

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

BEFORE :-

THE HON'BLE JUSTICE SHAMPA SARKAR

AP- COM 755 OF 2025

SUSHIL KHAITAN

VS

AJAY MITTAL AND ORS.

For the Petitioner	: Mr. Jishnu Chowdhury, Sr. Adv. Mr. Deepan Kumar Sarkar, Adv. Mr. Altamash Alim, Adv. Mr. Samridha Sen, Adv. Mr. Jaydeb Ghorai, Adv. Mr. Saugata Banerjee, Adv. Mr. Diptesh Ghorai, Adv.
For the Respondent no. 1	: Mr. S. N. Mookherjee, Sr. Adv. Mr. Subrojoyoti Mookherjee, Adv. Mr. Neelash Choudhury, Adv. Ms. Anuradha Poddar, Adv.
Judgment Reserved on	: 24.02.2026
Judgment Delivered on	: 19.03.2026
Judgment Uploaded on	: 19.03.2026

Shampa Sarkar, J.

1. This application has been filed for appointment of an arbitrator, to resolve the disputes which arose between the petitioner and the

respondents. The petitioner and the respondent Nos. 1 and 2 are the partners of Ashoka Exports (in short 'the firm'). The firm was registered under the provisions of Indian Partnership Act, 1932. The firm was engaged, inter alia, in the business of manufacture and export of jute and cotton bags. The partnership firm was governed by a Reconstituted Partnership Deed dated April 1, 2009. The said deed was renewed from time to time. The reconstituted partnership deed contained an arbitration agreement under clause 25 thereof, which is quoted below:-

“THAT all matters of differences/dispute relating to the said partnership affairs shall be referred to arbitration according to and subject to the prevailing provisions of the Arbitration Act, or as amended from time to time.”

2. According to Mr. Chowdhury, learned senior Advocate, pursuant to the final amendment to the reconstituted deed, vide an agreement dated April 6, 2023, the petitioner and the respondent Nos. 1 and 2 had the following shares in the partnership business:-

“(a) Petitioner : 47.5%
(b) Respondent No.1 : 47.5%
(c) Respondent No. 2 : 5%”

3. Mr. Chowdhury alleged that the respondent No. 1 acted in an unfair, unjust, disloyal and inequitable manner and denied the right of petitioner as a partner of the said firm. The respondent No. 1 was siphoning off the assets of the firm. The respondent No. 3, was nothing, but the alter ego of the respondent No 1. The respondent no. 1 was also poaching the clients, customers, employees, staff and workmen of the firm, thereby promoting the business of the

respondent No. 3. The respondent No 3 was a company registered under the Companies Act, 2013 and was running a competitive business enterprise. It was alleged that the actions of the respondent No. 1 were contrary to the terms and conditions of the reconstituted partnership deed. The respondent no. 3 was functioning from the same premises as the respondent No. 4 and was using the plant, machinery, space, workmen and the know-how of the partnership business. Moreover, the petitioner was not being given access to the accounts and was denied all his rights and privileges as a partner.

4. According to Mr. Chowdhury, the respondent no.1 induced the petitioner to amicably divide the partnership business and the petitioner, believing the proposal of the said respondent to be bona fide and in good faith, agreed to such proposal. Therefore, the petitioner and the respondent No. 1 executed a Memorandum of Understanding on October 30, 2024 as to how they would deal with their business. The respondent No. 2 was jointly and equally owned by the families of the petitioner and the respondent No. 1. The petitioner contends to have performed his obligations under the MOU by selling and causing the sale of his and his family's shares in the respondent No. 2, to the respondent No. 1, sometime in December 2024. In February 2025, the petitioner signed a letter of authority in favour of the respondent No. 1 in good faith. The respondent No. 1 was authorized to take loans for the business of respondent no. 3, by leveraging the financial credibility of the firm. It was alleged that the respondent no. 1 had unjustly and unfairly appropriated and

procured purchase orders of the partnership business, to expand the business of the respondent no. 3. The respondent no. 3 had also tried to participate in an international fair, and set up a stall with products which were akin to those manufactured by the partnership business, by proclaiming that it was the sole manufacturer of those products.

5. As per the MOU, the division of the business was to be effected from April 1, 2025. Reciprocal obligations of the petitioner and the respondent no.1 were contemplated thereunder. The said firm was to dissolve within a period of 2 years from the date of execution of the MOU. The respondent no. 1 promised that, he would adhere to the division of the clients and would not poach any client or employee or staff of the firm, or take any other step to render the MOU infructuous. However, there were violations of the terms. The respondent no. 3 used the same user id of the said firm. Further, the registered office of the respondent no. 3 was the same as the office of the respondent no. 4. The business of the firm was usurped by the respondent no.1. The respondent No. 3 was running a parallel business. The respondent no.1 severed all relationship with the petitioner vis-à-vis the firm. The petitioner was kept away from all such business related activities of the firm. It was further alleged that the respondent no.1 continued to act unjustly and unfairly against the interest of the firm.

6. Thus, disputes cropped up between the parties, and the petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 for various interim reliefs. The application under Section 9

came up for hearing before the High Court. The following order was passed:-

“.....

7. Although the law provides that any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, there is nothing on record to show that any attempt was made by the partners to resolve the disputes in terms of Section 12(c). Every partner has a right to have access to and inspect the books of the firm. Thus, Sushil cannot be kept away from the accounts, papers and books of accounts of the firm and he shall have access to the same.

8. General duties of the partners under Section 9 of the said Act provides that partners are bound to carry on business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm, to any partner or his legal representative.

.....

11. Under such circumstances, the petitioner being a partner of the firm shall enjoy the benefits of the business as per law, shall have equal right of participation in the business, shall be allowed to visit the office and access the books of accounts etc. ... All rights emanating from the Indian Partnership Act, 1932, shall be made available to Sushil...

12. Status quo will be maintained with regard to the assets. The assets which have allegedly been sold to Green Bridge, will not be further alienated. The nature and character of the same shall not be changed...”

7. Alleging non-compliance and violation of the above order, a contempt application was filed vide C.P. Com No. 13 of 2025. The following order was passed:-

“Copy of the contempt application be served upon the learned Advocate on record for the alleged contemnor. Affidavit in opposition to be filed within two weeks from date; reply, if any, within a week thereafter.

Let this matter appear along with AP-COM/ 427/2025 on September 15, 2025.

In the meantime, the interim order already passed, which Mr. Mookherjee submits to have been complied with, shall continue. Both the parties shall act in terms of the partnership agreement in respect of the partnership firm operating under the name and style of 'Ashoka Exports'. Both the parties shall have access to the official e-mails

received from the customers or any other third party of the partnership firm 'Ashoka Exports'.

Needless to mention that all parties shall have access to the accounts of 'Ashoka Exports' as well.

The submission of Mr. Chowdhury, learned Senior Advocate that, Green Bridge Exports Private Limited has been using the premises and the assets of Ashoka Exports, shall be decided on the next date."

8. The petitioner issued a notice under Section 21 of the Arbitration and Conciliation Act, invoking clause 25 of the reconstituted Partnership Deed, and nominated a retired Chief Justice to act as the sole arbitrator for adjudication of the claims of the petitioner. Mr. Jishnu Chowdhury submitted that this was a fit case for appointment of an arbitrator, in view of the disputes between the parties. The corporate veil of the respondent No.3 should be pierced, to appreciate the role and involvement of the respondent No.3 in the dispute which had arisen.

9. Mr. Jishnu Chowdhury relied on the following decisions:-

(i) ***Cox and Kings Limited vs Sap India Private Limited and Anr.*** reported in ***(2024) 4 SCC 1***

(ii) ***Oil and Natural Gas Corporation Limited vs Discovery Enterprises private Limited and Anr.*** reported in ***(2022) 8 SCC 42***

(iii) ***Cox and Kings Limited vs Sap India Private Limited and Anr.*** reported in ***(2025) 1 SCC 611,***

(iv) ***ASF Buildtech Private Limited vd Shapoorji Pallonji and Company Private Limited*** reported in ***(2025) 9 SCC 76.***

10. The respondent no.1 replied to the notice invoking arbitration and refused to agree to the name proposed by the petitioner and recommended another learned senior Advocate, to act as the Arbitrator.

11. Hence, this application has been filed for appointment of an arbitrator in terms of clause 25 of the reconstituted partnership deed, inter alia, for the resolution of the dispute between the parties. The other respondents did not enter appearance despite service. The respondent No.1 filed an affidavit-in-opposition to the application and denied the allegations of the petitioner. Mr. S.N. Mookherjee, learned senior Advocate for the Respondent no. 1 submitted that, the petitioner was actually trying to implement the terms and conditions of the MOU, which did not contain any arbitration clause. The respondent no. 3 was not a partner of the respondent no.4 and was in no way connected with the Reconstituted Partnership Deed dated April 1, 2009. There was no arbitration agreement between the petitioner and the respondent no.3. The respondent no.3 could not be compelled to participate in the arbitral proceeding. The respondent no.3 was a company incorporated under the Companies Act. It had a separate legal identity from the respondent no.1. When the deed was executed between the parties, that is, on April 1, 2009, the respondent no.3 was not in existence.

12. It was also urged that, no materials had been disclosed before the court which would demonstrate that as on April 1, 2009, either the respondent No.1 or the respondent no.3 had shown any intention to bind the respondent No.3 either to the partnership business or the arbitration clause. Further, the averments in the application and the documents annexed thereto, disclosed a separate and independent legal existence of the respondent no. 3. The identity of the respondent No. 3 was neither doubtful nor questionable. The arbitration agreement was contained exclusively in the partnership deed. The covenants in the said deed, did not

disclose any obligation of the respondent no.3. The respondent no. 3 was not connected with the underlying contract. There was nothing on record which would show that the respondent no.3, either directly or indirectly, could be bound by the arbitration agreement. Moreover, the respondent no.3 was not a party to the injunction application, but had been craftily added as a respondent in this application. This attempt of the petitioner to drag the respondent no.3 to an arbitral proceeding, was nothing but a ploy to harass and the respondent no.3 and hinder its business.

13. Mr. Mookherjee learned senior Advocate further submitted that the decisions relied upon by Mr. Jishnu Chowdhury were under the group companies doctrine. In those decisions, the central issue was whether a company who was not a signatory to an arbitration agreement should be referred to arbitration, being a part or constituent of the same group. In all such decisions, it had been recognized that the group companies' doctrine was a consent-based doctrine for identifying the real intention of the parties to bind the non-signatory corporate entities to an arbitration agreement. Mr. Mookherjee referred to paragraphs 85 to 94 of the decisions reported in ***Cox and Kings Limited vs. Sap India Private Limited and Another*** reported in **(2024) 4 SCC 1** in support of his contentions.

14. It was urged that, in the case in hand, the respondent no.3 had not expressed any consent to be bound either by the Reconstituted Partnership Deed dated April 1, 2009 or by the arbitration clause contained therein. As such, none of the decisions would be applicable. There was nothing on record which would indicate that the respondent no.1 was the agent of the respondent no.3 or that the respondent no.3 had stepped into the shoes of

the respondent No. 1. It was further submitted that, the doctrine of piercing the corporate veil could not be easily invoked and ought to be used sparingly, specially in the context of reference to arbitration. The only reason cited by the petitioner to invoke arbitration against the respondent no.3 was that the respondent no.1 was in control and management of the respondent no.3. Referring to ***Balwant Rai Saluja vs Air India Ltd.*** reported in **(2014) 9 SCC 407**, it was categorically submitted that the Hon'ble Apex Court had held that separateness of the corporate personality could not be disregarded, solely on the ground of ownership and control. The petitioner had failed to make out and establish a case for piercing the corporate veil. Mere averment that the respondent no.3 was the alter ego of the respondent no.1 and that the respondent no.1 was competing with the partnership business through the respondent no. 3, would not be sufficient ground to pierce the corporate veil of the respondent no.3. The fact that some assets of the partnership had been transferred to the respondent no.3 for valuable consideration, also, could not result in the respondent no.3 being bound by the covenants of the partnership deed and by the arbitration agreement. Thus, in this case, the doctrine of piercing the corporate veil could not be pressed into service. Distinguishing the decision reported in ***Oil and Natural Gas Corporation (supra)***, Mr. Mookherjee submitted that, before a non-signatory could be referred to arbitration, several factors like intention of the parties, relationship between the signatory and the non-signatory, commonality of the subject matter, composite nature of the transaction and performance of the contract, were to be considered by the referral court.

15. Mr. Mookherjee vehemently urged that the respondent no.3 was unconnected with the affairs of the respondent no.4 and played no role whatsoever in the internal affairs of the respondent no.4. The reconstituted partnership deed contained personal covenants which were relevant only to the partners of the respondent no.4.

16. Moreover, the Hon'ble Apex Court had specifically held in the decision of **Cox and Kings (supra)** that the referral court should, prima facie, come to a finding that the non-signatory was a veritable party before referring such non-signatory to arbitration.

17. Considered the rival contentions of the parties. The petitioner and the respondent nos.1 and 2 are partners of a firm registered under the Indian Partnership Act, The partnership is governed by the Reconstituted Partnership Deed dated April 1, 2009. Clause 19 provides that each partner shall be just and faithful to each other in all transactions relating to the partnership and shall at all times be responsible to give the other a just and faithful account of the partnership business. Clause 21 provides that no partner shall, without the consent in writing of the other partner, start a similar or identical type of business like that of the firm. Clause 25 provides that all matters of dispute relating to the affairs of the partnership, shall be referred to arbitration, according to and subject to the prevailing provisions of the Arbitration and Conciliation Act, as amended from time to time. The partnership deed underwent various amendments and lastly on April 6, 2023, the profit and loss sharing was amended as follows:

Ajay Mittal - 47.5%
Sushil Khaitan- 47.5%
M/s Preview Barter Private Limited - 5%.

18. A Memorandum of Understanding (MOU) was entered into between the petitioner and the Respondent no. 1 on October 30, 2024. The said Memorandum of Understanding provided as follows:-

“WHEREAS THE PARTIES hereto of the FIRST AND SECOND PARTS have been doing, partner of M/s ASHOKA EXPORTS since Sharing profit and Loss equally. In the course of business, the following companies have also been established for effectively running the Joint Business.

1. Ashoka Jute Products Pvt. Ltd.
2. Preview Barter Pvt. Ltd.
3. Cegaro Industries Pvt. Ltd.

WHEREAS heirs apparent of both the Parties have joined the business and keeping future prospects in mind and to avoid any misunderstanding/dispute it has been amicably decided by both the Parties to split the existing business of manufacturing and Export of Jute, Cotton, Juco bags as per the agreed terms and conditions as enumerated hereunder:

1. That the division will be effective from 1st April 2025. However, orders received up to 28th February or deliverable by March 2025 as per WO, will remain in joint account.
2. That M/s Ashoka Exports, (AE), the partnership firm will remain a partnership firm with Parties hereto of the First and second Parts as equal partners. M/s Preview Barter Pt Ltd, (PBL) which is a 5% partner will retire and all the investment of PBL will be returned back. M/s AE will remain in existence till both parties mutually decide to wind up AE. It is, however, agreed that the winding up process of AE should start within a maximum of 2 years.
3. That existing domestic and Export clients of AE will be divided between both Parties as per the attached list, except M/s Promogift and Promoline of Italy (including any new entity that they max create) (Promo), which will remain in the joint partnership firm AE.
4. The business of Promo will be divided equally between both the parties as per Value and Profit and will be executed by the parties independently. The export would be done through AE at nominal profit. Both parties have agreed to devise modalities within 2 years (31.03.2027) so as the business of Promo is also divided equally between them.”

19. Both parties, keeping the future in mind had amicably decided to split the existing business of manufacture and export of jute, cotton, jute bags as per the agreed terms and conditions. The MOU provided that Ashoka Exports, that is the respondent no. 4, would remain a partnership firm. The

petitioner and the respondent no. 1 would be equal partners. M/s Preview Barter Private (PBL) Limited which was a 5% partner, would retire and all the investments of PBL would be returned back. The respondent no. 4 would remain in existence till both the parties mutually decided to wind up the respondent no. 4. and the winding up process would start within a maximum of 2 years. Therefore, the existing domestic and export clients of the respondent no. 4 would be divided between both the parties as per the list attached to the MOU, except M/s Promogift and M/s Promoline of Italy, which would remain in the joint partnership of Ashoka Exports. The business of Promo would be divided equally between the parties as per value and profit and would be executed by the parties independently. The exports would be done through the respondent no. 4 at nominal profit.

20. It, prima facie, appears to this court from the said MOU that, Ashoka Exports, the respondent no. 4, continued to be a partnership firm and both the parties were entitled to their rights and share in profits etc., which emanated from the Reconstituted Partnership Deed. Under the said deed, the respondent no.1 had to comply with the covenants and obligations mentioned therein. One of the covenants being that the petitioner would enjoy the status of a partner having equal right to the profits and equal right in participation of the business. The respondent no.1 could not keep the petitioner away from the business. The allegation of the petitioner was that the respondent no. 1 had ousted the petitioner completely from the firm. Further allegation was that, although, the respondent no. 3 was incorporated under the Companies Act, it was nothing but the alter ego of the petitioner no.1 and the business of the respondent no. 3 was the same

as that of the said partnership firm. The expertise, clients, workers, etc. of the firm were all being used by the respondent no. 3. Under such circumstances, a, prima facie, case for piercing the corporate veil of the respondent no. 3, in order to detect the connection of the respondent no. 3 with the dispute involved has been made out. Impleadment of the respondent no. 3 in this proceeding, prima facie, appears to be justified. Moreover, there are documents which would indicate that the respondent no. 1 had himself acknowledged that, in view of the disputes between the parties, the respondent no.1 had decided to go on his own and continue with a similar business, through the respondent no. 3 from the same premises as the firm. There are allegations that the same user Id as that of the firm was being used by the respondent No. 3. The workers were being poached and the purchase orders were diverted to the respondent no. 3.

21. Under such circumstances, based on the allegations made by the petitioner, it is, prima facie, established that there may be a commonality in the subject matter of the dispute between the petitioner and the respondent nos. 1 and 3. The allegations against the respondent no. 3 are specific. The petitioner's clear case is that the respondent no. 3 was running a competitive business as that of the respondent no. 4, during the subsistence of the firm, by not only poaching the customers and obtaining the purchase orders, but also by taking away the men and machinery of the partnership business. The respondent no. 3 was functioning from the same premises as that of the respondent no. 4 and also using the same user id. The referral Court cannot delve deeper into the issues and hold a mini-trial, but refer the dispute to arbitration, leaving it open to the learned Arbitrator

to decide on the issue of mis-joinder of the respondent No. 3. The learned arbitrator has the jurisdiction to decide who can be impleaded and who cannot. The arbitrator can also add a party or delete a party. The learned arbitrator can impose cost if he finds that a non-signatory has been unnecessarily dragged into the proceeding. Any firm opinion of the referral court on the issue of mis-joinder runs the risk of frustrating the arbitration agreement, thereby, causing serious prejudice to the claimant. The allegations also revolve around the mode and manner in which the respondent No.3 had derived benefits from the business of the firm, thereby, being bound by the doctrine of estoppel.

22. In **Cox and Kings (supra)**, it has been held that, even an alter ego can be referred to arbitration under exceptional situations:-

“**86.** Courts and tribunals across the world have been applying traditional contractual and commercial doctrines to determine the consent of the non-signatory parties to be bound by the arbitration agreement. Generally, consent-based theories such as agency, novation, assignment, operation of law, merger and succession, and third-party beneficiaries have been applied in different jurisdictions. In exceptional circumstances, non-consensual theories such as piercing the corporate veil or alter ego and estoppel have also been applied to bind a non-signatory party to an arbitration agreement. The Group of Companies doctrine is one such consent-based doctrine which has been applied, albeit controversially, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement.”

23. In **ONGC Limited (supra)**, it was held that a non-signatory may be held to be bound on a non-consensual basis, by applying the principle of estoppel and alter ego. Thus, a non-signatory to an arbitration agreement,

even against its wish, can be referred to arbitration. Paragraphs 37-41 are quoted below:-

“37. Gary B. Born in his treatise on *International Commercial Arbitration* indicates that:

“The principal legal basis for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego) [Gary Born, *International Commercial Arbitration*, 2nd Edn., Vol. 1, at p. 1418.] .”

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

“Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an ‘alter ego’ of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities [*Id*, p. 1432] .

“the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories [*Id*, p. 1450] .”

39. Recently, John Fellas elaborated on the principle of binding a non-signatory to an arbitration agreement from the lens of the doctrine of estoppel. He situated the rationale behind the application of the principle of direct estoppel against competing considerations of party autonomy and consent in interpreting arbitration agreements. Fellas observed that non-signatory parties can be bound by the principle of direct estoppel to prohibit such a party from deriving the benefits of a contract while disavowing the obligations to arbitrate under the same:

*“There are at least two distinct types of estoppel doctrine that apply in the non-signatory context: “the direct benefits” estoppel theory and the “intertwined” estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine-prohibiting a party from taking inconsistent positions or seeking to “have it both ways” by “rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage.” *Tepper Realty Co. v. Mosaic Tile Co.* [*Tepper Realty Co. v. Mosaic Tile Co.*, 259 F Supp 688 (SDNY 1966)]*

. The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract.

By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular whether “the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estoppel [signatory party] has signed....the intertwined estoppel theory has as its central aim the perseverance of the efficacy of the arbitration process is clear when one looks at the typical fact pattern of an intertwined estoppel case.” [John Fellas, “Compelling Signatories to Arbitrate with Non-Signatories”, New York Law Journal (28-3-2022)]
(emphasis supplied)

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41. Consent and party autonomy are undergirded in Section 7 of the 1996 Act. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppel or alter ego [Gary Born, *International Commercial Arbitration*, 2nd Edn., Vol. 1, at p. 1418.] . These principles would have to be understood in the context of the present case, where ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of ONGC's application for discovery and inspection of documents to prove the necessity for such a joinder.”

24. In the decision of **ASF Buildtech (supra)**, the Hon'ble Apex Court held as follows:-

“110. Even if it is assumed for a moment that the Referral Court in its jurisdiction under Section 11 of the 1996 Act has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of Cox & Kings (1) [Cox & Kings Ltd. v. SAP (India) (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680] , the Referral Court should only refrain but rather loathe the exercise of such discretion. Any discretion which is conferred upon any authority, be it Referral Courts must be exercised reasonably and in a fair manner. Fairness in this context does not just

extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided. Any determination even if prima facie by a Referral Court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the Referral Courts opine that a non-signatory in question is not a veritable party. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the Arbitral Tribunal to decide, as such party can always take recourse to Section 16 of the 1996 Act and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the Tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non-signatory is concerned be borne by the party who vexatiously impleaded it, but the Arbitral Tribunal would be well within its powers to also impose costs.

This extract is taken from ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd., (2025) 9 SCC 76 : 2025 SCC OnLine SC 1016 at page 191

III. Decision of Cox & Kings (2) [Cox & Kings Ltd. v. SAP (India) (P) Ltd., (2025) 1 SCC 611 : (2025) 1 SCC (Civ) 314 : (2024) 251 Comp Cas 802] and Ajay Madhusudan [Ajay Madhusudan Patel v. Jyotrindra S. Patel, (2025) 2 SCC 147 : (2025) 1 SCC (Civ) 154] and the scope of Section 11 of the 1996 Act for joinder of non-signatories to arbitration proceedings

111. The aforesaid may be looked at from one another angle. This Court in Cox & Kings (1) [Cox & Kings Ltd. v. SAP (India) (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680] also discussed the role and scope of jurisdiction of the Referral Courts and Arbitral Tribunals under Section(s) 11 and 16 of the 1996 Act, particularly in the context of binding a non-signatory to the arbitration agreement. It reiterated that under Section 11, the Referral Court only has to determine the prima facie existence of an arbitration agreement. Whereas, the issue of determining parties to an arbitration agreement is quite distinct from “existence” of the arbitration agreement, as such issue goes to the very root of the jurisdictional competence of the Arbitral Tribunal, and thus, empowered to decide the same under Section 16. Placing reliance on the decision of this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234 : (2005) 127 Comp Cas 97] ,

112. However, with the advent of Cox and Kings (I) (supra), the legal foundation for the application of the ‘Group of Companies’ doctrine, or any analogous principles designed to determine mutual consent was clarified to exist in the definition of “party” under Section 2(1)(h) read with the meaning of “arbitration agreement” under Section 7 of the Act, 1996. Unlike Section(s) 8 and 45 of the Act, 1996, the provisions of Section(s) 2(1)(h) and 7 are not confined in their applicability to only judicial forums or courts, and rather extend equally to both courts and arbitral tribunals, as these provisions form the bedrock of the framework of arbitration under the Act, 1996. The logical sequitur of this is that arbitral tribunals, too, are vested with the requisite authority to engage with and apply principles, such as the ‘Group of Companies’ doctrine, when determining whether a non-signatory may be bound by an arbitration agreement.

113. It is well within the jurisdiction of the Arbitral Tribunal to decide the issue of joinder and non-joinder of parties and to assess the applicability of the Group of Companies Doctrine. Neither in Cox and Kings (I) (supra) nor in Ajay Madhusudhan (supra), this Court has said that it is only the reference courts that are empowered to determine whether a non-signatory should be referred to arbitration. The law which has developed over a period of time is that both ‘courts and tribunals’ are fully empowered to decide the issues of impleadment of a non-signatory and Arbitral Tribunals have been held to be preferred forum for the adjudication of the same.

114. In the case of Ajay Madhusudhan (supra), this Court, placing reliance on Cox and Kings (I) (supra), has expressly held that Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal and the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal.

115. The case of Ajay Madhusudhan (supra) also recognizes that the legal relationship between the signatory and non-signatory assumes significance in determining whether the non-signatory can be taken to be bound by the Arbitration Agreement. This Court also issued a caveat that the ‘courts and tribunals should not adopt a conservative approach to exclude all persons or entities who are otherwise bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. The mutual intent of the parties, relationship of a non-signatory with a signatory, commonality of the subject matter, the composite nature of the transactions and performance of the

contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement'."

116. Recently, a coordinate bench of this Court in *Adavya Projects Pvt. Ltd. v. Vishal Strcturals Pvt. Ltd.*, 2025 INSC 507, also held that an arbitral tribunal under Section 16 of the Act, 1996 has the power to implead the parties to an arbitration agreement, irrespective of whether they are signatories or non-signatories, to the arbitration proceedings. This Court speaking through. P.S. Narasimha J. observed that since an arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, any person or entity who is found to be a party to the arbitration agreement can be made a part of the arbitral proceedings, and the tribunal can exercise jurisdiction over him. Section 16 of the Act, 1996 which empowers the arbitral tribunal to determine its own jurisdiction, is an inclusive provision that covers all jurisdiction question including the determination of who is a party to the arbitration agreement, and thus, such a question would be one which falls within the domain of the arbitral tribunal. It further observed that, although most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, yet an arbitral tribunal can direct the joinder of a person or entity, even if no such provision exists in the statute, as long as such person or entity is a party to the arbitration agreement. Accordingly, this Court held that since the respondents therein were parties to the underlying contract and the arbitration agreement, the arbitral tribunal would have the power to implead them as parties to the arbitration proceedings in exercise of its jurisdiction under Section 16 of the Act, 1996. The relevant observations read as under: -

"24. As briefly stated above, the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA. Section 16 embodies the doctrine of kompetenz-kompetenz, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement. and the scope of disputes referable to arbitration under the agreement. Considering that the arbitral tribunal's power to make an award that binds the parties is derived from the arbitration agreement, these jurisdictional issues must necessarily be decided through an interpretation of the arbitration

agreement itself. Therefore, the arbitral tribunal's jurisdiction must be determined against the touchstone of the arbitration agreement.

* * *

118. Furthermore, the legislative intent underlying Section 11 of the 1996 Act—particularly subsection (6-A)—is to ensure the expeditious disposal of applications for the appointment of arbitrators. This legislative objective militates against Referral Courts undertaking any elaborate or detailed factual inquiry, which would inevitably delay proceedings. Prudence thus dictates that the Referral Courts confine themselves to a prima facie examination of the existence of the arbitration agreement and leave substantive determinations, such as the binding nature of non-signatories, to the Arbitral Tribunal. An additional and equally compelling consideration is that the power exercised by the Referral Courts under Section 11 of the 1996 Act is judicial in nature. Consequently, the Referral Courts must refrain from embarking upon an intricate evidentiary inquiry or making final determinations on matters that are within the jurisdiction of the Arbitral Tribunal. Any premature adjudication or opinion by the Referral Court would not only usurp the Tribunal's role as the forum of first instance for dispute resolution but could also cause irremediable prejudice. In particular, if the Referral Court were to refuse impleadment of a non-signatory, there would be no statutory right of appeal available to challenge such a refusal. In contrast, determinations made by the Arbitral Tribunal—including on issues of jurisdiction and impleadment—are amenable to challenge under Section 16 of the 1996 Act and, thereafter, under Section 37. Accordingly, the better course of action is for the Referral Courts to refrain altogether from delving into the issue of whether a non-signatory is a veritable party to the arbitration agreement, and to leave such matters for the Arbitral Tribunal to decide in the first instance.”

25. Under such circumstances, the application is allowed. All objections raised by Mr. Mookherjee can be raised before the learned Arbitrator. The observations made hereinabove are prima facie.

26. Mr. Jishnu Saha, learned senior Advocate is appointed as the learned Arbitrator to arbitrate upon the disputes between the parties.

27. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the Schedule of Arbitration and Conciliation Act, 1996.

(Shampa Sarkar, J.)