

(2025) 5 ILRA 8
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2025

BEFORE

THE HON'BLE ABDUL MOIN, J.

Civil Misc. Arbitration Application No. 109 of
2024

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Civil Misc. Arbitration Application No. 110 of
2024

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Civil Misc. Arbitration Application No. 1 of 2025

M/s OM Automobiles & Anr. ...Applicants
Versus
Indian Oil Corporation & Ors.
...Respondents

Counsel for the Applicants:

Brij Bhushan Singh, Gaurav Mehrotra,
Pranjal Apurva, Sandeep Kumar Mishra,
Tushar Mittal

Counsel for the Respondents:

Ashok Kumar Singh

Civil Law – Arbitration and Conciliation Act, 1996 - Sections 11, 11(6), 11(8), 12(1), 12(5) & 16 - Application under Section 11 of the Act, 1996 - seeking appointment of an independent arbitrator – as well as challenging the appointment of the arbitrator by Indian Oil Corporation - who was later revealed to be both an employee and shareholder of the IOC – on the ground of biasness under the Fifth and Seventh Schedules – initially, the applicants were waived Section 12(5) for an employee but no waiver was given for a shareholder - citing *Perkins Eastman Architects DPC Vs HSCC (India) Ltd.*, the Court held that – once the applicants have withdrawn their consent regarding appointment of Shri S K Singh as an arbitrator who yet an employee and shareholder in IOC is not found to be ex facie valid and is clearly not countenanced in the eyes of the law – consequently, the Court annulled the appointment of Shir S K Singh and by exercising

the power conferred u/section 11(6) of the Act, 1986 proposed to appoint Justice D.K. Arora (Retired) as the new arbitrator. (Para - 31, 32, 33, 34, 35)

Application Pending. (E-11)

List of Cases cited:

1. Perkins Eastman Architects DPC Vs HSCC (India) Ltd., (2020) 20 SCC 760,

2. Walter Bau AG Vs Municipal Corporation of Greater Mumbai, (2015) 3 SCC 800,

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Shri Brij Bhushan Singh as well as Shri Tushar Mittal, learned counsel for the applicants as well as Shri Ashok Kumar Singh, learned counsel for the respondents.

2. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') for appointment of a sole Arbitrator.

3. Learned counsels for the parties contend that the issue involved in all the three applications are same. As such, the Court proceeds to hear all the applications together and a common order is being passed. For convenience, facts of CIVIL MISC. ARBITRATION APPLICATION No. - 109 of 2024 are being taken.

4. Preliminary objection has been taken by Shri Ashok Kumar Singh, learned counsel for the respondents that the respondents have already appointed Shri S.K. Singh as an Arbitrator vide the letter dated 24.06.2024, a copy of which is Annexure-14 to the application. He states that in case the applicants are aggrieved by the appointment of the said Arbitrator, it is

always open for the applicants to raise a dispute in terms of Section 16 of the Act, 1996 before the learned Arbitrator himself and consequently instant application would not be maintainable.

5. Responding to the aforesaid, learned counsel for the applicant argues that this aspect of the matter has been considered by the Hon'ble Supreme Court in the case of *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760 wherein after considering its earlier judgment in the case of *Walter Bau AG v. Municipal Corpn. of Greater Mumbai*, (2015) 3 SCC 800, the Hon'ble Supreme Court has held that an application under Section 11(6) of the Act, 1996 would be maintainable.

6. On merits, bereft of unnecessary details, the facts are that an agreement dated 08.09.2022 was entered into between the applicants and the respondents-Indian Oil Corporation (hereinafter referred to as 'the I.O.C.') for road transportation of Bulk Petroleum Products. A copy of agreement is Annexure-2 to the application.

7. Clause 18 of the said agreement provides that if any dispute or difference of any kind whatsoever arises between the parties in connection with or arising out of the Agreement, such dispute or differences shall be resolved through arbitration.

8. It is contended that a dispute arose between the parties with the result that vide a letter dated 24.01.2024, a copy of which is Annexure-10 to the application, the applicants requested the respondents for appointment of an Arbitrator.

9. A Letter dated 02.02.2024, a copy of which is Annexure-11 to the

application, was received from the respondents requiring the applicants to give consent for appointment of an I.O.C. Officer as an Arbitrator and also requiring a consent waiving the applicability of Section 12(5) of the Act, 1996.

10. Immediately thereafter, the applicants sent a letter dated 06.02.2024, a copy of which is Annexure-12 to the application, consenting for appointment of an officer of the I.O.C. as an Arbitrator to decide the dispute between the parties.

11. In pursuance thereof, the I.O.C. appointed Shri S.K. Singh as an Arbitrator vide the letter dated 24.06.2024, a copy of which is Annexure-14 to the application. Subsequent thereto, vide the letter dated 24.07.2024, a copy of which is part of Annexure-16 to the application, the Arbitrator wrote to the applicants disclosing that he is the shareholder and an employee of the I.O.C.

12. Upon that, the applicants claim to have sent a letter dated 12.08.2024 withdrawing their consent for appointment of an employee and shareholder of the I.O.C. namely S.K. Singh as an Arbitrator. However, nothing concrete arose on account of withdrawal of the consent given by the applicants for appointment of Shri S.K. Singh and the said Arbitrator has not been withdrawn by the I.O.C. and consequently instant application for appointment of an independent Arbitrator by this Court.

13. Argument of the learned counsel for the applicants is that although Section 12(5) of the Act, 1996 categorically provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or

counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator but subsequent to disputes having arisen between the parties, the parties may waive the applicability of this sub-section by an express agreement in writing.

14. Contention is that although the Arbitration Clause in the agreement specifically provided for appointment of Arbitrator who could be an employee and the respondents themselves had proposed to appoint one of the employees as an Arbitrator and the condition was specifically waived off by the applicants yet the condition had been waived off pertaining to an employee to be appointed as Arbitrator but subsequently once the Arbitrator himself indicated vide his letter dated 24.07.2024 that he is both an employee as well as shareholder of the company as such considering the specific bar provided both in the Vth & VII Schedules of a shareholder not to be act as an Arbitrator as such the applicants have withdrawn their consent for appointment of Shri S.K. Singh, an employee of I.O.C., to act as Arbitrator which should have been acted upon by the respondents yet they have not withdrawn the appointment of the said Arbitrator consequently the instant application under Section 11(6) of the Act, 1996 would be maintainable.

15. In this regard, learned counsel for the applicants has invited attention of the Court towards Items 17 and 32 of the the Vth Schedule as well as Item 17 of the VIIth Schedule to indicate that where the arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held, the same can be considered

to be a bar for appointment of an Arbitrator.

16. Responding Shri A.K. Singh, learned counsel for the respondents has argued that once upon the request for appointment of an Arbitrator by the applicants, the letter dated 02.02.2024 specifically required the applicants to waive off the applicability of Section 12(5) of the Act, 1996 to which they had acquiesced and consented consequently once an Arbitrator has been appointed in view of the consent given by the applicants as such it is always open for the applicants to raise objections before the Arbitrator in terms of Section 16 of the Act, 1966 consequently instant application shall not be maintainable.

17. Shri Ashok Kumar Singh, learned counsel for the respondents has further argued that once the applicants have themselves given the consent for appointment of an employee i.e. Shri S.K. Singh as an Arbitrator as such it is too late in the day for them to resile from the consent that they had given and thus the application filed by them merits to be dismissed.

18. Heard learned counsel for the parties and perused the record.

19. From perusal of the arguments as raised by the learned counsel for the parties and perusal of the record, it emerges that admittedly there is an agreement dated 08.09.2022 between the parties of which Clause 18 provides for appointment of an Arbitrator. The applicants requested for appointment of an Arbitrator. A letter dated 02.02.2024 was issued by the respondents requiring the applicants to give consent for appointment of an Officer of I.O.C. as an

Arbitrator and also requiring the applicants to give a consent waiving the applicability of Section 12(5) of the Act, 1996.

20. The applicants sent a letter dated 06.02.2024 consenting for appointment of an officer of I.O.C. as an Arbitrator and in pursuance thereof I.O.C. appointed Shri S.K. Singh as an Arbitrator.

21. The dispute arose when Shri S.K. Singh, the Arbitrator sent a letter dated 24.07.2024 disclosing that he is both an employee of the I.O.C as well as shareholder of the I.O.C.

22. The applicants sent a letter dated 12.08.2024 withdrawing the consent for appointment of Shri S.K. Singh as an Arbitrator. The same has not been accepted by the respondents and hence the instant application for appointment of an Arbitrator.

23. The respondents have raised a preliminary objection that as Shri S.K. Singh has been appointed as an Arbitrator as such it is open for the applicants to raise any dispute or objection that they may have pertaining to his appointment before the Arbitrator himself and consequently the instant application would not be maintainable.

24. Whether with the appointment of an Arbitrator the objections should always be raised before the Arbitrator or the court can also intervene, has been considered by the Hon'ble Supreme Court in the case of *Perkins Eastman Architects DPC (supra)* wherein the Hon'ble Supreme Court has held as under:-

"26. The further question that arises is whether the power can be

exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG [Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450] and the discussion on the point was as under : (SCC pp. 805-06, paras 9-10)

"9. While it is correct that in Antrix [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] and Pricol Ltd. [Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177 : (2015) 2 SCC (Civ) 530] , it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147] , appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd. [Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177 : (2015) 2 SCC (Civ) 530] , the party which had filed the application under Section 11(6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the

Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in *Datar Switchgears Ltd. [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151]* may have introduced some flexibility in the time-frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by Icaadr, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by Icaadr and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in *Datar Switchgears Ltd. [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151]*, is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted

by Icaadr. The said appointment, therefore, is clearly invalid in law.”

27. It may be noted here that the aforesaid view of the Designated Judge in *Walter Bau AG [Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450]* was pressed into service on behalf of the appellant in *TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]* and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed : (*TRF case [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]*, SCC p. 397, paras 32-33)

“32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in *Walter Bau AG [Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450]*, where the learned Judge, after referring to *Antrix Corpn. Ltd. [Antrix Corpn. Ltd. v. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 : (2014) 4 SCC (Civ) 147]*, distinguished the same and also distinguished the authority in *Pricol Ltd. v. Johnson Controls Enterprise Ltd. [Pricol Ltd. v. Johnson Controls Enterprise Ltd., (2015) 4 SCC 177 : (2015) 2 SCC (Civ) 530]* and came to hold that : (*Walter Bau AG case [Walter Bau AG v. Municipal Corpn. of Greater Mumbai, (2015) 3 SCC 800 : (2015) 2 SCC (Civ) 450]*, SCC p. 806, para 10)

‘10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such

appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law....'

33. *We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."*

(Emphasized by this Court)

25. From perusal of the judgement of the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC (supra)***, it emerges that the Hon'ble Supreme Court has held that unless the appointment of an Arbitrator is ex facie valid and such appointment satisfies the Court exercising the jurisdiction under Section 11 (6) of the Act, 1986 acceptance of such appointment as fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law.

26. Thus, it is apparent that despite the respondents having appointed Shri S.K. Singh as an Arbitrator yet unless the appointment of Shri S.K. Singh as an Arbitrator is found to be ex facie valid, this Court would have jurisdiction under Section 11(6) of the Act, 1996 and it cannot be debarred from exercising the said jurisdiction. Thus the preliminary objection is rejected.

27. On merits, it emerges that for appointment of an Arbitrator the respondents had required the applicants to give consent for appointment of an I.O.C. officer as an Arbitrator and requiring a consent waiving the applicability of Section 12(5) of the Act, 1996, which the applicants willingly gave. Thus, the waiver was required for appointment of an I.O.C. officer as an Arbitrator but the letter that was issued by the Arbitrator, Shri S.K.

Singh subsequent to his appointment on 24.06.2024 indicates that the Arbitrator wrote to the applicants disclosing that he is both, the shareholder and an employee of the I.O.C.

28. As already indicated above, the consent which had been sought by the respondents was a waiver in terms of the provisions of the Act, 1996 for appointment of an employee of the I.O.C. which had willingly been given by the applicants but instead of appointing solely an employee of the I.O.C. the respondents appointed a shareholder and an employee of the I.O.C. which was against the specific waiver that had been sought by the respondents and which had been given by the applicants.

29. Schedule Vth and VIIth of the Act, 1996 specifically provides in Items 17 and 32 (of the Vth Schedule) and Item 17 (of the VIIth Schedule) that where the Arbitrator holds shares either directly or indirectly in one of the parties the same can be considered to be a bar for appointment of an Arbitrator.

30. No doubt, Item 17 of the Vth Schedule comes under the heading of 'The Arbitrator's direct or indirect interest in the dispute' yet considering that the Arbitrator himself admits of being a shareholder obviously he would be having a direct or indirect financial interest in the dispute pertaining to the I.O.C. in the capacity of being a shareholder. Consequently once there is a specific bar under the Vth and the VIIth Schedule which gives rise to justifiable doubts as to the independence or impartiality of the Arbitrator and no consent was ever sought by the respondents for appointment of a shareholder as an Arbitrator and the consent was only with respect to an employee to be appointed as

an Arbitrator as such it is apparent that the respondents have patently erred in appointing Shri S.K. Singh, who is admittedly a shareholder of the I.O.C. as an Arbitrator.

31. Thus, once the applicants have withdrawn the consent for appointment of Shri S.K. Singh as an Arbitrator which consent, as already indicated above, was for appointment of an employee yet an employee and a shareholder has been appointed as an Arbitrator as such the appointment of Shri S.K. Singh as an Arbitrator is clearly not countenanced in the eyes of the law.

32. Accordingly, considering the law laid down by the Hon'ble Supreme Court in the case of *Perkins Eastman Architects DPC (supra)* the appointment of Shri S.K. Singh as an Arbitrator is not found to be ex facie valid and his appointment does not satisfy this court and clearly is not countenanced in the eyes of law and is thus held to be invalid in law.

33. Keeping in view the aforesaid discussion, a case is made out to entertain this application as preferred by the applicants.

34. Accordingly, the court accepts the application and annuls the effect of the letter dated 24.06.2024 appointing Shri S.K. Singh as an Arbitrator and appointment of the Arbitrator.

35. Further, in exercise of the power conferred under Section 11(6) of the Act, 1986 the Court proposes to appoint Justice D.K. Arora (Retired) r/o Type VII, New Campus, SGPGI, Raebareli Road, Lucknow as an Arbitrator to settle the dispute between the parties.

36. Let a copy of the pleadings on record alongwith the relevant provisions of the Act with amending Act 2015 be sent to Hon'ble Mr. Justice D.K. Arora, a former Judge of this Court, for eliciting his disclosures on format under the schedule in terms of Section 11(8) read with Section 12(1) of the Act, 1996 and Schedule VI and VII as amended by Act 2015, appended thereto and also his consent for appointment as an Arbitrator for resolving the dispute.

37. Learned counsel for the applicants shall supply an additional copy of the application to the office for the said purpose within a week.

38. List immediately after receipt of reply/consent.

(2025) 5 ILRA 14
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.05.2025

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Anticipatory Bail Application U/S
 482 BNSS No. 398 of 2025

Prashant Shukla ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
 Rakshit Raj Singh, Ayush Agarwal

Counsel for the Opposite Party:
 G.A.

Criminal Law - Bharatiya Nyaya Sanhita, 2023 - Sections 80 & 85 - Dowry Prohibition Act, 1961 - Section 3/4 - Sessions Court entertained anticipatory bail applications of three co-accused but