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**(2014) 09 BOM CK 0199**

**In the Bombay High Court**

**Case No :** Notice of Motion No. 540 of 2013 in Suit No. 62 of 2013 and  
Arbitration Application No. 86 of 2013

Aurora Properties And Investments

APPELLANT

Vs

Bombay Slum Redevelopment Corporation Ltd.

RESPONDENT

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**Date of Decision :** 30-09-2014

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11, 7, 7(5), 8, 8(1)

**Citation :** (2015) 2 ALLMR 333

**Hon'ble Judges :** S.J. Kathawalla, J

**Bench :** Single Bench

**Advocate :** P.K. Samdani, Senior Advocate, Snehal Shah, Deepti Panda instructed by Markand Gandhi and Co., S.U. Kamdar, Senior Advocate, D.V. Deokar, Sachin Pandey instructed by Parimal K. Shroff and Co, Advocate for the Appellant; Mahendra Ghelani instructed by Law Charter, S.U. Kamdar, Senior Advocate, D.V. Deokar, Sachin Pandey instructed by Parimal K. Shroff and Co., P.K. Samdani, Senior Advocate, Snehal Shah, Deepti Panda instructed by Markand Gandhi and Co, Advocate for the Respondent

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## **Judgement**

S.J. Kathawalla, J.—The above Notice of Motion is taken out by the Applicant - Samir Narayan Bhojwani (Original Defendant No. 2 and hereinafter referred to as "Samir") in Suit No. 62 of 2013 against M/s. Aurora Properties and Investments (Original Plaintiff in Suit No. 62 of 2013 and hereinafter referred to as "Aurora") and Bombay Slum Redevelopment Corporation Ltd. (Original Defendant No. 2 in Suit No. 62 of 2013 and hereinafter referred to as "BSRCL ") for the following relief:

"That the Suit be disposed of by referring the same to arbitration under Section 8(1) of the Arbitration and Conciliation Act, 1996"

2. Samir has also filed Arbitration Application No. 86 of 2013 under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") wherein Samir is the Applicant and BSRCL and Aurora are joined as Respondents 1 and 2 respectively. The reliefs sought in the said Application No. 86 of 2013 are reproduced

hereunder:

"(a) That the Hon"ble Court may take the Arbitration Clause 36 in the said Agreement for Sub-Development dated 22nd September, 1999 and clause 31 of the Agreement for Development dated 10th March, 2003 read with Tripartite Agreement dated 11th September, 2009 annexed as Exhibit ""C"", ""D"" and ""F"" respectively, on record;

(b) That the Hon"ble Chief Justice of the Hon"ble Court or the Hon"ble Judge nominated by the Hon"ble Chief Justice be pleased to appoint Hon"ble Mr. Justice F.I. Rebello (Retd.) as a Sole Arbitrator on behalf of the Applicant and the Respondents or appoint some fit and proper person as Arbitrator on behalf of the Respondent No.1 or to adjudicate upon the disputes which have arisen between the Applicant and the Respondents under Clause 36 of the said Agreement for Sub-Development dated 22nd September, 1999 and clause 31 of the Agreement for Development dated 10th March, 2003 read with Tripartite Agreement dated 11th September, 2009 (Exhibit ""C"", ""D"" and ""F"" hereto) in respect of the said property more particularly described in Exhibit ""A"" hereto, under Section 11 of the Arbitration and Conciliation Act, 1996."

3. The brief facts in the matter are as under:

3.1. Maharashtra Area and Housing Development Authority (MHADA) is the original owner of Survey No. 139, City Survey No. 1319 (Part) admeasuring 8892 sq. mtrs. situate, lying and being at Versova Link Road, Taluka Andheri, (hereinafter referred to as "the said property") which is declared as slum under the provisions of the Maharashtra Slum Act, more particularly described in Exhibit-A to the Complaint in Suit No. 62 of 2013.

3.2. By an Indenture of Lease dated 31st March, 1993, MHADA had leased the said property to one Andheri Kamgar Nagar Co-operative Housing Society Ltd. ("Society") consisting of members of slum dwellers who were in occupation of the said property.

3.3. Thereafter by a Development Agreement dated 6th October, 1996, executed by and between the Society on the one hand and Aurora on the other hand, the Society inter alia granted development rights in respect of the said property, on the terms and conditions more particularly set out therein, to Aurora. By the said Agreement dated 6th October, 1996, Aurora was entitled to assign the benefits of the said Development Agreement to any other party.

3.4. Aurora completed part construction of the rehabilitation building on the said property. Thereafter by and under a Sub-Development Agreement dated 22nd September, 1999, Aurora as the Developer therein, transferred and assigned its rights under the Development Agreement dated 6th October, 1996 to BSRCL, described therein as the "Sub-Developer", on terms and conditions more particularly set out therein. It was specifically recorded in the said Agreement dated 22nd September, 1999, that BSRCL would be liable to give 15,000 sq.ft. of

free sale area as per SRA sanctioned plan to Aurora. Aurora had also obtained the consent of the Society for the execution of the said Sub-Development Agreement. Clause 36 of the said Sub-Development Agreement dated 22nd September, 1999 between Aurora and BSRCL provides as under:

"The parties hereto hereby agree that in the event of their being any dispute and/or disagreement by and between the parties hereto in respect of interpretation of any of the terms and conditions herein contained as also in respect of any matter arising out of and/or touching these presents, the same shall be in accordance with the provisions of the Indian Arbitration and Reconciliation Act, 1996. The decision of the Arbitrator Tribunal shall be final and binding".

3.5. According to Aurora, while the development work was going on in the said property, Aurora was shocked and surprised to come across a public notice dated 9th December 2005, wherein it was stated that an Agreement had been executed by and between BSRCL and Samir on 10th March, 2003 and therefore the development rights in respect of the said property were claimed by Samir. According to Aurora, upon making further enquiries, Aurora for the first time in December, 2005, came to know that a Development Agreement dated 10th March, 2003, had been executed by BSRCL with Samir. The said Agreement was executed without taking consent of Aurora purporting to transfer the development rights of BSRCL in favour of Samir. However, it was recorded in the Development Agreement dated 10th March, 2003, that BSRCL would be liable to give 15000 sq.ft. free sale area as per SRA sanctioned plan to Aurora as was agreed by and between Aurora and BSRCL under the Sub-Development Agreement dated 22nd September, 1999. BSRCL's obligation under the said Sub-Development Agreement dated 22nd September, 1999 was specifically acknowledged and reiterated in the said Agreement dated 10th March, 2003. Clause 31 of the said Agreement contains a clause relating to Arbitration Agreement between BSRCL and Samir. The same is reproduced hereunder.

"31. It is agreed between the parties hereto that any dispute or differences which may arise between the parties hereto as to performance or non-performance or terms of performance or validity, termination, abandonment or cancellation of this Agreement for Development and interpretation of the terms of this Agreement for Development and all questions which may arise ancillary and incidental thereto shall be referred to Arbitration of three Arbitrators. BSRCL and SNB shall appoint one Arbitrator each and the said Arbitrators shall appoint the third Arbitrator and the Arbitration shall be in accordance with the provisions of Arbitration and Conciliation Act, 1996 or its amendment or re-enactment thereof as the case may be and the venue of Arbitration shall be at Mumbai."

3.6. After series of correspondence exchanged between the parties, negotiations and settlement talks ensued which finally culminated in a Tripartite Agreement in the form of a letter dated 11th September, 2009. The said letter dated 11th September, 2009, was addressed by Aurora to BSRCL and confirmed by Samir. It was agreed that Aurora would receive 22500 sq.ft. of constructed area as per

SRA sanctioned plan and proportionate car parking area out of the 45 per cent share of BSRCL. Admittedly, there is no clause in the said Tripartite letter/Agreement containing an arbitration agreement between the parties.

3.7. In July, 2012, Aurora wrote letters to BSRCL and Samir stating that Aurora is entitled to its 22500 sq.ft. constructed area as per the sanctioned plan from the 45 per cent area of BSRCL. However, Aurora did not receive its said share and in fact learnt in November, 2012, that an Occupation Certificate is received in respect of the free sale building by BSRCL and Samir on or about 9th January, 2012 and though BSRCL and Samir were required to give notice to Aurora calling upon Aurora to take possession of the constructed area, BSRCL as well as Samir did not give any such notice to Aurora.

3.8. Aurora (as Plaintiff) therefore on 21st November, 2012, filed the above Suit No. 62 of 2013 against BSRCL (as Defendant No.1) and Samir (as Defendant No.2) inter alia seeking specific performance of the Sub-Development Agreement dated 22nd September, 1999 executed by and between Aurora and BSRCL read with the Tripartite Agreement dated 11th September, 2009 including handing over to Aurora the constructed area of 22500 sq.ft. in the free sale building in the form of 12 flats along with the proportionate car parking space in the form of 24 car parking spaces and other reliefs. Aurora immediately applied for ad-interim reliefs which were granted by this Court vide its order dated 3rd December, 2012, as modified by an order dated 17th December, 2012.

3.9. In the meantime, Samir by his Advocate ""'s letter dated 28th November, 2012, after referring to some of the above facts alleged that there is multiple/multi party agreements between the parties in respect of the development of the said property which are intrinsically interlinked and thereby invoked the arbitration agreement between the parties contained in the Agreement for Sub-Development dated 22nd September, 1999, and Agreement for Development dated 10th March, 2003, read with the Tripartite Agreement dated 11th September, 2009.

3.10. According to Samir, though BSRCL failed to respond to his notice, Aurora vide its letter dated 2nd January, 2013, concurred to the appointment of the Learned Arbitrator as suggested by Samir. It is pertinent to note that though Aurora has through its Counsel agreed to refer the disputes to Arbitration subject to certain conditions, Aurora has categorically submitted that the invocation of Arbitration by Samir does not relate to the disputes and differences between Aurora on the one hand and BSRCL and Samir on the other hand, but relates to inter se disputes between BSRCL and Samir.

3.11. Thereafter Samir filed the above Notice of Motion in Suit No. 62 of 2013 for referring the Suit to arbitration under Section 8(1) of the Act. On 29th January, 2013, Samir also filed the above Arbitration Application No. 86 of 2013 before this Court in its jurisdiction under Section 11 of the Act for the aforesaid relief.

3.12. The Notice of Motion and the Application both taken out by Samir under

Sections 8 and 11 of the Act respectively are now taken up for hearing.

4. The Learned Senior Advocate appearing for Samir has submitted that the Agreement for Sub-Development dated 22nd September, 1999, entered into between Aurora and BSRCL contained an arbitration agreement (Clause 36) for resolution of disputes and disagreements between the parties. By the said Agreement for Sub-Development, Aurora transferred the development rights and obligations under the Development Agreement dated 6th October, 1996 (entered into between Aurora and the Society) in favour of BSRCL. Under the Agreement for Development dated 10th March, 2003, entered into between BSRCL and Samir, Samir became entitled to 55 per cent of the area available for free sale building and car parking and was required to construct 45 per cent of the total area and car parking for BSRCL. The said Agreement for Development dated 10th March, 2003, also contained Arbitration Agreement (clause 31) for resolution of disputes or differences between the parties. Aurora, BSRCL and Samir also entered into a Tripartite Agreement on 11th September, 2009 confirming therein both the Agreements i.e. Sub-Development Agreement dated 22nd September, 1999 and Development Agreement dated 10th March, 2003, which Agreements contained arbitration clauses 31 and 36 respectively. The said Tripartite Agreement is signed by all the three parties to the present proceedings. It is submitted that it is therefore clear that the subject matter of the arbitration between Aurora and BSRCL on the one hand and Samir and BSRCL on the other hand is the same subject property and thus there are multiple and multi party agreements having provision for arbitration in the Agreements between Samir, Aurora and BSRCL.

5. The Learned Senior Advocate appearing for Samir has further submitted that Section 7(5) of the Act provides that when there is a reference in a contract to a document containing an arbitration clause then such a contract also will have an arbitration agreement incorporated by a reference if such contract is in writing, and the reference is such as to make that arbitration clause part of the contract. It is submitted that the Tripartite Agreement dated 11th September, 2009, entered into between Samir, BSRCL and Aurora refers to an Agreement for sub-development dated 22nd September, 1999 as also Agreement for Development dated 10th March, 2003 and all the parties confirm the contents of both the said Agreements and both these documents have an arbitration clause, then by way of incorporation, the Tripartite Agreement also becomes subject to arbitration agreement. It is submitted that the Tripartite Agreement also refers to the development carried out by Samir on the property and reiterates entitlement of BSRCL under the Agreement for Sub-Development dated 22nd September, 1999. Thus the Tripartite Agreement refers to documents containing an arbitration clause and as such constitutes an arbitration agreement between Samir, BSRCL and Aurora. It is submitted that even otherwise all the three parties to the present proceedings have subjected themselves to arbitration for resolution of their disputes arising under their respective agreements. Both the Agreements i.e. the Sub-Development Agreement dated 22nd September, 1999 and the

Development Agreement dated 10th March, 2003, are in respect of development of the same property. Both documents were connected and interdependent because the Sub-Development Agreement arises out of the main Development Agreement. The disputes under these two Agreements cannot be independently resolved as they are arising out of both the Agreements and both the Agreements are connected with each other. It is submitted that even if there are independent arbitration agreements in both these documents, still it is necessary and in the interest of justice that for effectual resolution of disputes both must be referred to the same Arbitrator. In support of its submissions, the learned Senior Advocate appearing for Samir has relied on the decisions of the Hon'ble Supreme Court in the case of Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, and in the case of P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others,

6. The Learned Senior Advocate appearing for Samir has therefore submitted on behalf of Samir that the above Notice of Motion as well as the Application be allowed and the disputes between the parties be referred to arbitration as prayed.

7. Though it is repeatedly submitted on behalf of Samir that Aurora has expressed its willingness to refer all the disputes to arbitration, as already set out hereinabove, the Learned Senior Advocate appearing for Aurora has submitted that the invocation of arbitration does not relate to the disputes and differences between Aurora on the one hand and BSRCL and Samir on the other hand. However, with a view to achieve an early resolution of disputes, Aurora has no objection to refer all the disputes and differences to arbitration as a separate reference, independent of the invocation by Samir, on certain conditions viz. (i) the interim protection under order dated 3rd December, 2013, which was modified by an order dated 17th December, 2013, shall continue during the pendency of the arbitration with liberty to the parties to apply to the Arbitral Tribunal for additional reliefs/modification of the reliefs/or vacating the reliefs; (ii) Aurora shall be at liberty to file the statement of claim seeking reliefs including but not limited to those claimed in the Plaint before this Court; and (iii) BSRCL and Samir shall not raise the plea of arbitrability of disputes before the Tribunal.

8. The Learned Advocate appearing for BSRCL submitted that Samir has filed the above arbitration application seeking appointment of an Arbitrator, thereby attempting to combine parties, causes of action and arbitration agreements into one, though in fact they are not. Samir has no claim against Aurora. Aurora of course has made claims against BSRCL and filed a suit in which he has joined Samir as a party. However, Samir does not have any arbitration agreement with Aurora and is also not a party to the arbitration agreement between Aurora and BSRCL but wants to force himself therein and thereby compel arbitration also between Aurora and BSRCL, after Aurora has opted out of it. It is further submitted that the claims and controversies in the suit of Aurora are independent of and different and unrelated with the claims and controversies raised by Samir

against BSRCL. Causes of action in respect of the two different sets of disputes and the parties thereto are different and independent and an attempt is being made to mix up and confuse the same by interlinking the same into one arbitration between all the parties for all the matters, which however have not been contracted for, or agreed upon by the parties. It is submitted that unnecessary hardship will be caused to BSRCL if Samir is permitted to intermeddle in the matters between Aurora and BSRCL and Aurora is permitted to intermeddle in the matters between Samir and BSRCL. It is submitted that the contention of Samir that as a result of the writing, Exhibit-E at page 133 of the Arbitration Application No. 86 of 2013, there is a Tripartite Agreement between Aurora, BSRCL and Samir and that as a consequence of the execution of the said writing dated 11th September, 2009, the provision of Clause 36 contained in the Agreement for Development dated 22nd September, 1999 between Aurora and BSRCL also stands incorporated in the Development Agreement between Samir and BSRCL dated 10th March, 2003, and that in any event, subsequent to and despite the filing of the Suit, Aurora has consented to join in the arbitration and has even concurred in the appointment of the Arbitrator made by Samir, does not and cannot arise. It is submitted that by the said letter dated 11th September, 2009, all that Aurora has done is to confirm that Aurora has no objection to Samir carrying out the development and completing the construction, and has admitted awareness of the Agreement of Development dated 10th March, 2003. In fact, in the said letter, Aurora has made it clear (clause-v) that Aurora otherwise shall be entitled to all the rights under the Agreement dated 22nd September, 1999 in respect of the area from BSRCL.

9. It is submitted that therefore the moot point which arises for determination of this Court is whether a party who is not a party to the arbitration agreement, can be compelled or permitted to join in the arbitration proceedings, and whether it is permissible in law to club into one arbitration proceedings and make reference to one composite arbitration tribunal matters independently arising out of separate agreements of reference between two different sets of parties, merely because one of the parties is common to both the agreements of reference and pertains to the same project, keeping in view inter alia the provisions of Section 7 of the Act. In support of his submissions, the learned Advocate appearing for BSRCL has relied on the decisions of the Hon'ble Supreme Court in the cases of (i) Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, and (ii) S.N. Prasad Vs. Monnet Finance Ltd. and Others, . It is also submitted by the learned Advocate appearing for BSRCL that neither of the two judgments relied upon by the Advocate for Samir have any applicability to the facts and circumstances of the present case.

10. I have considered the submissions advanced by the learned Advocates appearing for the parties and also the case law relied upon by them.

11. By a Development Agreement dated 6th October, 1996, executed by and between the Society on the one hand and Aurora on the other, the Society inter

alia granted development rights in respect of the said property on terms and conditions more particularly set out therein, to Aurora. Aurora completed the part construction of the rehabilitation building on the said property. Thereafter under a Sub-Development Agreement dated 22nd September, 1999, Aurora as the Developer therein transferred/assigned its rights under the Development Agreement dated 6th October, 1996 to BSRCL described as the Sub-Developer therein, on terms and conditions set out therein. The only substantial right retained by Aurora in the said Agreement was the right to construct 15000 sq.ft. built up area as per SRA sanctioned plan for themselves in the new building, the location of which was given in the second Schedule of the said Agreement. It was also provided in the said Agreement that subject to the prior written consent of Aurora, BSRCL shall be at liberty to entrust the development rights in respect of the said property or parts thereof to other builders and developers on terms and conditions as may be agreed between them. BSRCL agreed that such other builders and developers shall be subject to the same obligations and liabilities as the BSRCL. Clause 36 of the said Agreement contains an arbitration agreement to refer the disputes and/or disagreement by and between Aurora and BSRCL to arbitration. Since Samir is not a party to the said Agreement dated 6th October, 1996, consequently Samir is also not a party to the arbitration agreement contained in Clause 36 of the said Agreement dated 22nd September, 1999.

12. BSRCL and Samir thereafter executed an Agreement dated 10th March, 2003, wherein after making a reference to the Agreement dated 22nd September, 1999, BSRCL transferred its rights acquired by it under the Agreement dated 22nd September, 1999 from Aurora to Samir. In the said Agreement BSRCL had agreed to grant to Samir development rights in respect of 55 per cent of the total area available in respect of the free sale building on the terms set out therein and 45 per cent was retained by BSRCL. The said Agreement dated 10th March, 2003 contains an arbitration agreement (clause 31) between BSRCL and Samir to refer any disputes or differences which may arise between them to arbitration. Since Aurora is not a party to the said Agreement dated 10th March, 2003 whereunder Samir acquired the rights as a Sub-Developer to develop the said property, Aurora is also not a party to the Arbitration Agreement contained in the said Agreement.

13. According to Aurora, BSRCL had failed to obtain its prior permission before transferring BSRCL's rights in favour of Samir under the Agreement dated 10th March, 2003. Aurora came to know about the said Agreement between BSRCL and Samir only in December, 2005. Aurora therefore addressed several letters to BSRCL as well as to Samir raising its objection viz. that the Agreement dated 10th March, 2003 was executed between BSRCL and Samir without obtaining prior approval of Aurora. The said objection raised by Aurora was resolved by a letter dated 11th September, 2009, addressed by Aurora to BSRCL, the relevant clauses of which are reproduced hereunder:

"2.(i) As mutually agreed between us and BSRCL, we will be now entitled to

22,500 sq.ft. constructed area, instead of 15,000 sq.ft. constructed area as set out in the Agreement for Grant of Sub Development Rights dated 22nd September, 1999. The said 22,500 sq.ft. constructed area and proportionate car parking area will be provided out of 45% area coming to the share of BSRCL.

2 (ii). We shall pay to BSRCL costs of construction of total 22,500 sq.ft. constructed area at the rate of Rs. 500/- per sq.ft. constructed area and aggregating to Rs. 1,12,50,000/- (Rupees One Crore Twelve Lacs Fifty Thousand only) in such instalments as may be payable as per the progress work to be certified by Architect of you No.2 from time to time without any delay or default.

2 (v) We shall otherwise be entitled to all our rights under the Agreement dated 22nd September, 1999 in respect of our area from BSRCL.

14. Though it is true that before setting out the clauses of the Agreement, Aurora has in its letter referred to the earlier documents/agreements executed by and between the parties, from the Agreement dated 11th September, 2009, more particularly the clauses set out hereinabove, it is established that Samir was not required to provide anything to Aurora, but it was BSRCL who had agreed to now hand over 22500 sq.ft. constructed area instead of 15000 sq.ft. constructed area to Aurora and proportionate car parking area out of the 45 per cent area coming to the share of BSRCL. The share of 55 per cent of Samir as agreed by and between BSRCL and Samir in the Agreement dated 10th March, 2003 therefore remained untouched. Again for the said 22500 sq.ft. constructed area Aurora agreed to pay BSRCL Rs. 5000 per sq.ft. of constructed area aggregating to Rs. 1,12,50,000/- with which Samir was not concerned. In fact clause 2 (v) of the said Agreement makes it abundantly clear that Aurora shall be entitled to all its rights under the Agreement dated 22nd September, 1999 in respect of the area to be received from BSRCL.

15. Therefore, the only dispute raised by Aurora, is that Aurora should get its 22500 sq.ft. of constructed area from the 45 per cent area coming to the share of BSRCL. On the other hand, the notice of invocation issued by Samir through his Advocates dated 28th November, 2012 is relevant. In para 12 of the said letter, it is recorded by the Advocates for Samir that as per the said Agreement for Development dated 10th March, 2003, Samir by his letter dated 14th August, 2012 offered to hand over to BSRCL possession of the premises in Wings A and B on the said property. However, BSRCL has not taken possession of the same despite receipt of the said letter and that Samir has dealt with his 55 per cent area and car parking spaces in Wings A and B of the said building as per the said Agreement dated 10th March, 2013. This shows that apart from there being no arbitration agreement between Aurora, BSRCL and Samir, there is no dispute between Samir and Aurora qua his 22500 sq.ft. area, which he is entitled to receive from BSRCL and possession of which has in fact been offered by Samir to BSRCL, and which possession BSRCL has failed to take. Again in paragraph 13 of the said letter of Invocation, the Advocates for Samir after referring to the Agreement for Development dated 10th March, 2003 executed by and between

Samir and BSRCL have recorded that it is BSRCL who is in breach of the Agreement dated 10th March, 2003 and has thereafter under clauses (i) to (xiii) set out the breaches committed by BSRCL. There is not a single breach set out against Aurora. In fact, in the clause pertaining to invocation (clause 14), the Advocates for Samir have clearly stated as under:

"14. In the aforesaid circumstances, the disputes and differences have now arisen and which inspite of repeated requests and reminders of our client, you No. 1 (i.e. BSRCL) have failed to resolve and/or settle. In the circumstances our client is left with no other alternative but to invoke Agreement for Arbitration and refer the disputes and differences for arbitration."

16. Despite the aforestated facts, the Advocates for Samir have, in my view, now wrongly alleged that there are multiple and multi-party agreements having provision for arbitration therein, between Samir, Aurora and BSRCL. In my view, the mere reference made in the letter/agreement dated 11th September, 2009 (which does not contain an arbitration clause) to Agreements dated 22nd September, 1999 and 10th March, 2003, which contain an arbitration agreement between Aurora and BSRCL and Samir and BSRCL respectively, does not mean that the arbitration clauses contained therein are part of the Tripartite Agreement dated 11th September, 2009. In my view, the cause of action arisen in the above Suit and the cause of action arisen under the Agreement dated 10th March, 2003, between Samir and BSRCL cannot be said to be the same. It therefore cannot be accepted that even if there are independent arbitration agreements in both the documents dated 22nd September, 1999 and 10th March, 2003, it is still necessary and in the interest of justice that for effectual resolution of disputes both must be referred to the same Arbitrator.

17. In the case of Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and others (supra) , the disputes revolved around three Agreements to Sell three flats (main Agreements) and three related Agreements about the interior design of the said flats (related Agreements). The parties to the Agreements were common. All the Agreements contained an Arbitration clause. However, clause 39 of the main Agreement was general and did not refer to any named Arbitrator, whereas clause 5 of the related Agreements required the reference to specifically named Arbitrators. The Hon"ble Apex Court whilst noting the words in clause 39 of the main Agreement "Otherwise as to any other matter in any way connected with, arising out of or in relation to the subject matter of this Agreement", observed that clause 39 permits reference to Arbitration not only of issues arising under the main Agreement but also those disputes and differences which are ""connected with" disputes arising under the main Agreement. The question which inter alia therefore arose before the Hon"ble Apex Court was whether the disputes and differences arising under the Interior Design Agreement are integrally ""connected with" the disputes and differences arising from the main contract. The Hon"ble Apex Court thereafter noted that there were several items in Schedule-E to the main Agreement which overlap the items in Schedule-A of

the Interior Design Agreement and observed that, "therefore the coverage of the two Agreements makes it clear that the execution of the Interior Design Agreement is "connected with the execution of the main Agreement".

18. In view of the facts in the present case and the observations made hereinabove qua the subject Agreements, it cannot be held that each of the subject Agreements is connected to the other. In view thereof, the decision of the Hon"ble Apex Court in Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and others (supra) will not be applicable to the present case.

19. As regards the decision in P.R. Shah Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd. and others (supra), relied upon on behalf of Samir, I am of the view that the same would not apply to the facts and circumstances of the present case. In fact, paragraph 19 of the said judgment is contrary to what is submitted on behalf of Samir. The same is reproduced hereunder:

19. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration".

20. In the present case the Development Agreement dated 22nd September, 1999 is between Aurora and BSRCL. Therefore the arbitration agreement contained in the said Development Agreement is also between Aurora and BSRCL, to which Samir is not a party. The Agreement dated 10th March, 2003, contains an arbitration agreement to which BSRCL and Samir are parties but Aurora is not a party. The Tripartite Agreement dated 11th September, 2009, admittedly does not contain an arbitration agreement between the parties. The Agreements dated 22nd September, 1999, and 10th March, 2003, merely mention the Tripartite Agreement dated 11th September, 2009, in the form of recital. Thus by no stretch of imagination one can say that as envisaged by Section 7(5) of the Act, the reference to the said Agreements dated 22nd September, 1999, and 10th March, 2003, in the Agreement dated 11th September, 2009, is such as to make the arbitration clauses contained therein part of the Tripartite Agreement dated 11th September, 2009.

21. In the above circumstances, the above Notice of Motion as well as the Arbitration Application are dismissed.