IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

RESERVED ON: 22.09.2026
DELIVERED ON: 14.10.2026

PRESENT:

THE HON'BLE MR. JUSTICE GAURANG KANTH

AP 128 OF 2026
[OLD NO. AP-COM 447 OF 2026]

BARASAT MANAGEMENT PRIVATE LIMITED
VS
NILADRI MOITRA AND ORS.

Appearance: -

Mr. Satadeep Bhattacharyya, Adv.
Mr. Saptarshi Dutta, Adv.
Ms. Sriparna Mitra, Adv.
Ms. Srinjita Ghosh, Adv.
Mr. Pourush Kanti Pal, Adv.
Mr. Debdut More, Adv.

..... for the Petitioner

Mr. Satyam Mukherjee, Adv.
Ms. Debomita Biswas, Adv.

..... for the Respondents

JUDGMENT

Gaurang Kanth, J. :-

1. The petitioner has preferred the present petition under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole arbitrator to adjudicate the disputes between the petitioner and respondent nos. 1 and 2 in relation to alleged arrears of common area maintenance charges. The petitioner relies upon the arbitration agreement contained in the deed of conveyance dated 19.04.2019, whereby the terms of the deed of declaration dated 24.04.2010 are stated to have been incorporated by reference.

2. The facts leading to the present case are as follows:

3. According to the petitioner, respondent no. 3, the proforma respondent, developed a project known as "Fortune Township" at 49/2 Jessore Road (East), Kazipara, Barasat, Kolkata-700125, comprising approximately 68303.55 sq. mtrs., 21 towers and a club house, with 650 residential flats and common areas stated to comprise more than 6 lakh sq. ft.

4. Respondent nos. 1 and 2 purchased Flat No. L-04 in the said project from respondent no. 3 under a registered deed of conveyance dated 19.04.2019. Prior thereto, respondent no. 3 had executed a deed of declaration dated 24.04.2010, the terms whereof, according to the petitioner, were incorporated in the deed of conveyance.

5. The petitioner states that it was formed or incorporated by respondent no. 3 as the maintenance body for the upkeep and maintenance of the common areas and facilities of the project pursuant to Clause 34 of the deed of declaration. It is further stated that respondent no. 3 and the petitioner entered into a separate agreement dated 08.03.2017 for rendering common area maintenance services and that the petitioner has been providing such services with effect from 01.04.2017.

6. The petitioner states that common area maintenance charges were initially fixed at Rs.1.50 per sq. ft. and were subsequently revised to Rs.2/- per sq. ft. with effect from 01.11.2017 and to Rs.2.50 per sq. ft. with effect from 01.04.2022. According to the petitioner, the revisions were communicated to respondent nos. 1 and 2 and the other flat owners by email.

7. The petitioner alleges that respondent nos. 1 and 2 had made payments towards the maintenance charges from time to time, but defaults were reflected in its books of account from April, 2021. It is stated that for the period from 01.04.2024 to 31.03.2026, bills aggregating to Rs.1,46,775/-

were raised upon respondent nos. 1 and 2, against which payments of Rs. 37,269/- were made. The petition, however, states the principal outstanding as Rs. 1,46,775/-, apparently without giving adjustment of the said payments. The petitioner further claims interest at the rate of 18% per annum, stated to be mentioned in the maintenance bills, amounting to Rs. 32,491/- for the period from 01.04.2025 to 31.03.2026. The total amount claimed as on 31.03.2026 is stated to be Rs.1,79,266/-, apart from interim interest and interest upon the award. The petitioner states that despite repeated demands, the aforesaid amount remained unpaid and that no complaint was raised by respondent nos. 1 and 2 regarding the maintenance services.

8. The arbitration clause relied upon by the petitioner, contained in the deed of conveyance dated 19.04.2019, reads as follows:

> *"All disputes and differences between the parties hereto as detailed in the Deed of Declaration including those relating the said Unit and/or the Complex shall be referred to the sole Arbitration of Mr. Naresh Balodia, Advocate presently at M/s S. Jalan & Co. of 10 Old Post Office Street, Kolkata-700001 or a person to be nominated them in terms of the Arbitration Clause contained in the Deed of Declaration."*

9. The petitioner contends that it is a party, or a veritable party, to the arbitration agreement and is consequently entitled to invoke the same. In support of such contention, reliance is placed, *inter alia*, on its incorporation and engagement under Clause 34 of the deed of declaration, its alleged involvement in the performance of the contractual arrangement between respondent nos. 1 and 2 and respondent no. 3, and the incorporation by reference of the deed of declaration in the deed of conveyance.

10. The petitioner invoked the arbitration agreement by notice under Section 21 of the Act dated 08.04.2026, nominating Mr. Abirlal Chakraborty, Advocate, as the sole arbitrator and calling upon respondent nos. 1 and 2 to concur in

such appointment. Respondent nos. 1 and 2 replied by letter dated 23.04.2026, received by the petitioner on 28.04.2026, whereby respondent nos. 1 and 2 did not accept the said nomination and treated the same as a unilateral appointment. Respondent nos. 1 and 2 also raised an objection as to limitation. The petitioner disputes both such contentions and states that the existence or validity of the arbitration agreement have not been challenged.

11. As the parties could not agree upon the constitution of the arbitral tribunal, the petitioner preferred the present petition for the appointment of an arbitrator to adjudicate the disputes between the parties.

Submission on behalf of the Petitioner

12. Mr. Satadeep Bhattacharyya, learned counsel for the Petitioner, submits that the existence of the arbitration agreement is not in dispute. The deed of conveyance dated 19.04.2019 contains an arbitration clause and specifically incorporates by reference the terms of the deed of declaration dated 24.04.2010. He points out that in their reply dated 23.04.2026, the Respondent Nos. 1 and 2 did not challenge the existence or validity of the said agreement. Their objections were confined to the nomination of the sole arbitrator and limitation. Learned counsel contends that after the insertion of Section 11(6-A), the referral court's enquiry is limited to a *prima facie* examination of whether an arbitration agreement exists. He relies on ***Ajay Madhusudan Patel v. Jyotrindra S. Patel,*** reported as ***(2025) 2 SCC 147*** to contend that where the objecting parties do not deny the existence of the arbitration agreement, the *prima facie* requirement under Section 11 stands satisfied.

13. Learned counsel further submits that although the Petitioner did not sign the deed of conveyance, it is a veritable party to the arbitration agreement. He

argues that the Petitioner's very existence and role are traceable to the contract between the Respondents and the proforma respondent. The Petitioner was formed by the proforma respondent under Clause 34 of the deed of declaration as the maintenance body for the common areas and facilities of the project. The said deed forms part of the conveyance executed in favour of the Respondents. The Petitioner was then engaged by the proforma respondent under the agreement dated 08.03.2017. It has been maintaining the common areas since 01.04.2017, and has raised maintenance bills directly on the flat owners, including the Respondents. The Respondents paid those charges to the Petitioner for years and were informed of the rate revisions. Learned counsel contends that this conduct shows the Petitioner's involvement in performing the underlying contract was positive, direct and substantial, not merely incidental. He argues that the Respondents dealt with the Petitioner on that footing throughout.

14. Mr. Bhattacharyya, learned counsel for the Petitioner, relying on ***Ajay Madhusudan Patel*** *(supra)*, submits that the definition of *'party'* under Section 2(1)(h), read with Section 7 of the Act, includes non-signatories. The question of who is a party is essentially one of consent, which may be inferred from conduct. Relevant factors include the mutual intent of the parties, the relationship of the non-signatory with a signatory, commonality of subject-matter, the composite nature of the transaction and participation in the performance of the contract.

15. Learned counsel also relies on ***Hindustan Petroleum Corporation Ltd. v. BCL Secure Premises (P) Ltd.,*** reported as ***(2026) 3 SCC 711***. In that case, the Supreme Court held that the referral court need only be *prima facie* satisfied that the non-signatory is a veritable party. Even then, the final

decision on whether the non-signatory is bound remains with the Arbitral Tribunal under Section 16 of the Act. In the present case, the Petitioner's role as maintenance body is provided for in the deed incorporated into the conveyance itself, and the Petitioner has dealt directly with the Respondents throughout.

16. As to the Respondents' objections as raised in the reply to the Section 21 notice, learned counsel submits that the Petitioner's notice dated 08.04.2026 merely proposed a name and sought the Respondents' concurrence. It was not a unilateral appointment. In any event, the Petitioner now asks this Court to appoint an independent sole arbitrator, which answers the said objection. On limitation, learned counsel contends that the claim relates to bills raised from 01.04.2024 to 31.03.2026, and that arbitration was invoked on 08.04.2026, so no part of the claim is time-barred. He further submits that limitation, and whether the Petitioner is ultimately bound as a party, are questions requiring evidence. These questions fall within the domain of the Arbitral Tribunal and should not be decided through a mini-trial at the referral stage. He relies on ***Ajay Madhusudan Patel*** *(supra)*, under which the Respondents remain free to raise all their objections before the Tribunal. He accordingly prays that a sole arbitrator be appointed to adjudicate the disputes between the parties.

Submission on behalf of the Respondents

17. Per contra, Mr. Satyam Mukherjee, learned counsel appearing for Respondent Nos. 1 and 2, submits that the application is misconceived and has been filed by suppressing material facts. The Petitioner is neither a party nor a signatory to the deed of declaration dated 24.04.2010 or the deed of conveyance dated 19.04.2019. It relies only on the agreement dated 08.03.2017, which was entered into between the Petitioner and the proforma

respondent. Respondent Nos. 1 and 2 are strangers to the said agreement. Learned counsel points out that neither the agreement of 2017 nor the Petitioner's Memorandum and Articles of Association refers to the deed of declaration. He further submits that the agreement of 2017 contains a separate arbitration clause of its own, which cannot be enforced against Respondent Nos. 1 and 2. Respondent Nos. 1 and 2 deny that the Petitioner was formed under Clause 34 of the deed of declaration or that it has ever had authority to levy or revise maintenance charges.

18. Learned counsel further submits that the flat owners formed the "Fortune Township Association of Apartment Owners" on 07.04.2023, registered on 24.04.2023. The association has been maintaining the project ever since. The proforma respondent's challenge to the registration in W.P.A. No. 25143 of 2023 led to a fresh decision by the Competent Authority on 17.01.2024, continuing the registration. That order remains unchallenged. The Petitioner and the proforma respondent also filed Title Suit No. 1126 of 2023 against the association, in which ad-interim injunction was refused. Misc. Appeal No. 149 of 2023 against that refusal was dismissed on 07.08.2024. Learned counsel contends that none of this has been disclosed by the Petitioner. On this basis, he submits that the Petitioner has no authority to claim maintenance charges and no cause of action, and that any claim for the period before 07.04.2023 is *ex facie* time-barred.

19. Learned counsel submits that by its reply dated 23.04.2026 the Respondent no.1 declined consent to the Petitioner's unilaterally proposed arbitrator, citing Sections 12 and 13 of the Act. It proposed mediation through the District Legal Services Authority, Barasat, and objected that the claim was time-barred under Article 137 of the Limitation Act, 1963. He argues that the

reply's silence on the existence of the arbitration agreement does not amount to an admission, since Respondent Nos. 1 and 2 have specifically denied in their affidavit the existence of any arbitration agreement between them and the Petitioner.

20. Distinguishing the Petitioner's authorities, learned counsel submits that in ***Ajay Madhusudan Patel*** *(supra)*, it was a signatory that sought to join a non-signatory. The agreement there expressly contemplated obligations on the non-signatory group, and there was substantial evidence of its participation. Here, the non-signatory itself seeks to invoke the arbitration clause, and Respondent Nos. 1 and 2 had no role in the 2017 agreement. He further submits that ***BCL Secure Premises (P) Ltd.*** *(supra)*, supports Respondent Nos. 1 and 2. That case holds that a non-signatory must first establish *prima facie* that it is a veritable party, and that a mere commercial connection does not entitle it to claim "through or under" a signatory. According to learned counsel for the Respondents, the Petitioner, like the sub-vendor in that case, was engaged under a separate contract and operates on a "separate orbit" from Respondent Nos. 1 and 2. He prays that the application be dismissed.

Legal Analysis

21. This Court heard the arguments advanced by the learned counsel for both parties and examined the documents and judgments cited at the Bar.

22. The core issue in the present matter is whether the Petitioner, which admittedly did not sign the deed of conveyance dated 19.04.2019, can invoke the arbitration agreement in that deed, read with the deed of declaration dated 24.04.2010, against Respondent Nos. 1 and 2. The connected question is whether, within the limited scope of Section 11 of the Arbitration and

Conciliation Act, 1996, this Court should refer the disputes between the parties to arbitration.

23. Before examining the facts, it is important to analyse the law in this field.

24. After the insertion of Section 11(6-A), the referral court's examination is confined to the existence of an arbitration agreement. The Supreme Court summarised the position in ***Ajay Madhusudan Patel*** *(supra).*

25. The nature of this "examination" was explained in ***In re, Interplay Between Arbitration Agreements under Arbitration & Conciliation Act, 1996 & Stamp Act, 1899, (2024) 6 SCC 1***, which was quoted with approval in ***BCL Secure Premises (P) Ltd.*** *(supra)*:

> *" Section 11(6-A) uses the expression 'examination of the existence of an arbitration agreement'. The purport of using the word 'examination' connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression 'examination' does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the Arbitral Tribunal can 'rule' on its jurisdiction, including the existence and validity of an arbitration agreement. ..."*

26. In ***SBI General Insurance Co. Ltd. v. Krish Spg.,*** reported as ***(2024) 12 SCC 1***, also quoted in ***BCL Secure Premises*** *(supra),* the Supreme Court further held:

> *"The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under Section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the Arbitral Tribunal to 'rule' under Section 16. The prima facie view on existence of the arbitration agreement taken by the Referral Court does not bind either the Arbitral Tribunal or the Court enforcing the arbitral award."*

27. The Constitution Bench in ***Cox & Kings Ltd. v. SAP India (P) Ltd.,*** reported as ***(2024) 4 SCC 1*** held that the expression *'party'* in Section 2(1)(h), read with Section 7 of the Act, includes both signatories and non-signatories. It

further held that the conduct of a non-signatory may indicate its consent to be bound by the arbitration agreement. Applying *Cox & Kings (supra)*, the Supreme Court in ***Ajay Madhusudan Patel*** (supra) observed:

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

28. The Court then set out the standard of involvement required:

> *" … the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement."*

29. On the respective roles of the referral court and the Arbitral Tribunal, the Constitution Bench in ***Cox & Kings*** (supra) held:

> *"In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration*

> *agreement on the basis of the factual evidence and application of legal doctrine. …"*

30. Applying this principle, the Supreme Court in ***Ajay Madhusudan Patel*** *(supra)* identified several contested questions of fact about the non-signatory's participation. It then held that, under the limited jurisdiction in Section 11(6), the referral court should not conduct a mini-trial on contested questions of fact. The question whether the non-signatory was a veritable party was accordingly left to the Arbitral Tribunal, to be decided on the evidence adduced before it.

31. The Supreme Court in ***BCL Secure Premises*** *(supra)* clarified that referral is not automatic. After analysing ***Cox & Kings*** (supra), the Hon'ble Court held:

> *" A careful reading of the above passage reveals that the Referral Court should be prima facie satisfied that there exists an arbitration agreement and as to whether the non-signatory is a veritable party. It further holds that even if the Referral Court prima facie arrives at the satisfaction that the non-signatory is a veritable party, the Arbitral Tribunal is not denuded of its jurisdiction to decide whether the non-signatory is indeed a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. …*
> *…….But what is primordial is that it should be demonstrated prima facie before the Referral Court that the non-signatory is a veritable party. … The Referral Court under Section 11 is not deprived of its jurisdiction from examining whether the non-signatory is in the real sense a party to the arbitration agreement. The answer thereof will depend on the facts and circumstances of each case after examining the documents pertaining thereto."*

32. The Court cautioned that the referral court cannot be reduced to *"a monotonous automation"* that must refer absolute strangers to arbitration. Where a party that has entered into a contract engages a third party, and nothing shows even *prima facie* any intent to create a legal relationship between that third party and the party originally granting the contract, the third party cannot be treated as a veritable party. Relying on ***Cox & Kings*** *(supra)*, the Court also reiterated that a mere legal or commercial connection

does not entitle a non-signatory to claim through or under a signatory. At the same time, ***Cox & Kings*** *(supra)* recognises assignment, subrogation and novation as the typical scenarios in which a person may claim through or under a party.

33. From a careful reading of the aforesaid judgments, the legal position that emerges may be summarised as follows:

(i) At the stage of Section 11, the referral court's examination is limited to a *prima facie* determination of whether an arbitration agreement exists, confined to the requirements of Section 7 of the Act. The referral court is not to undertake a laborious or contested inquiry.

(ii) A person or entity that has not signed the arbitration agreement is not, for that reason alone, outside its scope. The expression *'party'* in Section 2(1)(h), read with Section 7, includes non-signatories who, by their conduct and relationship with the signatories, can be shown to have consented to be bound by the agreement.

(iii) Where a non-signatory seeks to invoke an arbitration agreement, or a signatory seeks to bind a non-signatory, the referral court must be *prima facie* satisfied, from the documents on record, that the non-signatory is a veritable party. The relevant factors include the mutual intent of the parties, the relationship of the non-signatory with the signatories, the commonality of subject matter, the composite nature of the transaction, and the non-signatory's participation in the negotiation or performance of the underlying contract, which must be positive, direct and substantial, and not merely incidental.

(iv) The *prima facie* threshold is not met by a mere legal or commercial connection. Where the non-signatory is an absolute stranger operating

on a separate orbit, and nothing shows even *prima facie* any intention to create a legal relationship with the signatory against whom arbitration is sought, the referral court is not bound to refer the matter merely because the non-signatory asks it to. In such a case, the court may decline the reference.

(v) Once the non-signatory crosses the *prima facie* threshold, and the final determination of whether it is truly bound depends on disputed questions of fact requiring evidence, the referral court should not conduct a mini-trial. The question should be left to the Arbitral Tribunal, which is empowered under Section 16 to rule on its own jurisdiction after appreciating the evidence and applying the relevant legal doctrines.

(vi) The *prima facie* view taken by the referral court binds neither the Arbitral Tribunal nor the court enforcing the award. All objections, including those on jurisdiction, remain open before the Tribunal.

34. It is undisputed that Respondent Nos. 1 and 2 purchased Flat No. L-04 from the proforma respondent under the registered deed of conveyance dated 19.04.2019, and signed that deed. The conveyance records that the purchaser acquired the unit on the terms contained in the deed of declaration. It states that the deed of declaration *"is hereby made a part and parcel of this Indenture"* and that the Indenture *"shall always be read along with the Deed of Declaration"*. Clause II(a) of the conveyance records that the terms, conditions and covenants of the deed of declaration are binding on both parties. Clause II(b) provides:

> *"All disputes and differences between the parties hereto as detailed in the Deed of Declaration including those relating the said unit and/or the Complex shall be referred to the sole Arbitration of Mr. Naresh Balodia, Advocate presently of M/s. S.*

> *Jalan & Co. of 10, Old Post Office Street, Kolkata-700 001 or a person to be nominated them in terms of the Arbitration clause contained in the Deed of Declaration;"*

35. Clause VI(1) of the deed of declaration in turn provides:

> *"All disputes and differences between the parties hereto regarding the construction or interpretation of any of the terms and conditions herein contained or touching these presents and/or the Indenture/s or determination of any right, title, interest, liability and/or obligation/s of any of the Purchasers and/or directly or indirectly relating to the Premises and/or Complex, and/or maintenance and/or management of the same shall be referred to the Arbitration of Mr. Naresh Balodia, Advocate … or a person to be nominated them …"*

36. A written arbitration agreement therefore exists, binding at least Respondent Nos. 1 and 2 and the proforma respondent. In their reply dated 23.04.2026 to the notice invoking arbitration, Respondent Nos. 1 and 2 did not dispute the existence of this agreement. Their objection in the affidavit-in-opposition is that no arbitration agreement exists *between the Petitioner and themselves*. That objection goes to whether the Petitioner is a party to the agreement, not to whether the agreement exists. The requirement of *prima facie* existence of agreement is satisfied.

37. Now the next question is whether the Petitioner is *prima facie* a veritable party. The Petitioner does not rely on the arbitration clause in the Maintenance and Management Agreement dated 08.03.2017. It has expressly said so in its affidavit-in-reply. The objection of Respondent Nos. 1 and 2 that the agreement of 2017 contains a separate arbitration clause, to which they are strangers, therefore does not bear on the present application. The Petitioner's case rests on the arbitration agreement in the deed of conveyance, read with the deed of declaration.

38. Clause 34 of the deed of declaration defines the *"Maintenance Body"* as follows:

> *"34) 'Maintenance Body' shall mean the Society / Association / Private Limited or Public Limited Company registered or otherwise that would be formed or promoted by the Developer at the cost of the purchaser for the common purposes, maintenance and upkeep of the Complex and till such time the maintenance and management of the complex is handed over to the aforesaid maintenance body shall mean the Developer;"*

39. The declaration contemplates that maintenance of the complex will be handed over by the developer to such a body. It further provides that purchasers shall deal only with the Maintenance Body in common matters. It further provides that the Maintenance Body shall manage and maintain the complex at the cost of the purchasers. Under Clause 4 of the Miscellaneous provisions, maintenance charges, common expenses and others are to be fixed by the Maintenance Body. The very instrument that Respondent Nos. 1 and 2 accepted as part of their conveyance thus contemplates a developer-promoted entity that would take over maintenance, fix maintenance charges, and deal with purchasers on common matters.

40. The Petitioner's case is that it is that entity. It states that it was promoted by the proforma respondent, took over maintenance of the complex on 01.04.2017 under the agreement dated 08.03.2017, and has since raised maintenance bills on the flat owners. The 2017 agreement is on record. Clause 2.1 appoints the Petitioner as the agency for maintenance and management of the project. Clause 9 records that the developer *"assigns to the Maintenance Company all rights to enforce payment of CAM Charges against Purchasers"* and that the Petitioner *"shall step into the shoes of the Developer for enforcement purposes"*. This Court refers to that agreement not as a source of any arbitration agreement with Respondent Nos. 1 and 2, but only as *prima facie* material evidencing the relationship between the Petitioner and the signatory developer. Such a relationship is a relevant consideration

under ***Ajay Madhusudan Patel*** *(supra)* and ***Cox & Kings*** *(supra)*. It is also significant that the deed of conveyance in favour of Respondent Nos. 1 and 2 was executed on 19.04.2019, by which time the Petitioner, on its own case, had already been maintaining the complex since 01.04.2017.

41. The Petitioner has further pleaded that Respondent Nos. 1 and 2 paid maintenance charges to it on a regular basis. It states that even against the bills raised for 2024 to 2026, Respondent Nos. 1 and 2 paid a sum of Rs. 37,269/-, and the receipts evidencing such payments have been annexed to the petition. The affidavit-in-opposition contains only a general denial of these averments. It offers no explanation of the payments or of the capacity in which they were made to the Petitioner. *Prima facie*, this conduct indicates that Respondent Nos. 1 and 2 dealt with the Petitioner as the entity maintaining the common areas under the scheme of the deed of declaration.

42. Most significantly, the dispute sought to be referred concerns the recovery of common area maintenance charges. That is the very subject matter which Clause VI(1) of the deed of declaration expressly places within the arbitration agreement, namely disputes *"directly or indirectly relating to the Premises and/or Complex, and/or maintenance and/or management of the same"*. The commonality of subject matter between the arbitration agreement and the Petitioner's claim is evident.

43. Taken together, these circumstances satisfy this Court, *prima facie*, that the Petitioner is not an absolute stranger to the arbitration agreement. These circumstances are: the scheme of the deed of declaration contemplating a developer-promoted maintenance body; the Petitioner's engagement by the signatory developer and its performance of the maintenance function under that scheme, the assignment of the developer's enforcement rights in its

favour. The *prima facie* conduct of Respondent Nos. 1 and 2 in paying maintenance charges to the Petitioner; and the fact that the dispute falls squarely within the subject matter of the arbitration clause.

44. The Petitioner's involvement in performing the obligations under the deed of conveyance and the deed of declaration, namely maintenance of the complex and collection of maintenance charges, appears *prima facie* to be positive, direct and substantial, and not merely incidental.

45. Learned Counsel for the Respondents relies heaving on ***BCL Secure Premises*** *(supra)* to counter this position. However, this Court finds that the facts of the present case are materially different from those in ***BCL Secure Premises*** *(supra).* In that case the tender conditions expressly prohibited assignment or subletting without the prior written consent of the owner, and no such consent was shown. The sub-vendor's own contract barred its Project Manager from communicating with HPCL without AGC's approval; and HPCL had expressly denied any contractual relationship with the sub-vendor. The Supreme Court, therefore, found that the parties operated on *"separate orbits"*. However, in the present case, the governing instrument itself, which Respondent Nos. 1 and 2 accepted, contemplates the handing over of maintenance to a developer-promoted body that would fix and collect maintenance charges. There is no prohibition on such an arrangement. There is also *prima facie* material showing that Respondent Nos. 1 and 2 dealt with the Petitioner.

46. Respondent Nos. 1 and 2 sought to distinguish ***Ajay Madhusudan Patel*** *(supra)* on the ground that it concerned a signatory seeking joinder of a non-signatory. That distinction is not material. ***Cox & Kings*** *(supra)* expressly applies the same approach to both scenarios: where a signatory seeks joinder

of a non-signatory, and where a non-signatory itself invokes the arbitration agreement.

47. Respondent Nos. 1 and 2 contend that the Petitioner was not formed under Clause 34 of the deed of declaration, and that the Maintenance Body contemplated by the declaration is a body of the purchasers, not a developer-controlled company. They further contend that the Petitioner's authority to levy maintenance charges ended with the formation of the flat owners' association. The Petitioner disputes all of these assertions. It asserts, relying on the orders passed in W.P.A. No. 25143 of 2023 and W.P.A. No. 3504 of 2026 as well as the position taken by the Competent Authority, that no association has yet legally come into existence. Whether the Petitioner is the Maintenance Body contemplated by the deed of declaration, and whether its authority to levy maintenance charges continues, are disputed questions of fact. They cannot be decided on affidavits. In terms of ***Cox & Kings*** (supra) and ***Ajay Madhusudan Patel*** (supra), this Court should not hold a mini-trial on such questions at the Section 11 stage. They are best left to the Arbitral Tribunal, which can decide them under Section 16 after taking evidence.

48. The claim relates to maintenance bills raised for the period from 01.04.2024 to 31.03.2026 and arbitration was invoked by notice dated 08.04.2026. The claim is not *ex facie* time-barred. The contention of Respondent Nos. 1 and 2 that any claim for the period before 07.04.2023 is barred, and any question about the composition of the amount claimed, may be urged before the Arbitral Tribunal.

49. The arbitration clause names Mr. Naresh Balodia, Advocate of M/s S. Jalan & Co. Clause 31 of the deed of declaration records that the same firm drafted the conveyancing documents as the developer's solicitors. The Petitioner did

not invoke the named arbitrator. Instead, it unilaterally nominated Mr. Abirlal Chakraborty, Advocate. Respondent Nos. 1 and 2 declined to consent to that nomination, raising concerns about independence and impartiality under Sections 12 and 13 of the Act. The parties have thus been unable to agree on the constitution of the Tribunal. In these circumstances, and to ensure the independence and impartiality required under Section 12 of the Act, it is appropriate for this Court to appoint an independent sole arbitrator.

50. On an overall examination of the documents, this Court is *prima facie* satisfied of the following:

(i) A valid arbitration agreement exists in the deed of conveyance dated 19th April, 2019, read with the deed of declaration dated 24th April, 2010, and Respondent Nos. 1 and 2 are bound by it.

(ii) The dispute over non-payment of common area maintenance charges falls within the subject matter of that agreement.

(iii) Having regard to the scheme of the deed of declaration, the Petitioner's relationship with the signatory developer, its role in maintaining the complex, and the *prima facie* conduct of Respondent Nos. 1 and 2, the Petitioner has made out a *prima facie* case of being a veritable party to the arbitration agreement.

(iv) The final determination of that question, and of the other objections raised by Respondent Nos. 1 and 2, depends on disputed questions of fact that fall within the domain of the Arbitral Tribunal.

51. It is made clear that the observations in this order are *prima facie* and confined to the purpose of deciding the present petition under Section 11. They shall not bind the learned Arbitral Tribunal, which shall decide all

questions, including its own jurisdiction under Section 16 of the Act, uninfluenced by any observation made herein.

52. In view of the limited scope of examination under Section 11 of the Arbitration and Conciliation Act, 1996, and being satisfied as to the existence of a valid arbitration agreement and the emergence of disputes between the parties, this Court is of the considered view that the present matter deserves to be referred to arbitration.

53. Accordingly, this Court appoints Ms. Srijani Ghosh, Advocate (Mob. No. 8910642648), as the Sole Arbitrator to adjudicate the disputes between the parties.

54. The learned Sole Arbitrator shall enter upon the reference after making the disclosure in terms of Section 12(1) of the Act and subject to the provisions of Section 12(5) thereof.

55. The learned Sole Arbitrator shall fix his remuneration in terms of the Fourth Schedule of the Act or as may be agreed between the parties.

56. A copy of this order shall be communicated by the petitioner to the learned sole Arbitrator for necessary action.

57. It is clarified that all questions relating to the arbitrability of the disputes, maintainability, claim, counter-claim, limitation, jurisdiction, and all other issues are left open to be urged before the learned Sole Arbitrator, who shall decide the same in accordance with law.

58. With the aforesaid directions, the present petition stands disposed of.

(GAURANG KANTH, J.)

SAKIL AMED (P.A)