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

COMM ARBITRATION APPLICATION NO.620 OF 2026

1. Nisus Finance Services Co. Limited
2. Nisus BCD Advisors LLP ... Applicants

Vs.

1. Blisvins Realty Private Limited
2. Triple A Construction Private Limited
3. Flexituff Technology International Limited
4. Nestivo Realty LLP
5. Treasure Group
6. Vinayak Kalani
7. Karthikeya Kalani ... Respondents

ATUL GANESH KULKARNI
Digitally signed by ATUL GANESH KULKARNI
Date: 2026.10.30 11:19:40 +0530

Mr. Shanay Shah with Mr. Sourasubha Ghosh and Mr. Aditya Trivedi i/by Induslaw for the Applicants.

Mr. Mayur Khandeparkar with Mr. Aashish Darne, and Mr. Parikshit Pania i/by Clove Legal for Respondent Nos.1, 2, 4, 6 and 7.

CORAM : AMIT BORKAR, J.

RESERVED ON : OCTOBER 28, 2026.

PRONOUNCED ON : OCTOBER 30, 2026

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JUDGMENT:

1. By the present Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), the Applicants seek appointment of a sole arbitrator to decide the disputes and differences between the Applicants and the Respondents arising out of the Term Sheet dated 15 December 2025, read with the Advisory Fee Letter Agreement dated 18 December 2025.

2. According to the Applicants, the facts leading to the filing of the present Application are as follows. In October 2025, negotiations commenced between the Applicants and the Respondents for arranging finance by way of structured debt funding for the real estate project known as "Treasure Palms Phase 1". On 15 December 2025, the parties entered into a Term Sheet. Under the Term Sheet, Applicant No. 2, Nisus BCD Advisors LLP, and/or its affiliates were to act as the Facility Agent for arranging finance up to INR 65 Crores. Thereafter, on 18 December 2025, an Advisory Fee Letter Agreement was executed, under which Applicant No. 1, NiFCO, and/or its associates were appointed as the Exclusive Advisor. The Respondents agreed to pay advisory fees of INR 1,62,50,000/-, together with applicable taxes. According to the Applicants, both documents formed part of one transaction and involved both Applicants. Nisus BCD was to act as the Facility Agent under the Term Sheet, whereas NiFCO was appointed as the Exclusive Advisor under the Advisory Fee Letter Agreement. On 24 December 2025, the Respondents, through their Chartered Accountant, Aditya Saraf, requested the Applicants to raise the

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invoice in the name of Flexituff Technology International Limited (FTIL). They confirmed that FTIL would make the payment. Accordingly, on 31 December 2025, the Applicants raised a Proforma Invoice in the name of FTIL towards the advisory fees, as instructed by the Respondents. Between 8 January 2026 and 16 January 2026, the Applicants sent reminders seeking payment of the outstanding advisory fees. On 16 January 2026, the Respondents informed the Applicants that they had decided to proceed with another investor and would not pay the advisory fees. According to the Applicants, the exclusivity period under Clause 23 of the Term Sheet commenced on 15 December 2025 and continued until 13 February 2026. The Applicants allege that the Respondents entered into a financing arrangement with another investor during this period, in breach of the exclusivity obligation under the Term Sheet. They contend that the Respondents' email dated 16 January 2026, informing them of the decision to proceed with another investor, amounts to a clear breach of the binding terms of the Term Sheet.

3. On 11 June 2026, the Applicants issued a Claim Notice, claiming a total amount of INR 16,94,81,200/-. This amount included the unpaid advisory fees, interest, commitment fees and damages claimed for breach of the exclusivity obligation. The Claim Notice formally recorded the disputes between the parties and stated that arbitration would be initiated if the amount was not paid. On 29 June 2026, the Respondents, through their advocates, replied to the Claim Notice and denied their liability to pay the amount claimed. Thereafter, on 7 July 2026, the

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Applicants issued a Final/Rejoinder Notice, disputing the stand taken by the Respondents and giving them one final opportunity to make the payment.

4. On 16 July 2026, the Applicants invoked the arbitration clause contained in Clause 25 of the Term Sheet. Applicant No. 2, claiming to act as the Facility Agent, appointed Advocate, as the sole arbitrator. On 30 July 2026, the Respondents replied to the notice invoking arbitration. They disputed the existence and enforceability of the arbitration agreement and did not act in accordance with the procedure provided under Clause 25 of the Term Sheet. In these circumstances, the Applicants have filed the present Application seeking appointment of a sole arbitrator.

5. Mr. Shanay Shah, learned Advocate appearing for the Applicants, submits that the Applicants are financial advisory entities specialising in arranging finance for infrastructure projects. They were engaged in connection with the proposed financing of a project being developed by the Respondents. The terms of their engagement were recorded in a Head of Terms/Term Sheet, pursuant to which an Advisory Fee Letter Agreement was executed. According to the Applicants, the Respondents breached the binding exclusivity obligation under the Term Sheet by approaching another investor. They failed to pay the agreed advisory fees under the Advisory Fee Letter Agreement. These disputes have given rise to the present Application seeking appointment of an arbitrator.

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6. The first objection raised by the Respondents is that there is no concluded or binding arbitration agreement between the parties. According to the Respondents, the clauses identified as binding in the Term Sheet do not include the arbitration clause contained in Clause 25. They contend that Clause 25 cannot be treated as a binding arbitration agreement. In reply, the Applicants submit that the question whether particular clauses of the Term Sheet are binding is a matter to be decided on merits by the Arbitral Tribunal. They point out that Clause 25 provides for arbitration in respect of disputes arising from any binding provision of the Term Sheet, including the exclusivity obligation. According to the Applicants, the interpretation suggested by the Respondents would lead to an unreasonable result. Although the Term Sheet contains certain binding obligations, the Respondents' interpretation would make the arbitration clause ineffective in respect of those very obligations. Such an interpretation would be contrary to the language of Clause 25 and would overlook the fact that an arbitration agreement is a separate and distinct agreement. The Applicants submit that Clause 25 satisfies the requirements of a valid arbitration agreement. They contend that the parties acted upon the Term Sheet and treated it as final, as is evident from the subsequent execution of the Advisory Fee Letter Agreement dated 18 December 2025. In support of this submission, they rely upon the emails dated 30 and 31 December 2025. On these grounds, the Applicants maintain that a valid and binding arbitration agreement exists between the parties.

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7. The next objection raised by the Respondents is that the Applicants have not signed or accepted the Term Sheet. In reply, the Applicants submit that the Term Sheet was issued as an offer by them and was accepted by signing it at the foot of the document by all the Respondents, except Respondent No. 5. In view of this position, the Applicants do not press the present Application against Respondent No. 5. According to the Applicants, the fact that they had made the offer is clear from the Respondents' own statements in their Reply, wherein they admit that the draft Term Sheet was circulated by Applicant No. 2. The Applicants submit that Applicant No. 2 is described as the "Facility Agent" in Clause 4 of the Term Sheet. Its role and participation in the proposed financing arrangement are evident from the terms of the document. They point out that Clause 23, which contains the exclusivity obligation alleged to have been breached, is one of the binding provisions of the Term Sheet. The Applicants contend that the objection regarding their failure to sign the Term Sheet does not answer the claim arising from the binding obligations recorded in it.

8. As regards Applicant No. 1, the Applicants submit that Clause 4 describes the Facility Agent as "Nisus BCD Advisors LLP and or its affiliates". According to them, there is no dispute that Applicant Nos. 1 and 2 are not affiliates of each other. However, by the Advisory Fee Letter Agreement dated 18 December 2025, the Applicants were appointed as the Exclusive Advisor in connection with the transaction contemplated under the Term Sheet. They contend that Applicant No. 1's role must be considered in the light

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of the Advisory Fee Letter Agreement and the overall transaction between the parties. In support of their submissions concerning the existence and scope of the arbitration agreement and the relationship between the parties, the Applicants rely upon the decisions of the Supreme Court in *Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, and KKH Finvest (P) Ltd. v. Ashiesh Shukla, 2026 SCC OnLine SC 1498*. According to the Applicants, the principles laid down in these decisions support their case.

9. The next objection raised by the Respondents is that the Advisory Fee Letter Agreement is not covered by the arbitration clause contained in the Term Sheet. The Applicants dispute this objection and submit that both documents form part of the same transaction. The Applicants submit that the Advisory Fee Letter Agreement was executed between Applicant No. 1, along with its affiliates, and the Respondents pursuant to the Term Sheet. According to them, the Advisory Fee Letter Agreement is an integral part of the transaction contemplated under the Term Sheet. In support of this submission, they rely upon the following circumstances. First, the Advisory Fee Letter Agreement refers to the Term Sheet. Secondly, the shortfall in the advisory fees is linked to the Term Sheet by treating the amount as an outstanding debenture. Thirdly, the Advisory Fee Letter Agreement is connected with the exclusivity obligation under the Term Sheet, as it describes the Applicant as the "Exclusive Advisor". Fourthly, both documents were negotiated and executed as part of a series of documents relating to the same transaction. The Applicants submit that this connection is evident from the emails dated 10 November

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2025 and 24 December 2025, and particularly from the Respondents' email dated 30 December 2025.

10. On the basis of these circumstances, the Applicants contend that the Advisory Fee Letter Agreement forms part of the same transaction as the Term Sheet. They submit that a dispute arising under the Advisory Fee Letter Agreement is a dispute arising "in connection with the ... implementation" of the Term Sheet. In support of this submission, they rely upon the decision in Cox & Kings Ltd. v. SAP India (P) Ltd.

11. The Applicants submit that, in any event, the question whether the disputes arising under the Advisory Fee Letter Agreement fall within the scope of the arbitration clause in the Term Sheet concerns the arbitrability of those disputes. According to them, this question should be decided by the Arbitral Tribunal and should not prevent the appointment of an arbitrator at this stage.

12. The next objection raised by the Respondents is that the Term Sheet had lapsed and cannot be relied upon for invoking arbitration. According to the Respondents, the Term Sheet lapsed on 22 December 2025 because it was not signed within seven days from 15 December 2025, as required under Clause 27 of the Term Sheet. On this basis, they contend that the Term Sheet, including the arbitration clause contained in it, cannot be enforced. In reply, the Applicants submit that the Respondents acted upon the Term Sheet, as is evident from the subsequent execution and issuance of the Advisory Fee Letter Agreement. They contend that the

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Respondents cannot now rely upon the alleged expiry of the Term Sheet to deny the existence of the obligations arising from the transaction.

13. The Applicants submit that the Respondents have admitted that they signed the Term Sheet before 30 December 2025, after the Applicants shared the final draft on 24 December 2025. According to the Applicants, the Term Sheet was signed within the period of seven days contemplated under Clause 27. They contend that the objection based on the alleged expiry of the Term Sheet is unsustainable even on this ground.

14. The next objection raised by the Respondents is that there is no defined legal relationship between the parties within the meaning of Section 7 of the Act. The Applicants submit that this objection is based on an incorrect understanding of the law. According to them, the fact that the Term Sheet describes certain provisions as non-binding does not mean that there is no defined legal relationship between the parties under Section 7(2) of the Act. The Applicants rely upon the decision of the Supreme Court in *Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1*, wherein a defined legal relationship is explained as one which "gives rise to legal obligation and duties, and, therefore confers a right". The Applicants submit that the Term Sheet admittedly contains binding obligations, including the exclusivity obligation under Clause 23. According to them, the Respondents' breach of this obligation is evident from the email dated 16 January 2026. They submit that the Respondents have admitted that the entire fee payable under the fee arrangement has not been paid. The Applicants contend

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that the Term Sheet and the Advisory Fee Letter Agreement create legal rights and obligations between the parties, and that the disputes arising from these obligations can be referred to arbitration.

15. The Applicants rely upon the order passed by this Court in *Urban Infrastructure Trustees Limited v. Mr. Bhavik Bhimjyani & Ors.,* Arbitration Application No. 14 of 2016, decided on 12 August 2026. According to the Applicants, this Court appointed an arbitrator in that case in respect of disputes arising from a non-binding Term Sheet. They rely upon this decision to support their submission that the description of a document as non-binding does not,, prevent the appointment of an arbitrator where the dispute concerns binding obligations arising from the transaction.

16. The Applicants submit that the scope of enquiry under Section 11 of the Act is limited to determining the existence of an arbitration agreement. In support of this submission, they rely upon *Cox & Kings Ltd. v. SAP (India) (P) Ltd.,* (2025) 1 SCC 611. According to the Applicants, the arbitration agreement exists in the present case, and the objections raised by the Respondents do not justify refusing the appointment of an arbitrator. They seek that the present Application be allowed.

17. Mr. Mayur Khandeparkar, learned Advocate appearing for Respondent Nos. 1, 2, 4, 6 and 7, submits that the Applicants rely upon the Term Sheet dated 15 December 2025, exchanged between Applicant No. 2 and the Respondents, and claim that it contains an arbitration agreement under Clause 25, which deals

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with jurisdiction. However, the Closing Note of the Term Sheet states that it is "for discussion purposes only" and is not binding, except for the clauses relating to "Transaction Costs", "Exclusivity" and "Confidentiality". It provides that no obligation would arise "until the Transaction Document(s) have been signed by all parties". The Term Sheet remains subject to fulfilment of the conditions precedent and execution of all necessary documents. Learned Advocate submits that Clause 25 has not been included among the provisions declared to be binding. He points out that the Applicants rely upon only the three provisions mentioned above as binding obligations. According to the Respondents, no Transaction Document was ever signed by all the parties. Even the Term Sheet was neither signed nor executed by the Applicants.

18. Learned Advocate for the Respondents submits that Clause 27 of the Term Sheet provides that it would remain valid for seven days "unless executed by relevant parties". Therefore, according to the Respondents, the Term Sheet dated 15 December 2025 expired on 22 December 2025. He submits that Applicant No. 2 never signed the Term Sheet. The signed copies from the Respondents were shared on 30 December 2025, that is, after the expiry of the seven-day period. Learned Advocate relies upon the email dated 31 December 2025, which is on record. In that email, Applicant No. 2 was called upon to execute the final documents, with the statement that "The signed TS that has been shared is final from our end. We expect to execute the final documents in the coming week." According to the Respondents, this email shows that execution of the final documents by the Applicants was still

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awaited. They contend that the Term Sheet never became a concluded and binding agreement between all the parties.

19. Learned Advocate for the Respondents submits that Section 7(1) of the Act requires the existence of a "defined legal relationship" between the parties. According to him, a Term Sheet which was never fully executed, had expired, and was expressly stated to be non-binding cannot create such a legal relationship. He submits that the essential terms were still to be recorded in the final documents, but those documents were never signed. Therefore, according to the Respondents, there was no concluded agreement between the parties and, consequently, no arbitration agreement within the meaning of Section 7 of the Act.

20. In support of his submissions, learned Advocate relies upon the decision of the Supreme Court in *Bihar State Mineral Development Corporation v. Encon Builders,* (2003) 7 SCC 418. He submits that paragraph 13 of the said decision explains the essential requirements of an arbitration agreement. These include the intention of the parties to settle their disputes through a private tribunal, a written agreement to be bound by the decision of that tribunal, and an agreement between the parties on these terms. He relies upon paragraph 17, which emphasises that there must be a common understanding between the parties to refer their disputes to an arbitral tribunal. According to the Respondents, the Closing Note of the Term Sheet, Clause 27 and the absence of execution by all the parties show that there was no such common understanding. They contend that the parties never agreed to refer their disputes to arbitration.

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21. Learned Advocate relies upon the decision of the Supreme Court in *MSEDCL v. R Z Malpani,* 2026 SCC OnLine SC 553. He submits that, in that case, the Supreme Court set aside an order appointing a sole arbitrator under Section 11 of the Act after examining whether an arbitration agreement prima facie existed and whether the parties had agreed to refer their disputes to arbitration. The Supreme Court treated a document which contemplated execution of a final agreement, namely, a Letter of Intent (LOI), as a mere "promise to make a promise". As no arbitration agreement was found to exist even at the initial stage, the appointment of the arbitrator was set aside. Learned Advocate submits that the principle of "when in doubt, do refer" can be applied only where an arbitration agreement prima facie exists. It cannot be applied when the very existence of such an agreement is in dispute and the available material does not show that the parties agreed to arbitration. On these grounds, learned Advocate prays that the present Application be dismissed with exemplary costs payable by the Applicants to the Respondents.

REASONS AND FINDINGS:

22. At this stage, it is necessary to see what this Court is required to examine while deciding an Application under Section 11 of the Act. At this stage, this Court is not required to decide whether the Applicants will succeed in recovering the advisory fees or damages claimed by them. The limited question is whether an arbitration agreement prima facie exists between the parties and whether there is sufficient material to send their disputes for arbitration. At the same time, only because one party says in its notice that an

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arbitration agreement exists, this Court cannot appoint an Arbitrator on that statement alone. There must be some material showing that the parties had agreed to refer their disputes to arbitration. If, even after looking at the documents at this initial stage, no such agreement is found, this Court cannot make an arbitration agreement on behalf of the parties.

23. In *Bihar State Mineral Development Corporation*, the Supreme Court has explained the necessary requirements of an arbitration agreement as follows:

> "The essential elements of an arbitration agreement are as follows:
>
> (1) There must be a present or a future difference in connection with some contemplated affair.
>
> (2) There must be the intention of the parties to settle such difference by a private tribunal.
>
> (3) The parties must agree in writing to be bound by the decision of such tribunal.
>
> (4) The parties must be ad idem."

24. In paragraph 17, the Supreme Court observed:

> "There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal."

25. From what is stated above, it is clear that both sides must have a common understanding that their disputes will be decided by an Arbitral Tribunal. Such common understanding has to be found from the agreement and the circumstances in which it was

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made. Only because an arbitration clause is written in a document, it does not mean that the parties have agreed to go for arbitration. The whole document will have to be read to understand whether the parties really wanted to be bound by that clause.

26. In the present case, Clause 25 of the Term Sheet provides for deciding disputes relating to the validity, interpretation, implementation or enforcement of "any binding provision of this Term Sheet or the Definitive Agreements". It provides that such disputes will be decided under the Arbitration and Conciliation Act, 1996. The Term Sheet mentions Mumbai as the seat of arbitration and provides for appointment of a sole Arbitrator. The words used in Clause 25 are important. This clause does not say that every term written in the Term Sheet will become binding only because an arbitration provision is included in it. It refers to disputes concerning "any binding provision". Therefore, Clause 25 cannot be read. It will have to be read along with the Closing Note and those provisions which the parties have agreed to keep binding. The Closing Note says that the Term Sheet is "for discussion purposes only" and is not binding, except the provisions relating to "Transaction Costs", "Exclusivity" and "Confidentiality". It states:

> "There is no obligation on the part of any negotiating party until the Transaction Document(s) have been signed by all parties."

27. The submission made by the Respondents on the basis of these words will have to be considered. These words show that the parties did not want every term of the proposed finance to become

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binding merely because the Term Sheet was prepared. The proposed finance was subject to certain conditions and signing of the necessary transaction documents. Therefore, this Court cannot proceed on the footing that the proposed investment of INR 65 Crores had become a completed and enforceable financing transaction. However, the matter does not end here. The Closing Note keeps three types of provisions binding upon the parties. One of them is Exclusivity. Clause 25 speaks about disputes relating to any binding provision of the Term Sheet. Both these provisions will have to be read together. Clause 25 does not create an obligation to give finance or complete the real estate project. It only provides the manner in which disputes arising from those provisions which the parties have agreed to keep binding will be decided. If Clause 25 is considered as having no effect at all until the final financing documents are signed, then there would be no way to decide disputes relating to those very provisions which the Closing Note has kept binding. The words “any binding provision” used in Clause 25 cannot be ignored while reading the Term Sheet. These words show that the arbitration provision was intended to apply to those obligations which the parties had agreed would remain binding. Therefore, at the prima facie stage, the reasonable understanding is that the terms of the proposed finance were still depending upon signing of the final documents. However, disputes relating to those provisions which were kept binding could be referred to arbitration under Clause 25. By taking this view, the whole Term Sheet is not being treated as binding. Only the arbitration provision is being given effect in respect of those

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obligations which the parties agreed to keep binding.

28. The difference between a non-binding proposal and a binding arbitration agreement has been explained by the Supreme Court. In *Cox & Kings Ltd*, paragraph 83, the Supreme Court explained that an arbitration agreement can arise out of a legal relationship which may be contractual or otherwise. The Supreme Court held that it is not necessary in every case that a person must sign the arbitration agreement to become bound by it. In the case of a person who has not signed the agreement, the important question is whether that person had intended or agreed, by his conduct, to become bound by the arbitration agreement or the underlying contract containing it. The judgment makes it clear that the requirement of an arbitration agreement being in writing has to be followed. However, the particular form in which the agreement is written is not important. Therefore, only because a party has not signed the Term Sheet, the enquiry cannot be stopped there. This Court will have to see whether the written document and the communications exchanged thereafter show that there was a common understanding between the parties to refer their disputes to arbitration.

29. It is necessary to consider the objection of the Respondents based upon Clause 27. According to this clause, the indicative Term Sheet would remain valid for seven days unless it was signed by the concerned parties. The Respondents say that the Term Sheet came to an end on 22 December 2025. On the other hand, the Applicants say that the Respondents had signed the Term Sheet and that the later correspondence shows that the parties continued

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to act on the same arrangement.

30. The documents show that the Advisory Fee Letter Agreement is dated 18 December 2025. It refers to the Term Sheet dated 15 December 2025 and records that the Issuer had accepted the same for a proposed investment up to INR 65 Crores. It confirms that NiFCO and/or its associates were appointed as Exclusive Advisor and were entitled to advisory fees of INR 1,62,50,000, together with applicable taxes and levies. The letter mentions the dates on which the advisory fees were required to be paid. It says that the entire fee would be payable by the Issuer, co-obligors and/or the promoters mentioned in the letter. This document is important for understanding whether the parties wanted to proceed on the basis of the Term Sheet. The Advisory Fee Letter was issued only three days after the Term Sheet. It is not a separate document having no connection with the proposed financing. It refers to the same proposed investment of INR 65 Crores and appoints an Exclusive Advisor for that transaction.

31. The email dated 24 December 2025 shows that the Respondents requested that the processing fee should be paid through FTIL and that the fee letter should be sent again without GST. Thereafter, the Applicants issued the Proforma Invoice dated 31 December 2025. These communications show that the parties continued their discussions and took steps regarding the advisory fee even after 22 December 2025. The email dated 31 December 2025, on which the Respondents rely, needs to be considered. In that email, it is stated that the signed Term Sheet shared by the Respondents was final from their side and that the final documents

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were expected to be signed in the following week. This communication certainly shows that the final documents were still required to be signed. However, it does not necessarily mean that the Respondents wanted to bring every obligation which they had accepted or acted upon to an end. The statement about signing the final documents is consistent with the Closing Note. The Closing Note provides for documents in relation to the proposed financing, while keeping certain obligations binding in the meantime. At this stage, it is not necessary to decide whether the Term Sheet was signed within the seven-day period mentioned in Clause 27. The date of the Term Sheet, the date on which the signed copies were exchanged and the later communications will have to be considered for deciding the full effect of Clause 27.

32. For the present purpose, it is enough to notice that the Advisory Fee Letter was issued on 18 December 2025 and that the parties continued to deal with each other regarding the same transaction even thereafter. Considering these facts, it would not be proper to hold at this initial stage that the arbitration agreement does not exist only because the Respondents are relying upon the seven-day period. Further, even if the proposed financing transaction was not completed, it does not mean that all the provisions which were kept binding under the Term Sheet came to an end. The effect of the exclusivity undertaking and its connection with Clause 25 will have to be considered separately.

33. The decision of the Supreme Court in *R Z Malpani*, needs to be considered. In paragraph 31, the Supreme Court observed:

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> "It is settled law that a letter of intent does not, in and of, create a legal relationship or contractual obligations until there is a clear, unambiguous final acceptance by the parties."

34. The Supreme Court explained the difference between a "promise" and a "promise to make a promise". In paragraph 33, the Supreme Court held that the Letter of Intent in that case was only a promise to make a promise and that no final agreement had come into existence between the parties. The Supreme Court explained in paragraph 42 that the principle "When in doubt, do refer" applies where an arbitration agreement prima facie exists. However, where it is clear even without examining disputed facts that no arbitration agreement exists, the Court can refuse to send the parties to arbitration.

35. The Respondents are right in relying upon this judgment to say that every preliminary document cannot be treated as a final agreement. This judgment does not mean that whenever a Term Sheet contains an arbitration clause, the parties must necessarily be sent to arbitration. The actual words used in the document and the intention of the parties will have to be seen in every case. However, the facts of the present case will have to be considered separately. In the present Term Sheet, the exclusivity provision is kept binding. Clause 25 provides for deciding disputes relating to any binding provision. The Advisory Fee Letter, which was issued shortly after the Term Sheet, records acceptance of the proposed investment and appointment of NiFCO as Exclusive Advisor. The later correspondence relates to payment of the advisory fees and the decision of the Respondents to proceed with another investor.

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These circumstances make the present case different, at least at the prima facie stage, from a case where a Letter of Intent only records an intention to enter into an agreement in future and does not keep any present obligation binding. Therefore, the decision in *R Z Malpani* does not require rejection of the present Application, when the written documents and the later conduct of the parties show a prima facie agreement to arbitrate disputes relating to the specified binding obligations.

36. The Applicants have relied upon the decision in *Urban Infrastructure Trustees Limited* decided by this Court. In that case, this Court considered whether disputes arising out of a Term Sheet could be sent to arbitration, even though the final agreements which were to be made under the Term Sheet had not been signed. In paragraph 20, this Court noticed that the applicant had invested approximately Rs. 51.50 Crores and that such investment was accepted in the communications of the Respondents. This Court held that the parties had acted upon the Term Sheet and that disputes arising from it were required to be decided under its arbitration clause. In paragraph 22, this Court observed that the Term Sheet was not merely a document recording terms for some future agreement, because the working of the Term Sheet provided for arbitration. Therefore, this Court sent the disputes to arbitration, while keeping the contentions of the parties open for decision by the Arbitrator.

37. The facts of the above case are not the same as the present case. In that matter, the applicant had invested a substantial amount under the Term Sheet. In the present matter, there is no

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material to show that the proposed finance of INR 65 Crores was given. However, the principle that signing of every final agreement mentioned in a Term Sheet is not necessary before the arbitration clause can be invoked will have to be kept in mind. The real question is whether the parties had created any binding rights under the Term Sheet and had agreed that disputes relating to those rights would be referred to arbitration. In the present matter, the exclusivity provision is kept binding. Clause 25 refers to such binding provisions. The Advisory Fee Letter and the communications regarding processing fees are connected with the same transaction. These documents provide sufficient prima facie material to hold that Clause 25 can operate in relation to the present disputes. Whether the Applicants will recover the entire advisory fee or prove breach of exclusivity is a separate matter.

38. The decision in *Welspun One Logistics Parks Fund*, requires consideration. In paragraph 18, the Delhi High Court held that an arbitration agreement is separate from the main contract and that the enquiry under Section 11 of the Act is limited. The Court observed that a reference to arbitration should be refused only when it is shown that the arbitration agreement does not exist, is invalid or the dispute cannot be sent to arbitration. In paragraph 19, the Court considered a Term Sheet which stated that, though the document was non-binding, the dispute resolution clause would remain binding upon the parties. In paragraph 20, the Court held that alleged illegality or non-enforceability of the other terms would not affect the separate arbitration agreement.

39. The Respondents can point out that the present Term Sheet

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does not contain the same clear statement that the arbitration clause will remain binding even though the document is described as non-binding. This difference will have to be noticed. However, Clause 25 of the present Term Sheet uses different but important words. It provides for arbitration of disputes connected with the implementation or enforcement of "any binding provision of this Term Sheet". Since the Closing Note keeps the exclusivity provision binding, Clause 25 can prima facie apply to disputes arising from that provision.

40. It is necessary to consider the reliance placed by the Applicants upon *Cox & Kings Ltd*, particularly paragraphs 121 and 123. Paragraph 121 explains that where one transaction consists of more than one agreement, the Court has to see whether the different agreements are connected with the main agreement or have been made as a step to it. There may be a composite transaction when the agreements are so connected that the main agreement cannot properly operate without the help or performance of the other agreements. Paragraph 123 states that the participation of a person who has not signed the arbitration agreement in carrying out the underlying contract is the most important factor. The Court may see the circumstances in which such person took part in the negotiations, performance and termination of the contract. The conduct of the parties may show whether the person who has not signed the arbitration agreement intended to become bound by it.

41. In *KKH Finvest Pvt. Ltd*, paragraph 19, the Supreme Court has explained the principle of "veritable parties". A person who has

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not signed the arbitration agreement may still be treated as a party if the legal relationship and participation in the underlying transaction show that such person was intended to be bound by it. All the relevant circumstances will have to be seen together. Only because a person has some connection with the transaction, that alone is not enough to make that person a party to the arbitration agreement.

42. These principles will have to be considered while examining the position of Applicant No. 1. The Respondents are correct in pointing out that Applicant Nos. 1 and 2 are separate legal entities and there is no material to show that Applicant No. 1 is an affiliate of Applicant No. 2. Only because both are connected with the same transaction, they cannot be treated as one legal entity. However, the claim of Applicant No. 1 is not based only upon its alleged connection with Applicant No. 2. The Advisory Fee Letter dated 18 December 2025 identifies NiFCO and/or its associates as the Exclusive Advisor. The letter mentions the fees payable for the said work. The communications of the Respondents thereafter relate to payment of those fees, including the request to issue the processing fee document in the name of FTIL. Applicant No. 1 raised the invoice and communicated regarding payment. The email dated 16 January 2026 refers to the efforts made by the Nisus Finance team, records the decision of the Respondents to proceed with another investor and states their inability to pay the processing fees. These facts show that Applicant No. 1 had a direct written relationship with the Respondents regarding the advisory services. The Advisory Fee Letter is connected with the proposed

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financing mentioned in the Term Sheet. It refers to the fee as forming part of secured financial obligations under the transaction documents. Therefore, the connection between these two documents is not only because both relate to the same project. The Advisory Fee Letter refers to the proposed financing under the Term Sheet and has been issued on that basis. At this stage, it is not necessary to decide whether the entire Advisory Fee Letter Agreement can be treated as a "Definitive Agreement" within the meaning of Clause 25. For the present purpose, there is sufficient prima facie material to consider the fee dispute as connected with the implementation of the Term Sheet and the binding obligations arising from the transaction. Whether every claim made under the Advisory Fee Letter comes within the scope of Clause 25 will remain open for decision by the Arbitral Tribunal.

43. The objection that Applicant No. 2 has not signed the Term Sheet cannot,, be a reason to reject the present Application. Section 7(4)(b) of the Act recognises an arbitration agreement recorded through exchange of letters or other communications, including electronic communications. Therefore, in every case, it is not necessary that the signatures of all parties must appear on one single document, if the exchange of communications otherwise shows an agreement in writing. Applicant No. 2 is described as the Facility Agent under Clause 4. According to the Applicants, the draft Term Sheet was circulated by Applicant No. 2. Thereafter, the Respondents signed and circulated their copies. They acted upon the arrangement by executing the Advisory Fee Letter and communicating regarding payment of the fees. These facts, when

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seen together, provide prima facie written material regarding the participation of the Facility Agent in the transaction and its reliance upon the arbitration clause. This does not mean that every unsigned document becomes binding upon every person whose name is mentioned in it. The consent of the parties is still necessary. In the present case, the words used in Clause 25 and the conduct of the parties provide sufficient prima facie material for considering the present Application. The final question regarding the rights and liabilities of each party under the documents will remain open.

44. The submission of the Respondents that there is no defined legal relationship between the parties within the meaning of Section 7 cannot be accepted at this stage. In Vidya Drolia, paragraph 24, the Supreme Court explained that a defined legal relationship is one which "gives rise to legal obligation and duties, and, therefore confers a right". In the present matter, the Term Sheet keeps the exclusivity obligation under Clause 23 binding. The Advisory Fee Letter records the appointment of NiFCO as Exclusive Advisor and mentions the fee payable for the work. These provisions show identifiable rights and obligations between the parties, though the complete financing transaction was still subject to documents and conditions. Only because the proposed finance was not taken from the Applicants, it cannot be said that no legal relationship arose regarding the exclusivity undertaking or the advisory fee arrangement.

45. The objection of the Respondents regarding expiry of the Term Sheet will have to be considered in this background. The

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Advisory Fee Letter dated 18 December 2025 and the emails exchanged thereafter show that the parties continued to deal with each other regarding the same financing transaction. The email dated 16 January 2026 records that the Respondents had decided to proceed with another investor and were unable to pay the processing fees. These communications are relevant for examining whether the parties continued to act upon the arrangement and whether any binding obligations continued between them. However, this Court is not required at this stage to decide when the exclusivity period started, whether Clause 27 affected that period or whether the later correspondence created or confirmed any particular obligation. These questions depend upon the meaning of the documents and the evidence which may be produced by the parties. Such questions cannot be decided in an Application where the limited enquiry is regarding the existence of an arbitration agreement. In the facts of the present case, the objection regarding the period of validity does not show that the arbitration agreement does not exist.

46. It is necessary to consider whether the email dated 16 January 2026 proves breach of the exclusivity provision. The email states that the Respondents had received “a competitive proposal from an investor with no financial obligations” and had “opted to move forward with them for our financing needs”. This email is certainly relevant material in support of the Applicants' allegation that the Respondents decided to proceed with another investor during the period of exclusivity. However, the email does not prove all the requirements of the alleged breach. It will be necessary to

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examine when the exclusivity period started, how long it continued, what were the terms of the arrangement with the other investor and what was the effect of the conditions mentioned in the Term Sheet. These questions will have to be decided by the Arbitral Tribunal. While deciding whether an Arbitrator should be appointed, this Court cannot treat the allegations of breach made by the Applicants as proved.

47. In the same manner, this Court cannot decide at this stage the actual amount of advisory fees, interest, commitment fees or damages payable to the Applicants. The Proforma Invoice mentions a claim for advisory fees of INR 1,62,50,000. The email dated 16 January 2026 of the Respondents acknowledges the processing fee arrangement and refers to forfeiture of the advance amount of Rs. 15 Lakhs paid. This correspondence shows that a dispute has taken place regarding the fee arrangement. However,, it does not prove the entire amount claimed by the Applicants or their right to recover the additional amounts mentioned in the Claim Notice. Therefore, the claims regarding fees, interest and damages will have to be examined by the Arbitral Tribunal on the basis of the agreements, correspondence and evidence produced by the parties. This Court is not giving any final finding regarding the amount which may be payable.

48. From the above discussion and the decisions referred to, the legal position is that the Court has to see whether an arbitration agreement prima facie exists between the parties. An arbitration agreement cannot be rejected only because there is a dispute regarding the validity or enforceability of other terms. At the same

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time, parties cannot be sent to arbitration when the documents show that they had never agreed to refer their disputes to arbitration. In the present case, Clause 25 refers to disputes arising in connection with "any binding provision" of the Term Sheet. Clause 23, which relates to exclusivity, is one of the provisions which the Closing Note keeps binding. The Advisory Fee Letter records the appointment of Applicant No. 1 as Exclusive Advisor and mentions the fee arrangement for the same proposed financing. The later correspondence shows that the parties dealt with each other in relation to that engagement and that a dispute arose when the Respondents decided to proceed with another investor and did not make payment.

49. When all these circumstances are seen together, there is sufficient prima facie material to refer the disputes to arbitration. This is not a case where the Court is being asked to create an arbitration agreement without any written material showing the consent of the parties. The arbitration clause is contained in the written Term Sheet. The Respondents signed and circulated the Term Sheet from their side. The later documents and communications connect the parties with the transaction and the disputes which have now arisen. Only because the Respondents are disputing the binding nature of Clause 25, the present Application cannot be rejected in the facts of this case. A difference will have to be made between the existence of an agreement to arbitrate disputes relating to binding provisions and the final enforceability of every obligation mentioned in the transaction documents. At this stage, this Court is satisfied that a prima facie

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arbitration agreement exists in relation to the disputes concerning the binding exclusivity provision and the connected advisory fee arrangement. This Court is not holding that the entire Term Sheet is binding or that every amount claimed by the Applicants can be recovered. These questions are kept open for consideration by the Arbitral Tribunal.

50. Another question arises because Applicant No. 2 has appointed Advocate, as the sole Arbitrator. Clause 25 gives the Facility Agent a role in appointing the sole Arbitrator. However, the existence of an arbitration agreement and the validity of the procedure for appointment of an Arbitrator are two different things. The arbitration agreement may continue to be valid even if the method of appointment mentioned in it cannotbe followed. The Supreme Court in *Bhadra International (India) Pvt. Ltd. v. Airports Authority of India,* 2026 INSC 4, held that unilateral appointment of a sole Arbitrator by a party having an interest in the dispute is not valid. Such invalidity does not make the underlying arbitration agreement invalid. Therefore, the earlier appointment of Advocate, by Applicant No. 2 cannot be accepted only because Clause 25 gives the Facility Agent a right to nominate the Arbitrator. The appointment will have to take place through an independent and permissible procedure. Since the Respondents have disputed the invocation of arbitration, an independent sole Arbitrator will have to be appointed under Section 11 of the Act.

51. In view of the above discussion, this Court finds that the present Application deserves to be allowed. An independent sole Arbitrator will be appointed under Section 11 of the Act through

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the appointment procedure of this Court. The Applicants have not pressed the present Application against Respondent No. 5. Therefore, the Application will stand dismissed as not pressed so far as Respondent No. 5 is concerned.

52. In the aforesaid circumstances, the present Application under Section 11 of the Act, is deserved to be disposed of in terms of the following order:

> A) Justice Rohit B. Deo (Retired) is hereby appointed as the Sole Arbitrator to adjudicate upon in respect of disputes relating to the binding exclusivity provision contained in Clause 23 of the Term Sheet dated 15 December 2025 and the connected advisory fee arrangement under the Advisory Fee Letter Agreement dated 18 December 2025, including the claims and counterclaims arising therefrom;
>
> Contact: 93737 81249
>
> Email: Rohitdeo1963@gmail.com
>
> B) A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from today. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;
>
> C) The 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

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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 Applicant and a copy of the same shall be furnished by the Advocates for the Applicant to the Advocates for the Respondent;

D) The 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 parties within a period of two weeks from receipt of a copy of this Order;

E) The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions 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 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;

F) 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.

53. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

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54. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

55. The Application stands disposed of in the above terms.

(AMIT BORKAR, J.)

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