agreement to arbitrate. Arbitration after all is founded on principle of party autonomy. A person, who has not expressly agreed for resolution of disputes through arbitration, cannot be forced to arbitrate. Therefore, existence of express arbitration agreement between the Applicant and Respondent No.2 for resolution of disputes is necessary and merely because Respondent No.2 can be forced to perform contractual obligations undertaken by the Society under the DA in his capacity as beneficiary, it would not mean that he has agreed to arbitrate with the Applicant or with the Society. Therefore, a member of a cooperative society, purely in his/her capacity as beneficiary of the DA, cannot avail the adjudicatory mechanism available under the DA. Conversely, such a beneficiary member cannot be forced to undertake the adjudicatory mechanism agreed under the DA, which he has not signed.

61. The Applicant has conflated the issue of enforcement of contractual obligations under the DA with the concept of availability of adjudicatory mechanism of private arbitration. If a member of cooperative society is denied any benefit flowing out of the DA, he/she may file a Suit for enforcement of obligations under DA. Similarly, if a beneficiary member of a society acts in conflict with contractual

obligations under the DA, the developer can sue the member for damages or for performance of contractual obligations. Both these actions initiated by the member or the developer are for enforcement of contractual obligations flowing out of the DA and mere factum of the member being non-signatory to the DA may not come in the way of enforcement of such contractual obligations. The issue however is about the forum before which such enforcement can be sought either by the member or by the developer. No doubt, ordinary remedy of Civil Court would be available both to member as well as to the developer, but for exercise of remedy of arbitration, there needs to be an express agreement to arbitrate. Therefore, the issue of entitlement to enforce contractual obligations by or against the beneficiary member to a DA cannot be conflated with the issue of forum before which such enforcement can be sought.

62. In my view, therefore, the capacity of a member of cooperative society as a beneficiary under the DA, though may create rights or obligations in his favour or against him, such capacity would not be sufficient to assume that such rights or obligations can be adjudicated through private arbitration.

VERITABLE PARTY

63. It is Applicant's contention that Respondent No. 2 is otherwise a veritable party to the DA and therefore the arbitration agreement contained therein would apply to him as well. The role as veritable party to the DA is sought to be attached to Respondent No. 2 on

the basis of his participation in performance of DA, composite nature of transaction in DA and PAAA, relationship between society (signatory) and Respondent No. 2 (non-signatory), mutual intent of parties and commonality of subject matter.

64. Section 2(1)(h) of the Arbitration Act defines the term ‘party’ to mean a party to arbitration agreement. Section 7 of the Act deals with ‘arbitration agreement’ and provides thus:

7. Arbitration agreement

- (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in—
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means] which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Thus, even Section 7 of the Arbitration Act provides that arbitration agreement means an agreement by the ‘parties’ to submit to arbitration all or certain disputes in respect of defined legal relationship. The combined effect of provisions of Section 2(1)(h) and Section 7 of the Arbitration Act is that ‘parties’ must agree to submit the disputes to arbitration. Therefore ordinarily, if there is no agreement with an entity who is not a ‘party’ to the arbitration agreement, the dispute cannot be

resolved by private arbitration. However, can it be contended that only an entity, who puts its signature on the document containing arbitration agreement would alone be a 'party' to arbitration agreement ? Section 7 of the Arbitration Act uses the term 'parties' and not 'signatories'. The law has evolved over the period of time and in certain cases even a non-signatory can be treated as veritable party to the arbitration agreement.

65. As per the dictionary, the word 'veritable' means 'real' or 'being in fact the thing named and not false, unreal or imaginary'. The word is often used to stress the aptness of a metaphor. Like *garden* becoming a veritable *jungle* in absence of the owner. In the context of 'party' under Section 2(1)(h) and Section 7 of the Arbitration Act, 'veritable' means a party which is the true and real party to the arbitration agreement, though he/she has not put the pen to paper.

66. The doctrine of veritable party has been evolved by the Supreme Court over the period of time through various judgments. The Constitution Bench judgment in ***Cox and Kings*** expounds the principle. The doctrine of veritable party seeks to include non-signatory parties to the arbitration agreement within the definition of the term 'parties' under Section 2(1)(h) r/w Section 7 of the Arbitration Act. The Apex Court has applied 'Group of Companies' doctrine to rope in non-signatories to the arbitration agreement to the arbitral proceedings. The judgment is rendered in a reference made to the larger Bench on account of doubt expressed in three Bench decision about the view in judgment in ***Chloro Controls India (P) Limited versus. Severn Trent Water***

Purification Inc and others¹⁸ in which the phrase ‘claiming through or under’ appearing in Section 45 of the Arbitration Act was relied upon to adopt ‘Group of Companies’ doctrine. In the three Judge Bench referral judgment, following issues were formulated for determination by the Constitution Bench in the two concurring judgments:

4.1 (a) Whether the phrase ‘claiming through or under’ in Sections 8 and 116 could be interpreted to include the ‘Group of Companies’ doctrine; and

4.2 (b) Whether the ‘Group of Companies’ doctrine as expounded by Chloro Controls Case (supra) and subsequent judgments is valid in law.

5.1 (a) Whether the Group of Companies Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision;

5.2 (b) Whether the Group of Companies Doctrine should continue to be invoked on the basis of the principle of ‘single economic reality’;

5.3 (c) Whether the Group of Companies Doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

5.4 (d) Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies Doctrine into operation even in the absence of implied consent.

67. The Apex Court answered the issues by holding that a non-signatory to the agreement could be subjected to arbitration without his/her prior consent on the basis of (i) mutual intent of parties (ii) relationship of a non-signatory to a party, which is a signatory to the agreement (iii) commonality of subject matter (iv) composite nature of transaction and (v) performance of contract. In paragraph 70 of the judgment in ***Cox and Kings***, Apex Court has dealt with the concept of ‘non-signatory’ to an agreement and has held as under:-

¹⁸ (2013) 1 SCC 641

70. The general method to figure out the parties to an arbitration agreement is to look for the entities who are named in the recitals and have signed the agreement. The signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the jurisdiction of an arbitral tribunal. **However, the corollary that persons or entities who have not signed the agreement are not bound by it may not always be correct.** A written contract does not necessarily require that parties put their signatures to the document embodying the terms of the agreement [Pollock and Mulla, The Indian Contract and Specific Reliefs Act (14 th edn, 2016) 235]. Therefore, the term “non-signatories”, instead of the traditional “third parties”, seems the most suitable to describe situations where consent to arbitration is expressed through means other than signature. **A non-signatory is a person or entity that is implicated in a dispute which is the subject matter of an arbitration, although it has not formally entered into an arbitration agreement** [Stavros Brekoulakis, ‘Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories’ (2017) 8 Journal of International Dispute Settlement 610]. **The important determination is whether such a non-signatory intended to effect legal relations with the signatory parties and be bound by the arbitration agreement.** There may arise situations where persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may intend to be bound by the terms of the agreement. In other words, the issue of who is a “party” to an arbitration agreement is primarily an issue of consent.

(Emphasis added)

68. Adopting a pragmatic approach to the concept of ‘consent’ and emphasizing need to interpret contracts in a manner that would give business efficacy, the Apex Court in **Cox and Kings** held that emphasis on formal consent would lead to exclusion of non-signatory from the ambit of arbitration agreement leading to impossibility of proceedings and fragmentation of disputes. The Court further held in paragraph 100 that the Courts and Tribunals cannot adopt a rigid approach to exclude all persons and entities, who through their conduct and relationship with

the signatory parties, intended to be bound by the underlying contract containing the arbitration Agreement. The Apex Court, in paragraph 101 of the judgment, applied the test of level of the non-signatory party's involvement to the extent of making the other party believe that it was a veritable party to the contract and to the arbitration agreement contained under it. It is held in paragraphs 100 and 101 as under:

100. Arbitration law is an autonomous legal field. While the main purpose of corporate law and contract law is imputation of substantive legal liability, the main purpose behind the law of arbitration is to determine whether an arbitral tribunal has jurisdiction over the dispute arising between parties to an arbitration agreement. On the one hand, the courts and tribunals cannot lightly brush aside the decision of the parties to not make a person or entity a party to the arbitration agreement. **The fact that the non-signatory did not put pen to paper may be an indicator of its intention to not assume any rights or responsibilities under the arbitration agreement. On the other hand, courts and tribunals cannot adopt a rigid approach to exclude all persons or entities who, through their conduct and relationship with the signatory parties, intended to be bound by the underlying contract containing the arbitration agreement.** The area of arbitration law not only concerns domestic law, but it also encompasses the international law, particularly when it pertains to the enforcement of international arbitral awards. Therefore, this Court ought to adopt a balanced approach without comprising on the basic principles of arbitration law, contract law, and company law to ensure that the resultant legal framework is consistent with internationally accepted practices and principles.

101. A formalistic construction of an arbitration agreement would suggest that the decision of a party to not sign an arbitration agreement should be construed to mean that the mutual intention of the parties was to exclude that party from the ambit of the arbitration agreement. Indeed, corporate entities have the commercial and contractual freedom to structure their businesses in a manner to limit their liability. However, there have been situations where a corporate entity deliberately made an effort to be not bound by the underlying contract containing the arbitration agreement but was actively involved in the negotiation and performance of the contract. **The level of the non-signatory party's involvement was to the extent of making the other party believe that it was a**

veritable party to the contract, and the arbitration agreement contained under it. Therefore, the group of companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual arrangements [Gary Born (n 44) 1568].

(Emphasis and underlining added)

69. The Apex Court thereafter applied the test of non-signatory party assuming the obligations to be bound by the actions of signatory and held in paragraph 108 of the judgment as under:-

108. In ***Chloro Control*** (supra), this Court rightly observed that a non-signatory could be subjected to arbitration provided the underlying transactions were with a group of companies and there was a clear intention of the parties to bind both the signatory as well as non-signatory parties to the arbitration agreement. This legal proposition has been reiterated in a series of subsequent decisions of this Court including ***Canara Bank*** (supra) and ***Discovery Enterprises*** (supra). Further, this Court in ***Cheran Properties*** (supra) held that the group of companies doctrine helps in decoding the layered structure of commercial arrangements to unravel the true intention of the parties to bind someone who is not formally a signatory to the contract, but has “assumed” the obligation to be bound by the actions of a signatory. This court explained the purport of the doctrine to discern the “true” party in interest:

“25. [...] The group of companies doctrine has been applied to pierce the corporate veil to locate the “true” party in interest, and more significantly, to target the creditworthy member of a group of companies. Through the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract.”

(Emphasis added)

70. In ***Cox and Kings***, the Apex Court then dealt with situation involving multi-party agreements and held that role of non-signatory

party in the conclusion, performance and termination of underlying contract containing arbitration agreement would make it 'true party' to the arbitration agreement. It is held in paragraph 111 as under:

111. The group of companies doctrine requires the courts and tribunals to consider the commercial circumstances and the conduct of the parties to evince the common intention of the parties to arbitrate. It is important to note that the group of companies doctrine concerns only the parties to the arbitration agreement and not the underlying commercial contract. **Consequently, a non-signatory could be held to be a party to the arbitration agreement without becoming a formal party to the underlying contract. The existence of a group companies is one of the essential factors to determine whether the conduct amounts to consent but membership of a group is not sufficient in itself.** This has been the consistent position of law, starting from the Dow Chemicals (supra) award, where it was observed that the common intention of the parties to bind the non-signatory party to the arbitration can be inferred from the "circumstances that surround the conclusion and characterize the performance and later the termination of the contracts." In other words, it was held that a non-signatory party could be considered as a "true party" to the arbitration agreement on the basis of their role in the conclusion, performance, or termination of the underlying contract containing the arbitration agreement.

(Emphasis added)

71. The Apex Court thereafter discussed factors such as commonality of subject matter, composite nature of transaction and performance of contract and held that those factors need to be cumulatively considered and analysed by Courts and Tribunals to identify intention of the parties to bind the non-signatory party. It is held in paragraph 116 as under:-

116. Since the group of companies doctrine is a consent based theory, its application depends upon the consideration of a variety of factual elements to establish the mutual intention of all the parties

involved. In other words, the group of companies doctrine is a means to infer the mutual intentions of both the signatory and non-signatory parties to be bound by the arbitration agreement. The relationship between and among the legal entities within the corporate group structure and the involvement of the parties in the performance of the underlying contractual obligations are indicators to determine the mutual intentions of the parties. **The other factors such as the commonality of the subject matter, composite nature of the transactions, and the performance of the contract ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties to bind the non-signatory party to the arbitration agreement.** The party seeking joinder of a non-signatory bears the burden of proof of satisfying the above factors to the satisfaction of the court or tribunal, as the case may be.

(Emphasis added)

72. Referring to Sections 6 and 7 of the Arbitration Act, dealing with Agreement by parties in respect of defined legal relationship, the Apex Court held that the legal relationship must be analysed in the context of underlying contract containing the arbitration agreement and that mere presence of commercial relationship between signatory and non-signatory party is not sufficient to infer 'legal relationship'. It is held that in case of multiple parties, necessity of a common subject matter and composite transaction is an important factual indicator for inferring definite legal relationship between the parties. It is held in paragraphs 117 and 120 as under:-

117. Section 7 of the Arbitration Act broadly talks about an agreement by the parties in respect of a defined legal relationship, whether contractual or not. Such a legal relationship must give rise to legal obligations and duties. In a corporate group, a company may have various related companies. **The legal relationship must be analysed in the context of the underlying contract containing the arbitration agreement. The nature of the contractual relationship can either be formally encrusted in the underlying contract, or it can also be inferred from the conduct of the**

signatory and non-signatory parties with respect to such contract. However, we clarify that mere presence of a commercial relationship between the signatory and non-signatory parties is not sufficient to infer “legal relationship” between and among the parties. If this factor is applied solely, any related entity or company may be impleaded even when it does not have any rights or obligations under the underlying contract and did not take part in the performance of the contract. The group of companies doctrine cannot be applied to abrogate party consent and autonomy. The doctrine, properly conceptualised and applied, gives effect to mutual intent and autonomy.

Xxx

120. **In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator.** An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.

(Emphasis added)

73. Dealing with composite transaction involving multiple agreements the Apex Court held in **Cox and Kings** that Courts and Tribunals must assess whether agreements are ‘consequential’ or in the nature of ‘follow-up’ to the principal agreement. It has held that parties can be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences ‘in connection with’ the main agreement and also disputes ‘connected with’ subject matter of the principal agreement. It is held in paragraphs 121 and 122 as under:-

121. In case of a composite transaction involving multiple agreements, it would be incumbent for the Courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in Canara Bank [MTNL v. Canara Bank, (2020) 12 SCC 767] observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.

122 The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences “in connection with” the main agreement and also disputes “connected with” the subject-matter of the principal agreement [Olympus Superstructures (P) Ltd v. Meena Vijay Khetan, (1999) 5 SCC 65]. In Chloro Controls (supra), this Court clarified that the principle of “composite performance” would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. **The common participation in the commercial project by the signatory and non-signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement.** Thus, the application of the group of companies doctrine in case of composite transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing so have evinced a mutual intent to be bound by the agreement to arbitrate.

(emphasis added)

74. In paragraph 126 of the judgment, the Apex Court held that involvement of non-signatory party in negotiation, performance or termination of contract is an important factor and that (i) active involvement in performance of contract (ii) conduct of non-signatory in harmony with the conduct of other members of the group (iii) appearance created by non-signatory party towards the other party would make a non-signatory a veritable party. It is held in paragraph 126 thus:

126. **Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons.** First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non-signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.

(emphasis and underlining added)

75. Delving deeper into the subject of involvement of non-signatory in performance of contract, the Apex Court held in paragraph 127 of the judgment in **Cox and Kings** that there needs to be positive, direct and substantial involvement in the negotiations, performance or termination of the contract and mere incidental involvement is not sufficient to infer consent of non-signatory to be bound by the underlying contract or its arbitration agreement. It is held in paragraph 127 thus:

v. Threshold standard

127. In Cox and Kings (supra), Justice Surya Kant observed that Reckitt Benckiser (supra) fixed a higher threshold of evidence for the application of the group of companies doctrine as compared to earlier decisions of this Court. This Court's approach is Reckitt Benckiser (supra) is indicative of the fact that the mere presence of a group of companies is not the sole or determinative factor to bind a non-signatory to an arbitration agreement. Rather, the courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. **The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or**

termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.

(Emphasis added)

76. The findings in para 128 of the judgment in **Cox and Kings** are of utmost relevance to the present case where the distinction between the arbitration agreement and substantive commercial contract is highlighted and it is held that to join a non-signatory to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the underlying contract containing the arbitration agreement. It is held in Para 128 thus:

128. **An arbitration agreement is a distinct and separate agreement from the substantive commercial contract which contains the arbitration agreement.** An arbitration agreement is independent of the other terms of the contract, to the extent that nullification of the contract will not lead to invalidation of the arbitration agreement. [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] The concept of separability of the arbitration agreement from the underlying contract ensures that the intention of the parties to resolve the disputes through arbitration does not vanish merely because of a challenge to the legal validity of the underlying contract. [Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] **To join a non-signatory to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the underlying contract containing the arbitration agreement.** [Gary Born, International Arbitration Law and Practice, (3rd Edn., 2021) at p. 1545.]

(emphasis and underlining added)

77. Holding that the factors laid down in judgment in **ONGC Limited Versus. Discovery Enterprises (P) Limited**¹⁹ must be applied holistically, the Apex Court held in paragraphs 132 and 133 of the judgment in ***Cox & Kings*** as under:

132. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under ***Discovery Enterprises*** (supra) are applied holistically. **For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject matter** would suggest that the claims against the non-signatory were strongly inter-linked with the subject matter of the tribunal's jurisdiction. **Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to the subject matter, are not actually strangers to the dispute between the signatory parties.**

133. We hold that all the cumulative factors laid down in *Discovery Enterprises* (supra) must be considered while determining the applicability of the group of companies doctrine. However, the application of the above factors has to be fact-specific, and this Court cannot tie the hands of the courts or tribunals by laying down how much weightage they ought to give to the above factors. This approach ensures that a dogmatic emphasis on express consent is eschewed in favour of a modern approach to consent which focuses on the factual analysis, complexity of commercial projects, and thereby increases the relevance of arbitration in multi-party disputes. Moreover, it is also keeping in line with the objectives of the Arbitration Act which aims to make the Indian arbitration law more responsive to the contemporary requirements.

(emphasis added)

¹⁹ (2022) 8 SCC 42

78. Both the sides have relied on the ratio of Constitution Bench judgment in ***Cox and Kings***. Mr. Khandeparkar has contended that a non-signatory can be subjected to arbitration if any of the following eventualities exist:

- (i) intention by non-signatory to effect legal relations with signatory party and be bound by arbitration agreement (*para-70*),
- (ii) conduct and relationship between signatory and non-signatory party exhibiting intention to be bound by underlying contract and arbitration agreement (*para-100*),
- (iii) level of involvement of non-signatory party in performance of contract to the extent of making other party believe that it is a veritable party (*para-101*),
- (iv) true intention of a party to bind someone who is not formally a signatory to the contract but has assumed the obligation to be bound by the actions of the signatory (*para-108*).
- (v) Role of non-signatory party in negotiation and performance of underlying contract contained in arbitration agreement making it 'a true party' to the arbitration agreement (*para-111*)
- (vi) conduct of non-signatory party relating to subject matter, contractual duties and obligations under the contract containing arbitration agreement (*para-120*)
- (vii) participation of non-signatory in performance of underlying contract (*para-123*).

- (viii) involvement of non-signatory party in negotiation, performance or termination of contract (*para-126*)

79. On the other hand, Mr. Tamboly has strenuously relied on findings in the judgment of **Cox and Kings** in para-127 of the judgment in which it is held that the '*The nature or standard of involvement of non-signatory in performance of the contract must be such that it has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement.*'

80. The judgment of Constitution Bench in **Cox and Kings** essentially deals with application of 'group of companies' doctrine for inferring consent or intent to arbitrate on the part of non-signatory party. The present case does not involve application of Group of Companies doctrine, in strict sense. However, arbitration agreement with Respondent No.2 member is sought to be inferred on the basis of assumption of contractual obligations of DA by him and active participation in its performance. However, if the tests laid down in paragraph 127 of the judgment in **Cox and Kings** are strictly applied, it is difficult to hold that Respondent No.2 would be a veritable party to the arbitration agreement. He has not voluntarily undertaken contractual

obligations arising out of the underlying contract, which in the present case is the DA. He has in fact opposed to the very execution of the DA. The case does not involve a scenario where Respondent No.2 has actively participated in the negotiations and execution of the DA, but has stood aside and not put his signature thereon. He was always opposed to execution of the DA. His conduct is not in harmony with the signatory i.e. the society. Therefore, it is difficult to believe that the nature or standard of his involvement in performance of the contract is such that he has actively assumed obligations or performance upon himself under the DA.

81. The acts of Respondent No.2 in receiving the of benefits under the redevelopment process and execution of PAAA are sought to be relied on for drawl of an inference of active participation in performance of the DA. In the present case, however, Respondent No.2, always opposed to execution of the DA, and was forced to execute the PAAA after possession of Flat No.10 was taken away from him by the Court Receiver towards implementation of Section 9 order passed by this Court. A member of a Society is paid transit rent only after he executes the PAAA with the developer. Therefore, once a member loses its shelter and is required to scout for alternate premises, he is bound to feel pressurized to execute PAAA upon execution of which, he becomes entitled to be paid rent/license fees in respect of the transit accommodation. Redevelopment process results in suspension of occupation rights in respect of the flats owned by the members till they are put back in possession of permanent alternate accommodations. To compensate the members/occupants of flats in a building going for

redevelopment, transit rent is paid by the developer. In the present case, the transit rent payable in respect of Flat No.10 of Respondent No.2 is Rs.60/- per sq.ft for first 12 months, Rs.65/- per sq.ft for further 12 months and Rs.70/- per sq.ft thereafter. The monthly transit rent is in the range of approximately Rs.40,000/-. Therefore, if Respondent No.2 was not to execute PAAA with the Applicant-Developer after losing his shelter, he would have been required to spend monthly amount of Rs.40,000/- towards rent in respect of transit accommodation. These factors usually force the members to execute PAAA with the developer.

82. Therefore, execution of PAAA by a dissenting member cannot always be inferred as a voluntary act towards performance of the DA. In my view, it cannot be inferred that Respondent No.2 has actively participated in performance of the DA or has voluntarily undertaken obligations arising therefrom. As held by the Apex Court in **Cox and Kings**, mere incidental involvement in performance of contract is not sufficient to infer the consent of non-signatory party to be bound either by underlying contract or by its arbitration agreement. Therefore, applying the ratio of the judgment in **Cox and Kings**, it is difficult to conclude that a dissenting member, who is not a signatory to the DA, would be a veritable party to the DA and in any case, to the arbitration agreement contained in the DA.

83. Mr. Khandeparkar has relied on judgment of the Apex Court in **Ajay Madhusudan Patel** (supra) on which reliance is also placed by Mr. Tamboly. In **Ajay Madhusudan Patel**, the Apex Court has broadly

followed and reiterated the principles of Constitution Bench judgment in ***Cox and Kings***. Referring to the ratio of the Constitution Bench judgment the Apex Court has held that the referral Court is required to *prima-facie* rule on the existence of arbitration agreement and whether the non-signatory party is a veritable party. It has further been held that considering the complexity of such determination, the Arbitral Tribunal is considered as a proper forum since it can decide whether a non-signatory party is a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. The Apex Court has further held that requirement of a written agreement under Section 7 of the Arbitration Act does not exclude the possibility of binding a non-signatory party if there is a defined legal relationship between the signatory and non-signatory parties. It has further held that Courts and Tribunals should not adopt a conservative approach to exclude all persons or entities who are intended to be bound by the underlying contract contained in the arbitration agreement. It has further held that intention of parties to be bound by the arbitration agreement needs to be gauged from circumstances that surround participation of non-signatory party in the negotiation, performance and termination of underlying contract. It is further held that the Arbitral Tribunal is the correct forum to rule on the issue of non-signatory's role as party to the arbitration agreement. The Apex Court held in paragraphs 64, 68, 69 and 71 as under:

64. Therefore, on the pivotal issue whether the non-signatories can be referred to arbitration, this Court took the view that the referral court is required to *prima facie* rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement. However, recognising the complexity of

such a determination, the arbitral tribunal was considered the proper forum since it can decide whether the non-signatory is a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. In this process, the nonsignatory must also be given an opportunity to raise objections regarding the jurisdiction of the arbitral tribunal in accordance with the principles of natural justice.

68.This Court in Cox and Kings (supra) held that the definition of “parties” under Section 2(1)(h) read with Section 7 of the Act, 1996 includes both the signatory as well as non-signatory parties. Persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may also intend to be bound by the terms of the agreement. Further, the requirement of a written agreement under Section 7 of the Act, 1996 does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties. Therefore, the issue as to who is a “party” to an arbitration agreement is primarily an issue of consent. Actions or conduct could be an indicator of the consent of a party to be bound by the arbitration agreement. This aspect is also evident from a reading of Section 7(4)(b) which emphasises on the manifestation of the consent of persons or entities through actions of exchanging documents.

69.The fact that a non-signatory did not put pen to paper may be an indicator of its intention to not assume any rights, responsibilities or obligations under the arbitration agreement. However, the courts and tribunals should not adopt a conservative approach to exclude all persons or entities who intended to be bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. The mutual intent of the parties, relationship of a non-signatory with a signatory, commonality of the subject matter, composite nature of the transactions and performance of the contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement.

71.It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the

contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement.

84. **ASF Buildtech** (supra) further builds on the principles enunciated in judgments of **Cox & Kings** and **Ajay Madhusudan Patel**. But for the present case, the judgment in **ASF Buildtech** is relied upon mainly in support of contention that the High Court must adopt hands-off approach and leave the issue of non-signatory's role as party to arbitration agreement to the Arbitral Tribunal. That issue is discussed separately in latter part of the judgment.

85. In **Mukesh Patel** (supra), a Single Judge of this Court has discussed the issue of applicability of principle of veritable party in relation to DA in the light of ratio of the judgments in **Cox and Kings** and **ASF Buildtech Private Ltd.** (supra). However, in **Mukesh Patel** the issue for consideration was slightly different. The case did not involve the issue of non-signatory member of a cooperative society being treated as a veritable party to the DA. The case before this Court involved disputes and differences between the two developers. The society had executed DA with the Applicant therein, which was terminated, and a new developer was appointed by the Society. The earlier developer invoked arbitration clause in the DA and sought to implead the new developer as a veritable party to the DA. This Court rejected the contention that the new developer could be a veritable party to the DA. Distinguishing the judgments in **Cox and Kings** and **ASF Buildtech Private Ltd.** (supra),

this Court held that for roping in a non-signatory to the arbitration agreement into arbitral proceedings, the elements such as ‘Group of Company’, ‘alter ego’ or ‘composite transactions’ need to be discernible. This Court held in paragraphs 17 to 24 of the judgment as under:

17. The reliance upon an isolated strand and sentence in ASF Buildtech is disingenuous inasmuch that judgement only builds further on the law declared in Cox and Kings, which in turn, declared the law on invoking the “group of companies” doctrine. First and foremost, it would be appropriate to examine the plain meaning of the term “veritable party” for purposes of examining the application of the law in Cox and Kings and in ASF Buildtech.

18. When the law allows a non-signatory to an arbitration agreement to be regarded as a “veritable party”, it essentially permits a non-signatory to be treated as a signatory to the arbitration agreement. Towards this end i.e. to ascertain if a party is a de facto signatory to an arbitration agreement even when such party is de jure not a signatory to the arbitration agreement, various factors and surrounding factual circumstances may be taken into account. The term “veritable” in the context of “party” means a party that is truly, genuinely, authentically to be regarded as a party to the agreement that such party has not signed.

19. When the Supreme Court declared the law in Cox and Kings, the Supreme Court did so in the context of whether a party that is part of the same “group of companies” to which a signatory belongs, could be regarded as a veritable party. The declaration of the law has to be seen in this context. Two or more companies forming part of a group of companies are evidently “related parties” – related by such degree of common ownership, management or control that would lead to their being treated as members of the same group.

20. This is precisely why even in accounting standards as universally applied all over the globe, dealings between two distinct and separate enterprises or entities but forming part of the same group, are treated with distrust, with the presumption being that such dealings are not informed by genuine arms-length rigorously negotiated contracts, unless specific stipulations for treating them as such are complied with. This is the foundational principle on which the “group of companies” doctrine is based – that in a contract between two parties, a third party that is related to a party to the contract regarded de facto as a party to the contract despite being a third party.

21. The law declared in Cox and Kings and elaborated in ASF Buildtech must be read in this light. The very opening paragraphs of Cox and Kings makes this abundantly clear. Therefore, when these judgements throw light on how third parties who may not fall within the scope of “group of companies” but are placed in the same position, the law declared must be appreciated in context. It is most inappropriate to pick and choose individual sentences from concluding summaries in the judgements ignoring the rest of the detailed articulation of what led to such summaries.

22. It is trite law on what a precedent is. To quote from Ravi Ranjan, which puts it succinctly:

41. It is well settled that a judgment is a precedent for the issue of law that is raised and decided. The judgment has to be construed in the backdrop of the facts and circumstances in which the judgment has been rendered. Words, phrases and sentences in a judgment, cannot be read out of context. Nor is a judgment to be read and interpreted in the manner of a statute. It is only the law as interpreted by in an earlier judgment, which constitutes a binding precedent, and not everything that the Judges say.

[Emphasis Supplied]

23. Therefore, when ASF Buildtech builds further on Cox and Kings, it expands the reasoning on discerning the veritable nature of a party but without losing sight of the need to establish that the third party to a contract is in a factual position that would for all practical purposes i.e. de facto, render him to be a party to that very contract. This is a vital and important threshold to be met. For a party to be regarded as a veritable party, one has to bring to bear circumstances that would show that such non-signatory is for all practical purposes to be regarded as a signatory. In fact, Paragraph 109 of ASF Buildtech is instructive and is reproduced below:-

“109. From the above exposition of law, it can be seen that there is nothing within the scheme of the Act, 1996, which prohibits or restrains an arbitral tribunal from, impleading a non-signatory to the arbitration proceedings on its own accord. So long as such impleadment is undertaken upon a consideration of the applicable legal principles — including, but not limited to, the doctrines of ‘group of companies’, ‘alter ego’, ‘composite transaction’, and the like —the arbitral tribunal is fully empowered to summon the non-signatory to participate in the arbitration. This autonomy stems from the broad jurisdiction

conferred upon arbitral tribunals under the Act, 1996 to rule upon their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, as enshrined under Section 16. The impleadment of a non-signatory, being fundamentally a question of jurisdiction and consent, Special Leave Petition (C) No. 21286 of 2024 Page 142 of 190 falls squarely within the province of the tribunal's powers, free from any statutory prohibition.”

24. Therefore, a judgement has to be read for it truly stands for and declares and not ignoring the very premise on which a non-signatory may be attempted to be roped in as a veritable party. **To rope a non-signatory to an arbitration agreement into arbitration proceedings, elements such as the “group of companies” or “alter ego” or “a composite transaction” or facts of that nature would need to be discernible. A historical and long-terminated contract cannot be allowed to rope in a party to a completely different contract executed years later, merely because the subject matter of the contract executed years later, had been the subject matter of the earlier contract.**

25.If the non-signatory is not a related party, not a group company or enterprise, has no commonality of ownership, management or control, is not alter ego of a party, and is not undertaking a transaction that is contingent upon or subservient to or a contact not forming part of a wider, integral and composite transaction, it would not be possible to invoke principles of making such person a veritable party.

(emphasis added)

86. The judgment of this Court in **Mukesh Patel**, though rendered in the context of redevelopment contract executed by the society, it involved a different issue of permissibility to rope in the new developer to arbitration proceedings initiated against the society by the earlier developer.

87. I have already taken note of judgment of this Court in **Harshad B. Shah** where this Court has appointed arbitrator for adjudication of disputes between the developer and non-signatory members to the DA. Those members had executed PAAA with the

developer, wherein there was no arbitration clause. The disputes pertained to shortfall in payment of transit rent, shortfall in area allotted towards permanent alternate accommodation and non-provision of agreed amenities. Even though there was no arbitration clause in the PAAA and though the Applicants had not signed the DA, thus Court proceeded to appoint arbitrator taking note of peculiar facts of that case where non-signing of DA was not a conscious act by the Applicants, and the act of non-signing was attributable to their physical non-presence in India at the relevant time. No doubt, this Court has made few observations in Para 11 of the judgment about existence of intent to arbitrate on account of non-signatories being bound by the DA and on account of their conduct in accordance with DA, the judgment is ultimately rendered considering the fact that absence of signatures by those members was a fortuitous circumstance and there always existed intention to arbitrate. The judgment itself makes it clear that the same is rendered in the peculiar facts of that case. It is well settled that judgment is an authority for what it decides and not what can be logically deduced therefrom. Therefore, the judgment in **Harshad B. Shah** cannot be read in support of an abstract proposition that in every case non-signatory member of cooperative society would become a party to arbitration agreement contained in the DA.

88. Thus, a member who dissents from the decision taken by the society and refuses to sign the DA, but is forced to act in terms of DA by application of principle of loss of individuality vis-à-vis society, cannot be treated as a veritable party to the DA and particularly to the arbitration agreement contained therein.

89. In the present case, Respondent No.2 never intended to act towards performance of the DA. He was opposed to execution thereof. Through his actions or conduct, he did not create an impression on the developer that he is also party to the DA. He was forced to execute the PAAA after he was evicted from the old flat. His participation in the redevelopment process is not voluntary. Therefore, there is absence of intent to arbitrate on the part of Respondent No. 2. In the PAAA, he has agreed for resolution of only the disputes arising out of PAAA through arbitration. Therefore, if there were disputes between parties relating to transit rent, area of alternate accommodation, etc, the same can be resolved through arbitration. However the disputes between Applicant and Respondent No. 2 do not emanate from PAAA and relate exclusively to the stipulations under the DA, which is not signed by Respondent No. 2. Therefore, it is difficult to accept the position that Respondent No. 2, who is a dissenting member and who has consciously not signed the DA, would be a veritable party to the arbitration agreement.

INEXTRICABLE CONNECTION BETWEEN DA AND PAAA

90. It is contended on behalf of the Applicant that DA and PAAA constitute multiple documents for effecting a common transaction and that therefore a common reference to arbitration needs to be made for adjudication of disputes and differences arising between the parties from both the instruments. In the present case, though the DA contains arbitration agreement, to which Respondent No.2 is not a signatory. He has however signed and executed PAAA with the Applicant-Developer, which contains arbitration agreement. There is no opposition on the part

of Respondent No.2 for conduct of arbitral proceedings in respect of the disputes arising out of PAAA. However, as observed above, both in invocation notice, as well as in the Application, the Applicant has specifically restricted the reference to arbitration only for adjudicating the disputes arising out of DA. As of now, there appears to be no dispute arising out of PAAA. However, since PAAA contains arbitration agreement, Applicant is seeking to interlink PAAA with DA and urges this Court to hold that both the documents are ultimately executed for completion of same transaction.

91. Reliance is placed on Division Bench judgment in **Adityaraj Builders** (supra) which involved the issue of payment of separate stamp duty on PAAA even after the same duty is paid on DA. The Division Bench of this Court held that an agreement with individual member is a part and parcel of, included in or covered by or subordinate to principal DA between the society and the developer. This Court recognized the principle of permissibility to execute several documents used to complete the transaction and held that all instruments can be treated as one. Applying the principle in **Girish Mulchand Mehta** (supra) this Court held that the juristic entity of Society cannot exist without members and that in executing the DA, the society acts for all its members even on behalf of those who may disagree. The Division Bench held in paragraphs 29 to 35 as under:

29. In the context of redevelopment and the rights of individual members of a cooperative society, the law itself has been well settled in different dimensions. There used to be an argument that individual society members have rights independent of the society in dealing with third parties. A Single Judge of this Court negated that contention:

Aditya Developers v. Nirmal Anand CHSL 3. This decision has been followed consistently. A Division Bench of this Court, speaking through AM Khanwilkar J, as he then was, in Girish Mulchand Mehta v. Mahesh S Mehta 4 specifically dealt with this argument where there were two sets of agreements or dealings, one with the society and the other with members, the members would have rights independent of the society. That judgment was specifically in the context of a development agreement with a society and separate agreements with members, and a situation where members had not signed the DA. The Court held that members were nonetheless bound by the terms of the DA (albeit for the purposes of the arbitration act). There is a long line of authority in this vein. We need not revisit it.

30. Whether in the context of arbitration and commercial law or in cases of transactions between a developer and a society has now evolved such that an agreement between an outsider and a society binds members of the society. Conversely, an agreement with an individual member is part and parcel of, included in, covered by or subordinate to the principal DA between the society and the developer. The situation is highlighted perhaps most dramatically when it comes to arbitration clauses. These are to be found in DA between the society and the developer. This was the case in Girish Mulchand Mehta when the Court was told that the arbitration clause bound only the society. Other provisions of the DA bound only the society. Because individual members had not signed the DA, therefore they were not bound by the arbitration agreement or certain other provisions of the DA. The Court had not the slightest hesitation in repelling this argument.

31. Lest it be brought into question again, we take the opportunity of now once again reaffirming Girish Mulchand Mehta in every single aspect. We most respectfully are in accord with the entirety of its findings.

32. This assessment of the law as pronounced by the Courts, fit exactly with the statutory contemplation under Section 4(1) of the Stamp Act, extracted above. The statute itself makes no distinction between several instruments being used to "complete the transaction". All instruments are treated as one. The Section may not use the words 'Master Agreement' but the statutory intent is plain and unmistakable.

33. Is there a meaningful distinction to be made between the society and its members in the context of a re-development by an outsider (a developer)? What precisely is the relationship between a DA by a developer with the society and PAAAs by the developer with the members?

34. The distinction that there exists a juristic entity known as the society even without its members is a submission that has only to be stated to be rejected. A cooperative society without members is a creature unknown to law.

35. This guides our approach to the needlessly nice distinction sought to be made between a DA and a PAAA. **In executing a DA, the society acts for all its members - even those who may disagree, because a society sometimes is run by majority.** The PAAA may provide for other matters such as bespoke questions of the amount of transit rent, individual flat numbers, distinct flat sizes, and so on. **But a PAAA is only a particularisation per member of the redevelopment contemplated by the DA itself. To view it differently, it is the society that goes into re-development. This is governed by the DA. There can, conceivably, be a DA without a single PAAA - for example by adding pages and pages of annexures, one per member - but there can never be society re-development only by PAAAs without a DA with the society. It is, therefore, a distinction without a difference.** The segregation is merely one of convenience. It is done thus for simplicity, clearer understanding. and ease of reference of all concerned.

92. Thus, in the context of liability to pay separate set of stamp duty on PAAA, the Division Bench of this Court in **Adityaraj Builders** has held that PAAA is executed only to particularize the details of alternate accommodation allotted to a member, which can also be incorporated in the DA. It is held that the redevelopment is contemplated and executed only by DA. It is also held that redevelopment process can be carried out only through DA, but it can never be carried out only through PAAA. Mr. Khandeparkar relies on these observations made by the Division Bench in support of his contention of inextricable interconnection between DA and PAAA.

93. There can be no doubt that the PAAA are executed only to give shape to and to particularize the details of allotment of alternate accommodation to society members. In that sense, PAAA cannot exist

without a DA. Therefore, the connection between the two documents is inevitable. However, the issue for consideration is whether the inextricable interconnection between DA and PAAA would mean that the parties who executed PAAA, also intended to agree for arbitration. And whether the principles discussed in the judgment about interconnection between the DA and PAAA can be extended to arbitration agreement under Section 7 of the Arbitration Act.

94. In my view, the above observations of the Division Bench in *Adityaraj Builders* are made in the context of provisions of Section 4(1) of the Maharashtra Stamp Act, 1958, which provides for payment of single stamp duty in respect of multiple documents executed to complete the transaction. To illustrate, if Agreement for Sale is executed and full stamp duty is paid under the Stamp Act thereon, another set of stamp duty is not required to be paid on Deed of Assignment, Sale Deed or Deed of Conveyance after completion of transaction of purchase of the property. Applying the provisions of Section 4 of the Stamp Act, this Court held that DA and PAAA are executed to complete the common transaction of demolition of old flat and allotment of new flat and that therefore once stamp duty is paid on DA, it is not necessary to once again pay separate stamp duty on PAAA. The judgment however cannot be read to mean that a member executing the PAAA would automatically become party to arbitration agreement contained in the DA, which he has not signed. Here again the well established position would apply that a judgment is an authority for what it decides and not what could be logically deduced therefrom. In my view, therefore the ratio of the

judgment of the Division Bench in **Adityaraj Builders** cannot be read to mean that execution of PAAA by a dissenting member would make him a veritable party to the arbitration agreement contained in the DA.

95. Mr. Khandeparkar has also relied upon the findings recorded by the Constitution Bench in paragraph 132 of the judgment in **Cox and Kings** wherein the Apex Court has considered the factor of 'composite nature of transaction' and 'commonality of subject matter' for the purpose of inferring involvement of non-signatory in performance of the underlying contract. Mr. Khandeparkar contends that DA and PAAA are multi-party documents, which are inextricably connected in the context of the same subject matter and the same are executed for completion of composite nature of transaction. However, what Mr. Khandeparkar misses is the point that all factors must be cumulatively applied as held by the Apex Court in paragraph 133 of the judgment in **Cox and Kings**. Therefore, mere commonality of subject matter of DA and PAAA and mere composite nature of transaction cannot be considered in isolation by ignoring the position that a dissenting member does not participate in negotiations or performance of the DA. Such dissenting member is opposed to execution of performance of the DA and this factor cannot be segregated and ignored by giving weightage to the factors of commonality of subject matter and composite nature of transaction. In fact, the factors of 'active participation in performance' and 'creation of impression on opposite party of taking over contractual obligations' would weigh more for deciding whether a non-signatory is a veritable party than the factors of composite nature of transaction and

commonality of subject matter. In my view, therefore merely because the subject matter of DA and PAAA is common and merely because the two instruments may ultimately effect composite nature of transaction, the same cannot be enough for inferring that dissenting member becomes either a veritable party to the DA or that the arbitration agreement in the PAAA would bind him to arbitration agreement in the DA.

‘INCORPORATION’ OF ARBITRATION AGREEMENT OF DA IN PAAA

96. It is contended by the Applicant that PAAA has been executed for giving effect to the terms contained in the DA and that Respondent No.2 has confirmed contractual stipulations in the DA while executing the PAAA. It is contended that reference to the DA in PAAA is not merely as and by way of narration but has been made with a view to incorporate terms thereof as a part and parcel of the said PAAA.

97. No doubt, PAAA is executed in furtherance of the DA executed between the Applicant and the Society. Clause 10(xvi) of the DA provides for Society being confirming party to the individual agreements to be signed between the developer and members of the society. Clause-10(xvi) of the DA reads thus:

xvi) The Society shall be confirming party to the individual agreement to be signed between the developer and the individual members of the society in respect of allotment of their new flat premises in the new building to be constructed by the developer. The said agreement shall be executed by the developer within 30 days of obtaining Intimation of Disapproval.

98. PAAA also refers to the DA executed between the Applicant and the Society at multiple places in the recitals. In paragraph 1 of the PAAA, Respondent No.2 has confirmed that the DA is valid, subsisting and binding on the parties even to the PAAA.

1. The parties hereto confirm that the Re-Development Agreement dated 02/07/2021, Power of Attorney dated 02/07/2021 and Irrevocable Consent given by the member to the Party of the first part is valid, subsisting and binding on the parties hereto.

99. However, confirmation of the DA by Respondent No. 2 and agreement to be bound by its terms and conditions by Respondent No.2, would at the highest, make the terms and conditions of the DA applicable to him. However, this reference to the DA in the PAAA would not mean incorporation of arbitration agreement in Clause 38 of the DA in the PAAA. The PAAA provides for arbitration in Clause 32 and parties have agreed to resolve only those disputes which arise out of PAAA by arbitration. If parties intended that disputes arising out of DA between the Developer and member should also be resolved by arbitration, arbitration Clause-38 in the DA ought to have been specifically incorporated in the PAAA. Following the ratio of the judgment of the Apex Court in M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.²⁰ and NBCC (India) Ltd. V/s. Zillion Infraprojects Pvt. Ltd.²¹, it is difficult to hold that arbitration agreement in Clause 38 of the DA has been incorporated in any manner in the PAAA.

²⁰ (2009) 7 SCC 696

²¹ SLP (CIVIL)NO. 7573 OF 2021 DECIDED ON 19/03/2024

WIDE WORDING OF ARBITRATION CLAUSES IN THE DA AND PAAA

100. It is sought to be contended that Clause 38 of the DA uses the expression ‘any dispute arising out of or in connection with’ and that the said expression needs to be given the widest amplitude and context. It is further contended that Clause 38 provides that the disputes can be in the context of ‘performance or any alleged breach of any provisions of this agreement’. It is further contended that the peculiarity of Clause 38 of the DA would include not just the disputes in the context of developer on one hand and society on the other, but would also extend to individual disputes which would have arisen on account of any defaults committed by any member in performance of any obligations stipulated under the DA. Reliance is placed on the judgment of the Apex Court in ***Giriraj Garg*** (supra) in support of the contention of giving widest amplitude and context to the expression ‘any dispute arising out of or in connection with’. Similarly, it is contended that Clause 32 of the PAAA would also provide for adjudication of disputes regarding ‘any matter, thing, deed or term of this agreement’ and that since DA is confirmed in paragraph 1 of the PAAA by Respondent No.2, the adjudicatory mechanism contained in Clause 32 of the PAAA would also extend to contractual obligations under taken by Respondent No. 2 under the DA.

101. In my view, none of the above submissions deserve acceptance in view of express intention of the parties to the two instruments. In the DA, the arbitration agreement is only between the Developer and the Society and Respondent No.2 has refused to sign the same. The intention of Respondent No. 2 not to be bound by arbitration

agreement is made clear by him by refusing to sign the DA. The contention that Respondent No.2 is a veritable party is already rejected. The contention of Respondent No.2 being party to arbitration agreement on account of his capacity as third-party beneficiary is also rejected. Therefore, it is too far-fetched to hold that the language employed in arbitration clauses in DA or PAAA is so wide that the same contemplates adjudication of disputes arising out of DA through arbitration mechanism agreed in PAAA. The intention of the parties is clear and manifest that if any dispute arises out of DA, the same would not be arbitrable and would go before Civil Court. Recognizing this position, Respondent No. 2 has filed Civil Suit in respect of his disputes with the developer. In my view, therefore even the language employed in arbitration clauses in DA and PAAA is not sufficient to infer any arbitration agreement between the Applicant and Respondent No.2 in respect of the disputes arising out of the DA.

MEMBER IS A CONSTITUENT OF THE SOCIETY

102. It is sought to be contended on behalf of the Applicant that even though the member loses his individuality *qua* the society and has no independent rights as held by the Apex Court in **Daman Singh** (supra), the position in law does not obfuscate the arbitration agreement that may arise in relation to dispute between the developer and the member. It is contended that **Daman Singh** recognizes an exception in respect of statutory rights. Reliance in this regard is placed on judgment of this Court in **Uday Dalal** (supra). The case involved objection by

individual members to the decision of General Body of the society to grant membership to new members. Relying on judgment in **Daman Singh**, it was sought to be contended that once General Body has taken a decision to grant membership, no individual member has a right to challenge it. This Court held that the Petitioners therein were not asserting any individual rights outside the statute and that they were merely asserting a right under the statute. This Court upheld the right of a member to challenge the decision of the society which violates a statutory provision. This Court has explained the ratio of the judgment in **Daman Singh** in para-45 of the judgment as under :-

45. The correct reading of Daman Singh, when applied to the present facts, is as follows (i) A member cannot challenge decisions which are otherwise lawful and taken within statutory limits. (ii) But a member can always challenge a decision that violates the Act, especially when the violation affects the democratic structure of the society. Since the petitioners allege violation of mandatory statutory provisions regarding the number of flats in the sanctioned plan, thereby tilting majority, their challenge is fully maintainable. Therefore, the judgment in Daman Singh does not bar the petitioners' locus. Instead, it reinforces that cooperative societies must act strictly within the four corners of statute. When they do not, members affected by the illegality have every right to seek judicial review.

103. The reliance on judgment in **Uday Dalal** (supra) far from assisting the case of the Applicant, can militate against it. In **Uday Dalal** this Court has recognized exceptions where a member can take a position different than the Society and the doctrine of 'loss of individuality' *qua* Society does not get attracted in such situation. However, reliance on **Daman Singh** and **Uday Dalal** is placed by the Applicant in support of the contention that right to arbitrate is a statutory right recognized under the Arbitration Act and that the same

can be availed of by contract. However, exercise of statutory right may be a reason for individual member to segregate himself from the society and in a given case, one may take a position that individual member can enter into agreement to arbitrate by separating himself from the society. The converse however cannot be true. A society entering into DA may bind individual member in respect of contractual obligations under the DA. However, the society cannot bind individual member to arbitration agreement. In my view, therefore the very argument sought to be raised on behalf of the Applicant, apart from being confusing, is misplaced. Merely because individual members can exercise statutory right to agree for arbitration, the same would not mean that Society can force a member to arbitrate with the developer.

HANDS OFF APPROACH BY REFERRAL COURT

104. It is urged on behalf of the Applicant that in the limited scope of inquiry under Section 11 of the Arbitration Act, this Court is supposed to determine only the *prima facie* existence of arbitration agreement and that whether Respondent No.2 can be treated as a veritable party to arbitration agreement in the DA must be left to be decided by the Arbitral Tribunal. It is contended that existence of arbitration agreement in PAAA is *prima facie* demonstrated and whether there is composite transaction and whether there can be adjudication of disputes arising out of DA and PAAA in a common reference is something which the Arbitral Tribunal would decide under Section 16 of the Arbitration act. Reliance is placed on judgment of the Apex Court in

ASF Build-tech Private Ltd. (supra) in support of the contention that Arbitral Tribunal be constituted and the issue as regard to capacity of Respondent No. 2 as veritable party be kept open for adjudication before the Tribunal.

105. In ***ASF Build-tech Private Ltd.*** (supra) the Apex Court referred to its judgment in ***Ajay Madhusudan Patel*** (supra) and held that existence of arbitration agreement *qua* non-signatory is in substance an issue of 'consent' and not one of 'existence of arbitration agreement' simplicitor. The Court further held that inquiry into non-signatory being bound by arbitration agreement is not an inquiry into formal or juridical existence of arbitration agreement itself and it is an exercise of determining fundamental concept of 'consent' within the existing arbitration agreement rather than existence of arbitration agreement itself. The Apex Court drew distinction between inquiry into existence of arbitration agreement and determining its existence *qua* the non-signatory. The Apex Court held that latter is an independent and substantive determination that falls outside narrow and circumscribed domain of referral Court's powers under Section 11 of the Arbitration Act. The Apex Court held in paragraphs-106, 107, 108, 109 and 110 of the judgment as under:

106. In ***Ajay Madhusudan Patel v. Jyotrindra S. Patel***, this Court comprising one of us, (J.B. Pardiwala, J.) further brought this distinction into perspective by observing that the issue concerning the "existence of the arbitration agreement *qua* the non-signatory" is, in substance an issue of "consent", as it involves determining the manifestation of consent of parties or entities through their actions and conduct of exchange of documents (sic or otherwise) in terms of Section 7 sub-section (4) of the 1996 Act, and not one of "existence of arbitration agreement" simpliciter, as such an issue *inter alia* requires

examination and thorough consideration of the underlying contract in addition to the arbitration agreement.

107. Thus, what has been conveyed in so many words by *Ajay Madhusudan Patel* is that the inquiry into whether a non-signatory is bound by an arbitration agreement is not, in its essence, an inquiry into the formal or juridical existence of the arbitration agreement itself. It is an exercise of determining the functional concept of consent within the existing arbitration agreement rather than the existence of the arbitration agreement itself. It is to cull out and discern the intention of various parties-whether signatories or otherwise-in relation to their willingness to be bound by the arbitration mechanism embedded in the contract.

108. Put differently, although notionally the exercise of determining "existence of the arbitration agreement qua the non-signatory", may, on the surface appear to be concerned with the arbitration agreement or clause in question, yet one must be mindful that the actual focus of such exercise lies in determining the existence of consent of the parties through fact patterns to such arbitration agreement or clause and not vice-versa. It is the existence of mutual consent to arbitrate-not the formal existence of the arbitration agreement-that is the heart of this inquiry.

109. There runs no umbilical cord between the exercise of determining the "existence of the arbitration agreement" and determining its "existence qua the non-signatory". The latter is an independent and substantive determination that falls outside the narrow and circumscribed domain of the Referral Court's singular obligation under Section 11 sub-section (6-A) of the 1996 Act and as such cannot be conflated to be one pertaining to or attacking the "existence" of an arbitration.

110. Even if it is assumed for a moment that the Referral Court in its jurisdiction under Section 11 of the 1996 Act has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of Cox & Kings, the Referral Court should only refrain but rather loathe the exercise of such discretion. Any discretion which is conferred upon any authority, be it Referral Courts must be exercised reasonably and in a fair manner. Fairness in this context does not just extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided. **Any determination even if prima facie by a Referral Court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the Referral Courts opine that a non-signatory in question is not a**

veritable party. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the Arbitral Tribunal to decide, as such party can always take recourse to Section 16 of the 1996 Act and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the Tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non-signatory is concerned be borne by the party who vexatiously impleaded it, but the Arbitral Tribunal would be well within its powers to also impose costs.

106. The Apex Court in *ASF Build-tech Private Ltd.* (supra) has further held that Arbitral Tribunal can always permit impleadment of non-signatory to arbitral proceedings on its own accord and that impleadment of a non-signatory is fundamentally a question of jurisdiction and consent and the same falls squarely within the province of Tribunal's power. It has held in para-125 of the judgment as under:

125. From the above exposition of law, it can be seen that there is nothing within the scheme of the 1996 Act, which prohibits or restrains an Arbitral Tribunal from, impleading a non-signatory to the arbitration proceedings on its own accord. So long as such impleadment is undertaken upon a consideration of the applicable legal principles-including, but not limited to, the doctrines of "group of companies", "alter ego", "composite transaction", and the like-the Arbitral Tribunal is fully empowered to summon the non-signatory to participate in the arbitration. This autonomy stems from the broad jurisdiction conferred upon the Arbitral Tribunals under the 1996 Act to rule upon their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, as enshrined under Section 16. The impleadment of a non-signatory, being fundamentally a question of jurisdiction and consent, falls squarely within the province of the Tribunal's powers, free from any statutory prohibition.

107. However, what is decided by the Apex Court in *ASF Build-tech Private Ltd.* is the principle that Arbitral Tribunal can also decide

the issue of impleadment of non-signatory in capacity as veritable party and that the *prima facie* determination by the referral court would not prevent the Tribunal from deciding the said issue as it is better equipped to do so. This is clarified in the subsequent judgment in ***HPCL Vs. BCL Secure Premises Pvt. Ltd.*** (supra). The Apex Court has clarified that the referral Court should be *prima facie* satisfied that there exists an arbitration agreement and as to whether non-signatory is a veritable party. It is further held that under Section 11 of the Arbitration Act, the referral Court is not deprived of its jurisdiction for examining whether non-signatory is in real sense a party to the arbitration agreement. The Apex Court has held in paragraph 25 and 26 of the judgment as under:

25. A careful reading of the above passage reveals that the referral court should be prima facie satisfied that there exists an arbitration agreement and as to whether the non-signatory is a veritable party. It further holds that even if the referral court prima facie arrives at the satisfaction that the non-signatory is a veritable party, the Arbitral Tribunal is not denuded of its jurisdiction to decide whether the non-signatory is indeed a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. The Court further reinforces this proposition by holding that as to whether the non-signatory is bound would be for the Arbitral Tribunal to decide.

26. But what is primordial is that it should be demonstrated prima facie before the referral court that the non-signatory is a veritable party. According to the “Illustrated Oxford Dictionary (Revised Edition 2003)” the word:

“veritable” means “real; rightly so called (a veritable feast)”, In substance, it means truly, genuinely or for all intended purposes. The referral court under Section 11 is not deprived of its jurisdiction from examining whether the non-signatory is in the real sense a party to the arbitration agreement. The answer thereof will depend on the facts and circumstances of each case after examining the documents pertaining thereto.

108. It must be noted that the judgment in ***HPCL Versus. BCL Secure Premises Pvt. Ltd.*** is rendered subsequent to the judgment in ***ASF Build-tech Private Ltd.*** and that one of the Judges (His Lordship Justice J.V. Pardiwala) is common to both the judgments. In fact, in para-33 of the judgment in ***HPCL Versus. BCL Secure Premises Pvt. Ltd.*** the Apex court took note of submission that ***ASF Build-tech Private Ltd.*** directs referral Court to leave the issue of non-signatory being a veritable party to the Arbitral Tribunal. After examination of the judgment in ***ASF Build-tech Private Ltd.***, the Apex Court held that the said judgment is in harmony with the judgments in ***RE: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and Stamp Act 1899***²², ***SBI General Insurance Co. Ltd. Versus. Krish Spinning***²³ and ***Cox and Kings Limited*** (supra) and that the judgment in ***ASF Build-tech Private Ltd.*** (supra) does not sing any discordant note. It has held in paragraphs 33 , 34 and 35 as under:

33. Mr. Nalin Kohli, learned Senior Advocate, made a strenuous effort to sustain the impugned judgment by relying on the judgment of this Court in ***ASF Buildtech Private Limited vs. Shapoorji Pallonji and Company Private Limited***⁵, to contend that the Referral Court should leave the matter to the Arbitral Tribunal to decide the issue. **We have carefully examined the judgment of this Court in ASF Buildtech (Supra), authored by one of us J.B. Pardiwala J. We hold that the judgment of this Court in ASF Buildtech (Supra) is in harmony with the judgments of this Court in Interplay (Supra), Krish Spinning (Supra), Cox & Kings (Supra), Ajay Madhusudan Patel (Supra) and ASF Buildtech (Supra) does not sing any discordant note.**

²² (2024) 6 SCC 1

²³ (2024) 12 SCC 1

34. In fact, ASF Buildtech (Supra) expressly notices the holding in Para 169 of Cox & Kings (Supra) to conclude that the Referral Court was required to prima facie rule on the existence of the arbitration agreement and whether the nonsignatory was a veritable party. All that it holds further in reiteration of the earlier line of judgments is that even if the Court holds that prima facie a party is a veritable party that will not foreclose the Arbitral Tribunal from concluding to the contrary after an intensive inquiry.

35. **This does not mean that where the Referral Court finds prima facie a party is not a veritable party still the matter is left to the Arbitral Tribunal. To hold so, would relegate the Referral Court to the status of a monotonous automation.** Further, to countenance such an extreme proposition would lead to disastrous consequences, where absolute strangers could walk into the Referral Court and contend that the matter has to perforce go to the Arbitral Tribunal for a decision on the veritable nature of the party. We are not prepared to accept such an extreme proposition.

(emphasis added)

109. Thus, if the Referral Court, *prima-facie*, finds that a party is not a veritable party, reference can be denied and the dispute relating to status of non-signatory as a veritable party need not always be left to be decided only by the Arbitral Tribunal.

110. In my view, therefore this Court need not adopt hands-off approach and leave the matter of arbitrability between the Applicant and Respondent No.2 to be decided by the Arbitral Tribunal when it is *prima-facie* satisfied that Respondent No.2 is not a veritable party to the DA.

SUMMATION AND CONCLUSIONS

111. A reference to arbitration cannot be made in absence of existence of arbitration agreement between parties. Ordinarily, 'parties' to arbitration agreement are those who have 'signed' the same. However,

Section 7 of the Arbitration Act uses the expression 'parties' and not 'signatories'. Therefore, in a given case, even a non-signatory can be treated as veritable party to arbitration. This principle applies when the doctrines of 'group of companies' or 'alter ego' or 'composite transaction', etc. can be invoked to gather intention of non-signatory to be bound by the obligations of the contract. As held by the Constitution Bench in **Cox and Kings**, a non-signatory can be subjected to arbitration by applying the tests of mutual intent, relationship, commonality of subject matter, composite nature of transaction, participation in performance of contract etc. However, participation in performance of contract by a non-signatory must be positive, direct and substantial so that the same must create an impression of assumption of obligations upon itself under the contract. To join a non-signatory to arbitration, court must satisfy itself that the non-signatory consented to the arbitration agreement as contradistinct from the underlying contract containing arbitration agreement. This is the decisive test for determining whether a non-signatory is a veritable party to the arbitration agreement.

112. In relation to development agreements executed for redevelopment of society's building however, a member, who dissents and who has no intention of signing the DA and opposes its execution, cannot become veritable party to the DA. His participation in the redevelopment process becomes an involuntary act, as he is forced to vacate the old flat and execute PAAA with the developer on account of imposition of will of majority. In such a case, his participation in the

redevelopment process cannot be a factor for inferring that he is a veritable party to the DA. He becomes beneficiary of DA, not by choice, but because of imposition of majority will on him. Therefore, his capacity as third-party beneficiary would not make him a variable party to the arbitration agreement contained in the DA. Far from any intention to arbitrate, the dissenting member actually does not want to act as per the DA, but is forced to do so by applying the principle of loss of individuality and by forcing the majority decision on him. Thus, the mutual intention to arbitrate cannot be inferred in case of a dissenting member.

113. Ultimate participation by a dissenting member in the redevelopment process, reaping of benefits by him under the DA and execution of PAAA, etc. may, at the highest, give rise to a presumption that he has finally consented to the underlying contract (DA), but as held in para 128 of the judgment in **Cox and Kings**, this would not necessarily mean his consent for arbitration agreement.

114. Thus, in redevelopment agreements, the key is to find out whether the non-signatory member has consented for arbitration. The consent or otherwise to arbitration can be determined by finding out as to whether the individual member is a participating member or dissenting member to the redevelopment process. In case of participating member signing the DA containing the arbitration clause, reference to arbitration may be permissible depending on the language of the arbitration clause and permissibility to take stand different than

the one taken by the society (**Ketan Champaklal Divecha** and **Shankar Vithoba Desai**). Where a participating member is not a signatory in individual capacity, either because the DA is signed in representative capacity by the society or because the participating member was not physically available for signature, reference to arbitration can still be made (**Harshad B. Shah**). This is because, in both eventualities, the participating members have intention to arbitrate. However, in case of a dissenting member, he never intends to act in terms of DA nor expresses any intention to arbitrate. He acts contrary to the DA. Therefore, no reference can be made for adjudication of disputes arising out of DA between non-signatory dissenting member and developer.

115. So far as the aspect of presence of arbitration agreement in the PAAA is concerned, the dissenting member agrees to resolve through arbitration only the disputes arising out of PAAA. His agreement for arbitration in PAAA cannot be inferred to mean that he has also agreed to resolve the disputes arising out of DA, which he has consciously not signed and executed. Therefore, if the disputes pertain purely to the DA, which the dissenting member has consciously not signed, presence of arbitration clause in the PAAA would not be a reason for making reference to arbitration. Composite nature of transaction effected vide twin documents of DA and PAAA may be a reason for foisting the contractual obligations arising out of DA on the dissenting member who has executed the PAAA, but the same cannot be a reason enough for making him bound by the arbitration agreement contained in the DA, which he has refused to sign.

116. While examining the issue of *prima facie* existence of arbitration agreement under Section 11 of the Arbitration Act, the Referral Court also needs to examine and hold as to whether the non-signatory is a veritable party. The Referral Court need not adopt hands-off approach in relation to the inquiry into the status of non-signatory as veritable party. However such inquiry can also be conducted by the arbitral tribunal under Section 16 of the Arbitration Act. (***ASF Buildtech and HPCL V/s. BCL Secure Premises Pvt. Ltd.***)

117. The conspectus of the above discussion is that Respondent No.2 is not a veritable party to the DA. Mere capacity of Respondent No.2 as beneficiary o the DA would not make him automatically a party to arbitration agreement contained in the DA. Applicability of contractual obligations in the principal contract (DA) to an individual member is a different and distinct concept than the concept of being governed by arbitration agreement contained in the principal contract. Therefore, even if any contractual stipulations provided for in the DA are held to be applicable to a dissenting member, the same would not *ipso-facto* make him party to arbitration agreement. To paraphrase, enforceability of DA against dissenting member is a different concept than applicability of arbitration agreement contained in the DA. Therefore, mere availing of benefits flowing out of DA would not make a non-signatory member party to arbitration agreement. Execution of PAAA by a member who has not signed the DA would again not make him a party to arbitration agreement contained in the DA. Composite nature of transaction or commonality of subject matter of DA and PAAA

would again not make non-signatory member party to the arbitration agreement in the DA. Arbitration agreement between developer and society does not get incorporated in PAAA executed between the developer and members. Thus, there is no agreement to arbitrate between the Applicant and Respondent No.2 and this Court is unable to make reference to arbitration. Consequently, the application deserves to be dismissed.

118. Before parting, this Court places on record appreciation for valuable assistance rendered by Mr. Tamboly and Mr. Khandeparkar, who have appeared in the Application at the request of the Court.

ORDER

119. Arbitration Application is accordingly dismissed. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]

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