AGK

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

COMM ARBITRATION APPLICATION NO.382 OF 2025

Vilas Shidruk, Sole Proprietor of
M/s. Balaji Construction ... **Applicant**

Vs.

1. **Supreme Developers**
2. **Shree Sadguru Cooperative Housing Society Limited** ... **Respondents**

Mr. Yuvraj Narvankar with Mr. Kshitij Munj i/by Mr. Ashish Pawar for the Applicant.

Mr. S.B. Pawar with Ms. Lubna Shaikh and Milkesha Sangle i/by S.K. Legal Associates LLP for Respondent No.1.

CORAM	**: AMIT BORKAR, J.**
RESERVED ON	**: SEPTEMBER 11, 2026.**
PRONOUNCED ON	**: SEPTEMBER 17, 2026**

JUDGMENT:

1. By the present Arbitration Application filed under Section 11 of the Arbitration and Conciliation Act, 1996, the Applicant is seeking appointment of an Arbitrator to decide the disputes between the parties arising out of APMC Agreement dated 13 May 2014.

2. The facts and circumstances stated by the Applicant, which have led to filing of the present Arbitration Application, are as follows. Respondent No. 1 and Respondent No. 2 had entered into an Agreement for Project Management Consultancy ("APMC") dated 13 May 2014. Pursuant to the said APMC, Respondent No. 1 entered into a Memorandum of Understanding ("MOU") with the Applicant. Thereafter, under the said APMC dated 13 May 2014, Respondent No. 1 obtained the right to assign the development rights relating to the project. Accordingly, Respondent No. 1 executed an MOU dated 12 September 2018 in favour of the Applicant. According to the Applicant, the Respondents accepted the Applicant as the Developer of the said project. The said MOU was executed with the knowledge and consent of Respondent No. 2. Under this arrangement, the Applicant acquired the right to construct and develop the buildings for Respondent No. 2, namely, Shree Sadguru Co-operative Housing Society Ltd. In pursuance of the aforesaid MOU and the development arrangement between the parties, the Applicant states that it invested substantial amounts in the project. Between 31 July 2018 and 22 October 2019, the Applicant paid a total amount of Rs. 4,01,00,000/- (Rupees Four Crores One Lakh only). Respondent No. 1 received these payments towards the project, including payments towards extension order charges and other expenses relating to the project. A major part of these payments was made by NEFT and/or RTGS and, according to the Applicant, the same is reflected in its bank statements and other records. The Applicant states that the Respondents accepted and used the amounts paid by it and continued to take benefit of the money invested by the Applicant. However, according to the Applicant, the Respondents did not comply with the terms of the MOU and did not provide the necessary details and accounts regarding the amounts received and used by them. The Applicant states that, even after accepting it as the Developer and receiving and using the substantial amount invested by it in the project, the Respondents failed to comply with the terms and conditions of the MOU. Instead, the Respondents thereafter started inviting and/or negotiating with other developers for development of the project of Respondent No. 2. This was done without giving effect to the MOU executed in favour of the Applicant and without first resolving the Applicant's rights and claims under the said MOU. According to the Applicant, this conduct of the Respondents has caused serious prejudice and irreparable loss to it. The Applicant had invested Rs. 4,01,00,000/- in the project relying upon the representations, commitments and obligations of the Respondents. The Applicant states that, after receiving and retaining its money and enjoying the benefit of the same, the Respondents are now seeking to deny its rights under the MOU and are attempting to create or give rights to third parties in respect of the same project.

3. The Applicant issued a legal notice dated 2 August 2022 calling upon the Respondents to comply with and honour the terms and conditions of the MOU and to resolve the disputes and differences between the parties. According to the Applicant, even after receiving the notice, the Respondents failed to comply with the MOU and did not show any readiness or willingness to perform their obligations. Respondent No. 1, by its reply dated 22 August

2022, denied the contents and allegations made in the legal notice. According to the Applicant, the said reply did not show any intention or willingness on the part of Respondent No. 1 to honour and perform the terms of the MOU. The Applicant states that the Respondents failed to perform their obligations under the arrangement and disputes and differences arose between the Applicant and the Respondents which have remained unresolved. The Applicant submits that, since disputes and differences have arisen between the parties under and in connection with the APMC and the MOU, it has been required to approach this Court under Section 11 of the Arbitration and Conciliation Act, 1996. The Applicant seeks appointment of an independent and impartial Sole Arbitrator to decide these disputes and differences. The Applicant accordingly seeks appointment of an officer of this Court, or an Advocate from the panel of Arbitrators of this Court, or any other suitable person as the Sole Arbitrator to decide all disputes and differences arising between the Applicant and the Respondents under and/or in connection with the said APMC and MOU.

4. Mr. Narvankar, learned Advocate for the Applicant, submits that certain facts are not disputed. According to him, these facts are clear from the record and are admitted on the face of the reply. He submits that Respondent No. 2 Society had appointed Respondent No. 1 as its Project Management Consultant and Construction Contractor for development of the said property under an Agreement for Project Management Consultancy ("the said APMC") dated 13th May 2014. Clause No. 10 of the said APMC contains an arbitration clause. Under that clause, disputes relating to the terms of the APMC were to be referred to the sole arbitration of Mr. Shreekant Ghanekar of M/s. Ghanekar and Co. under the Arbitration and Conciliation Act, 1996.

5. Mr. Narvankar submits that Respondent No. 1 and the Applicant thereafter executed a Memorandum of Understanding dated 12th September 2018 ("the said MOU"). In the said MOU, Respondent No. 1 expressly stated that it was the appointed PMC and Construction Contractor of Respondent No. 2 Society under the APMC dated 13th May 2014. Respondent No. 1 stated that it was unable to arrange the funds required for obtaining extension of the Collector's NOC and for taking the project forward. Respondent No. 1 requested the Applicant to arrange the required funds and to step into the shoes of Respondent No. 1 as PMC and Construction Contractor for development of the same property.

6. The Applicant submits that Clauses 3, 5, 6, 9 and 10 of the said MOU show that the MOU was not a separate and independent commercial agreement. According to the Applicant, it was a continuation of the said APMC and was dependent upon it. Clause No. 3 provides that the Applicant would pay the premium demanded by the Collector for obtaining extension of the NOC and, against such payment, Respondent No. 2 Society would allot membership to the representatives of the Applicant. Clause No. 5 states that the Applicant was engaged in the development field and was familiar with the entire procedure. It agreed to step into the shoes of Respondent No. 1 and take the project forward by appointing as PMC and Construction Contractor. The said clause records the agreed consideration payable by the Applicant to

Respondent No. 1 as Rs.13,72,60,000/- (Rupees Thirteen Lakhs, Seventy-Two Lakhs and Sixty thousand only). Clause No. 6 provides that an "Agreement for Project Management Consultant and Construction Contractor" would be executed between Respondent No. 2 Society and the Applicant. According to the Applicant, this meant that the same PMC contract which was earlier held by Respondent No. 1 under the APMC was to be transferred or novated in favour of the Applicant. Clause No. 9 states that the payment by the Applicant is "the essence of the contract". It provides that, in case of default, the MOU would stand cancelled and the money would be refunded. According to the Applicant, this shows that the MOU was connected with and dependent upon the continuing rights of Respondent No. 1 under the APMC.

7. The Applicant relies upon Clause No. 10 of the MOU. Under that clause, Respondent No. 1 was to continue to act as Mediator between the Applicant and Respondent No. 2 and was to be "responsible to act as an Arbitrator in case of any misunderstanding while implementing the project between Balaji and the Society". According to the Applicant, this shows that the parties themselves contemplated that disputes arising during implementation of the same project would be resolved through a dispute resolution arrangement connected with the arbitration mechanism contained in the APMC.

8. The Applicant submits that the APMC was the principal agreement and the MOU was an agreement made inance of the APMC. According to the Applicant, both agreements formed part of one composite transaction for development of the same property. Both were entered into for the common purpose of completing the redevelopment project of Respondent No. 2 Society. The Applicant submits that the MOU cannot be properly understood or performed separately from the APMC because its subject matter, consideration and performance arose from and depended upon the rights and obligations created under the APMC.

9. In view of the above, the Applicant submits that the disputes between the Applicant and Respondent No. 1 under the MOU are closely and inseparably connected with the rights and obligations under the APMC, which contains the arbitration clause in Clause No. 10. The Applicant relies upon the following circumstances. First, the subject matter of both agreements is the same, namely, development of the property belonging to Respondent No. 2 Society. Second, Respondent No. 1 executed the MOU only because of the rights which it had received as PMC and Construction Contractor under the APMC. Third, the MOU repeatedly refers to the APMC and, according to the Applicant, incorporates its terms and remains subject to the continuing existence of the APMC and the rights of Respondent No. 1 under it. Fourth, the consideration and performance under the MOU, including payment of the premium for extension of the NOC and appointment as PMC and Construction Contractor, are directly connected with the obligations which Respondent No. 1 had under the APMC.

10. The Applicant submits that the MOU dated 12th September 2018, in substance, amounted to a novation and assignment of the rights and obligations of Respondent No. 1 under the APMC in favour of the Applicant. According to the Applicant, Clause No. 10 of the APMC is the arbitration agreement governing this entire composite transaction and governs the disputes between the Applicant and Respondent No. 1. The Applicant submits that any other interpretation, as suggested by Respondent No. 1, would result in treating one development project as two separate and unrelated agreements. According to the Applicant, such an interpretation would mean that one agreement is arbitrable while the other is not, although both relate to the same project and arise from the same commercial arrangement.

11. The Applicant denies the statement made in paragraph No. 5 of the reply that there was no invocation of arbitration. The Applicant submits that its Advocate's legal notice dated 2nd August 2022, at Exhibit-D to the Arbitration Application, called upon Respondent No. 1 to furnish accounts, comply with the terms of the MOU and refund the amounts paid by the Applicant. According to the Applicant, the MOU is inseparably connected with the APMC for the reasons stated. After Respondent No. 1 gave its reply dated 22nd August 2022, at Exhibit-E to the Arbitration Application, which according to the Applicant was evasive, the Applicant approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitral Tribunal.

12. Mr. Pawar, learned Advocate for Respondent No.1, submits at the outset that the present Arbitration Application filed by the Applicant is illegal and is not maintainable in law. According to him, there is no legal or valid arbitration agreement between the

Applicant and Respondent No.1. He submits that the Applicant is trying to rely upon the Agreement for Project Management Consultancy dated 13 May 2014 and is thereby seeking to mislead this Court. The said agreement was entered into between Respondent No.2 Society and Respondent No.1 independently. The Applicant is admittedly not a party to that Agreement for Project Management Consultancy.

13. Mr. Pawar submits that the MOU dated 12 September 2018 executed between the Applicant and Respondent No.1 does not contain any arbitration agreement. According to him, the said MOU does not provide that disputes between the Applicant and Respondent No.1 are to be referred to arbitration. There is no arbitration clause in the MOU as required for referring a dispute to arbitration and for seeking appointment of an Arbitral Tribunal under Section 11 of the Arbitration and Conciliation Act, 1996 ("said Act"). He submits that, since there is no arbitration agreement between the Applicant and the Respondents, the Applicant cannot seek adjudication of its alleged claims and disputes under the said Act. On this ground alone, according to Respondent No.1, the present Arbitration Application is bad in law and deserves to be dismissed or rejected by this Court.

14. Mr. Pawar submits that even the alleged demand notice dated 2 August 2022 issued by the Advocate for the Applicant to the Respondents does not change the position. The said notice refers to the MOU dated 12 September 2018 and raises the alleged claims of the Applicant. However, according to Respondent No.1, the MOU is not an arbitration agreement between the parties. He submits that even in the notice dated 2 August 2022, the Applicant did not refer to arbitration or invoke arbitration proceedings. Therefore, according to Respondent No.1, the alleged claims of the Applicant cannot be referred to arbitration. The present Arbitration Application deserves to be rejected, with compensatory costs.

15. Mr. Pawar submits that the reliefs sought by the Applicant in the present Arbitration Application, particularly the relief seeking a declaration regarding Clause 10 of the Agreement for Project Management Consultancy dated 13 May 2014, are illegal and misconceived. According to him, while exercising jurisdiction under Section 11 of the said Act, this Court cannot grant any such declaration regarding the interpretation or effect of Clause 10 of an agreement to which the Applicant is admittedly not a party.

16. Mr. Pawar submits that the Applicant is wrongly trying to combine two separate agreements, namely, the Agreement for Project Management Consultancy dated 13 May 2014 and the MOU dated 12 September 2018. According to Respondent No.1, both are separate and independent contracts between the respective parties. They cannot be combined or treated as one agreement for the purpose of referring the disputes between the Applicant and Respondent No.1 to arbitration.

REASONS AND FINDINGS

17. I have considered the submissions made by the learned Advocates appearing for the Applicant and Respondent No.1. I have considered the judgments relied upon by both sides. It is not dispute that there are disputes between the Applicant and

Respondent No.1. The question is whether there is at least a prima facie arbitration agreement between the Applicant and Respondent No.1 which can bind both of them and on that basis an Arbitrator can be appointed under Section 11 of the Arbitration and Conciliation Act, 1996.

18. Before considering what is submitted by both sides, it is necessary to see what is written in the two documents. The Agreement for Project Management Consultancy, which is referred to as the APMC, was entered into between Shree Sadguru Co-operative Housing Society Ltd. and Supreme Developers. Under this Agreement, the Society appointed Supreme Developers as Project Management Consultant and Construction Contractor for development of the Society's property. The APMC contains various works to be done by Supreme Developers regarding development of the property, obtaining permissions, construction and other related matters. Thus, the arrangement under the APMC was between the Society and Supreme Developers. The Applicant, Balaji Constructions, was not a party to this Agreement. This position is not disputed.

19. The APMC contains an arbitration provision. Clause 10 provides for disputes touching the terms and conditions of the Agreement to be referred to the sole arbitration of Mr. Shreekant Ghanekar of M/s. Ghanekar and Co. Therefore, there is an arbitration agreement in the APMC. But the existence of this clause alone does not finish the issue before the Court. The difficulty is that the Applicant did not sign the APMC and was not a party to that Agreement.

20. The other document is the MOU dated 12 September 2018. This MOU was executed between Supreme Developers and Balaji Constructions. The Applicant relies upon this MOU and says that under the MOU it stepped into the position of Supreme Developers and could rely upon the arbitration clause contained in the APMC. The MOU refers to the earlier arrangement concerning the same project. It records that Supreme Developers had been appointed as Project Management Consultant and Construction Contractor for development of the Society's plot. It records that Supreme Developers was not able to arrange the amount required for getting extension of the Collector's NOC. Thereafter, the MOU records that Balaji was ready to arrange the required funds and take the project forward by stepping into the position of Supreme Developers. Therefore, the MOU is connected with the earlier project. It was not some separate document having no relation with the project. It came in the background of the work which Supreme Developers was doing. But the question remains whether this connection is enough to make Balaji a party to the arbitration agreement contained in the APMC.

21. The Applicant has relied upon Clauses 3, 5, 6, 9 and 10 of the MOU. There is some substance in saying that the MOU was connected with the APMC. Clause 3 contemplated payment by Balaji for getting extension of the Collector's NOC. Clause 5 dealt with Balaji taking the project forward and stated the consideration payable by Balaji to Supreme Developers as Rs.13,72,60,000/-. The MOU records that Balaji was willing to “step into the shoes” of Supreme Developers and take the project forward. Therefore, both documents are concerning the same development project and the MOU was made with reference to the earlier arrangement. However, Clause 6 of the MOU is required to be seen. It contemplated execution of an "Agreement for Project Management consultant and Construction Contractor" between the Society and M/s. Balaji. This shows that the proposed arrangement between the Society and Balaji was still to be separately entered into. Therefore, only because Balaji was to take the project forward, it cannot be said that Balaji had completely replaced Supreme Developers under the original APMC arrangement. The MOU shows that some arrangement between the Society and Balaji was still contemplated.

22. This difference becomes important. Two documents can relate to the same project. One document can be made because of an earlier agreement. One person can agree to take over the work which another person was earlier doing. But from this alone, the arbitration clause in the earlier agreement does not go into the later agreement.

23. In the present case, the MOU does not say that the arbitration clause in the APMC is incorporated into the MOU. It does not say that Balaji accepts Clause 10 of the APMC and agrees to be bound by it. It does not say that disputes between Supreme Developers and Balaji under the MOU will be referred to the Arbitrator named in the APMC. It does not say that the APMC has been novated in favour of Balaji with the consent of the Society. Rather, Clause 6 shows that another agreement between the Society and Balaji was contemplated. Therefore, merely from the wording of the MOU, it is difficult to hold that Balaji had accepted the arbitration clause contained in the APMC.

24. In this connection, the judgment relied upon by Respondent No.1 in *S.N. Prasad v. Monnet Finance Ltd.*, (2011) 1 SCC 320, is relevant. The Supreme Court has held that arbitration can be referred only when there is an arbitration agreement between the parties to the dispute. The Supreme Court stated in paragraph 8:

> "Thus there can be reference to arbitration only if there is an arbitration agreement between the parties."

25. This principle applies to the present case. The APMC contains an arbitration agreement between the parties who entered into that Agreement. The Applicant was not one of those parties. The fact that the Applicant later entered into a connected MOU with Supreme Developers cannot, by, make the Applicant a party to the arbitration agreement in the APMC. The Applicant submits that the matter should not be seen only from the signatures appearing on the APMC. According to the Applicant, the entire commercial transaction, the connection between the two documents and the conduct of the parties should be seen. For this purpose, reliance has been placed upon *Cox & Kings Ltd. v. SAP India (P) Ltd.,* (2024) 4 SCC 1 and *ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd.,* (2025) 9 SCC 76.

26. There is some substance in the general principle relied upon by the Applicant. *Cox & Kings* holds that even a person who has not signed an agreement may be bound by its arbitration agreement if his participation and conduct in the transaction, along with the surrounding circumstances, show an intention to be bound. Therefore, only because a person has not signed the agreement, the matter cannot always end there. The conduct and circumstances can be looked into.

27. *ASF Buildtech* holds that the question whether an arbitration agreement exists and the question whether a non-signatory is bound by an existing arbitration agreement are separate questions. The wider arrangement, conduct of the parties and their intention can be relevant.

28. But these judgments do not mean that every person who is connected with a commercial transaction becomes a party to the arbitration agreement. There has to be consent. Such consent can be directly shown or can be understood from the conduct and surrounding circumstances. Therefore, there should be some material from which it can be prima facie seen that the Applicant agreed to be bound by the arbitration clause in the APMC.

29. On looking at the documents relied upon by the Applicant, I do not find such prima facie consent. The MOU shows that Balaji wanted to take the project forward. It shows that Balaji was ready to undertake the work which was earlier being done by Supreme Developers. Therefore, the participation of the Applicant in the project and its commercial arrangement with Supreme Developers are shown. But the MOU does not state that Balaji accepted the arbitration clause contained in the APMC. It does not say that Balaji agreed that its disputes with Supreme Developers under the MOU would be decided under Clause 10 of the APMC. The MOU, when read as a whole, shows something. Clause 6 contemplated a future agreement between the Society and Balaji. That agreement was to concern the appointment of Balaji as Project Management Consultant and Construction Contractor. Therefore, one more step was still contemplated for completing the proposed arrangement. Because of this, it becomes difficult to say that the Applicant had become a party to the APMC and its arbitration clause.

30. The Applicant has relied upon Clause 10 of the MOU. The said clause states that Supreme Developers would continue as Mediator between Balaji and the Society and would be "responsible to act as an Arbitrator in case of any misunderstanding while implementing the project between Balaji and the Society". This provision has to be looked at in the manner in which it is written. It is different from the arbitration clause contained in the APMC. Clause 10 of the APMC provides for arbitration of disputes touching the terms and conditions of that Agreement. Clause 10 of the MOU speaks about Supreme Developers continuing as mediator and, in a particular situation, acting as an arbitrator in case of any misunderstanding between Balaji and the Society. It does not say that disputes between Balaji and Supreme Developers under the MOU are to be referred to arbitration. The present dispute raised by the Applicant against Respondent No.1 is based on the rights and obligations which the Applicant claims under the MOU. Therefore, Clause 10 of the MOU cannot be understood as an arbitration agreement between Balaji and Supreme Developers for deciding such disputes.

31. There is one more difficulty in the Applicant's case. The Applicant wants to rely upon the APMC though it was not a signatory to that Agreement. The Applicant submits that the MOU amounted to "novation-cum-assignment" of the rights and obligations of Supreme Developers under the APMC. This cannot be accepted only because Balaji agreed to take over the development work. If Supreme Developers was to be replaced by Balaji under the existing arrangement with the Society, such intention should appear from the documents and conduct of the parties in a reasonably clear manner. The Society was a party to the APMC. It was not a party to the MOU dated 12 September 2018 between Supreme Developers and Balaji. More importantly, the MOU contemplated another agreement between the Society and Balaji. Therefore, from the material presently before the Court, it cannot be held that the APMC stood novated or assigned in favour of Balaji in such a manner that Balaji became a party to the arbitration agreement contained in Clause 10 of the APMC.

32. The judgment in *ASF Buildtech* explains the difference between existence of an arbitration agreement and the question whether a non-signatory is bound by it. Paragraph 101 states that once existence of an arbitration agreement is established, whether a non-signatory is bound by that agreement is a separate question. Paragraph 102 holds that the two questions are connected but different. The present case is not merely a case where there is a prima facie arbitration agreement between Balaji and Supreme Developers and only the question of binding effect remains. The documents themselves do not show such prima facie agreement between these two parties. The arbitration clause in the APMC is between the parties to that Agreement. The MOU between Balaji and Supreme Developers does not incorporate that arbitration clause as a term governing their disputes. Therefore, the Court cannot first presume that there is an arbitration agreement between the Applicant and Respondent No.1 and then leave the question of its binding effect for later consideration. The basic foundation for appointment of an Arbitrator between these two parties is not shown from the material presently available.

33. The Applicant has relied upon the principle in *Cox & Kings* that at the stage of reference the Court has to see only the prima facie existence of an arbitration agreement. This principle is correct. At the Section 11 stage, the Court is not required to conduct a full trial regarding every dispute between the parties. But even for a prima facie finding, there should be some material showing an arbitration agreement between the parties. In the present case, the documents show a commercial relationship between Supreme Developers and Balaji. They show that the MOU was connected with the same redevelopment project for which Supreme Developers had earlier been appointed. However, the commercial connection and consent for arbitration are different things. The connection between the two documents is there. But the necessary consent of Balaji and Supreme Developers to have their disputes under the MOU decided under the arbitration clause in the APMC is not shown.

34. The decision in *Nagreeka Indcon Products v. Cargocare Logistics*, (2026) 267 Comp Cas 39, is relevant while considering whether the MOU contains an arbitration agreement. The Supreme Court, while referring to *K.K. Modi* and *Jagdish Chander*, has held that the words used in an agreement should show a clear intention and obligation to go to arbitration. If the words only keep open some possibility of arbitration and consent is required, then such wording by does not become a binding arbitration agreement. The same appears to apply here. The MOU does not state that disputes between Balaji and Supreme Developers arising under the MOU shall be referred to an Arbitral Tribunal. Clause 10 refers to Supreme Developers continuing as mediator and, in a particular situation, acting as an arbitrator in case of a misunderstanding between Balaji and the Society. Such wording cannot be treated as a arbitration agreement between Balaji and Supreme Developers for all disputes arising from the MOU.

35. The Applicant has submitted that the legal notice dated 2 August 2022 amounted to invocation of arbitration and that merely because particular words of arbitration were not used, the Application should not fail. Respondent No.1, on the other hand, submits that the notice did not invoke arbitration. It is not necessary to finally decide this question for deciding the present Application. Even if the notice is treated as an invocation of arbitration, the notice cannot create an arbitration agreement when such agreement is otherwise not found between the parties. The arbitration agreement has to come from the agreement or other material satisfying Section 7 of the Act. A notice sent by one party cannot create the consent of the other party to arbitration.

36. The principle stated in *Bhagheeratha Engg. Ltd.* is relevant. Section 21 is concerned with commencement of arbitral proceedings and limitation. It is procedural in nature. Therefore, even if there is some issue regarding the notice under Section 21, that cannot provide the basic arbitration agreement which is otherwise absent between the Applicant and Respondent No.1.

37. The Applicant has relied upon the substantial amounts allegedly paid by it in connection with the project and the receipt of those amounts by Respondent No.1. The MOU contains a detailed payment arrangement. Clause 5 records the consideration payable by Balaji to Supreme Developers as Rs.13,72,60,000/-. Clause 9 states that payment is the "essence of Contract" and provides consequences if the required payments are not made. These provisions show that there was a substantial commercial arrangement between Balaji and Supreme Developers. The MOU contemplated handing over of documents by Supreme Developers to Balaji so that approvals could be obtained, and the project could proceed. Therefore, the Applicant has shown that the MOU was an important document concerning the project and involved substantial financial and other obligations. But these facts, by themselves, do not create an arbitration agreement. The Applicant may have claims for refund, recovery of money, damages, accounts or other reliefs. Whether such claims are correct or not is not the issue which is required to be decided in the present Section 11 Application. The claim and the arbitration agreement are two different matters.

38. The Applicant has submitted that it should be treated as a party to the APMC because it had stepped into the shoes of Supreme Developers. The expression “step into the shoes” used in the MOU indicates that Balaji was to take over the work of Supreme Developers and take the project forward. But these words by themselves do not establish that Balaji legally became a substituted party under the APMC. The MOU shows that the Society had earlier appointed Supreme Developers and that a separate agreement between the Society and Balaji was contemplated. This becomes important. If Balaji had become a substituted party in place of Supreme Developers under the APMC, including its arbitration clause, then the agreement contemplated between the Society and Balaji would have to be held. Therefore, the words used in the MOU cannot be extended to the extent of holding that there was a completed novation of the APMC in favour of Balaji.

39. The Applicant has submitted that the APMC and the MOU should not be treated as two completely separate documents because both concern the same redevelopment project. This submission cannot be rejected so far as the commercial connection between the documents is concerned. Both documents are connected with the same project. But commercial connection alone cannot create an arbitration agreement. Where different agreements are parts of one transaction, they may, in an appropriate case, be considered together for understanding the intention of the parties. Even then, the Court has to find that the parties intended the particular disputes to be referred to arbitration. In the present case, the APMC created rights between the Society and Supreme Developers and contained the arbitration clause. The MOU was executed between Supreme Developers and Balaji. Though the MOU is connected with the earlier project, it does not incorporate the arbitration clause of the APMC as governing disputes between Balaji and Supreme Developers. It does not state that disputes between them under the MOU will be decided by the Arbitrator named in the APMC.

40. The principle stated by the Supreme Court in *S.N. Prasad* becomes important. An arbitration agreement between certain parties cannot be treated as an arbitration agreement against another person who was not a party to it. The judgments concerning non-signatories permit the Court to look at conduct and surrounding circumstances where consent may be gathered from such material. But the requirement of consent does not disappear. In the present case, the surrounding circumstances show that Balaji participated in the project and entered into an important commercial arrangement with Supreme Developers. But they do not show, even prima facie, that Balaji agreed with Supreme Developers that disputes under the MOU would be referred to the arbitration clause contained in the APMC.

41. I find substance in the objection of Respondent No.1 regarding the prayer seeking declaration concerning Clause 10 of the APMC. The Applicant was not a party to the APMC. Therefore, the arbitration clause in that Agreement cannot become binding upon the Applicant merely by interpreting that clause in the present Section 11 Application.

42. The Court is conscious that the inquiry under Section 11 is limited. I am not deciding finally all questions relating to the APMC, the MOU, novation, assignment, payments or the other claims of the Applicant. Those questions may arise before the competent forum in appropriate proceedings. But for deciding the present Application, the Court has to see whether there is a prima facie arbitration agreement between the Applicant and Respondent No.1. On the material before the Court, such agreement is not established.

43. Therefore, on the material before the Court, the basic requirement for exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 is not satisfied. There is no prima facie arbitration agreement between the Applicant and Respondent No.1 in respect of the disputes raised in the present Application. An Arbitrator cannot be appointed on the basis of the arbitration clause contained in the APMC.

44. The Arbitration Application is accordingly rejected.

45. The rejection of this Application will not prevent the Applicant from pursuing such remedies as may otherwise be available to it in law before the competent forum. No final opinion is expressed on the merits of the Applicant's underlying monetary or claims.

(AMIT BORKAR, J.)