

Shabnoor

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN IT'S COMMERCIAL DIVISION**

COMMERCIAL ARBITRATION APPLICATION NO.293 OF 2026

SHABNOOR
AYUB
PATHAN

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Prime Realtors ... Applicant

V/s.

3D Megastructure Private Limited
and Ors. ... Respondents

Mr. Rahul Soman, a/w Mr. Sachin Mahagavkar i/b
DSM Legal for Applicant.

Mr. Vaibhav Ugle a/w Mr. Mohan Waghmode, for
Respondent No.1.

Mr. Joel Carlos i/b Vikas Somawanshi, for Respondent
No.2.

Mr. Vikas Somwanshi for Respondent Nos. 3 to 5.

CORAM : AMIT BORKAR, J.

RESERVED ON : SEPTEMBER 3, 2026.

PRONOUNCED ON : SEPTEMBER 7, 2026.

1. By the present Commercial Arbitration Application filed under Section 11 of the Arbitration and Conciliation Act, 1996, the Applicant seeks appointment of an Arbitrator for deciding the disputes between the Applicant and the Respondents arising under Clause 28 of the Contractor Agreement dated 28th February 2025 executed between the Applicant and Respondent No.1. Respondent No.1 was appointed for carrying out the Structural Glazing work for the Applicant's project "Prime Square", Kandivali (West),

Mumbai. According to the Applicant, though advance payments of in all Rs.1,32,70,000/- were made, the Respondents failed to complete the work.

2. The facts and circumstances because of which the present Application has been filed are stated hereunder. In January 2025, Respondent No.3 approached the Applicant and represented that the Respondents had experience and knowledge in Structural Glazing work. Respondent No.3 expressed his willingness to carry out the Structural Glazing work for the Applicant's project "Prime Square". On 28th February 2025, the Applicant and Respondent No.1 entered into a Contractor Agreement for carrying out the Structural Glazing work of the said Project. Clause 28 of the Agreement contains the Arbitration Clause. Before execution of the Agreement, on 14th February 2025 and 27th February 2025, the Applicant paid Rs.50,00,000/- and Rs.25,00,000/- respectively to Respondent No.2 towards advance payment for the Structural Glazing work, at the instance of Respondent No.3., on 05th March 2025, the Applicant paid a amount of Rs.29,40,000/- along with TDS of Rs.1,80,000/-. Thus, the total amount paid as advance to Respondent No.2 came to Rs.1,06,20,000/-. Respondent No.2 issued Invoice No. 3D/CPT/RA001 in favour of the Applicant.

3. On 23rd May 2025, Respondent No.3 represented to the Applicant that the vendor was not releasing the material because payment had not been made. On the basis of this representation, the Applicant paid a amount of Rs.20,00,000/- to Respondent No.2. The total advance paid by the Applicant thereby increased to Rs.1,26,20,000/-. On 12th June 2025, the first lot of material,

namely glass panels, was delivered at the Project site. This was after a delay of about three and a half months from the date of the Agreement., on 20th June 2025, material consisting of glass panels, base gutter and aluminium bracket was delivered at the Project site. material was delivered on 17th July 2025 and again on 21st July 2025. However, according to the Applicant, the installation work was being carried out very slowly and was not being done in the required manner. During July and August 2025, Respondent No.3 stopped replying to the repeated communications made by the Applicant regarding delivery of material., the work came to a complete stop. The Applicant was therefore required to engage another contractor for completing the work. According to the Applicant, this resulted in an additional escalation cost of Rs.63,85,069/-. On 9th September 2025 and 11th October 2025, the Applicant, under protest, paid a total amount of Rs.6,50,000/- to the labour contractor engaged by the Respondents so that the work at the Project site would not be disturbed. According to the Applicant, the said payment was the responsibility of the Respondents under the Agreement., on 29th January 2026, the Applicant's Advocate issued a Demand Notice to the Respondents calling upon them to pay an amount of Rs.4,45,72,335/- within 15 days. The Demand Notice was served upon the Respondents. The Applicant relies upon the postal receipts, tracking reports and email communications in support of such service. On 4th March 2026, the Applicant's Advocate issued a Notice invoking arbitration and seeking appointment of an Arbitrator under Section 21 of the Arbitration and Conciliation Act,

1996. By the said Notice, the Applicant proposed three names for appointment as Sole Arbitrator. On 18th March 2026, the Respondents, through their Advocate, replied to the said Notice. The Respondents denied having executed the Contractor Agreement. They denied the existence of Clause 28 of the Agreement. They rejected the names proposed by the Applicant for appointment as Arbitrator. The Respondents objected to Respondent Nos.2 to 5 being joined as parties to the proposed arbitration proceedings. In these circumstances, the Applicant filed the present Application under Section 11 of the Arbitration and Conciliation Act, 1996 on 13th April 2026, seeking appointment of an Arbitrator for deciding the disputes between the parties.

4. Learned Advocate for the Applicant submits that the Applicant is seeking appointment of a fit and proper person as the Sole Arbitrator to decide the disputes and differences between the Applicant and the Respondents arising under Clause 28 of the Contractor Agreement dated 28th February 2025. The Applicant seeks costs of the present Application and such other reliefs as may be required considering the facts and circumstances of the case. Learned Advocate for the Applicant submits that the Contractor Agreement dated 28th February 2025 was entered into between the Applicant and Respondent No.1. The said Agreement contains an Arbitration Clause, being Clause 28, and the Agreement has been signed by the parties. Learned Advocate for the Applicant submits that Respondent No.1 was appointed as the Contractor for carrying out the Structural Glazing work for the Applicant's project "Prime Square", Kandivali (West), Mumbai. Under the Contractor

Agreement dated 28th February 2025, the work was to be completed within four months. Time was therefore important under the Agreement.

5. He submits that the Applicant paid an advance amount of Rs.1,32,70,000/- to the Respondents. Even after receiving this amount, the Respondents continued to assure the Applicant that the material was ready. However, when the Applicant's partner personally visited the Respondents' godown, the godown was found to be empty. He submits that the material was brought to the Project site in small quantities during June and July 2025 and after substantial delay. The installation work was progressing very slowly. By August 2025, the work had stopped. The Respondents stopped replying to the communications sent by the Applicant. Learned Advocate for the Applicant submits that because of the above situation, the Applicant had to engage another contractor to complete the work. This caused an additional cost of Rs.63,85,069/-. The Applicant paid Rs.6,50,000/- to the labour contractor engaged by the Respondents to prevent disruption at the Project site. Learned Advocate for the Applicant submits that the value of the work actually completed by the Respondents was only Rs.1,13,22,218/-. There was therefore a shortfall of Rs.19,47,782/- as against the amount paid by the Applicant. According to the Applicant, after adding interest, escalation costs and business losses, the total amount claimed is Rs.4,45,72,335/-. The said amount was demanded by the Applicant in the Demand Notice dated 29th January 2026. Learned Advocate for the Applicant submits that although the Demand Notice was duly

served upon the Respondents, the Respondents did not give any reply to the same. The Applicant therefore invoked Clause 28 of the Contractor Agreement by issuing the Notice dated 4th March 2026. He submits that Respondent No.1, namely 3D Megastructure Pvt. Ltd., is the Contractor and is the signatory to the transaction. Respondent No.1 executed the Contractor Agreement dated 28th February 2025, which contains Clause 28 providing for arbitration.

6. Learned Advocate for the Applicant submits that Respondent No.2, MKK Ventures (India) LLP, is not a signatory to the Agreement but is the entity in whose name the invoices were issued and which received the payments. Respondent No.3 represented Respondent No.2 as a “sister concern” of Respondent No.1. Respondent No.2 received the entire advance amount of Rs.1,32,70,000/- and issued Invoice No. 3D/CPT/RA001. According to the Applicant, Respondent No.2 has admitted receipt of the said amount in its reply. Learned Advocate for the Applicant submits that Respondent No.3, Ketan Khaire, is not a signatory to the Agreement. He is, however, a Director of Respondent No.1 and a Partner of Respondent No.2. He personally started and negotiated the transaction and remained involved in the transaction throughout. He represented the expertise of Respondent No.1. He signed the Arbitration Agreement, gave repeated assurances to the Applicant during the period of delay and requested a advance of Rs.20,00,000/-. Learned Advocate for the Applicant submits that Respondent No.4, Manisha Ketan Khaire, is a non-signatory. She is a Director of Respondent No.1 and a Partner of Respondent No.2. She was looking after the day-

to-day affairs of Respondent Nos.1 and 2. He submits that Respondent No.5, Prakash Govind Rewale, is a non-signatory, Director of Respondent No.1 and Partner of Respondent No.2. He was looking after the day-to-day affairs of Respondent Nos.1 and 2. Learned Advocate for the Applicant submits that Clause 28 of the Contractor Agreement contains an Arbitration Clause and disputes have arisen between the parties. The Applicant has therefore approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to decide the disputes and differences between the Applicant and the Respondents.

7. Learned Advocate for Respondent No.2 and Respondent Nos.3 to 5 submits that the present Application, to the extent it seeks appointment of an Arbitrator against Respondent No.2, is misconceived and cannot be maintained either on facts or in law. It therefore deserves to be dismissed at the threshold. Respondent No.2 is neither a signatory nor a party to the Contractor Agreement dated 28th February 2025 executed between the Applicant and Respondent No.1. Respondent No.2 has never entered into any contractual arrangement with the Applicant containing an arbitration clause or otherwise agreeing to refer any dispute to arbitration. Learned Advocate for Respondent Nos.2 to 5 submits that the entire case made in the present Application arises from the alleged breaches of the Contractor Agreement dated 28th February 2025. Respondent No.2 neither negotiated nor executed nor signed the said Agreement. Respondent No.2 was not entrusted with carrying out any part of the contractual work. It did

not take any obligation under the Agreement and never represented to be a contracting party. Learned Advocate for Respondent Nos.2 to 5 submits that the Applicant has not produced any document showing that Respondent No.2 agreed to be bound by the terms of the Contractor Agreement or by the Arbitration Clause contained in it. There is no assignment, novation, accession, assumption of obligations or any written or oral agreement by which Respondent No.2 accepted any contractual liability towards the Applicant.

8. Learned Advocate for Respondent Nos.2 to 5 submits that the only apparent reason for joining Respondent No.2 in the present proceedings is that some payments were made by the Applicant into the bank account of Respondent No.2. Mere payment into the account of Respondent No.2 does not create a contractual relationship between the Applicant and Respondent No.2. It does not show that Respondent No.2 agreed to arbitration. The Applicant has not shown any legal basis under which merely receiving money can make a non-signatory liable under an Arbitration Agreement executed by other parties. Learned Advocate for Respondent Nos.2 to 5 submits that the Applicant has nowhere stated that Respondent No.2 carried out the contractual work, issued invoices under the Contractor Agreement, raised running account bills, took part in the contractual negotiations, communicated with the Applicant as a contracting party or accepted any obligation under the Contractor Agreement. In the absence of such basic pleadings, the joining of Respondent No.2 as a party is without proper basis and is liable to be rejected. Learned

Advocate for Respondent Nos.2 to 5 submits that the Supreme Court in Cox & Kings Ltd. v. SAP India Pvt. Ltd. has held that a non-signatory can be referred to arbitration only in exceptional circumstances and after satisfying the held legal requirements, including a clear intention of the parties to bind the non-signatory. Mere commercial dealings, financial transactions, routing of payments or business association are not sufficient to apply the Group of Companies doctrine or any other held exception. Learned Advocate for Respondent Nos.2 to 5 submits that the present Application does not contain the necessary facts required for making a non-signatory a party to the arbitration. There are no pleadings showing any common intention to arbitrate, assumption of contractual obligations, acceptance of contractual benefits under the Arbitration Agreement or any composite transaction which could bring the case within the limited exceptions held by law. According to the Respondents, the Applicant has only relied upon the banking transactions to draw an inference against the Respondents. Such an inference, according to the Respondents, is not legally permissible.

9. Learned Advocate for Respondent Nos.2 to 5 submits that the Applicant has not disclosed any cause of action against Respondent No.2 arising from the Contractor Agreement dated 28th February 2025. The entire Application proceeds on the basis that the contractual obligations were undertaken by Respondent No.1. Even from the Applicant's own case, there is no statement that Respondent No.2 executed the Agreement, carried out the contractual work, issued any Work Orders, submitted running

account bills, participated in the contractual negotiations or accepted any obligations under the Agreement. In the absence of such pleadings, the joining of Respondent No.2 is misconceived and should be rejected at the threshold. Learned Advocate for Respondent Nos.2 to 5 submits that the statements made in paragraphs 1 to 7 of the Application concern the Applicant, Respondent No.1 and the execution of the Contractor Agreement dated 28th February 2025. Respondent No.2 is neither a signatory nor a party to that Agreement. Therefore, those statements do not concern Respondent No.2. Except to the extent anything has been admitted, all allegations, statements, inferences and interpretations made therein, insofar as they seek to place any liability upon Respondent No.2, are denied.

10. Learned Advocate for Respondent Nos.2 to 5 submits that the contents of paragraph 8 of the Application are denied to the extent that they concern or seek to involve Respondent No.2. Respondent No.2 was never concerned with the contractual payment schedule, mobilisation advance, purchase of material or performance of the contractual obligations under the Contractor Agreement. The Applicant cannot make Respondent No.2 contractually liable merely because certain amounts were paid into its bank account. Mere receipt of money does not establish a contractual relationship between the Applicant and Respondent No.2. It does not make Respondent No.2 a party to the Arbitration Agreement. Learned Advocate for Respondent Nos.2 to 5 submits that the power of this Court under Section 11 of the Arbitration and Conciliation Act, 1996 can be exercised only against persons

who are bound by a valid and enforceable Arbitration Agreement. The Applicant has not produced or disclosed any Arbitration Agreement executed by or binding upon Respondent Nos.2 to 5. There is no agreement, assignment, novation, accession, assumption of contractual obligations or any other held legal basis by which Respondent Nos.2 to 5 can be treated as parties to the Arbitration Agreement contained in the Contractor Agreement dated 28th February 2025.

11. Learned Advocate for Respondent Nos.2 to 5 submits that Respondent Nos.2 to 5 are admittedly not signatories to the Contractor Agreement dated 28th February 2025. They did not negotiate or execute the said Agreement and never undertook or accepted any contractual obligation under it. Respondent No.4, in particular, never agreed, either expressly or impliedly, to refer any dispute to arbitration. Learned Advocate for Respondent Nos.2 to 5 submits that the Supreme Court has consistently held that a non-signatory can be referred to arbitration only in exceptional circumstances held by law. Mere business association, common management, commercial dealings, participation in meetings or involvement in a project does not by make a non-signatory bound by an Arbitration Agreement. According to the Respondents, the Applicant has failed to satisfy any of the legal requirements for making a non-signatory bound by the Arbitration Agreement.

12. Learned Advocate for Respondent Nos.2 to 5 submits that the Applicant has tried to give an impression that Respondent No.4 was responsible for carrying out the Project. The said allegation is denied. Respondent No.4 was never entrusted with carrying out

the work under the Contractor Agreement. She never accepted any contractual obligation towards the Applicant. Therefore, she cannot be made liable for disputes which, according to the Respondents, arise only from the contractual relationship between the Applicant and Respondent No.1.

REASONS AND FINDINGS:

13. I have considered the submissions made by the learned Advocate for the Applicant and the learned Advocate appearing for Respondent No.2 and Respondent Nos.3 to 5. At this stage, the Court has to see whether there is prima facie an Arbitration Agreement and whether the disputes can be referred to arbitration. The Court has to see whether the objections raised by the Respondents who have not signed the Agreement are such that the arbitration cannot proceed against them.

14. From the material before the Court, the first fact which appears is that there is a Contractor Agreement dated 28th February 2025 between the Applicant and Respondent No.1. The Applicant relies upon Clause 28 of that Agreement as the Arbitration Clause. The Respondents have not shown any material at this stage to say that there was no such Agreement between the Applicant and Respondent No.1. The Applicant has produced the Agreement and has relied upon the signatures appearing on it. Therefore, as regards Respondent No.1, there is prima facie sufficient material to show that an Arbitration Agreement exists.

15. The Applicant's case is that Respondent No.1 was appointed for carrying out the Structural Glazing work of the project "Prime

Square”, Kandivali (West), Mumbai. According to the Applicant, the work was to be completed within four months. The Applicant says that substantial advance amounts were paid to the Respondents. Even after receiving these amounts, according to the Applicant, the work was not completed. The material was supplied after considerable delay. The installation work was proceeding stopped. The Applicant then appointed another contractor and claims Rs.63,85,069/- towards the additional escalation cost. The Applicant claims Rs.6,50,000/- paid to the labour contractor and other amounts. The total amount claimed by the Applicant is Rs.4,45,72,335/-.

16. Whether the Applicant is in fact entitled to receive these amounts is a matter to be decided on the merits. Whether the Respondents committed breach of the Agreement, whether the work actually completed was worth Rs.1,13,22,218/-, whether the Applicant was justified in appointing another contractor and whether the claims for escalation, interest and business loss can be recovered are matters which require evidence. These questions cannot be finally decided in the present Section 11 proceedings only by looking at the different statements made by the parties.

17. The objection raised by the Respondents that Respondent No.2 has not signed the Contractor Agreement requires consideration. The Respondents submit that Respondent No.2 did not negotiate or execute the Agreement, did not undertake the contractual work and never agreed that any dispute would be referred to arbitration. It is submitted that merely because money was received in the bank account of Respondent No.2, Respondent

No.2 cannot become a party to the Arbitration Agreement. This submission cannot be rejected without examining the same. A person who has not signed the Agreement cannot automatically be treated as a party merely because such person has some connection with the transaction. The conduct of that person and the surrounding circumstances have to be seen. However, the Applicant's case is not based only on the bank payments. The Applicant states that Respondent No.3 represented Respondent No.2 as a “sister concern” of Respondent No.1. The Applicant relies upon the fact that Respondent No.2 received the advance amounts and issued Invoice No. 3D/CPT/RA001. The Applicant states that Respondent No.2 has admitted receipt of the amount in its reply. The Applicant relies upon the role of Respondent No.3, who is stated to be a Director of Respondent No.1 and Partner of Respondent No.2 and who is alleged to have negotiated and conducted the transaction. Therefore, the material relied upon by the Applicant shows certain facts and circumstances which require consideration. Whether these circumstances are finally enough to show consent to arbitration is a separate question. At this stage, it would not be proper to reject the Applicant's case only because Respondent No.2 has not signed the Agreement. The law as it stands does not say that signature is the only way by which a person can become bound by an Arbitration Agreement.

18. The Supreme Court in *Cox & Kings Ltd. v. SAP India (P) Ltd.* (2024) 1 SCC 1 has held what the Court has to examine when a matter is brought for reference to arbitration. Paragraph 166 states:

“the Court only has to determine the prima facie existence of an arbitration agreement.”

19. Therefore, if the Court cannot finally decide the issue at this stage, the issue can be left to the Arbitral Tribunal. The Court should avoid unnecessary interference in the arbitration proceedings. The reason for following this approach is held in the passage referred to in paragraph 166. The Supreme Court relied upon *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* (2005) 7 SCC 234 and observed:

“74. ... Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not valid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration.”

20. In view of this legal position, the submission of Respondent No.2 that this Court must finally decide at this stage whether Respondent No.2 is bound by the Arbitration Agreement cannot be accepted in the manner in which it is made. At this stage, the Court has to make only a prima facie examination. A full trial on this issue is not required at this stage.

21. Paragraph 168 of *Cox & Kings* deals with a non-signatory who is joined in a petition under Section 11. The Supreme Court

has held that the Court has to make a prima facie examination about the existence and validity of the Arbitration Agreement., the question whether the non-signatory is actually bound by the Arbitration Agreement can be left to the Arbitral Tribunal. The position is held in paragraph 169 of Cox & Kings. The Supreme Court has held that deciding whether a non-signatory is a party to an Arbitration Agreement may require consideration of “the factual evidence and application of legal doctrine”. The Tribunal can therefore consider “the factual, circumstantial, and legal aspects of the matter” and decide whether its jurisdiction extends to the non-signatory. The Tribunal must give the non-signatory an opportunity to raise objections regarding its jurisdiction.

22. The objections raised by Respondent No.2 concern the reason for making payments into its bank account, the invoice issued by it, the representations allegedly made by Respondent No.3, the relationship between Respondent Nos.1 and 2 and the actual conduct of the persons concerned. These matters may require examination of the complete documents and evidence. Therefore, they cannot properly be finally decided in the present Section 11 proceedings. The Respondents have relied upon the fact that Respondent Nos.2 to 5 have not signed the Agreement. They have submitted that there is no assignment, novation, accession or assumption of contractual obligations. To the extent the Respondents submit that merely being connected with a contracting party is not sufficient, that submission is correct. However, the absence of a separate document of assignment or novation does not by end the matter. Paragraphs 170.1 to 170.3 of

Cox & Kings make it clear that “parties” may include both signatories and non-signatories. The conduct of a non-signatory can be considered for finding out whether there was consent.

23. Paragraph 170.2 states:

“Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;”

24. Therefore, it cannot be accepted that the signature on the Contractor Agreement is in every case the only material which can be considered for deciding whether a non-signatory is bound by the Arbitration Agreement. At the same time, the submission that merely receiving money makes Respondent No.2 a party to the Arbitration Agreement cannot be accepted. Receipt of money alone would not establish consent to arbitration. In the present case, however, the Applicant relies upon other circumstances. It relies upon the invoice issued by Respondent No.2, the alleged representation regarding its relationship with Respondent No.1 and the conduct of Respondent No.3. Whether all these circumstances are finally sufficient to satisfy the legal requirement can be decided after the evidence is considered.

25. The Respondents have submitted that there are no pleadings showing any common intention to arbitrate or assumption of contractual obligations. However, the Applicant has pleaded that Respondent No.2 received the contractual payments and issued the invoice. The Applicant has pleaded the active role of Respondent No.3 in negotiating and conducting the transaction. Therefore, at this stage, it cannot be said that the Applicant's case has no factual

basis. Whether these facts are sufficient to bind the non-signatories is a separate question. This difference is important at the stage of reference. The Supreme Court has considered written communications in paragraph 186 of *Cox & Kings*. It has held that the consent of a non-signatory may be gathered from its conduct shown in written correspondence. Such correspondence may include correspondence with third parties if it shows conduct pursuant to the contract containing the Arbitration Agreement. The Supreme Court has stated:

“even in the absence of a signature, the non-signatory's consent to arbitration can be gathered from its written correspondence (even with third parties) that shows its conduct pursuant to the contract containing the arbitration agreement.”

26. This principle does not mean that every person or company receiving money in a transaction automatically becomes a party to the Arbitration Agreement. Such a conclusion cannot be taken from *Cox & Kings*. At this stage, the Court can consider the conduct and surrounding material on a prima facie basis and see whether the issue requires fuller consideration by the Arbitral Tribunal. The same consideration applies to Respondent No.3. The Applicant states that Respondent No.3 is a Director of Respondent No.1 and Partner of Respondent No.2. It is stated that he initiated and negotiated the transaction, made representations regarding the work and material, gave assurances during the delay and requested a advance of Rs.20,00,000/-. The Applicant states that Respondent No.3 signed the Arbitration Agreement. The Respondents dispute the liability and status of the non-signatory

persons. These competing cases cannot be finally decided merely from the pleadings without examining the supporting material.

27. So far as Respondent Nos.4 and 5 are concerned, the Applicant mainly relies upon their position as Director and Partner and their alleged involvement in the day-to-day affairs of Respondent Nos.1 and 2. The Respondents deny that such position or involvement made them parties to the Contractor Agreement. They deny that they personally accepted any contractual obligation towards the Applicant.

28. A person does not become personally liable under a contract merely because that person is a Director, Partner or is involved in management of a separate legal entity. The separate legal identity of the concerned companies and firms has to be respected. This is consistent with paragraph 170.5 of *Cox & Kings*, which requires corporate separateness to be maintained while considering the Group of Companies doctrine. Paragraph 170.6 states:

“The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the Group of Companies doctrine;”

29. Therefore, the fact that Respondent Nos.4 and 5 are Directors or Partners, or that they are alleged to have looked after the day-to-day affairs, by is not sufficient to treat them as parties to the Arbitration Agreement. There must be some material showing their consent or some other held legal basis by which they can prima facie be bound by the Arbitration Agreement.

30. On the material placed before the Court, the case against Respondent Nos.4 and 5 is different from the case against Respondent Nos.2 and 3. In the case of Respondent No.2, there is the pleaded receipt of the advance amount and issuance of the invoice. In the case of Respondent No.3, there is the pleaded role in negotiating and conducting the transaction and the other acts relied upon by the Applicant. In the case of Respondent Nos.4 and 5, the main basis is their position in the concerned entities and their alleged role in management. This is not sufficient.

31. The difference between a “party” to an Arbitration Agreement and a person “claiming through or under” a party has been considered in paragraph 170.4 of *Cox & Kings*. Paragraph 170.9 states that persons “claiming through or under” can assert a right only in a derivative capacity. Therefore, the actual basis on which a non-signatory is sought to be bound has to be seen. A corporate relationship by is not sufficient.

32. Paragraph 170.8 of *Cox & Kings* is relevant. The Supreme Court has held that all the cumulative factors laid down in *ONGC Ltd. v. Discovery Enterprises (P) Ltd.* have to be considered. The fact that companies form one economic unit cannot by be the only reason for applying the Group of Companies doctrine. Therefore, merely because Respondent Nos.1 and 2 are stated to be “sister concerns” or are said to have common management, that fact alone cannot decide whether the non-signatories are bound by the Arbitration Agreement. However, at this stage, the Court is not required to finally decide the whole question relating to the Group of Companies doctrine. Paragraph 170.11 of *Cox & Kings*

recognises that the doctrine may be useful in complicated transactions involving several parties and several agreements. Paragraph 170.12 states that at the referral stage the Court should leave it to the Arbitral Tribunal to decide whether the non-signatory is bound by the Arbitration Agreement.

33. The Respondents have submitted that the Applicant has not shown any cause of action against Respondent No.2. This submission by cannot result in dismissal of the present Application. The Applicant has stated that Respondent No.2 received substantial payments and issued an invoice. Whether these facts ultimately create contractual liability is a matter for the Tribunal to decide. At the referral stage, the Court has mainly to see whether there is prima facie an Arbitration Agreement and whether the disputes can be referred to arbitration. The dispute raised by the Applicant is mainly regarding failure to complete the Structural Glazing work and the consequences which, according to the Applicant, followed from that failure. These disputes arise from the transaction covered by the Contractor Agreement. No material has been shown to indicate that these disputes are of such a nature that they cannot be referred to arbitration. The main issue before the Court is therefore regarding the persons who are bound by the Arbitration Agreement. The Applicant has relied upon the fact that the Demand Notice was not replied to by the Respondents. This may have some relevance when the merits are considered. But silence by cannot be treated as an admission of liability. In the same way, the Applicant's allegation that the Respondents failed to complete the work cannot at this stage be treated as a final

finding. Whether there was breach, what caused the delay and whether the amounts claimed are payable will have to be decided by the Arbitral Tribunal.

34. The claim of Rs.4,45,72,335/- cannot at this stage be treated as admitted or proved. The Applicant has held the claim by referring to the amount paid, the value of the work allegedly completed, escalation costs, labour payments, interest and business losses. The Respondents are entitled to dispute each part of the claim. The Tribunal can examine the Agreement, invoices, payment records, correspondence, work records and other relevant evidence and decide the claim in accordance with law. I therefore find that, so far as Respondent No.1 is concerned, the existence of the Arbitration Agreement is sufficiently established on a prima facie basis. There is a written Contractor Agreement dated 28th February 2025 containing Clause 28. The disputes raised by the Applicant arise from that contractual relationship. There is therefore no reason at this stage to refuse reference of the disputes between the Applicant and Respondent No.1 to arbitration.

35. As regards Respondent No.2, I am unable to accept the submission that the Application must fail only because Respondent No.2 has not signed the Contractor Agreement. At the same time, I am not recording any final finding that Respondent No.2 is conclusively bound by Clause 28. The material placed by the Applicant gives rise to a prima facie issue which requires consideration. In view of the law stated in *Cox & Kings*, the proper course is to leave the final decision as to whether Respondent No.2 is bound by the Arbitration Agreement to the Arbitral Tribunal.

36. The same approach applies to Respondent No.3, though the factual basis relied upon is different. The Applicant has pleaded the participation of Respondent No.3 in the negotiation and conduct of the transaction. This conduct requires consideration. Whether such conduct amounts to consent to the Arbitration Agreement cannot be finally decided only on the pleadings. The Arbitral Tribunal can consider the evidence and decide the issue under Section 16 of the Arbitration and Conciliation Act, 1996.

37. So far as Respondent Nos.4 and 5 are concerned, however, the material presently placed before the Court shows their relationship with Respondent Nos.1 and 2 and their alleged involvement in management. These facts, by themselves, do not show prima facie consent to the Arbitration Agreement. The judgment in *Cox & Kings* does not permit the separate identity of the concerned entities to be ignored merely because a person holds a managerial position. I therefore find that, on the present material, there is no sufficient prima facie basis to treat Respondent Nos.4 and 5 as parties to the Arbitration Agreement. This finding does not mean that Respondent Nos.4 and 5 can never have any connection with the dispute or that no independent claim can ever be made against them if the law otherwise permits such claim. The finding is limited to the present Section 11 Application. On the material presently available, they cannot be treated as parties to the Arbitration Agreement.

38. The Respondents have relied upon the general principle that a person who is not a party to an Arbitration Agreement should not be referred to arbitration. The principle, as a general

proposition, is correct. However, after the judgment in *Cox & Kings*, whether a non-signatory is actually bound by an Arbitration Agreement cannot in every case be finally decided at the referral stage. The Court has to make a prima facie assessment. If the question requires a fuller examination of facts and law, it can be left to the Arbitral Tribunal. This approach gives effect to the principle of competence-competence. Section 16 of the Arbitration and Conciliation Act, 1996 permits the Arbitral Tribunal to decide its own jurisdiction. This includes objections regarding the existence or validity of the Arbitration Agreement and the question as to which persons are bound by it. The concerned non-signatory must be given proper opportunity to raise its objection and the Tribunal has to decide the same in accordance with law and principles of natural justice. On considering the submissions of both sides as a whole, I therefore find that the Applicant has made out a prima facie case for referring the disputes arising from the Contractor Agreement dated 28th February 2025 to arbitration. Clause 28 of the Agreement is prima facie an Arbitration Clause and is operative between the Applicant and Respondent No.1. The objections raised do not give any sufficient reason at this stage to refuse reference of the disputes between them.

39. I find that the objections of Respondent No.2 and Respondent No.3 involve questions regarding their conduct, the documents, the surrounding circumstances and the applicable legal principles. These questions cannot properly be finally decided in the present proceedings. In view of paragraphs 168, 169 and 170.12 of *Cox & Kings*, the final decision as to whether they are

bound by the Arbitration Agreement should be left to the Arbitral Tribunal. The Arbitral Tribunal will therefore consider the Contractor Agreement, the payments made, the invoice issued by Respondent No.2, the correspondence between the parties, the conduct of the persons concerned and all other relevant material. The Tribunal will consider the objections raised by the non-signatory Respondents. It will then decide whether, on facts and in law, Respondent Nos.2 and 3 are bound by Clause 28.

40. So far as the actual monetary claims are concerned, I am not recording any final finding in favour of either side. The Applicant will have to establish its entitlement to the amount claimed. The Respondents will be entitled to raise all their contractual, factual and legal defences before the Tribunal. The findings in the present order shall not be treated as a final finding regarding breach, delay, quantum, escalation cost, labour payments, interest or business losses claimed by the Applicant. I therefore find that the Applicant has crossed the threshold required for appointment of an Arbitrator in respect of the disputes arising from the Contractor Agreement dated 28th February 2025. The question whether Respondent Nos.2 and 3 are bound by the Arbitration Agreement is left to the Arbitral Tribunal for determination after considering the complete material and giving them proper opportunity of hearing. However, Respondent Nos.4 and 5 cannot, on the present material, be treated as parties to the Arbitration Agreement merely because of their alleged corporate or managerial connection with Respondent Nos.1 and 2.

41. In these circumstances, the Application is liable to be allowed to the aforesaid extent. The necessary directions regarding appointment of the Sole Arbitrator and the manner in which the reference shall proceed are therefore required to be passed separately in the operative part of the order.

42. In view of the aforesaid, the present Application filed under Section 11 of the Act, is disposed of by passing the following order:

A) Mr.Shadab Jan, an advocate of this Court, is hereby appointed as the Sole Arbitrator to to adjudicate the disputes and differences arising between the Applicant and Respondent No.1 in connection with the Contractor Agreement dated 28th February 2025, including the disputes arising under Clause 28 thereof;

Office Address:- 1701, One Infinity, Cawasji Patel Street, Fort, Mumbai – 400001.

Email ID:shadabsjan@outlook.com

B) A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from today. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C) The 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 Applicant and a copy of the same shall be furnished by the Advocates for the Applicant to the Advocates for the Respondent;

D) The 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 parties within a period of two weeks from receipt of a copy of this Order;

E) The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions 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 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;

43. 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.

44. The learned Sole Arbitrator shall, at the appropriate stage and in accordance with law, consider and decide the objection as to whether Respondent Nos.2 and 3 are bound by the Arbitration Agreement contained in Clause 28 of the Contractor Agreement dated 28th February 2025 and whether the Tribunal has jurisdiction over them. The said issue shall be decided in accordance with Section 16 of the Arbitration and Conciliation Act, 1996 and after giving the concerned Respondents full opportunity of hearing.

45. Respondent Nos.4 and 5 are not referred to arbitration under the present Application. The Applicant shall be at liberty to pursue such remedies as may be available in law against Respondent Nos.4 and 5, if otherwise permissible.

46. The Application stands disposed of in the aforesaid terms.

47. There shall be no order as to costs.

(AMIT BORKAR, J.)