

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Arb P No.28/2024

Reserved on:21.02.2025.

Pronounced on: 27.02.2025

Meena Kumari W/O Sh. Pawan Sharma
D/O Sh. Parshotam Lal
R/O Village Dharna, Rajouri,
At present House No. 286-G,
Sainik Colony, Jammu, age 59 years

....Petitioner(s)/Appellant(s)

Through :- Mr. R K Jain, Senior Advocate with
Mr. Pranav Jain, Advocate.

V/s

1. Sainik Cooperative House Society Ltd., Sainik Colony, Jammu through its Chairman
2. The Secretary, Sainik Cooperative House Building, Society Ltd. Sainik Colony, Jammu.
3. The Administrator, Sainik Cooperative House Building, Society Ltd., Sainik Colony, Jammu.
4. The Registrar, Cooperative Societies Act, Jammu and Kashmir, Jammu.

....Respondent(s)

Through :- Mrs. Monika Kohli, Sr. AAG for R-4.
Mr. K. Nirmal Kotwal, Advocate for R-1 to. 3.

CORAM: HON'BLE THE CHIEF JUSTICE

ORDER

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the appointment of an independent Arbitrator.
2. Brief facts, which lead to the filing of the present petition, are that on 03.10.2005, as per perpetual lease deed, lease hold rights of shop bearing No. GS-119 measuring 12' x 15' situated at Sector G, Sainik Colony, Jammu was allotted in favour of Smt. Vaishno Devi and as per clause (4) of the Lease Deed, arbitration clause has been incorporated, in the event of existence of any dispute. On 10.07.2007, the premium for regularization of excess land of 225 sqft. appurtenant to the shop was received by the respondent No. 1 Society from the

lessee. On 19.07.2007, as per Release Deed, the lease hold rights of the shop was transferred in faovur of Ajay Kumar Choudhary and possession of excess land for which premium was received was also given. As per release deed, the aforesaid shop along with excess land and its possession was obtained by the petitioner on 12.09.2017. On 17.10.2019, the petitioner applied for construction of shop on the shop site and the excess land which came to be sanctioned in favour of the petitioner. On 05.06.2023, the respondents no. 1 and 3 without having any authority unilaterally cancelled the allotment of excess land appurtenant to the shop, as was allotted in favour of the petitioner resulting existence of dispute to be decided by an arbitration as per terms of the Perpetual Lease Deed, Release Deed read with Rule 49 of the Bye Laws of the respondent no.1 Society. Finally, on 27.09.2023, the petitioner issued notice for appointment of an independent Arbitrator, as the Registrar Cooperative being the controlling Head of all the Cooperative Societies under the Cooperative Societies Act is debarred from acting as an Arbitrator as per Section 12(5) of the Arbitration and Conciliation Act but no Arbitrator has been appointed. Hence the present petition.

3. It is averred in the petition that an independent arbitrator is required to be appointed in this case because in the present case, the Registrar of Cooperative Societies is nominated as arbitrator in terms of the Clause (IV) of Perpetual Lease executed between the parties which is against prohibition contained in Section 12(5) of Arbitration and Conciliation Act, 1996 read with Schedule 7 thereof.

4. In support of his contentions, learned counsel for the petitioner has relied upon judgment of the Supreme Court in the case of **Haryana Space Application Centre & Anr. v. M/s Pan India Consultants Pvt. Ltd.** 2021 AIR (Supreme Court) 653; **M/s Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation**

Ltd., 2017(4) SCC 665; TRF Ltd. v. Energo Engineering Projects Ltd., 2017(8) SCC 377; Ellora Paper Mills Limited v. The State of Madhya Pradesh, passed in Civil Appeal No. 7697 of 2021 on 04.01.2022; Bharat Broadband Network Limited v. United Telecoms Limited in Civil Appeal No. 3972 of 2019 on 16.04.2019; M/s Glock Asia Pacific Ltd. v. Union of India, 2023 (8) SCC 226; Ratnam Sudesh Iyer v. Jackie Kabubhai Shroff, 2022 (4) SCC 206 and also relied upon judgments passed by this court in the cases of Messrs. Rama Rice and General Mills v. General Manager, J&K Cooperative Supply & Marketing Federation Ltd. reported at 1984 KashLJ 143; Arb P No.75/2023 titled Avtar Krishan Suri v. The Estate Manager, J&K Small Scale Industries Development Corporation Ltd. on 11.12.2024; Arb P No. 68/2024 titled 'M/s Mir Associates Construction Company v. Superintending Engineer Hydraulic Circle, Doda and anr passed on 14.11.2024.

5. It is submitted by the learned senior counsel for the petitioner that as per the Rule 49 of the Bye Laws of the respondent no.1 Society, there exist an Arbitration Clause which reads as under:

“49. If any dispute touching the constitution, management or the business of the society arises between members, past members and persons claiming through members, past member, sureties of members past members and the society or committee of any of its officers, employees or between the society or its committee and any officer’s agent or employees or the nominees or heirs, or legal representatives of any deceased officer’s agent or employees of the society, such dispute shall be referred to the Registrar of Cooperative Societies for decision as provided in the Act and the Rules framed thereunder.”

6. It is also submitted that Clause IV of the Perpetual Lease Deed dated 03.10.2005 also provides for referring the disputes to the sole Arbitration, which is reproduced hereinbelow:

IV. That, in the event on any dispute or difference, arising under these presents or in connection therewith, (except as to any matter the decision of which is specifically provided by these presents the same shall be referred to the sole arbitration the Registrar of Co-operative Societies. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant and that he has to deal with matters to which these presents relate or that in the course of his duties as such servant of the Govt. or has expressed views on all or any of the matters in dispute or difference. The award of arbitrator so appointed shall be final and binding on the parties. The arbitrator may with the consent of the parties enlarge the time for making or publishing the award. Subject as aforesaid the Arbitration Act of Jammu and Kashmir and the rules there under (if any) and any modification thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

7. In view of amended Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule and in view of the judgment referred supra, learned senior counsel further submitted that an independent arbitrator is required to be appointed by this court. Hence, the present petition.

8. On the other hand, Mr. K Nirmal Kotwal, learned counsel appearing for the respondents 1 to 3 has filed his objections and vehemently opposed this petition. learned counsel submits that the petitioner is bound by the terms and conditions provided in the perpetual lease deed executed between Smt. Vaishno Devi W/O Late Sh. Kuldeep Singh Sambyal, wherein in condition No.15(IV) it is provided that sole arbitrator will be Registrar Co-operative Societies. It is further

submitted that the petitioner has stepped into the shoes of Smt. Vaishno Devi with whom the original perpetual lease deed has been registered and by virtue of which release deed in respect of GS-119 in Sector G all the terms and conditions which are applicable to the original allottee shall also be applicable to the petitioner herein.

9. It is further averred in the objections that by virtue of transfer of lease hold rights in respect of GS-119 in Sector-G, the petitioner has accepted the terms and conditions of the perpetual lease deed where Registrar Co-operative Societies has been nominated as the sole arbitrator to adjudicate upon the disputes, and the petitioner by virtue of registration of release deed of lease hold rights has become the member of the society, then the petitioner is not entitled to invoke the provisions of arbitration and conciliation Act, 1996, as such the petition deserves to be dismissed. Lastly, it is averred in the objections that the provisions of Arbitration and Conciliation Act, 1996 do not apply to the disputes between the Society and its members, on the other hand, provisions of Jammu and Kashmir Cooperative Societies Act will apply in the facts and circumstances of the case.

10. In support of his submissions, learned counsel Mr. K. Nirmal Kotwal relied upon judgment of Hon'ble Supreme Court in the case of **Bharat Broadband Network Limited vs. United Telecoms Limited** reported at (2019) 5 SCC 755.

11. Heard Mr. R K Jain, learned senior counsel assisted by Mr. Pranav Jain, learned counsel for the petitioner and Mr. K Nirmal Kotwal, learned counsel for respondents 1 to 3 and Mrs. Monika Kohli, learned Sr. AAG for the respondent no.4, at length and perused the record.

12. The Supreme Court in the case titled “*Haryana Space Application Centre (HARSAC) & Anr. Vs. M/s Pan India Consultants Pvt. Ltd.*” reported as **2021 AIR (Supreme Court) 653** has observed in para 17, as:-

“17. We are of the view that the appointment of the Principal Secretary, Government of Haryana as the nominee arbitrator of HARSAC which is a Nodal Agency of the Government of Haryana, would be invalid under Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule. Section 12(5) of the Arbitration Act, 1996 (as amended by the 2015 Amendment Act) provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, or counsel, falls within any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator.

Item 5 of the Seventh Schedule of the Act reads as under:

“Arbitrator’s relationship with the parties or counsel

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.”

(emphasis supplied)

Section 12(5) read with the Seventh Schedule is a mandatory and non-derogable provision of the Act. In the facts of the present case, the Principal Secretary to the Government of Haryana would be ineligible to be appointed as an arbitrator, since he would have a controlling influence on the Appellant Company being a nodal agency of the State.”

13. The Supreme Court in **Civil Appeal No. 7697 of 2021** titled as “*Ellora Paper Mills Limited vs. The State of Madhya Pradesh*” decided on 04.01.2022, has observed in para 3.1 as under:-

“3.1 It is submitted that in the aforesaid decision, this Court negated the submission that once the contractor participated in the arbitration proceedings before the Arbitral Tribunal by filing a statement of claim, thereafter it would not be open for him to approach the Court invoking sub-section (5) to Section 12 and pray for appointment of a fresh Arbitral Tribunal. It is submitted that unless and until there is an express agreement in writing to continue with the arbitration

proceedings by the earlier Arbitral Tribunal, such an application to terminate the mandate of the earlier Arbitral Tribunal and to appoint a fresh arbitrator would be maintainable.”

14. Also, a perusal of the Schedule VII of the Arbitration and Conciliation Act, 1996, a person having a controlling influence in any respect on one of the party or the guide for the purposes of affairs of one of the party, cannot act as an Arbitrator for adjudication of dispute arisen between the parties.

15. The arbitration clause reproduced supra gives very wide powers to the Registrar, in deciding the disputes between the parties. From the averments made in the petition, the possibility of bias in his mind even otherwise cannot be completely ruled out, let alone the fact that he is also the head of the Cooperative Societies. The greater his powers under the arbitration agreement, the greater the care that should be taken by the court to obviate any injustice at his hands.

16. All the submissions made by the learned counsel for the respondents vis-à-vis nomination of Registrar Cooperative Society as arbitrator pale into insignificance in view of amended Section 12(5) of the Arbitration and Conciliation Act, 1996.

17. The judgment relied upon by Mr. K. Nirmal Kotwal, learned counsel in the case of *Bharat Broadband Networks Ltd (supra)* is distinguishable and thus not applicable to the facts and circumstances of this case.

18. In view of the preceding analysis, and the above referred judgments passed by the Supreme Court as well as by this court, and in view of amended Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule, I am of the considered opinion that Clause 15(IV) of the Perpetual Lease Deed, as well as Rule 49 of the Bye Laws of the Society, which

provides the Registrar Cooperative Societies to be a sole arbitrator for adjudicating the claims/disputes between the petitioner and the department, would be against the law governing the field. Accordingly, this petition is allowed.

19. I, appoint **Mr. Suneet Gupta, retired District & Sessions Judge**, as sole Arbitrator in this case, who shall proceed in the matter in accordance with the provisions of the *Act* to make an award within the time provided in the *Act* itself, after charging the prescribed fee along with incidental expenses to be shared by the parties.

20. Parties may raise their claims and counter claims, which may include preliminary objections before the Id. Arbitrator.

21. Registry shall send the copy of this order to the arbitration appointed by this court today for information.

22. With the above observation and direction, the petition stands disposed of.

Jammu:
27.02.2025
Raj Kumar

(Tashi Rabstan)
Chief Justice