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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO. 14 OF 2016

Urban Infrastructure Trustees Limited
(Registration No. 158050), a public company incorporated under the Companies Act, 1956 and a public company within the meaning of the Companies Act, 2013 and having its Registered Office at 46-47, 4th Floor, Maker Chambers VI, Nariman Point, Mumbai-400 021, acting in its capacity as Trustee of Urban Infrastructure Venture Capital Fund. **...Applicant**

Versus

1. Mr. Bhavik Bhimjiyani
of Mumbai Indian Inhabitant (Promoter and Director of Respondent No.1) residing at 13, Jeevan Villa, Neapeansea Road, Mumbai – 400 006.

2. Mr. Rashmi Bhimjiyani
of Mumbai Indian Inhabitant (Promoter and Director of Respondent No.1) residing at 13, Jeevan Villa, Neapeansea Road, Mumbai – 400 006.

3. (a) Mr. Leena Tulsi Bhimjiyani
(b) Mr. Anshul Tulsi Bhimjiyani
(c) Mr. Devang Tulsi Bhimjiyani
(d) Ms. Nehal Tulsi Bhimjiyani
all of Mumbai, Indian Inhabitants, residing at Ashford Apartment, 1st Floor, Flat No. 1, 1/26 A, Ridge Road, Malabar Hill, Mumbai 400 006
in their capacity as the heirs and legal representatives of Mr. Tulsi Bhimjyani, original Respondent No.3

4. Mr. Anshul Bhimjyani
of Mumbai Indian Inhabitant residing
at Ashford Apartment, 1st Floor,
Flat No.1, 1/26 A, Ridge Road, Malabar Hill,
Mumbai – 400 006. **...Respondents**

Mr. Sharan Jagtiani, Senior Advocate *a/w Mr. Siddharth Joshi, Mr. Hamd Bhati, Ms. Mumtaz Bandukwala i/b M/s Junnarkar and Associates, for Applicant.*
Mr. Prateek Seksaria, Senior Advocate *a/w Ms. Gulnar Mistry, Mr. Saket More, Mr. Rohit Agarwal, Mr. Shrey Shah, Ms. Mitali Dhoble i/b Vidhii Partners, for Respondent no.1.*
Ms. Gulnar Mistry *a/w Aksha Hudda i/b Hudda & Associates, for Respondent no.2.*
Mr. Rubin Vakil *a/w Mr. Aniket Malu, Mr. Prasad Nikale and Mr. Dev Mehta, for Respondent nos. 3(a), 3(b), 3(c), 3(d) and 4.*

CORAM	**ARUN R. PEDNEKER, J.**
RESERVED ON:	**03rd AUGUST 2026**
PRONOUNCED ON:	**12th AUGUST 2026**

JUDGMENT:-

1. By the present application under Section 11 of the Arbitration and Conciliation Act, 1996, the Applicant seeks appointment of an arbitral tribunal in terms of clause 41 contained in the Term Sheet dated 21.02.2007.

2. The brief facts leading to the filing of the application are noted below:

On 24.08.2006, **Neelkanth Township and Construction Pvt. Ltd. ("Neelkanth")** (formerly Respondent No.5 in the Section 11 Application) was incorporated. Neelkanth is engaged in the business of acquisition, development and sale of real estate projects. It is a case of the Applicant that Neelkanth was promoted by Respondent Nos. 1 to 4. The subscribers to the Memorandum of Association of Neelkanth were Respondent Nos. 1 to 4.

It is the case of the Applicant that in the year 2007, Respondent Nos. 1 to 4 approached the Applicant seeking investment in Neelkanth for financing a bungalow scheme in Kihim (Alibaug) ("**Project**"). Neelkanth was proposed as the special purpose vehicle to carry out the Project. Based on the representations made by Respondent Nos. 1 to 4, the Applicant were to make investment. It is the case of the Applicant that the Respondent Nos. 1 to 4 have participated in the negotiation stage of the transaction.

On 21.02.2007, the Applicant executed a Term Sheet with the Respondents to record the key terms and conditions which would apply to the investment made by the Applicant in Neelkanth. The Term Sheet was signed by Respondent No.1 for himself and as agent of the other promoters of Neelkanth who were operating as a group.

On 23.10.2007 and 28.03.2008, two 'Amendment Notes' were executed by which certain amendments were carried out to the Term Sheet, which include *inter alia* extension of the period by which the definitive agreements were supposed to be executed. It is the case of the Applicant that both of the 'Amendment Notes' were signed by Respondent No.1 on behalf of Neelkanth.

In the year 2007, following the completion of the due diligence undertaken by the Applicant and based on the assurances of the promoters of Neelkanth, i.e. Respondent Nos.1 to 4, the Applicant invested a total sum of Rs.51.50 Crores in Neelkanth. In accordance with the discussions had between the parties and pursuant to the investment made by the Applicant, Neelkanth purchased approximately 82 acres of land for the Project. It is the case of the Applicant that after this purchase, no effective development took place towards completion of the Project.

On 28.08.2008, a letter was addressed by the Respondents on the letterhead of Neelkanth regarding the investment of the Applicant in Neelkanth. It is the case of the Applicant that the letter clearly shows that the Respondents acted as one group in its dealings with the Applicant. The letter is signed by Respondent No.3 on behalf of Neelkanth. In the letter, Respondent Nos. 1 to 4 have accepted the position that the obligations under the Term Sheet to make investments in Neelkanth was binding on them.

On 29.01.2009, the Applicant addressed a letter to Respondent No.1 as promoter of Neelkanth. On 10.04.2009, the Applicant addressed a letter to Neelkanth and Respondent No.3 as a promoter to Neelkanth to refund the amount of the Applicant invested together with interest at the rate of 24% per annum.

On 24.03.2011, Respondent No.2 addressed a letter to Mr. Manoj Modi (a third party approached by the Respondents for resolution of disputes). This letter indicated the understanding of Respondents regarding their joint investment in the Project.

On 31.03.2011, financial statements of Neelkanth, reflected the investment made by the Applicant. The same was reflected in the further financial statement for the year ended 31.03.2014.

On 05.04.2011, the Applicant addressed a letter to Neelkanth with a copy to Respondent Nos.1 to 3 (described as "Promoters") calling upon the Respondents to furnish certain documents to the Applicant, failing which the Applicant would be compelled to take legal action.

On 30.10.2012, the Applicant addressed a letter to Respondent Nos. 1 to 3 in respect of the “Proposed Settlement Agreement between the Neelkanth Group (Promoters) and Urban Group (Investors). There were certain mediation talks between the parties. However, they failed.

On 27.02.2016, the Applicant, through its Advocate, sent a letter to the Respondents invoking arbitration in terms of the arbitration agreement contained in Clause 41 of the Term Sheet and appointment of a retired judge as the sole arbitrator to adjudicate upon all disputes and differences between the Applicant and Respondents.

On 28.03.2016 and 05.04.2016, replies were given by the Respondents denying the maintainability of the arbitration. On 14.06.2016, the present Application is filed. On 20.08.2018, an order of winding up of Respondent No. 5 was passed by the NCLT. Respondent No.5 was thereafter dropped on account of the order passed in SLP (C) No. 391-392 of 2019 with a request to the High Court to decide the Section 11 Application.

3. From the above facts, **Mr. Sharan Jagtiani,** the learned senior counsel appearing for the Applicant, submits that the Referral Court under Section 11 only needs to consider *prima facie* whether a valid arbitration agreement exists. He also submits that Clause 41 of the Term Sheet provides for arbitration and that the parties be referred to arbitration.

4. Per contra, **Mr. Prateek Seksaria,** the learned senior counsel appearing for Respondent No.1, submits that Respondent No.1 has not signed the Term Sheet dated 21.02.2007 in his personal capacity and the that Respondent No.1 is not named party or a signatory to the Term Sheet in his personal capacity. It is submitted that the Term Sheet is executed by and between Urban Infrastructure Opportunities Fund ("**UIOF**"), a scheme of Urban Infrastructure Venture Capital Fund ("**UIVCF**") and Neelkanth Township and Construction Pvt. Ltd. ("**the Company**"). In the Term Sheet, the Promoter is named as Shri Tulsibhai Bhimjyani (Org. Respondent No.3), the Investor is UIOF. The funds invested are for acquisition of the project land and land for development and shareholding pattern and Definitive agreements were to be entered into within a period of 30 days from the date of signing of the

Term Sheet. The Amendment Notes 1 and 2 indicates that the timeline was extended and the same was between the Company only and Urban Infrastructure Venture Capital Pvt. Ltd. ("**UIVCPL**"). The Term Sheet was extended till 30.04.2008 and stood expired by efflux of time. Notice dated 10.04.2009 issued by UIVCPL to the Company and Mr. Tulsi Bhimjyani (Org. Respondent No.3) calling upon them to refund the investment amount of Rs.51.50 crores. The Notice invoking arbitration is issued by one Urban Infrastructure Trustees Limited ("**UITL**") to the Company-Respondent No. 5 and Respondent Nos.1 to 4. UITL claims to be a trustee of UIVCF. UITL is not a party to the Term Sheet and/or the arbitration agreement. Respondent No.1 responded to the Invocation Notice informing UITL that Respondent No.1 is not a party to the arbitration agreement and the signature of Respondent No. 1 are only affixed in his capacity as a director of the Company. It is stated that Section 7 Application under Insolvency and Bankruptcy Code, 2016 filed by UITL was allowed by the NCLT, Mumbai and the Company was admitted into Corporate Insolvency Resolution Process. On 20.08.2018, upon an Application made by the RP of the Company, the NCLT ordered liquidation of the Company.

5. From the above facts, Mr. Seksaria submits that the Referral Court is required to be *prima facie* satisfied that the non-signatory is a 'veritable' party and submits that Respondent No.1 is not a 'veritable' party, as he signed the Term Sheet on behalf of the Company and not in his personal capacity.

6. It is further submitted that the Term Sheet is not a concluded contract and that there is no arbitration agreement between the parties. The Term Sheet envisages execution of Definitive Agreements, including the Share Subscription Agreement, the Shareholders' Agreement, and the Debenture Subscription Agreement. It is these Definitive Agreements which were to record the mutually agreed terms and conditions of investment, representations and warranties. The concluding paragraph of the Term Sheet demonstrates that the Term Sheet was merely a preliminary document, subject to due diligence checks and further negotiations between the parties.

7. It is further submitted that UIOF, the party to the Arbitration Agreement, is no longer in existence, and therefore, the Applicant has no locus to file the present application. The claim is hopelessly barred by limitation, as the Term Sheet dated 21.02.2007 expired on 30.04.2008, whereas the claim was only made on 27.02.2016. Hence, the claim is *ex facie* barred by limitation. Reliance is placed upon the Judgment of the Supreme Court in the case of ***State of West Bengal & Ors. vs. BBM Enterprises***[1] and it is submitted that the Referral Court has to take a *prima facie* view on the limitation and, if the claim is hopelessly barred by limitation, this Court should refrain from referring the parties to arbitration.

8. It is further submitted that the Applicant and its group entities made investments in different companies of the Neelkanth Group. The parties engaged in mediation/settlement talks in respect of these investments as the Applicant sought an exit from the Neelkanth Group investee companies. Reliance is placed upon the Judgment dated 01.09.2023 passed by the learned Single Judge of this Court, whereby the learned Single Judge dismissed the referral of time-barred claims to arbitration.

9. It is further submitted that Exhibits D and G demonstrates that the Applicant and its group entities made investments in different companies of the Neelkanth Group for projects in Alibaug, Panvel and Pune. The investments are in Neelkanth

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Township and Construction Pvt. Ltd. and Neelkanth Realty Pvt. Ltd. which is a distinct company altogether. “We as a Group” is descriptive of the family’s aggregate exposure across several companies and projects. It is not an acknowledgment by any individual of being a party to the Term Sheet or intending to be a “Promoter” as defined in the Term Sheet. The Company’s letter under one director’s signature does not indicate that any other parties were bound or intended to be bound by the Term Sheet in question. The third party’s assistance taken with respect of all investments by the Applicant and its group entities and not merely under the Term Sheet dated 21.02.2007.

10. I have also heard **Ms. Gulnar Mistry**, the learned counsel appearing Respondent No.2, who would adopt the submissions canvassed by Mr. Seksaria, the learned counsel appearing for Respondent No.1.

11. **Mr. Rubin Vakil**, the learned counsel for Respondent Nos.3 and 4, submits that Respondent Nos.3 and 4 are neither a party nor a signatory to the Term Sheet and have not authorized anyone to enter into the Term Sheet in their behalf. There is no arbitration agreement existing between the Applicant and Respondent Nos.3

and 4 and their names should be deleted from the present Application. It is not permissible to appoint an arbitrator / arbitral tribunal to adjudicate the dispute between persons in absence of a signed arbitration agreement or the mutual consent of persons.

12. Having considered the rival submissions, the following issues arise for consideration:

(i) Whether the Term Sheet dtd. 21.02.2007 is a concluded contract with arbitration clause or whether the Term Sheet only makes a reference to a future contract and has no binding effect on the parties?

(ii) Whether the Applicant has locus to file the present Application, i.e., whether it can represent the party to the Term Sheet?

(iii) Whether this court can examine the issue of limitation of the underlying claim made in section 11 application? And If yes, whether the claim made in the present application is barred by limitation?

(iv) Whether the Respondents can be referred to arbitration as signatory and non-signatory parties to the Term Sheet?

13. At the outset, this Court would note the Term Sheet and the relevant clauses thereof. The Clause 1 of the Term Sheet is noted below:

> *"The intent of this term sheet (this "**Term Sheet**") is to set out the key terms of investment by **Urban Infrastructure Opportunities Fund (UIOF)** Scheme of the Urban Infrastructure Venture Capital Fund, a SEBI registered venture capital fund, managed by Urban Infrastructure Venture Capital Private Limited (the "**Investor**") in **Neelkanth Township and Construction Pvt. Ltd.** (the "**Company**")."*

14. The name of the Promoter is mentioned as under:

> *"Sh Tulsibhai Bhimjyani"*

15. The name of the Investor is mentioned as under:

> *"Urban Infrastructure Opportunities Fund (a Scheme of the Urban Infrastructure Venture Capital Fund)"*

16. The arbitration clause, is Clause 41, which reads as under:

> *"41. Arbitration: Any dispute or difference, if not resolved amicably, shall be referred to arbitration in accordance with the Arbitration and Conciliation Act, 1996. The place of arbitration shall be Mumbai, India. The arbitral tribunal shall be composed of a sole arbitrator if the Parties so agree, and failing such the arbitral tribunal shall comprise three arbitrators, each Party appointing one arbitrator (i.e. the Investor appointing one arbitrator, and the Promoters and the Company collectively appointing one arbitrator) and the third arbitrator shall be selected by the two arbitrators so appointed."*

17. It is signed as under:

> *"Promoters*
> *By: -sd-*
> *Name: Bhavik Bhimjiyani*
> *Title: Neelkanth Township and Construction Pvt. Ltd.*

<u>Investor</u>
By: -sd-
Name: Trevor Machado
Title: Associate Director
Urban Infrastructure Venture Capital Pvt. Ltd.
<u>Company</u>
By: -sd-
Name: Bhavik Bhimjiyani
Title: Director"

18. In the instant case, the Applicant, Urban Infrastructure Trustees Limited, is acting in its capacity as the sole trustee of UIVCF. UIVCF was registered with the Securities and Exchange Board of India as a Venture Capital Fund under the then prevailing Securities and Exchange Board of India (Venture Capital Fund) Regulations, 1996. UIOF was a scheme of UIVCF. UIOF was wound up with effect from 31.01.2023. UIVCF continues as a private trust and the winding up of UIOF does not affect the rights and obligations of the Applicant as the trustee of UIVCF.

19. In this regard, the submissions of Respondent No.1 is that since the Applicant is the sole trustee of UIVCF, it cannot claim the rights of the wound-up UIOF. *Prima facie,* this court finds that the Applicant being the sole trustee of UIVCF, has the right to invoke the arbitration agreement and file the present Application. This finding is only limited for the purpose of deciding the Section 11 Application and the issue may be further contested before the

Arbitrator. The Applicant prima facie has locus to file the present application.

20. Coming to the next submission that the Term Sheet is merely a loose terms on which a furture agreements were to come into existance and since no future agreement was executed, the Term Sheet met with the natural death after efflux of time and there was no concluded contract between the parties. It is noted from the Exhibits E, F and N that the applicant has invested an amount of about Rs.51.50 crores and the investment of the Applicant is noted by the Respondents in the various communications. Thus, one of the parties have acted on the agreement in the Term Sheet and the applicant has made investment in persuance of the Term Sheet clauses. In the event of the failure of the parties to further execute full fledged agreements, the intention of the parties was clear from the arbitration clause in the Term Sheet that the disputes arising under the Term Sheet would be referred to arbitration.

21. Reliance is placed by the learned council for the Respondent in the case of ***PSA Mumbai Investments Pte. Limited vs. The Board***

of Trustees of the Jawaharlal Nehru Port Trust and Ors.[2] wherein the Supreme Court at paragraph 15, 16 and 18 held as under:

> “15. Under Section 7 of the Indian Contract Act, 1872 in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. It is clear on the facts of this case that there is no absolute and unqualified acceptance by the Letter of Award - two or three very important steps have to be undergone before there could be said to be an agreement which would be enforceable in law as a contract between the parties.
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> 16. Mr. Amit Sibal, learned Senior Advocate, is wholly correct in relying upon both Dresser Rand S.A. (supra) and Bharat Sanchar Nigam Limited (supra). In Dresser Rand S.A. (supra) it was found, on the facts, that unless a purchase order was placed, there would be no agreement between the parties. Everything that took place before such purchase order was placed would only be a prelude to a contract which cannot be confused with the contract itself. This was set out in para 32 of the judgment as follows:
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> > 32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed, is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself. The purpose of Revision 4 dated 10-6-1991 was that if and when a purchase order was placed by BINDAL, that would be governed by the "General Conditions of Purchase" of BINDAL, as modified by Revision 4. But when no purchase

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2 MANU/SC/0990/2018

> order was placed, neither the "General Conditions of Purchase" nor the arbitration Clause in the "General Conditions of Purchase" became effective or enforceable. Therefore, initialing of "Revision 4" by DR and BINDAL on 10-6-1991 containing the modifications to the General Conditions of Purchase, did not bring into existence any arbitration agreement to settle disputes between the parties.

> 18. However, Mr. Dave, strongly relied upon the judgment in Kollipara Sriramulu (Dead) by his LR (supra). **This judgment did indeed state that it is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties if, in fact, there is such a bargain. The judgment then went on to state that "there are, however, cases whether the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed."**

22. In the aforesaid case of ***SA Mumbai Investments Pvt. Limited*** (supra), the Supreme Court, on the facts, found that there was no concluded contract as the purchase order was not placed and the terms were to govern the purchase order. In the instant case, there is an arbitration clause in the Term Sheet and the parties have acted upon the Term Sheet to an extent as provided in the Term Sheet, thus, any dispute arising therefrom is required to be adjudicated as provided in the arbitration clause of the Term Sheet. The Term Sheet is not merely the terms of future agreement that would come into existance, but the working of the Term Sheet itself provides for arbitration. This Court is *prima facie* of the view that there is an arbitration clause in the Term Sheet and the parties have acted upon the Term Sheet and thus, the dispute arises from the Term Sheet has to be referred to the Arbitrator. The parties may take up the matter further before the arbitrator.

23. Coming to the issue of limitation, reliance has been placed upon the decisions in ***In Re: Interplay Between Arbitration Agreement under The Arbitration and Conciliation Act, 1996 and The Indian Stamp Act, 1899,***[3] ***SBI General Insurance Company Ltd. Vs. Krish Spinning,***[4] ***Aslam Ismail Khan Deshmukh Vs. Asap Fluids Pvt. Ltd. & Anr.***[5] *and* ***State of West Bengal & Ors. vs. BBM Enterprises*** *(supra).*

24. Referring to cases of ***In Re: Interplay*** *(supra)* and ***Krish Spinning*** *(supra)*, This Court in the case of ***Palwinder Singh Samra vs. Sukhvinder Singh Samra***[6] at paragraph 10 and 13 observed as under:

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3 (2024) 6 SCC 1
4 (2024) 12 SCC1
5 (2025) 1 SCC 502
6 MANU/MH/5148/2026

"10. The scope of judiciary interference under the 1996 Act has undergone a significant change after the judgment of the Supreme Court in the case of ***In Re: Interplay*** *(supra) and it has been explained further by a Three Judge Bench Judgment in the case of* ***SBI General Insurance Company Ltd.*** *(supra). The relevant paragraphs of the judgment in* ***SBI General Insurance Company Ltd.*** *(supra) dealing with the scope of enquiry including on an issue of limiation in an application under Section 11 is noted as under:*

"113. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

117. In view of the observations made by this Court in Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re, it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia and adopted in NTPC Ltd. v. SPML Infra Ltd. that the jurisdiction of the Referral Court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re.

131. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the 1996 Act. Further, we also held that it is the duty of the Referral Court to examine that the application under Section 11(6) of the 1996 Act is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963 i.e. 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in para 57 of the said decision that: (Arif Azim case , SCC p. 340)

130. In Arif Azim, while deciding an application for appointment of arbitrator under Section 11(6) of the 1996 Act, two issues had arisen for our consideration:

130.1. (i) Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?

130.2. (ii) Whether the Court may decline to make a reference under Section 11 of the 1996 Act where the claims are ex facie and hopelessly time-barred?

131. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the 1996 Act. Further, we also held that it is the duty of the Referral Court to examine that the application under Section 11(6) of the 1996 Act is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963 i.e. 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in para 57 of the said decision that: (Arif Azim case, SCC p. 340)

> *"57. the limitation period for filing a petition under Section 11 (6) of the 1996 Act can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on the part of that other party in complying with the requirements mentioned in such notice."*

132. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim do not require any clarification and should be construed as explained therein.

133. On the second issue it was observed by us in para 68 of Arif Azim case that the Referral Courts, while exercising their powers under Section 11 of the 1996 Act, are under a duty to "prima facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process".

134. Our findings on both the aforesaid issues have been summarised in para 92 of the said decision thus: (Arif Azim case, SCC p. 357)

> *"92. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the 1996 Act, the courts should satisfy themselves on two aspects by employing a two-pronged test first, whether the petition under Section 11(6) of the 1996 Act is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an Arbitral Tribunal."*

135. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia and NTPC Ltd. v. SPML Infra Ltd. However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re.

136. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the 1996 Act, the Referral Court should limit its enquiry to examining whether Section 11 (6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim. As a natural corollary, it is further clarified that the Referral Courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time-barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in

Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re."

13. ***Thus, the issue of limitation as regards the claim made in the arbitration is concerned, the same cannot be inquired into by the Referral Court while considering the application under Section 11(6)****. Limitation period for claim made under arbitration stops on service of notice under Section 21 of the Act on the Respondent. Section 11 application is required to be filed within 3 years of process under section 21. The reference court can only examine limitation for filing applicsation under section 11(6) as within of three years from the service of notice under section 21. The arbitral claim being ex-facie barred by limitation cannot be examined by the reference court."*

25. Also, the three-judges bench of Supreme Court in the case of ***Asap Fluids Pvt. Ltd. & Anr.*** (supra) with regard to the underlying claim made in section 11 application held as under:

"33. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether we should decline to make a reference under Section 11(6) of the 1996 Act, by examining whether the substantive claims of the petitioner are ex facie and hopelessly time-barred?

38. This very Bench in Arif Azim Co. Ltd. v. Aptech Ltd. was concerned with the following two issues while deciding an application for the appointment of an arbitrator under Section 11(6) of the 1996 Act, - first, whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the 1996 Act?; and second, whether the court may decline to make a reference under Section 11 of the 1996 Act, where the claims are ex facie and hopelessly time-barred.

39. On the first issue in Arif Azim, it was observed that Section 11(6) of the 1996 Act, would be covered by Article 137 of the Limitation Act, 1963 which prescribes a limitation period of 3 years from the date when the right to apply accrues. The limitation period for filing an application seeking appointment of an arbitrator was held to commence only after a valid notice invoking arbitration

40. On the second issue in Arif Azim[3], which is identical to the issue raised in the present petitions, it was observed that, although, limitation is an admissibility issue, yet it is the duty of the courts to prima facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process. The findings on both the issues were summarised as thus: (SCC p. 357, para 92)

> *"92. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the 1996 Act, the Courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under Section 11(6) of the 1996 Act is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the Court may refuse to appoint an Arbitral Tribunal."*
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> *(emphasis supplied)*

*41. **However, subsequently, very pertinent observations were made by a seven-Judge Bench of this Court in Interplay between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899,** In re regarding the scope of judicial interference at the Section 11 stage with a view to give complete meaning to the legislative intention behind the insertion of Section 11(6-A) of the 1996 Act. This Court referred to the Statement of Objects and Reasons of the 2015 Amendment Act and opined that the same indicated that the referral Courts shall "examine the existence of a prima facie arbitration agreement and not other issues" at the stage of appointment of an arbitrator. These "other issues" would include the examination of any other issue which has the consequence of unnecessary judicial interference in the arbitral proceedings. The relevant observations are reproduced hereinbelow: (SCC pp. 103-104, paras 219-20)*

> *"219. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:*
>
> > *'6. (iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible*

and an endeavour should be made to dispose of the matter within a period of sixty days.

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues.'

220. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and "not other issues"". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral Court at the Section 8 or Section 11 stage."

(emphasis supplied)

42. In light of the aforesaid observations, the ratio of Arif Azim[3] was reconsidered by this very Bench in SBI General Insurance Co. Ltd. v. Krish Spg. The position of law was clarified as thus: (Krish Spg. case, SCC paras 131-32 & 135-37)

"131. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the 1996 Act. Further, we also held that it is the duty of the referral Court to examine that the application under Section 11(6) of the 1996 Act is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963 i.e. 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in para 57 of the said decision that: (Arif Azim cases, SCC p. 340)

'57. the limitation period for filing a petition under Section 11(6) of the 1996 Act can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.'

132. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim do not require any clarification and should be construed as explained therein.

135. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia[2] and NTPC v. SPML Infra Ltd. However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in Interplay between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re.

136. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the 1996 Act, the referral Court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim. As a natural corollary, it is further clarified that the referral Courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time-barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in Interplay between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re.

137. The observations made by us in Arif Azim are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim, which shall be *given full effect to notwithstanding the observations made herein."*

(emphasis supplied)

43. Therefore, while determining the issue of limitation in the exercise of powers under Section 11(6) of the 1996 Act, the referral Court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not. At this stage, it would not be proper for the referral Court to indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time-barred. Such a determination must be left to the decision of the arbitrator.

44. After all, in a scenario where the referral Court is able to discern the frivolity in the litigation on the basis of bare minimum pleadings, it would be incorrect to assume or doubt that the Arbitral Tribunal would not be able to arrive at the same inference, especially when they are equipped with the power to undertake an extensive examination of the pleadings and evidence adduced before them.

45. As observed by us in Krish Spg., the power of the referral Court under Section 11 must essentially be seen in light of the fact that the parties do not have the right of appeal against any order passed by the referral Court under Section 11, be it for either appointing or refusing to appoint an arbitrator. Therefore, if the referral Court delves into the domain of the Arbitral Tribunal at the Section 11 stage and rejects the application of the claimant, we run a serious risk of leaving the claimant remediless for the adjudication of their claims.

48. The primary issue that has been canvassed by the respondents is that the substantive claims of the petitioner are ex facie time-barred and therefore, incapable of being referred to arbitration. The respondents contend that, with respect to the issue relating to the 2,00,010 equity shares, the petitioner has sought enforcement of the letter dated 22-9-2011 but has however, served a notice invoking arbitration 6 years later on 23-1-2017. Further, with respect to the 4,00,000 equity shares, it was contended that the claim can only arise upon the date of resignation i.e. 18-7-2013 and the claim would, therefore, again be time-barred.

50. ***As evident from the aforesaid discussion and especially in light of the observations made in Krish Spg., this Court cannot conduct***

an intricate evidentiary enquiry into the question of when the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time-barred. *This has to be strictly left for the determination by the Arbitral Tribunal. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in Respondent 1 company are concerned with the merits of the dispute which squarely falls within the domain of the Arbitral Tribunal.*

51. It is now well-settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists-nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral Courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process. This is especially possible in instances, including but not limited to, where the claimant canvasses either ex facie time-barred claims or claims which have been discharged through "accord and satisfaction", or cases where the impleadment of a non-signatory to the arbitration agreement is sought, etc.

52. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration.

53. The existence of the arbitration agreement as contained in Clause 13.10/of the shareholders' agreement is not disputed by either of the parties. The submissions as regards the claim of the petitioner being ex facie time-barred may be adjudicated upon by the Arbitral Tribunal as a preliminary issue.”

26. The Respondent has relied upon the judgment of Supreme Court in the case of ***BBM Enterprises*** (supra) at para 5 read as under:

> *"5. … However, noticing the decision in Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re., it was held that in a scenario where the Referral Court is able to deal with the frivolity of the litigation on the basis of bare minimum pleadings it would be incorrect to assume or doubt that the Arbitral Tribunal would not be able to arrive at the same inference. It was held that the Referral Court cannot indulge in any intricate evidentiary inquiry into the question whether the claims raised by the petitioner are time barred which determination has to be left to the decision of the Arbitrator. In the case of Arif Azim, the question of limitation was to be considered on the basis of the facts disclosed, whether the period commenced from; the date of the letter forming the basis of the claim, the date of resignation of the petitioner or the date of subsequent legal notice sent by the respondent to the petitioner, which was left to be considered by the Arbitrator. However, in the present case there is no intricate evidentiary inquiry to be done. After Annexure P9 of 04.01.2001, whether it be the interim determination of dues or not, the appellant slept over its claim for 21 years before the notice seeking arbitration was issued on 02.06.2022; an ex-facie dead claim."*

27. Considering the Judgments in ***In Re: Interplay*** (supra), the subsequent three-Judge Bench decisions in ***Krish Spinning*** (supra) and ***Asap Fluids Pvt. Ltd. & Anr.*** (supra), it is clear that the issue of limitation in underlying claim under Section 11 cannot be gone into by the referral court. The expression "the referral court cannot conduct intricate evidentiary inquiry into the question of claim being barred by limitation" should not be understood to mean that if the claim is *prima facie* barred by limitation, the referral court can examine the issue of limitation in the underlying claim of section 11 application. The limited inquiry into the issue of limitation as permitted in the case of ***Arif Azim Co. Ltd. v. Aptech Ltd.***[7] has been specifically foreclosed in view of the subsequent judgments of ***In Re: Interplay*** (supra), ***Krish Spinning*** (supra) and ***Asap Fluids Pvt. Ltd. & Anr.*** (supra). This Court would apply the judgments of the Larger Bench at this stage and hold that the underlying claim under Section 11 cannot be adjudicated by the Referral Court. The Supreme Court in ***BBM Enterprises*** (supra) has rejected the dead wood claim as hopelessly barred by 21 years before issuance of notice invoking arbitration. However, the Supreme Court in ***BBM Enterprises*** (supra) has not not disturbed the law laid down in ***In Re: Interplay*** (supra), the subsequent three-Judge Bench decisions in ***Krish Spinning*** (supra) and ***Asap Fluids Pvt. Ltd. & Anr.*** (supra).

28. In any event, the learned counsel for the Applicant submits that the claim is not *ex facie* barred by limitation and that there have been acknowledgments of liability till the year 2014 by the Respondents. It is also submitted that the issue of limitation would

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require adjudication by Arbitrator. In view of the law laid down in ***In Re: Interplay*** (supra), ***Krish Spinning*** (supra) and ***Asap Fluids Pvt. Ltd. & Anr.*** (supra), this Court would not deal with the factual aspect of limitation of the underlying claim made in the present application.

Judgments in case of ***In Re: Interplay*** (supra), ***Krish Spinning*** (supra) and ***Asap Fluids Pvt. Ltd. & Anr.*** (supra) does not lay down that an *ex facie* claim barred by limitation can be examined by the Referral Court.

29. The next issue is as regards the parties to the arbitration. It is the case of the Applicant that the Promoters constituted four persons who were the Promoters of deleted Respondent No.5 Company and the same is reflected from the documents on record. As regards Respondent No.1, he is a signatory to the Term Sheet, whereas the name of Respondent No.3 is mentioned as the Promoter.

30. As regards the submission of Respondent No.1 that he signed the Term Sheet only on behalf of the Company, the said submission is *prima facie* misconceived because Respondent No.1 has signed the Term Sheet not only as Director of the Company but has also independently signed it as a Promoter of the Company.

31. The learned counsel for Applicant has submitted that all four members of the family were Promoters, as they were also the Promoters of deleted Respondent No.5 Company and had agreed to the terms of the Term Sheet. Document on record indicating involvement of parties to the Term Sheet are noted below:

1. Letter dated 28th August 2008 on Exhibit D
From: Neelkanth Township And Construction Pvt. Ltd. (NTCPL)
To: Urban Infrastructure Venture Capital Limited (UIVCL)
Subject: Pending Promoter's Investment In Neelkanth Township And Construction Pvt. Ltd.
By this letter the Promoters' Group informed UIVCL that there was a shortfall of ₹15.05 crore in their required 30% contribution to Neelkanth Township And Construction Pvt. The promoters' Group also assured to invest this amount of Rs. 15.05 Crore by December 31, 2008.

2. Letter dated 29 January 2009 on Exhibit E
From: Urban Infrastructure Venture Capital Limited (UIVCL)
To: Mr. Bhavik R. Bhimjyani, Promoter, Neelkanth Township And Construction Pvt. Ltd. (NTCPL)

Subject: Contribution by Neelkanth Group in Neelkanth Township & Construction Pvt. Ltd.
This letter records that the UIVCL and its fund had invested Rs. 51.50 crore in Neelkanth Township & Construction Pvt. Ltd. under the term sheet dated 21st February, 2007. The letter therefore records the promoters' default in making their agreed contribution and notes that the investor had to continue funding the project.

3. Letter dated 10 April 2009 on Exhibit F
From: Urban Infrastructure Venture Capital Limited (UIVCL)
To: Neelkanth Township And Construction Pvt. Ltd. (NTCPL) (Mr. Bhavik R. Bhimjyani, Director and Mr. Tulsibhai Bhimjiyani,

Promoter)
Subject: Refund of Investment made by UIOF In Neelkanth Township and Construction Pvt. Ltd. (NTCPL) – Alibaug Project
This letter serves as a final demand notice issued by UIVCL, acting as the investment manager of urban infrastructure opportunities fund (UIOF), to NTCPL and its promoters. The letter refers to the term sheet dated 21 February 2007, the amendment dated 23 October 2007, the promoters' letter dated 28 August 2008, and UIVCL's letter dated 29 January 2009. It also mentions that arbitration would be invoked on non-payment of amount by 15th April, 2009.

4. Letter dated 24th March, 2011 on Exhibit G
From: Mr. Rashmi C. Bhimjyani, Mr. Bhavik R. Bhimjyani
To: Mr. Manoj Modi
Subject: Urban Infrastructure Opportunities Fund (UIOF)
A letter attaching 2-page note on investment with UIOF. Letter points out the general understanding between the parties as regard the investment of the applicant in Neelkanth.

5. Letter dated 5th April 2011 on Exhibit H
From: Urban Infrastructure Venture Capital Limited (UIVCL)
To: Neelkanth Township And Construction Pvt. Ltd. (NTCPL) (CC: Mr. Bhavik Bhimjyani and Mr. Tulsibhai Bhimjiyani, Promoter)
Subject: Reminder to send us copies of the inspected documents & to make available copies of the documents not presented for inspection carried out by us on 28th March, 2011 at the Registered office of the company.
This letter is a follow-up to the earlier letter dated 30 March 2011. Urban Infrastructure Venture Capital Fund requested NTCPL by 9 April 2011 to provide copies of all documents that had been inspected, along with copies of the documents that were not made available during the inspection conducted on 28 March 2011.

6. Letter dated 25 April 2011 on Exhibit I
From: Urban Infrastructure Venture Capital Limited (UIVCL)
To: Neelkanth Township And Construction Pvt. Ltd. (NTCPL) (CC: Mr. Bhavik Bhimjyani and Mr. Tulsibhai Bhimjiyani, Promoter; Mr. Rashmi Bhimjiyani, Mr. Kirtikumar Pandya and Haresh Manek, Director)
Subject: Reply to the letter dated 7th April, 2011; seeking copies of the documents that have been untraceable till date

This letter is a final reminder from urban infrastructure venture capital fund seeking the untraceable documents for inspection.

7. Letter dated 27 April 2011 on Exhibit J
From: Neelkanth Township And Construction Pvt. Ltd. (NTCPL)
To: Urban Infrastructure Venture Capital Limited (UIVCL)
The letter requests the recipient to acknowledge receipt of the communication that the documents seek by UIVCF by the letter dated 25th April, 2011 are still intraceable.

8. Letter dated 30 October 2012 on Exhibit K
From: Urban Infrastructure Venture Capital Limited (UIVCL)
To: Mr. Bhavik Bhimjiyani, Mr. Rashmi Bhimjiyani, Mr. Tulsi Bhimjiyani
Subject: Settlement Agreement between Neelkanth Group (Promoters) and Urban Group (Investors)
The letter states that urban infrastructure fulfilled all its investment commitments in the Neelkanth group projects. The letter calls upon the promoters to immediately complete the necessary formalities for execution of settlement agreement and repay all investor dues by 31st January 2013, failing which civil and criminal proceedings would be initiated.

9. Letter dated 16 November 2012 on Exhibit L
From: Neelkanth Township And Construction Pvt. Ltd. (NTCPL)
To: Urban Infrastructure Venture Capital Limited (UIVCL)
Subject: Settlement between Neelkanth Township and Construction Pvt. Ltd. And Others & Urban Group
This letter is a brief response to the letter dated 30 october 2012. It states that since settlement discussions are ongoing they are not giiving a detailed reply to the letter dated 30th October, 2012 at present. Also, they do not admit or accept any statement made in that letter and reserve the right to respond in detail later.

Therefore, it can *prima facie* be inferred that the Respondents (except Respondent No. 1) were non-signatory parties to the Term Sheet.

In this regard, reliance has been placed by the Applicant upon the Judgment of Supreme Court in the case of ***Cox and Kings Limited vs. Sap India Private Limited & Anr.***[8], particularly paragraphs 73 and 74, which read thus:

> *"73. The above exposition gives rise to the inference that in case of an implied contract, the question revolves around the determination of the consent of the parties to be bound by the terms of the contract. Such determination is manifested through the acts or conduct. The theory of implied contract by conduct has also been accepted by this Court. In Haji Mohd. Ishaq v. Mohd. Iqbal & Mohd. Ali & Co., the plaintiff supplied tobacco to the defendant. Although there was no express agreement between the parties, the defendant accepted the goods, but allegedly failed to clear the outstanding dues despite repeated demands raised by the plaintiff. A Bench of three Judges of this Court observed that the conduct of the defendants in accepting the goods and not repudiating any of the demand letters raised by the plaintiff "clearly showed that a direct contract which in law is called an implied contract by conduct was brought about between them". Under the Indian contract law, it is posited that actions or conduct can be an indicator of consent of a party to be bound by a contract. This also applies to an arbitration agreement considering the fact that it is a creature of contract. However, an arbitration agreement also has to meet the requirements laid down under the Arbitration Act to be valid and enforceable.*
>
> *74. Section 2(h) of the Arbitration Act defines a "party" to mean a party to an arbitration agreement. Section 7 defines an arbitration agreement to mean 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 Tegal relationship". Section 7 requires that an arbitration agreement has to be in writing. Section 7 indicates the circumstances in which it is regarded as an agreement in writing. Such an agreement may be embodied in a document, an exchange of communications, including in the electronic form, or in a statement of claim which is*

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not traversed in the defence. In Vidya Drolia v. Durga Trading Corpn., this Court observed that a legal relationship means a relationship which gives rise to legal obligations and duties, and confers a right. Such a right may be contractual or non-contractual. In case of a non-contractual legal relationship, the cause of action arises in tort, restitution, breach of statutory duty, or some other non-contractual cause of action. Thus, the legislative intent underlying Section 7 suggests that any legal relationship, including relationships where there is no contract between the persons or entities, but whose actions or conduct has given rise to a relationship, could form a subject-matter of an arbitration agreement under Section 7. This approach is in line with the observations of Lord Hoffman in Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd. where it was observed that: (Fili Shipping Co. case53, Bus LR p. 1725, para 13)

"13. … the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal."

(emphasis supplied)

32. The Supreme Court in case of ***KKH Finvest Pvt. Ltd. and Ors. vs. Ashiesh Shukla and Ors.***[9] at paragraph 19 held as under:

"19. We may also note that, in terms of the law laid down in Cox and Kings Limited (supra), the principle of 'veritable parties' would be applicable in situations where a person or entity may not sign an arbitration agreement, yet give the appearance of being a veritable party to such agreement due to that person/entity's legal relationship with the signatory parties and involvement in the performance of the underlying contract. This Court observed that the participation of a non-signatory in the performance of the underlying contract is the most important factor to be considered as the conduct of the non-signatory parties is an indicator of the intention of those parties to be bound by the arbitration agreement. This Court further observed that the intention of the parties to be bound by an arbitration agreement could be gauged from the circumstances that surround

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> *the participation of such non-signatory party in the negotiation, performance and termination of the underlying contract, containing such agreement. Further, observing that there was a need to strike a balance between the consensual nature of arbitration and modern commercial reality, where a non-signatory becomes implicated in a commercial transaction in a number of different ways, this Court held that the balance could be adequately achieved if the factors laid down in Oil and Natural Gas Corporation Limited v. Discovery Enterprises Private Limited and Anr. MANU/SC/0554/2022 : 2022:INSC:483 : (2022) 8 SCC 42 are applied holistically. Elaborating further, it was observed that the involvement of a 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 the transaction and commonality of subject matter, were also held to suggest that claims against a non-signatory are interlinked with the issues under arbitration."*

33. The Supreme Court in the above-noted Judgments of ***Cox and Kings Limited*** (supra) and ***KKH Finvest Pvt. Ltd. and Ors.*** (supra) has held that, on intrinsic and extrinsic material, the Court can render a finding as to whether the parties, who are not signatories, to the document can be treated as parties to the agreement.

34. Documents noted in above paragraph no. 31 indicates that the applicants dealt with the Promoters (Bhimjiyani Group) (Respondent No. 1 to Respondent No. 4) as the promoter of the now deleted Respondent No. 5-Company and had agreed for joint investment in the 'Alibaug Project' in which the applicant has invested Rs. 51.9 Cr. On investment by the applicant, further agreement were to be executed towards rights and liabilities of the parties. *Prima facie,* the Respondents are non-signatory parties to the Term Sheet (Respondent No. 1 is signatory) and dispute has arisen in the implementation of the terms in the Term Sheet. Thus, applying Clause 41 of the Term Sheet, parties are referred to arbitration. Hence, the following order:

O R D E R

(A) Mr. S. C. Gupte, Former Judge of this Court is appointed as the sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above. The contact details of the Arbitrator are as under :-

Address	**:**	43, Free Press House, 4th Floor, 215, Free Press Journal Marg, Nariman Point, Mumbai 400021.
Mobile No.	**:**	9821010104
Email ID	**:**	guptesc@gmail.com

(B) A copy of this order be communicated to the learned sole Arbitrator by the Advocates for the Applicant within a period of 1 week from the date of uploading of this order. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this order.

(C) Venue of the arbitration would be governed by the provisions of the agreement executed between the parties or as agreed and the parties are permitted to make submissions before the arbitrator in this regard.

(D) Learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocates for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocates for the Applicant to the Respondent.

(E) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by her, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers, if any, of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration.

(F) All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

35. All contentions of the parties are expressly kept open to be raised before the Arbitrator.

36. With the above directions, the Arbitration Application stands disposed of accordingly.

(ARUN R. PEDNEKER, J.)