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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION APPLICATION (L) NO.21172 OF 2026

Ashapura Developers **... Applicant**

Vs.

Ashapura Options Private Limited **... Respondent**

Mr. Kevic Setalvad, Senior Advocate with Mr. Bhushan Shah, Mr. Akash Jain, Ms. Reshaya Malhotra, Mr. Gaurav Edekar, and Ms. Ananya Sakpal i/by Mansukhlal Hiralal & Co., for the Applicant.

Mr. Mayur Khandeparkar, with Mr. Yash Momaya, Mr. Rishabh Dhanuka, Ms. Mahima Shah, Mr. Zaki Ansari, Ms. Khushi Nandu, Mr. Shivanshu Choudhary, and Mr. Yash Natasia i/by Dhanuka Law Offices for the Respondent.

CORAM : AMIT BORKAR, J.

RESERVED ON : SEPTEMBER 3, 2026.

PRONOUNCED ON : SEPTEMBER 7, 2026

JUDGMENT:

1. The present Application is filed under Section 11 of the Arbitration & Conciliation Act, 1996 ("Act"). By this Application, the Applicant seeks appointment of a sole arbitrator for deciding the disputes and differences which have arisen between the Applicant and the Respondent out of the Loan Agreement dated 27

August 2020 ("Loan Agreement").

2. The facts which have led to filing of the present Application, as stated by the Applicant, are as follows. The Applicant and the Respondent entered into a loan agreement dated 27 August 2000, under which the Respondent obtained a loan of Rs. 36,00,00,000/- from Blacksoil Capital and Allnet Financial Services ("Lenders"). The Applicant gave its properties as security for the loan taken by the Respondent. Accordingly, a deed of mortgage was executed. Thereafter, an escrow agreement was executed on 20 October 2020 for depositing the receivables from the mortgaged properties. On 15 December 2022, disputes arose between the parties because of failure to repay the loan. The Lenders filed a suit for enforcement of the mortgage. The suit was thereafter settled by consent terms and an order was passed by this Court in terms thereof. On 30 March 2023, the Respondent was admitted to the corporate insolvency resolution process. Subsequently, on 16 May 2024, the corporate insolvency resolution process was settled by way of a one-time settlement, and pursuant thereto the order admitting the Respondent to the insolvency process was set aside. During the intervening period, the Respondent failed to comply with the consent terms and did not repay the loan. The Lenders filed an execution petition against the Respondent and the Applicant and sought attachment of properties. On 31 October 2023, since the Respondent had been admitted to the corporate insolvency resolution process, the liability for repayment came upon the Applicant. In these circumstances, the Applicant was required to take the liability on behalf of the Respondent so that attachment proceedings against its properties could be avoided. The Applicant entered into modified consent terms with the Lenders and agreed to the changed repayment terms. On 15 February 2024 and 16 February 2024, the Applicant made a one-time settlement offer to the Lenders. The said offer was accepted by the Lenders.

3. On 30 April 2024, Blacksoil issued a letter acknowledging the repayment. On 20 June 2024, Allnet issued a conditional NOC in respect of repayment of the settlement amount. On 29 September 2025, this Court recorded the settlement between the parties. On 14 April 2024, the Applicant issued a demand notice to the Respondent calling upon it to repay the amounts which had been paid by the Applicant on behalf of the Respondent. On 13 May 2026, the Applicant, through its Advocates, addressed an invocation notice to the Respondent. On 10 June 2026, the Respondent, through its Advocates, replied to the invocation notice and disputed the claim made by the Applicant. It is in these circumstances that the Applicant has filed the present Arbitration Application.

4. Mr. Setalvad, learned Senior Advocate appearing for the Applicant, submitted that the present Commercial Arbitration Application (L) No. 21172 of 2026 ("Application") has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"). The Applicant seeks appointment of a sole arbitrator. Before considering the merits of the matter, it would be useful to briefly set out the facts which have resulted in filing of the present Application. Loan availed by the Respondent: In or about 2020, the Respondent approached Blacksoil Capital Private Limited and Allnet Financial Services Private Limited, collectively referred to as the "Lenders", for obtaining a loan of Rs. 36,00,00,000/- (Rupees Thirty-Six Crores Only) for general corporate purposes. Thereafter, the Respondent approached the Applicant for providing security for the said loan. Accordingly, the Applicant entered into a Loan Agreement dated 27 August 2020, a Mortgage Deed dated 27 August 2020 and an Escrow Agreement dated 20 October 2020. These documents are collectively referred to as "Finance Documents" in the Loan Agreement.

5. Sometime in 2021, the Respondent failed to make repayment as required under the loan documents. The Lenders filed Commercial Suit No. 102 of 2022 ("Suit") before this Court. In the said Suit, the Lenders sought, amongst other reliefs, enforcement of the mortgage and recovery of the outstanding amount. The parties thereafter settled the matter and entered into consent terms dated 15 December 2022 ("First Consent Terms"). Under the First Consent Terms, the Applicant and the Respondent agreed to jointly and severally pay the outstanding amount. It was submitted that the Applicant and Respondent had a long-standing business and commercial understanding. This was relied upon from the fact that the Applicant had provided security for the loan taken by the Respondent. The Respondent again failed to make payment as agreed. The Lenders filed Commercial Execution Application No. 24828 of 2023 ("Execution Application") against the Applicant and the Respondent. At that time, the Respondent had already been admitted to the corporate insolvency resolution process. Therefore, the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was applicable. The Lenders consequently proceeded against the Applicant for attachment and execution of the security which had been provided under the Finance Documents. In these circumstances, since the Applicant's properties given as security were exposed to attachment and execution, the Applicant entered into modified consent terms with the Lenders and agreed to repay the liability on behalf of the Respondent. According to the Applicant, it thereafter paid the entire loan liability on behalf of the Respondent. The Lenders have acknowledged such payment. In particular, reliance is placed on paragraph 5 of the letter dated 16 February 2024 addressed by the Lenders, which reads as follows:

> "5. We agree to provide necessary support at your cost and expenses by providing the necessary and available documents and information that could be required by Ashapura Developer to initiate legal proceedings against AOPL."

6. In view of the above, the Applicant initiated pre-institution mediation for the purpose of filing a commercial suit before this Court. It is submitted that the Applicant did not file any suit and the said proceedings were abandoned. The Applicant has instead chosen to pursue its claim by invoking the arbitration mechanism contained in Clause 36 of the Loan Agreement. In view of the facts and circumstances stated above, it is submitted on behalf of the Applicant that the disputes between the parties are required to be referred to arbitration. The Applicant has relied upon the following grounds, amongst others. These grounds are stated without prejudice to one another and are urged in the alternative.

7. In support of the submission regarding subrogation, reliance is placed upon the following decisions: *M/s Rahul Cargo Pvt. Ltd v. M/s National Insurance Company Ltd. & Anr*, 2014 SCC OnLine Del 2229, *Cox and Kings Limited v. SAP India Private Limited*, (2024) 4 SCC 1, *Economic Transport Organisation, Delhi v. Charan Spinning Mills Private Limited*, (2010) 4 SCC 114.

8. According to the Applicant, a plain reading of the arbitration clause extracted above shows that claims arising out of the Finance Documents are required to be referred to arbitration. Therefore, according to the Applicant, the objection of the Respondent that the Mortgage Deed does not contain an arbitration clause has no substance. It is submitted that the Applicant has, in any event, acquired the rights of the Lenders by virtue of subrogation. According to the Applicant, it is not in dispute that it has discharged the entire repayment liability on behalf of the Respondent. It is submitted that the Applicant has been subrogated into the position of the Lenders and is entitled to recover from the Respondent the amount which it has paid on the Respondent's behalf. Mortgage deed of the Applicant operates as a guarantee: The Respondent has contended that the right of subrogation, and consequently the right to recover the amount paid, can arise only under a guarantee agreement under Section 141 of the Indian Contract Act, 1872. According to the Respondent, such right cannot arise under the principles of subrogation contained in Section 91 of the Transfer of Property Act, 1882. The Applicant submits that this contention of the Respondent is not correct. In support of its submission, reliance is placed upon the following decisions: *State Bank of India versus Smt. Kusum Vallabhdas Thakkar*, 1991 SCC OnLine Guj 14, *Anuj Jain, IRP for Jaypee Infratech versus Axis Bank Limited & Ors*, (2020) 8 SCC 401, *Rajagopala Iyer and Ors. versus S. Ramachandra Iyer*, (1942) SCC OnLine MAD 41.

9. According to the Applicant, a plain reading of the Finance Documents, namely the Loan Agreement and the Mortgage Deed, shows that the security given by the Applicant was for securing performance of the obligations of the "Obligors" under the Finance Documents. Reliance is placed upon Clause E and Clause F Clause N of the Mortgage Deed.

10. It is submitted that after the amendment made in 2015, the scope of the Court while considering an application under Section 11 of the Arbitration Act is limited to examining whether an arbitration agreement exists. In the present case, it is admitted that the Applicant is a party to the Loan Agreement dated 27 August 2020. The said Loan Agreement contains an arbitration mechanism under Clause 36. It is submitted that the Applicant has acquired the rights of the Lenders by way of subrogation, as stated above. On this basis, it is submitted that the Applicant is entitled to refer the disputes and differences between the parties to arbitration before a sole arbitrator. It is submitted that once the Court finds that an arbitration agreement exists, the dispute should be referred to an arbitral tribunal without entering into a detailed examination of disputed questions of fact. According to the Applicant, after the 2015 amendment, the legislature has deliberately kept the scope of judicial examination under Section 11 limited and has held the principle of kompetenz-kompetenz. Reliance is placed on the following decisions in support of this submission: *Andhra Pradesh Power Generation Corporation Limited versus Tecpro Systems Limited & Ors*. (2026) 3 SCC 491, *Duro Felguera, S.A. versus Gangavaram Port Limited*, (2017) 9 SCC 729. In view of the facts and submissions stated above, the Applicant has prayed that this Court be pleased to refer the disputes and differences between the parties to a sole arbitrator.

11. Mr. Khandeparkar, learned Advocate appearing for the Respondent, submits that the present Application has been filed by the Applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("said Act") against the Respondent. The Applicant seeks appointment of a sole arbitrator to decide the disputes and differences which, according to the Applicant, have arisen out of the Loan Agreement dated 27 August 2020 ("Loan Agreement") and the Mortgage Deed dated 27 August 2020 ("Mortgage Deed"). For this purpose, the Applicant relies upon the arbitration clause contained in Clause 36 of the Loan Agreement. It is submitted that the Application is liable to be rejected for the reasons set out hereinafter. The Applicant's capacity under the Loan Agreement and the Finance Documents is only that of a mortgagor. Therefore, there is no arbitration agreement between the Applicant and the Respondent. According to Mr. Khandeparkar, a plain reading of Clause 36 shows that it is not an agreement to refer all disputes between all persons connected with the Loan Agreement to arbitration. Clause 36.1 specifically refers to "claims, disputes or rights, of the Lenders against the Obligors" arising out of the Loan Agreement and/or the Finance Documents. Clause 36.2 provides that "Such claims shall be referred by Lenders to arbitration". Thus, according to the Respondent, the clause permits the Lenders alone to invoke arbitration. There is no arbitration agreement between the Applicant, who is the Mortgagor, and the Respondent, who is the Borrower and an Obligor. It is submitted that even according to the Applicant's own case, its role under the documents is only that of a mortgagor. This is stated in the Invocation Notice dated 13 May 2026 issued by the Applicant. The same position is clear from the description of the parties in the Loan Agreement and the Mortgage Deed. The Applicant is described as the "Mortgagor" of the Second Part. Blacksoil Capital Private Limited and Allnet Financial Services Private Limited alone are described as "Lender 1" and "Lender 2" and are collectively referred to as the "Lenders". The definition of "Obligors" in the Loan Agreement includes only the Borrower and the Guarantors. The Mortgagor is separately described as a party. Therefore, the Applicant is neither a "Lender", who alone can refer claims to arbitration under Clause 36.2, nor an "Obligor", against whom the claims referred to in Clause 36.1 can be made. A similar question was considered by this Court in *Ketan Champaklal Divecha vs. DGS Township Pvt. Ltd. & Anr.* (Bom HC, Arbitration Petition (L) No. 20483 of 2023 with Arbitration Application (L) No. 21860 of 2023, Judgment dated 2 January 2024). This Court held that "the arbitration clause in the present case has to be interpreted on the basis of the aforesaid definition of 'party' and 'arbitration agreement" under Sections 2(1)(h) and 7 of the said Act, and that where the clause designates who may invoke arbitration, invocation by any other party "is rendered defective", such that "neither the petition under Section 9 nor the application under Section 11 of the Arbitration Act, can be entertained".

12. Applying the same principle, it is submitted that the arbitration agreement contained in Clause 36 is only between the Lenders and the Obligors. The Applicant is described in both the Loan Agreement and the Mortgage Deed only as the "Mortgagor". It is not a party to the arbitration agreement contained in Clause 36. Further, the Mortgage Deed, under which the Applicant created the mortgage over its property, does not contain any arbitration clause at all. Therefore, even on this ground, there is no arbitration agreement between the Applicant and the Respondent. The Applicant has no right of subrogation and, therefore, the very basis of the present Application is absent. The Applicant's case is that because it claims to have made repayment on behalf of the Respondent, it has stepped into the rights and remedies of the Lenders under the Loan Agreement. According to the Respondent, the Applicant has failed to establish any such subrogation under the Loan Agreement, the Finance Documents, any statutory provision or otherwise. The Lenders have not assigned or transferred their rights under the Loan Agreement in favour of the Applicant. The Applicant has not produced any document showing that the rights of the Lenders have been subrogated in its favour. The right of subrogation under Section 141 of the Indian Contract Act, 1872 is available to a guarantor or surety whose guarantee has been invoked. According to the Respondent, such right is not available to a mortgagor or pledgor. The right of subrogation under Sections 91 and 92 of the Transfer of Property Act, 1882 does not apply to the present case. Such right is available to a person who redeems a mortgage of property belonging to another person, and not to the mortgagor who redeems the mortgage of his own property. In the present case, according to the Applicant's own case, it has paid the liability and redeemed the mortgage over its own property. Section 91 excludes the mortgagor from claiming such a right of subrogation. Therefore, according to the Respondent, there is no statutory subrogation, no contractual subrogation and no assignment of rights in favour of the Applicant. Consequently, there is no basis on which the Applicant can claim the benefit of the arbitration agreement.

13. It is submitted that the conduct of the parties shows that they understood the position in the same manner. The Lenders, namely Blacksoil and Allnet, did not invoke arbitration against the Applicant. Instead, they filed a Commercial Suit before this Court, which was thereafter compromised by Consent Terms dated 15 December 2022. Under those Consent Terms, the parties, including the Applicant and the Respondent, settled the disputes. The Applicant agreed to a joint and several liability to pay amounts to the Lenders under Clauses 6 and 7 and thereby subjected to a joint and several personal decree. Even at that stage, no arbitration agreement between the Applicant and the Lenders was asserted and no application under Section 8 of the Arbitration Act was filed by any party. Clause 17 of the Consent Terms records that the parties had no claims against one another. According to the Respondent, this shows the parties' own understanding that there was no arbitration agreement between the Mortgagor and the Lenders. Thereafter, while the Respondent was undergoing the corporate insolvency resolution process, the Applicant and the Lenders modified the Consent Terms between themselves. The Applicant, who was Defendant No. 2 in the Suit, undertook responsibility to discharge the debt. The decree was thereafter satisfied. Consequently, according to the Respondent, the Loan Agreement stood discharged and there can be no surviving arbitration agreement on this basis.

14. Reliance is placed upon *S.N. Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Ltd. & Ors.*, (2011) 1 SCC 320, where the Supreme Court held that "an arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement". It is submitted that a mortgagor who is outside the class of persons covered by Clause 36 cannot invoke the clause as though it were a Lender.

15. Without prejudice to the above, the Applicant cannot be treated as a veritable party to Clause 36 and cannot invoke arbitration in the capacity of a Lender. It is submitted that the Applicant has not pleaded that it is a veritable party to the arbitration agreement. Its claim is based only on the alleged right of subrogation. This is clear from paragraph 45 of the Application.

16. Without prejudice to the above submission, in view of the position regarding subrogation stated earlier, the Applicant cannot be treated as a veritable party to the arbitration agreement. In *Hindustan Petroleum Corporation Limited vs. BCL Secure Premises Private Limited*, 2025 INSC 1401, the Supreme Court, while referring to *Cox and Kings Ltd. vs. SAP India Pvt. Ltd.*, (2024) 4 SCC 1 (5J), held that the circumstances in which a person can claim through or under a party include "assignment, subrogation, and novation". It was held that "mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party". The Supreme Court held that even a settlement or assignment arrangement between two other parties "does not mean that there is an arbitration agreement" between the claimant and a non-party. In the present case, as submitted above, there is no right of subrogation in favour of the Applicant. Therefore, the Applicant cannot claim to be a veritable party to the arbitration agreement.

17. On a combined consideration of the above grounds, namely, (i) the Applicant's position as a mortgagor; (ii) absence of any right of subrogation; (iii) complete discharge of the Loan Agreement and the Finance Documents, as stated hereinafter; and (iv) the fact that the Applicant's present claim arises outside the scope of the Loan Agreement, as stated hereinafter, it is submitted that the Applicant cannot claim to be a veritable party to Clause 36.

18. In *Hindustan Petroleum* (supra), the Supreme Court, on facts which are submitted to be similar to the present case, refused to refer the matter to arbitration. The Supreme Court held that "even prima facie the respondent has not been able to establish that it was a veritable party to the contract". The Court observed that there was "no privity at all" between the parties, who were "operating on separate orbits".

19. It is submitted that in *Interplay between Arbitration Agreements under Arbitration Act, 1996 & Stamp Act, 1899, In re*, [(2024) 6 SCC 1 (7J), Prs. 164-167], the Supreme Court has explained that the scope of Section 11(6-A) is confined to examining the existence of an arbitration agreement. According to the Respondent, the only arbitration agreement existing in the present case is between the Lenders and the Obligors. The said clause can be invoked by the Lenders alone. There is no arbitration agreement governing the Obligors and the Mortgagor inter se.

20. Any submission that the question regarding the Applicant's status should be left for decision by the Arbitral Tribunal is answered by the decision in *Hindustan Petroleum* (supra). The Supreme Court held that where the Referral Court finds, even prima facie, that a person is not a veritable party, the matter need not be referred to arbitration. The Supreme Court observed that to hold otherwise "would relegate the Referral Court to the status of a monotonous automation". It observed that this could allow "absolute strangers" to "walk into the Referral Court" and claim that the matter must necessarily be sent to the Arbitral Tribunal. The Supreme Court stated that it was "not prepared to accept such an extreme proposition". According to the Respondent, the Applicant is seeking precisely such a course in the present

Application. The Supreme Court has referred to paragraph 117 of *Cox and Kings* and held that a mere commercial relationship is not enough to establish a legal relationship. Otherwise, every related entity or person could seek to be brought within the arbitration agreement. It is submitted that where a person who is admittedly a non-signatory seeks to contend that it is a veritable party to the arbitration agreement, the Section 11 Court ought to examine such claim with greater care. This position is different from a case where a person who is admittedly a party to an arbitration agreement seeks to bring a non-signatory within the arbitration proceedings. In the first situation, there is no arbitration agreement, on the admitted position, between the Applicant and the Respondent. Therefore, the burden on the Applicant is to establish the existence of an arbitration agreement and its claimed status as a veritable party. According to the Respondent, this burden has clearly not been discharged in the present case. In the second situation, there is already an admitted arbitration agreement to which the applicant is a party. The question there is whether another non-signatory can be brought within that agreement. This submission is supported by the decision of the Supreme Court in *Hindustan Petroleum* (supra).

21. According to the Respondent, the above decision explains the scope of the decisions in *Cox and Kings* and *Ajay Madhusan Patel v. Jyotindra S. Patel*, 2024 SCC Online SC 2597. It is pointed out that the Bench in *Hindustan Petroleum* (supra) included two of the learned Judges who were members of the Bench which decided *Ajay Madhusan Patel* (supra). Therefore, according to the

Respondent, where the Referral Court finds prima facie that a person is not a veritable party to the arbitration agreement, as is submitted to be the position in the present case, the matter ought not to be referred to arbitration. It is submitted that the Loan Agreement and the Finance Documents, including the Mortgage Deed, have already been completely discharged. This position, according to the Respondent, is borne out from the documents produced by the Applicant.

22. Reliance is placed upon the no-dues letter dated 30 April 2024 issued by Blacksoil Capital Private Limited, the no-dues letter dated 20 June 2024 issued by *Allnet Financial Services Pvt. Ltd., and the Order dated 29 September 2025 passed by this Court in Comm. Exe. App. (L) No. 24828 of 2023* ("said Order"). According to the Respondent, these documents show that no amount remains outstanding under the Loan Agreement and that the Loan Agreement has been completely discharged. It is submitted that nothing remains to be performed under the Loan Agreement, including Clause 36. According to the Respondent, the arbitration clause can operate only in respect of a surviving claim concerning the 'Outstanding Amounts' under the Loan Agreement and/or the Finance Documents. Since the entire liability has been discharged, there is no surviving claim under the Loan Agreement which can be referred to arbitration.

23. The Applicant has approached this Court with unclean hands and has suppressed material facts. According to the Respondent, the conduct of the Applicant shows that the Applicant understood that there was no arbitration agreement governing the present claim. The Applicant has not disclosed that it had initiated a pre-institution mediation application under Section 12A of the Commercial Courts Act, 2015, being Commercial Dispute No. 01 of 2026, before the Main Mediation Centre of this Court. The claims raised in the said mediation proceedings are the same claims which have now been raised in the present Application. Reliance is placed upon the decision of the Supreme Court in *Rajiv Gaddh vs. Subodh Parkash*, 2026 SCC OnLine SC 507, where the Supreme Court held that "the subsequent application filed under Section 11(6) was based on the same cause of action and was barred on the principles contained in Order 23 Rule 1 of the Code". The Supreme Court held that "a litigant cannot be permitted to abuse the process of Court to file a fresh proceeding again on the same cause of action".

24. According to the Respondent, the Applicant, having already pursued the same claim through pre-institution mediation and thereafter not pursuing the claim in the manner contemplated by those proceedings, cannot now seek appointment of an arbitrator on the very same cause of action.

REASONS AND FINDINGS:

25. I have considered the submissions made by the learned Advocates for the Applicant and the Respondent. I have considered the subsequent consent terms and the documents under which the Applicant says that the amounts payable to the lenders were paid and discharged by it. I have considered the judgments relied upon by both sides. The question before this Court is not only whether there is some arbitration clause in the contractual documents. The question is whether the Applicant can invoke that arbitration clause against the present Respondent.

26. The first submission of the Applicant is that Clause 36 of the Loan Agreement contains a valid arbitration agreement and that the disputes raised by the Applicant arise from the Finance Documents. Clause 36.1 reads:

> "36. Arbitration- 36.1 The Parties agree and acknowledge that claims, disputes or rights, of the Lenders against the Obligors, arising out of and in connection with this Agreement and/or the Finance Documents with respect to the Loan, shall be adjudicated in arbitration as provided hereinafter."

27. There is no dispute that the above clause contains an arbitration agreement. The difficulty is about who can invoke this clause. The clause refers to "claims, disputes or rights, of the Lenders against the Obligors". Therefore, it is necessary to see whether the present Applicant, who admittedly is not a Lender and is not an Obligor under the Loan Agreement, can still take benefit of this arbitration clause. The Applicant submits that this question should not be examined in detail by this Court at the Section 11 stage. For this submission, reliance is placed upon *Duro Felguera* and the Constitution Bench judgment in *Interplay*. To this extent, there is substance in the submission of the Applicant because the jurisdiction of the Court at this stage is limited. In *Duro Felguera*, the Supreme Court has stated in paragraph 59:

> "After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more,

> nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

28. Similarly, paragraph 165 of *Interplay* says that under Section 11(6-A), the Court has to examine only the existence of an arbitration agreement and this examination is only a *prima facie* determination. Paragraph 166 makes clear that the Referral Court is not the proper forum for conducting a mini trial regarding the existence or validity of the arbitration agreement.

29. The Applicant is right in relying upon *A.P. Power Generation*. The Supreme Court has considered the effect of Section 11(6-A) and has made a distinction between what the Referral Court has to examine and what has to be finally decided by the Arbitral Tribunal. Paragraph 15 of that judgment shows that when the question is whether a person is a party to the arbitration agreement, the Referral Court has to reach only a *prima facie* satisfaction. Thereafter, the detailed enquiry can be made by the Arbitral Tribunal as stated in paragraph 16. The Court has quoted paragraph 170.12 of *Cox & Kings*:

> "*170.12. At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement.*"

30. Thus, while considering the present Section 11 application, this Court should not conduct a full trial on disputed questions of fact. But this limited jurisdiction does not mean that every person having some connection with the transaction has to be sent to arbitration and the question whether such person is a party to the arbitration agreement must always be left to the Arbitral Tribunal. The Supreme Court has explained this limit in *HPCL* v. *BCL Secure Premises*. In paragraph 34, the Supreme Court observed:

> “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."

31. Therefore, this Court has to make a real *prima facie* examination. The Court should not conduct a mini trial, but at the same time it cannot refer every matter to arbitration without seeing whether there is some basis for doing so. The present case has to be considered within this limited scope. The Applicant admittedly is not one of the “Lenders” mentioned in Clause 36.1. It is not disputed that the Applicant is not described as an “Obligor” under the Loan Agreement. Therefore, from the wording of the arbitration clause, the Applicant is not a contracting party to that arbitration agreement. The Applicant seeks to overcome this difficulty mainly by saying that after making payment of the lenders' dues, it stepped into the shoes of the lenders by way of subrogation and obtained the right of the lenders to invoke arbitration.

32. The law does recognise that in an appropriate case a person claiming through or under a signatory can take benefit of an arbitration agreement. *Cox & Kings*, in paragraph 140, explains the usual situations where such right can arise:

> "*140.* An analysis of the cases cited above establishes the following propositions of law: first, the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation, and novation; second, a person "claiming through or under" can assert a right in a derivative capacity, that is through the party to the arbitration agreement, to participate in the agreement; third, the persons claiming through or under do not possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest; and fourth, mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party."

33. Thus, the Applicant is correct to the limited extent that a non-signatory is not in every case prevented from invoking an arbitration agreement. In a proper case, subrogation may place a non-signatory in the position of the signatory. But this alone is not sufficient. The Applicant has to show, at least *prima facie*, that such derivative right has come to it.

34. The judgment in *Economic Transport Organization* explains the position regarding subrogation. Where an insurer fully pays the claim of the insured, equitable subrogation may arise by operation of law and the insurer may enforce the rights of the insured. But the important thing is that the person claiming subrogation must succeed to the rights of the original party. Merely because one person has made payment which is connected with the liability of another person, it does not mean that all the rights of that other person have come to the person making the payment. There has to be some legal basis for the derivative right which is being claimed.

35. In the present case, the Applicant relies upon the fact that it paid the amounts due to the lenders and thereby discharged the liability. The payment is a relevant fact. But payment by cannot be treated as proof that the Applicant became an assignee or subrogee of all the contractual rights of the lenders, including their right to invoke arbitration. No separate assignment of the arbitration right has been shown before this Court. The Applicant has not pointed out any document by which the lenders expressly transferred their rights under Clause 36 to the Applicant.

36. The Applicant has relied upon the Mortgage Deed and submits that the Mortgage Deed was in substance a guarantee and that after making the payment it acquired the rights of the lenders. Reliance is placed upon *Kusum Vallabhdas Thakkar* and *Jaypee Infratech Ltd.* There is no difficulty in accepting the general proposition that when a third person gives security for the debt of another person, depending upon the terms of the document, such obligation may have the nature of a surety or guarantee. *Kusum Vallabhdas Thakkar* considered a case where a third party had agreed to create mortgage as collateral security and the provisions of Sections 126, 127 and 128 of the Contract Act were considered. But this general principle by does not decide the issue before this Court. It is necessary to see what the Applicant agreed to under the Mortgage Deed and what right, if any, came to the Applicant after making payment. A mortgage given as security and an arbitration agreement are two different things. Even if the

Mortgage Deed is treated as creating an obligation similar to that of a surety, it does not follow that the arbitration clause contained in a separate agreement between the Lenders and the Obligors became an arbitration agreement between the Applicant and the Respondent.

37. The decision in *Jaypee Infratech* does not help the Applicant's case. That judgment shows that in an appropriate case mortgage security given by a third party may have the character of a guarantee or surety obligation. But merely giving such security does not make that third party a party to each and every term of the principal loan agreement. The question before this Court is narrower. It is whether Clause 36, on reading its wording and the documents placed before the Court, can be invoked by this Applicant against this Respondent.

38. The Applicant has relied upon *Rajagopala Iyer*. It is submitted that equity can protect a person who discharges a debt which in substance belongs to another person and may give such person the benefit of the mortgage security. This principle may have relevance while deciding the substantive rights between the person who makes the payment and the person whose debt has been discharged. But such right cannot by create an arbitration agreement when the contract containing the arbitration clause does not extend to that person. Arbitration is based upon consent, whether express or arising in a manner held by law. Such agreement cannot be enlarged only because one person may have an equitable claim against another.

39. The Respondent has relied upon *S.N. Prasad.* In that case, the Supreme Court made it clear that an arbitration agreement between the lender, borrower and one guarantor cannot be treated as an arbitration agreement with another guarantor who was not a party to it. This principle has relevance here. The Applicant's case is that because it was connected with the loan transaction and thereafter discharged the debt, the arbitration agreement should be treated as available to it or binding upon it. Such conclusion cannot follow merely from the Applicant's connection with the transaction. The principle in *S.N. Prasad* is that an arbitration agreement operates between the persons and in the relationship for which it was made. A person who was outside that agreement does not become a party merely because he has some connection with the transaction.

40. The same difficulty can be seen from the actual wording of Clause 36.1. It refers to "claims, disputes or rights, of the Lenders against the Obligors". Therefore, the clause identifies not only the nature of the claims but the persons between whom arbitration is contemplated. The Applicant is neither a Lender nor an Obligor. Therefore, if the Applicant wants to invoke this clause, it has to do so not as an original party, but by showing that it is claiming through or under one of the Lenders.

41. For this purpose, *Cox & Kings* requires a derivative relationship. The non-signatory has to succeed to the interest of the signatory. It does not get an independent right to become a party to the arbitration agreement. Mere relationship or commercial connection is not enough. The same position is reflected in *HPCL*, where the Supreme Court held that a legal or commercial relationship between a signatory and non-signatory by is not sufficient to make the non-signatory a veritable party.

42. In the present case, the documents relied upon by the Applicant do show that the Applicant had given its properties as security for the loan and thereafter made payment towards the outstanding dues. Thus, there is a connection between the Applicant and the loan transaction. But this is not the only question. The question is whether the Applicant acquired the arbitration right of the Lenders. On the material placed before this Court, that particular right has not been shown to have been assigned to the Applicant.

43. The Applicant may submit that assignment is not necessary in every case because equitable subrogation can arise by operation of law. The law can recognise derivative rights in an appropriate case even without a separate assignment document. But even in such a case, the Applicant has to show the legal basis by which it has succeeded to the rights of the Lenders. Mere repayment cannot be treated as creating every right of the Lenders in favour of the person who makes such payment.

44. The rights now claimed by the Applicant arose after the original loan transaction was acted upon and after arrangements were made between the lenders and the concerned parties. The Respondent relies upon the consent terms, the no-dues communications and the subsequent proceedings and submits that the original obligations stood discharged. It is not necessary for this Court at this stage to finally decide all the effects of those subsequent transactions. But these documents are relevant for considering whether there is an arbitration right which can be invoked by the Applicant. The Applicant has not shown any document by which the lenders retained and transferred to the Applicant the right to invoke Clause 36 after the original obligations were discharged.

45. The Respondent has submitted that the Applicant's case of subrogation is not consistent with the legal position relating to a mortgagor. It is submitted that subrogation under Section 91 of the Transfer of Property Act does not assist a mortgagor who redeems its own property. For deciding this Section 11 application, it is not necessary to finally decide every question relating to the exact nature of the Applicant's substantive rights. Even if it is assumed in favour of the Applicant that some right arose after payment, the Applicant still has to show a corresponding right to invoke the arbitration agreement. That requirement has not been shown.

46. I have considered the submission of the Applicant that difficult questions concerning a non-signatory should be left to the Arbitral Tribunal. This proposition is correct, but it does not mean that every matter has to be referred where the documents, even on a *prima facie* reading, do not show that the Applicant is a party or a person claiming through or under a party to the arbitration agreement. The distinction can be seen from *HPCL*. Where there is material showing a possible legal relationship and the status of the non-signatory requires detailed examination of facts, such question may be left to the Arbitral Tribunal. But where the person approaching the Court has not shown even a sufficient basis for treating himself as a veritable party or derivative claimant, the Referral Court cannot be required to refer the matter only as a mechanical exercise.

47. In the present case, the difficulty of the Applicant is not such a disputed question which can only be decided after a detailed trial. The important documents themselves show that the Loan Agreement was between the Lenders and the Obligors. The arbitration clause is contained in that agreement. The Applicant was not a Lender and was not an Obligor. The Mortgage Deed did not contain the arbitration clause which is now sought to be invoked. The Applicant relies upon its later payment of the lenders' dues and from that payment seeks to derive the arbitration right. On the material placed before this Court, the Applicant has not shown a sufficient *prima facie* basis to say that it succeeded to the arbitration rights of the Lenders.

48. I am unable to accept the submission that because the Applicant had given collateral security and discharged the debt, it stepped into the shoes of the Lenders for all purposes. Where subrogation is legally established, it may permit a person to enforce the rights of another. But the extent of such right depends upon the source and nature of the subrogation. It cannot be presumed that all rights of the Lenders, including the particular arbitration agreement, became available to the Applicant without showing that the Applicant is entitled to enforce those rights against the Respondent.

49. The judgment in *Rahul Cargo* does not lead to a different result. That case held that an insurer, after valid subrogation, can enforce the rights of the insured and can rely upon an arbitration clause contained in the underlying contract. The important basis of that decision was that the insurer had acquired the position of a subrogee of the rights of the insured. In the present case, the Applicant has not established a similar position in relation to the rights of the Lenders under Clause 36. Therefore, the principle in *Rahul Cargo* cannot be applied in the manner suggested by the Applicant.

50. The judgment in *Ketan Champaklal Divecha* dealt with an arbitration clause which treated the Society and its members as one side and the Developer as the other side, and the Court did not permit an individual member to invoke arbitration separately. The facts of that case are not the same as the present case. But the principle which is relevant is that the arbitration clause has to be read in the manner in which the parties have drafted it. The Court cannot take one expression from the clause and create an arbitration right which is not found from the clause as a whole. In the present case, Clause 36.1 cannot be read as if it permits every person having a claim connected with the Finance Documents to invoke arbitration. It specifically refers to the claims or rights "of the Lenders against the Obligors". This contractual arrangement has to be respected.

51. At the same time, I do not accept the Respondent's submission in its widest form that a non-signatory can never invoke Clause 36 merely because his name is not shown as a signatory. Such a broad proposition would not be consistent with *Cox & Kings*, *Rahul Cargo* and the held principle concerning persons claiming through or under a signatory. In an appropriate case, a non-signatory may derive a right to arbitrate. Therefore, the Respondent succeeds not because every non-signatory is excluded from arbitration, but because this particular Applicant has not shown the required derivative legal relationship.

52. The Respondent has relied upon the subsequent consent terms and the alleged discharge of the Loan Agreement. In my view, it is not necessary for deciding this application to finally decide every consequence of the settlement between the lenders and the parties. Such matters may involve rights and may require determination in another properly constituted proceeding. For the present application, the question is whether the Applicant has an arbitration right which can be enforced against the Respondent. Since that foundation has not been established, it is not necessary to decide every other objection arising from the subsequent transactions.

53. The objection regarding the earlier proceedings and the alleged proceedings under Section 12A of the Commercial Courts Act has been considered. The Respondent relies upon *Rajiv Gaddh* and submits that a fresh proceeding based on the same cause is not maintainable and amounts to abuse of process. This submission may have relevance depending upon what exactly was the earlier proceeding, what reliefs were claimed there and what orders were passed in that proceeding. However, as the present application fails on the question that the Applicant has not shown a *prima facie* arbitration right in its favour, it is not necessary to finally decide the issue of abuse of process for disposing of this application.

54. I find that the Applicant has not been able to show even at the *prima facie* level that it is a signatory party to the arbitration agreement contained in Clause 36.1. I find that the Applicant has not placed sufficient material to show that by assignment, subrogation, novation or any other held derivative legal basis, it has succeeded to the arbitration rights of the Lenders against the Respondent. The fact that the Applicant paid or discharged the dues of the lenders, by, is not sufficient to establish such right.

55. In view of the above discussion and findings, I hold that the Applicant has not established the existence of an arbitration agreement which can be invoked by the Applicant against the Respondent. Therefore, the Applicant cannot seek appointment of a sole arbitrator on the basis of Clause 36 of the Loan Agreement. The Application is liable to be dismissed.

56. In view of the foregoing discussion and for the reasons recorded hereinabove, the following order is passed:

i) The Application under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of a Sole Arbitrator is dismissed;

ii) It is clarified that this Court has not expressed any opinion on the substantive rights, claims or remedies, if any, available to the Applicant. All contentions of the parties in respect of such rights are kept open.

iii) There shall be no order as to costs.

iv) The Application is disposed of accordingly.

(AMIT BORKAR, J.)