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

COMMERCIAL ARBITRATION APPLICATION NO.184 OF 2026

1. **Hemant D. Shah** HUF
   through its Karta, Hemant D. Shah
   of Mumbai, Indian Inhabitant,
   Residing at 1803, Rajul "A"
   Apartments, 9, J. Mehta Road,
   Mumbai – 400 006

2. **Kokila H. Shah** of Mumbai
   Indian Inhabitant,
   Residing at 1803, Rajul "A"
   Apartments, 9, J. Mehta Road,
   Mumbai – 400 006 .... Applicants

Vs.

1. **Chittaranjan D. Shah** HUF
   through its Karta Viral C. Shah
   of Mumbai, Indian Inhabitant,
   Residing at 2501,Om Vikas Towers,105
   Walkeshwar Road, Mumbai- 400 006

2. **Parul V. Shah** of Mumbai,
   Indian Inhabitant,
   Residing at 2501,Om Vikas Towers 105,
   Walkeshwar Road, Mumbai- 400 006

3. **Gayatri Sachin Shah** of Mumbai,
   Indian Inhabitant, Residing at
   T-2, 4401, Planet Godrej,
   Mahalaxmi, Mumbai – 400 011

4. **M/s Sachin Trust**
   401, Kshamalaya, 37, New Marine
   Lines, Mumbai – 400 020 .... Respondents

Mr. Nikhil Sakhardande, Senior Advocate a/w Adv. Mr. Amrut Joshi, Mr. Ashish Venugopal, Mr. Saurish Shetye, Mr. Ajay Panicker and Mr. Dhairya Sampat i/b Ajay Law Associates for Applicant.

Mr. Rohan Savant (Counsel) a/w Mr. Aman Saraf (Counsel), Mr. Gobinda C. Mohanty for Respondent nos. 1 and 2.

Mr. Sharan Jagatiani, Senior Counsel a/w Shanay Shah and Mr. Tushar Gujjar, Hamza Lakhani (Counsel), amd Gobinda C. Mohanty i/b Mohanty & Associates for Respondent nos. 3 and 4.

CORAM : ARUN R. PEDNEKER, J.

RESERVED ON : 24th JUNE 2026
PRONOUNCED ON : 6th JULY 2026.

JUDGMENT :

1. Heard learned counsel appearing for the parties.

2. By the present Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("**the Arbitration Act**"), the Applicant seeks the appointment of a sole Arbitrator by invoking the arbitration clause contained in the Deed of Partnership dated 9th December 1985, in relation to the disputes that have arisen between the Applicant and the Respondents.

3. The Applicants have commenced fresh arbitral proceedings against the Respondents pursuant to the Order of this Hon'ble Court dated 15th October 2019, whereby the Arbitral Award dated 15th April 2016 was set aside under Section 34 of the Arbitration and Conciliation Act, 1996.

4. It is undisputed that the Partnership Deed dated 9th December 1985, executed between the Applicant and Respondent Nos.1 and 2, contains a valid arbitration clause. The Arbitration Application states that Respondent No.3 was subsequently inducted as a partner of the firm, M/s Prospective Traders, while Respondent No.4 is a private trust whose trustees and beneficiaries are members of the family of Respondent No.1. Although Respondent Nos. 3 and 4 are not signatories to the Partnership Deed dated 9th December 1985, it is contended that they are nevertheless bound by the arbitration agreement therein by virtue of the doctrine of persons "claiming through or under" a party to the agreement. It is, therefore, submitted that Respondent Nos. 3 and 4 are parties to the arbitration agreement, as their rights and interests in M/s Prospective Traders emanate from and are derived under the Partnership Deed of 9th December 1985. It is further contended that the present application is within the prescribed period of limitation. The earlier arbitral award was set aside on 15th October 2019. During the intervening period, the computation of limitation stood excluded pursuant to the orders of the Hon'ble Supreme Court extending limitation on account of the COVID-19 pandemic. Consequently, the period from 15th October 2019 to 28th February 2022 is liable to be excluded. Thereafter, a fresh notice under Section 21 of the Arbitration and Conciliation Act, 1996 was issued on

8th March 2024, i.e., after the expiry of 738 days of the reckonable limitation period. It is submitted that, in terms of Sections 21 and 43(2) of the Arbitration and Conciliation Act, 1996, the issuance of the notice under Section 21 constitutes the commencement of arbitral proceedings and stops the running of limitation. Accordingly, the present application is stated to be within the period of three years prescribed under Article 137 of the Limitation Act, 1963.

Mr. Nikhil Sakhardande, learned Senior Counsel, relies upon following judgments :

(i) Harkisandas Tulsidas Pabari & Anr. Vs. Rajendra Anandrao Acharya (Deleted) & Ors.[1]

(ii) Edelweiss Financial Services Limited (Formerly known as Edelweiss Capital Vs. Percept Finserve Private Limited (Order dated 9th March 2026) of this Court.

(iii) Bharat Sanchar Nigam Limited and Anr. Vs. Nortel Networks India Pvt. Ltd.[2]

(iv) M/s Agro Indus Credits Limited (Formerly known as Agro Indus Finance and Leasing India Ltd. Vs. Mangalan @ Jagan Mangalan & Ors., (Order dtd. 18th December 2025) of Kerala High Court at Ernakulam.

(v) Adavya Projects Pvt. Ltd. Vs. Vishal Structurals Pvt. Ltd. And Ors.[3]

1 (2025) 2 High Court Cases (Bom) 1
2 (2021) 5 SCC 738
3 (2025) 9 SCC 686

5. Per contra, **Mr. Rohan Savant**, learned counsel appearing for Respondent Nos. 1 and 2, submits that the present application is barred by limitation. According to him, the prescribed limitation period of three years for filing an application under Section 11 commences from the date on which the right to apply accrues, namely, the date on which the arbitral award is set aside. In the present case, the arbitral award dated 15th April 2016 was set aside by this Court on 15th October 2019. Consequently, the cause of action to file the present application arose on 15th October 2019. He further submits that, once an arbitral award has been set aside, issuance of a fresh notice invoking arbitration under Section 21 of the Act is not mandatory. Upon the setting aside of the earlier award, the party is entitled to directly approach the High Court under Section 11 of the Act for the appointment of a substitute arbitrator.

6. It is further submitted that the principles governing the first round of arbitration proceedings, including the mandatory requirement of issuing a notice invoking arbitration and the consequential filing of an application under Section 11 of the Arbitration and Conciliation Act, 1996, are inapplicable to a second round of arbitration initiated after an arbitral award has been set aside under Section 34 of the Act. It is contended that, upon the setting aside of the award, a fresh application under Section 11 is required to

be filed within three years from the date of the order passed under Section 34. It is, therefore, submitted that an application under Section 11 ought to have been filed within three years from the date on which the earlier arbitral award was set aside. Learned counsel further submits that, even after excluding the period covered by the COVID-19 extension orders, the present arbitration application, having been filed on 15th October 2026, is barred by limitation. However, learned counsel does not dispute that the notice issued under Section 21 of the Arbitration and Conciliation Act, 1996, would be within the prescribed period of limitation if this Court were to hold that the second arbitral proceedings commenced upon the issuance of the notice under Section 21. It is nevertheless submitted that the limitation period for filing the application under Section 11 expired on 28th September 2024. Accordingly, learned counsel prays that the present application be dismissed as being barred by limitation.

7. **Mr. Rohan Savant**, learned counsel relies on the judgment of Supreme Court in the matter of **S.B.I. General Insurance Co. Ltd. V. Krish Spinning**[4].

Submissions of Respondent nos. 3 and 4 :

8. **Mr. Sharan Jagatiani**, learned Senior Counsel appearing for Respondent Nos.3 and 4, has resisted the arbitration application by

4 (2024) 12 SCC 1

submitting that there is no arbitration agreement between the Applicant and Respondent Nos. 3 and 4. Respondent Nos. 3 and 4 are not signatories to the Partnership Deed dated 9th December 1985, and thus cannot be referred to arbitration by this Court. It is submitted that since Respondent Nos. 3 and 4 are not parties/signatories to the Partnership Deed dated 9th December 1985, the arbitration clause contained therein cannot bind them. It is further submitted that the Applicants had knowledge of the Deed of Partnership dated 30th September 2009, when Respondent Nos.3 and 4 joined as partners of the firm, namely M/s Prospective Traders, with Respondent No.1, and vide Deed of Retirement dated 4th November 2009, Respondent No. 1 retired. It is stated that in the partnership deeds of 2009, neither the Applicants nor Respondent Nos.1 and 2 are signatories. In fact, the Applicants had retired from the partnership firm in 1995. Consequently, no arbitration agreement exists between the Applicant and Respondent Nos. 3 and 4.

9. It is further submitted that Respondent Nos. 3 and 4 are not veritable parties in the dispute sought to be referred to arbitration by the Applicant. Respondent Nos. 3 and 4 became partners of M/s Prospective Traders constituted under the 2009 partnership deeds and had absolutely no connection with the disputes pertaining to the erstwhile partners under the

said partnership deed of 1985, and the present dispute is purely an inter se partnership dispute between the Applicants and Respondent Nos. 1 and 2. It is further submitted that this Court on 27th January 2011 categorically regarded Respondent Nos. 3 and 4 as third parties to the first round of arbitral proceedings. It is submitted that the Applicants had undertaken before this Court in the earlier Section 11 application that the award made in the earlier proceedings would not bind Respondent Nos. 3 and 4. The same was also reiterated in the submissions in the Section 34 application.

10. It is further submitted that the application filed is hopelessly time-barred as against Respondent Nos. 3 and 4. The Applicants were not parties to the first arbitral proceedings. It is submitted that the earlier award was set aside by this Hon'ble Court on 15th October 2019, and the notice invoking arbitration was issued on 8th March 2024, and the arbitration application was filed on 25th March 2026. Thus, the Applicants have, in the interregnum between 2019 to 2026, actively filed various proceedings, including two proceedings under Section 9 of the Arbitration and Conciliation Act, 1996. It is submitted that in the first application under Section 11 of the Act, as noted in the order dated 27th January 2011, the Applicants categorically agreed that the award would neither bind nor affect Respondent Nos. 3 and 4. The Applicants were aware that Respondent Nos. 3 and 4 had become partners of

M/s Prospective Traders throughout the first round of arbitration proceedings, and even during the subsequent proceedings under Sections 34 and 37 of the Act. However, at no point did the Applicants ever invoke arbitration against Respondent Nos. 3 and 4.

11. Learned Senior counsel relies upon the judgments :

(i) Hindustan Petroleum Corporation Limited Vs. BCL Secure Premises Pvt. Ltd.[5]

(ii) Vardhaman Builders Vs. Narendra Balasaheb Ghatge[6],

(iii) Kirloskar Pneumatic Company Ltd. Vs. Kataria Sales Corporation[7]

(iv) Cox and Kings Limited V. Sap India Pvt. Ltd. & Anr.[8]

(v) Adavya Projects Pvt. Ltd. Vs. Vishal Structurals Pvt. Ltd. & Ors.

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ANALYSIS QUA RESPONDENT NOS. 1 AND 2 :

12. Having heard rival submissions, this Court would consider the Arbitration Application independently in respect of Respondent Nos. 1 and 2 and Respondent Nos. 3 and 4. The first issue that arises for determination is whether the Application under Section 11, filed on 15th October 2026, i.e. three years after the award was set aside by this Court on 25th March 2026 is within limitation. The relevant provisions applicable are Section 21 and

5 (2026) 3 SCC 711
6 (2024) SCC OnLine Bom. 5171
7 (2024) SCC OnLine Bom 941 : (2024) 2 CCC 11.
8 (2024) 4 SCC 1

Section 43(4) of the Arbitration Act, which for ready reference are quoted below :

> 21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.
>
> 43. Limitations.—
> (1) …...
> (2) ….
> (3) ….
>
> (4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

13. In the instant case, the notice under Section 21 was issued on 8th March 2024. The two-year period of exclusion of limitation due to COVID-19 is between 15th March 2020 and 28th February 2022. The limitation period is computed in the chart given below.:

#	Period	Dates	Days
A	Original cause of action (C.D. Shah first alleged that the Applicants had retired from the firm vide the alleged Deed of Retirement dated 03.07.1995) to first S.21 invocation.	24.05.2006 to 17.06.2006	**25 days**
B	**First S.21 to S.34 setting-aside – EXCLUDED under Section 43(4)**	17.06.2006 to 15.10.2019	**EXCLUDED**
C	S.34 setting-aside to commencement of COVID exclusion	16.10.2019 to 14.03.2020	**152 days**
D	COVID exclusion under In Re: Cognizance for	15.03.2020	**EXCLUDED**

	Extension of Limitation, Suo Motu WP (C) 3/2020-EXCLUDED	to 28.02.2022	
E	End of COVID exclusion to fresh S.21 (limitation stops on issuance of fresh S.21 under Section 43(2) read with Section 21)	01.03.2022 to 08.03.2024	**738 days**
	TOTAL PERIOD COUNTED FOR LIMITATION (3 years) (A+C+E)		**915 days** within limitation.

14. The Division Bench of this Court in the case of **Harkisandas Tulshidas Pabari and Anr. v. Rajendra Anandrao Acharya & Ors**., in Arbitration Appeal Nos. 62 and 63 of 2007, reported in (2025) 2 High Court Cases (Bom) 1, has held that, in terms of the provisions of sub-section (4) of Section 34 of the Arbitration Act, if an arbitral award is set aside, the period between the commencement of fresh arbitration proceeding and the date of the order of the Court setting aside the arbitral award needs to be excluded while computing the time prescribed by the Limitation Act for commencement of fresh arbitral proceedings. Section 43(4) of the Arbitration Act applies only when arbitration proceedings are freshly commenced. The Division Bench of this Court, in the above judgment, has observed that for the commencement of fresh arbitral proceedings after the setting aside of the award, in order to take benefit of the Limitation Act under Section 43(4) of the Arbitration Act, the procedure under Section 21 of the Arbitration Act becomes mandatory. The Division Bench has further observed as under :

> “21. Thus, under provisions of sub-section (4) of Section 43 of the Arbitration Act, where the Arbitral award is set aside, the period between commencement of arbitration and the date of the order of the Court needs to be excluded in computing the time prescribed by the Limitation Act for "commencement" of the proceedings. Thus Section 43(4) of the Arbitration Act applies only when arbitration proceedings are to be freshly commenced. Therefore reference made by this Court while setting aside the award to provisions of Section 43(4) of the Act again makes the position clear that what was contemplated was commencement of fresh proceedings and not remand of proceedings to the same arbitrator.
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> 22. When it comes to 'commencement' of proceedings under Section 43(4) of the Act, provisions of Section 21 become relevant. Section 21 of the Arbitration Act provides thus:
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> "21. **Commencement of arbitral proceedings**.- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."
>
> Thus for 'commencement' of the arbitral proceedings after setting aside of the Award by taking benefit of limitation under Section 43(4) of the Arbitration Act, the procedure under Section 21 becomes mandatory.”

15. Section 21 provides that unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute commence on the date on which the request for that dispute to be referred to arbitration is received by the respondent. In the instant case, it is not disputed that the notice received under Section 21 for the commencement of fresh arbitral proceedings is within the period of three years. The contention raised is that

the application under Section 11 has to be filed within three years from the date of the earlier award being set aside cannot be accepted, as the fresh arbitral proceedings commence on the notice under Section 21. Reliance placed by learned counsel for the respondent on the judgment of the learned Single Judge in the case of **Vardhaman Builders v. Narendra Balasaheb Ghatge & Ors**., wherein this Court has held that the fresh application under Section 11(6) ought to have been filed within three years from the date of passing of the order under Section 34 when the award is set aside, cannot be accepted, Since, the learned Single Judge was not dealing with the issue as to whether the arbitral proceedings would commence from the date of notice under Section 21 or an application under Section 11 of the Arbitration Act. In the case of **Vardhaman** (supra), the notice invoking arbitration under Section 21 was dated 20th June 2023 and the application under Section 11 was filed on 5th July 2023. Both were clearly barred by limitation. As such, it made no difference to the case, and the Court proceeded to observe that the application under Section 11(6) ought to have been filed within three years from December 2019 when the award was set aside.

16. The Supreme Court in the case of **Bhagheeratha Engineering Ltd. V. State of Kerala**[9] has held that Section 21 of A&C Act, is only for the purpose of commencement of arbitral proceedings is also well settled. Section 21 is

9 (2026) SCC OnLine SC 5

concerned only with determining the commencement of the dispute for the purpose of reckoning limitation. There is no mandatory prerequisite for issuance of a Section 21 notice prior to the commencement of Arbitration. Issuance of a Section 21 notice may come to the aid of parties and the arbitrator in determining the limitation for the claim. Failure to issue a Section 21 notice would not be fatal to a party in Arbitration if the claim is otherwise valid and the disputes arbitrable.

17. In the instant case, notice under Section 21 is issued within three years of the Arbitral Award being set aside. So also, the application under Section 11 of the Act is within 3 years of notice under Section 21 as such his application under Section 11 is within limitation.

18. As regards Respondent nos. 3 and 4, following issues arise for consideration.

(i) Whether Respondent nos. 3 and 4 being non signatories to the agreement of partnership of the year 1985, whether they can be referred to the arbitration as a veritable parties, or as derivative parties claiming "through or under" the 1985 Partnership Deed.

(ii) What is the effect of statement made by the Applicant before the Reference Court in the earlier Section 11 application and not making the Respondent nos.3 and 4 parties to the first arbitration proceedings.

(iii) Whether the application qua Respondent nos. 3 and 4 is time barred by limitation as they were not made parties to the first arbitral proceedings.

19. Considering the judgment of **Cox & Kings** (supra), this Court would have ordinarily directed the Arbitral Tribunal to decide whether Respondent nos. 3 and 4 are veritable parties or would be the parties claiming under the original signatories i.e. Respondent nos.1 and 2. However, the Supreme Court in the subsequent case of **Hindustan Petroleum Corporation Limited V. BCL. Secure Premises Private Limited** (supra) has explained the judgment of **Cox & Kings** (supra) and has held that the Referral Court should *prima facie* be satisfied that there exist an arbitration agreement and whether the non signatory is a veritable party or not. The Supreme Court has further held that if the Referral Court *prima facie* arrives at the satisfaction that the non signatory is a veritable party or not, 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. The Supreme Court Constitution Bench in the case of **Cox & Kings** (supra) held as under :

> "151. One of the questions that has been referred before us is whether the phrase "claiming through or under" in Section 8 could be interpreted to include the Group of Companies doctrine. The Group of Companies doctrine is founded on the

mutual intention of the parties to determine if the non-signatory entity within a group could be made a party to the arbitration agreement in its own right. Such non-signatory entity is not "claiming through or under" a signatory party. As mentioned above, the phrase "claiming through or under" is used in the context of successors-in-interest that act in a derivative capacity and substitute the signatory party to the arbitration agreement. To the contrary, the Group of Companies doctrine is used to bind the non-signatory to the arbitration agreement so that it can agitate the benefits and be subject to the burdens that it derived or is conferred in the course of the performance of the contract. The doctrine can be used to bind a non-signatory party to the arbitration agreement regardless of the phrase "claiming through or under" as appearing in Sections 8 and 45 of the Arbitration Act.

168. In Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar, a two-Judge Bench of this Court held that when a third party is impleaded in a petition under Section 11(6) of the Arbitration Act, the referral court should delete or exclude such third party from the array of parties before referring the matter to the Tribunal. This observation was made prior to the decision of this Court in Chloro Controls[1] and is no longer relevant in light of the current position of law. Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement.

169. 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. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16."

20. After examining the judgment of **Cox & Kings** (supra), the Supreme Court in the case of **Hindustan Petroleum Corporation Limited** (supra), at paragraph 33, 34 and 35, has held as under:

> "33. In fact, ASF Buildtech expressly notices the holding in para 169 of Cox & Kings to conclude that the Referral Court was required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory was a veritable party. All that it holds further in reiteration of the earlier line of judgments is that even if the Court holds that prima facie a party is a veritable party that will not foreclose the Arbitral Tribunal from concluding to the contrary after an intensive inquiry.
>
> 34. This does not mean that where the Referral Court finds prima facie a party is not a veritable party still the matter is left to the Arbitral Tribunal. To hold so, would relegate the Referral Court to the status of a monotonous automation. Further, to countenance such an extreme proposition would lead to disastrous consequences, where absolute strangers could walk into the Referral Court and contend that the matter has to perforce go to the Arbitral Tribunal for a decision on the

veritable nature of the party. We are not prepared to accept such an extreme proposition.

35. It could happen that one party having undertaken a contract from the other may engage one or more third parties like in the present case. In such a scenario, if there is nothing even prima facie to show that there was any semblance of an intent to effect legal relationship between that party and the party originally granting the contract and/or to indicate that such a third party was a veritable party, such parties cannot be found to be veritable parties. The following pertinent observations from Cox and Kings are relevant: (SCC p. 73, para 117)

> "117. However, we clarify that mere presence of a commercial relationship between the signatory and non-signatory parties is not sufficient to infer "legal relationship" between and among the parties. If this factor is applied solely, any related entity or company may be impleaded even when it does not have any rights or obligations under the underlying contract and did not take part in the performance of the contract. The group of companies doctrine cannot be applied to abrogate party consent and autonomy."

As pointed out earlier, on the facts of the present case, we hold that the parties operated on separate orbits."

21. Thus, considering the Judgment of Hindustan Petroleum (supra), it is necessary for me to decide *prima facie* whether the Respondent nos.3 and 4 are veritable parties or derivative parties to the partnership of 1985. The Supreme Court in the case of **Cox and Kings Limited V. SAP India Private Limited & Anr** has extensively dealt with the issue of non signatories being referred to Arbitration under two categories.

(i) The group of Companies doctrine and
(ii) Persons claiming through or under a party

The Constitution Bench of the Supreme Court in the case of **Cox & Kings** (supra) has held that the arbitration is an alternative dispute resolution mechanism where parties consensually decide to submit a dispute between them to an Arbitral Tribunal to the exclusion of domestic courts. The party autonomy allows the parties to choose the seat of arbitration, number of arbitrators, procedure for appointment of Arbitrators, rules governing the arbitral procedure and the institution which will administer the administration. The principle that only the parties to the arbitration agreement are either bound or benefited by such an agreement is fundamental to arbitration. Since consent forms the cornerstone of arbitration, a non-signatory cannot be forcibly made a "party" to an arbitration agreement as doing so would violate sacrosanct principles of privity of contract and party autonomy. However, in case of multi-party contracts, the Courts and Tribunals are often called upon to determine the parties to an arbitration agreement. A non signatory is a person or entity that is implicated in a dispute which is the subject matter of an arbitration, although it has not formally entered into an arbitration agreement. The important determination is whether such a non-signatory intended to affect

legal relations with the signatory parties and be legally bound by the arbitration agreement.

22. The Supreme Court in **Cox and Kings** (supra) has held that in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement, or the underlying contract containing the arbitration agreement may be held to be bound by such an agreement. Therefore, the decisive question before the Courts or Tribunals is whether a non-signatory consented to be bound by the arbitration agreement. The Supreme Court in **Cox & Kings** (supra) has held that there needs to be a balance between the consensual nature of arbitration and modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways.

23. The non-signatory's participation in negotiation, performance, or termination of the contract can give rise to the implied consent of it being bound by the contract. Applying the above principles, it is to be seen that that the partnership deed of 1985 and the partnership deed of 2009 are distinct and Respondent nos.3 and 4 have not participated in the business of the partnership under the 1985 deed in close proximity for the benefit or overall business transactions under the 1985 partnership deed. The concept of group companies doctrine, has no applicable in the instant case. The

parties to the 1985 Partnership Deed and the parties to the 2009 Partnership Deed operate on separate orbits.

24. The next principle is "claiming through or under". I will now examine whether Respondent nos. 3 and 4 can be referred to the arbitration under the doctrine of "claiming through or under", the Respondents nos.1 and 2 under the 1985 Deed of Partnership. The Supreme Court in the **Cox and Kings** (supra) has held that the test of derivative action conveys that a third party's cause of action is derived from the original party to the arbitration agreement. The third party cannot be saddled with new duties and liabilities to which it has not consented, they can only be held liable or entitled to the extent they derive their right or entitlements from the original party to the agreement.

25. The person "claiming through or under" cannot be made a "party" to the arbitration agreement on its own terms, as it only stands in the shoes of original signatory party. The phrase "claiming through or under" has not been used either in Section 2(1)(h) or Section 7 of the Arbitration Act. This is so because those provisions are based on the concept of party autonomy and party independence, which requires the party to provide consent to submit their disputes to arbitration. On the contrary, a person claiming through or under a party to an arbitration agreement is merely standing in the

shoes of original party to the extent that it is merely agitating the right of the original party to the arbitration agreement.

26. The partnership constituted in September 2009 is between a proprietorship concern of Respondent no.1 and Respondent Nos.3 and 4. Respondent Nos.3 and 4 were not parties to the Partnership Deed of 1985, and there is nothing to indicate that they agreed to be bound by the arbitration agreement contained in 1985 Partnership Deed. Learned counsel for the Applicant,Mr. Sakhardande, submitted that the partnership constituted under the Deed of 2009 had only one asset, and carried on the business previously carried on by the partnership constituted under the Deed of 1985. According to him, the partnership of 2009 continues to carry on the same business and uses the same firm name as the partnership of 1985. He, therefore, contended that if the arbitration proceedings are confined only to the parties to the 1985 Partnership Deed, any award rendered would be ineffective and incapable of meaningful enforcement, as the assets of the erstwhile partnership are now held and utilized by the partnership constituted under the Deed of 2009. He further submitted that if his alleged retirement in the year 1995 is dis-proved, consequently, he would continue to be as a partner of the partnership constituted under the Deed of 1985 and Respondent Nos. 3 and 4 would necessarily be treated as having been

inducted into the partnership of 1985 and, therefore, would also be bound by the arbitration clause contained in the Partnership Deed of 1985. It was further argued that unless all the concerned parties are referred to arbitration, any award in favour of the Applicant would be rendered unenforceable. On that basis, it was urged that Respondent Nos. 3 and 4 should also be referred to arbitration. A similar argument has been specifically rejected by the Constitution Bench in **Cox and Kings** (supra). The Court, while rejecting the contention that a composite reference of all parties should be directed merely to serve the ends of justice, held that arbitration is fundamentally a matter of consent. The Constitution Bench observed that considerations of equity, convenience, or the interests of justice cannot, by themselves, constitute a valid basis for compelling a party to arbitrate in the absence of its consent to the arbitration agreement. Thus, the interests of justice and equity alone cannot be the sole grounds for invoking or extending an arbitration agreement to a non-signatory.

27. This Court is of the view that parties may be referred to arbitration only if they are signatories to the arbitration agreement or, though non-signatories, fall within the recognised exceptions, such as persons claiming "through or under" a signatory or those covered by the Group of Companies Doctrine. The latter applies where the conduct of the companies within the

group demonstrates that they participated in the negotiation, execution, performance, or fulfilment of the contract in a manner indicating a common intention to be bound by its terms, including the arbitration agreement, notwithstanding that one of the companies is not a signatory to the arbitration agreement.

28. In the present case, Respondent Nos. 3 and 4 are not signatories to the 1985 Partnership Deed. Further, they do not fall within the category of persons claiming through or under the signatories, nor can they be brought within the ambit of the group of companies doctrine. Consequently, they cannot be regarded as parties to the arbitration agreement contained in the 1985 Partnership Deed. In the event I hold that the Respondent nos.3 and 4 can be referred to arbitration under the 1985 Partnership Deed applying the arbitration clause in 1985 Partnership Deed, it could conversely mean that Respondent nos. 3 and 4 can also raise the claim against the Applicant under the same Partnership Deed of 1985 applying the clause in the Arbitration. Respondent nos. 3 and 4 have absolutely no connection with the Applicants and the Partnership 1985. Accordingly, Respondent Nos. 3 and 4 cannot be referred to arbitration under the 1985 Partnership Deed. The 1985 and 2009 partnership Deeds, act is completely different orbits.

29. As regards other issues raised, since I am not referring Respondent Nos. 3 and 4 to arbitration, I do not consider it necessary to decide the issues.

30. Having considered the material, this Court would pass the following order :-

O R D E R

(A) The Applicants and Respondent nos.1 and 2 are referred to arbitration.

(B) Application is dismissed against Respondent Nos. 3 and 4.

(C) **Mrs. Justice Sadhana Jadhav**, (Retired Judge of Bombay High Court) is appointed as the sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above. The contact details of the Arbitrator are as under :-

Address : C/o Advocate Mr. Swaraj Jadhav,
108 Seksaria Chambers,
Master Nagindas Road,
Opp. Commerce House, Kala Ghoda,
Fort, Mumbai

Mobile No. : 9422989004

(D) A copy of this order be communicated to the learned sole Arbitrator by the Advocates for the Applicant within a period of 1 week from the date of uploading of this order. The Applicant shall provide the contact and

communication particulars of the parties to the Arbitral Tribunal along with a copy of this order.

(E) Seat of the arbitration would be governed by the provisions of the agreement executed between the parties.

(F) Learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocates for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocates for the Applicant to the Respondent.

(G) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by her, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers, if any, of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration.

(H) All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

31. All contentions are expressly kept open to be raised before the Arbitrator.

32. With the above directions, Commercial Arbitration Application stands disposed of accordingly.

[ARUN R. PEDNEKER, J.]