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Shifting paradigm of appointment of arbitrators

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I. INTRODUCTION

"Justice should not only be done, but should manifestly be seen to be done"[1]

As arbitration has become the preferred forum of dispute resolution, continuous efforts are being made by Indian jurists to ensure that the procedures for appointment of an arbitral tribunal under the Arbitration and Conciliation Act, 1996 (hereinafter "the Act"), adhere to the best international practices and that a tribunal that is independent and impartial is chosen to adjudicate the dispute between the parties. To this end, the Courts have forbidden unilateral appointment of arbitrator, even if the same was contemplated in the arbitration agreement executed between the parties. However, recently in the judgement of *McLeod Russel India Limited and Another v Aditya Birla Finance Limited and Others* [2], the Calcutta High Court while determining an application seeking termination of the mandate of the arbitrator on the ground of unilateral appointment of the arbitrator has held that admitting to the jurisdiction of the arbitrator in the pleading would amount to a waiver of the right to challenge the appointment of the said arbitrator under Section 12(5) of the Act.

Before delving into the issue of waiving off the rights of a party to challenge the unilateral appointment of an arbitrator, it is pertinent to have a basic idea of the status of such appointments under the Act. Before 2015, there were no strict parameters to determine the impartiality and independence of the arbitrators and there was no bar on unilateral appointment of an arbitrator by a party. There was a general practice by PSUs of appointing their employees or ex-employees as arbitrators in furtherance to arbitration agreement and the same was upheld by the Courts, as long as the appointed person had no nexus with the contract in respect of which such dispute had arisen. [3]

Eventually, after various international arbitration institutions recognised the importance of party equality and impartiality of arbitrators, the Law Commission in its 246th Report recommended inclusion of the principles of neutrality of arbitrators as enshrined in International Bar Association

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies.

We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

Guidelines on Conflict of International Arbitration into the Act by incorporation of Section 12(5) along with Schedule V and VII. Thus, an amendment was brought to the Act in 2015 ("the Amendment Act") wherein it was clarified in Section 12 that any person whose relationship with the party, or the counsel or the subject matter of the dispute is found to be falling under any of the categories in the Seventh Schedule, that person would be ineligible to be appointed as an arbitrator in the dispute. However, the proviso appended to the Section further provided that the applicability of the said sub-section can be waived off by the parties by virtue of an 'express agreement in writing'.

Section 26 of the Amendment Act restricted the applicability of the Act only to arbitration proceedings commenced after the enactment of the Amendment Act, unless expressly agreed otherwise by the parties. However, the Supreme Court in *Ellora Paper Mills v. State of Madhya Pradesh* [4] in order to kick-start a slow-moving arbitration, gave a retrospective application to Section 12(5) of the Act to an arbitration proceeding commenced in 2000 thereby adding a fresh discourse to the discussion. One needs to take note that though the Amendment Act advanced the principle of independence and impartiality of arbitrator, however it did not invalidate any agreement between the parties for unilateral appointment by a party of an arbitrator.

II. JUDICIAL PRECEDENTS FOR ADVANCEMENT OF PRINCIPLES OF NEUTRALITY IN APPOINTMENT PROCEDURES

The Supreme Court in *TRF Ltd v Energo Engg. Projects Ltd* [5] while dealing with the appointment of the nominee of the Managing Director of the party to the dispute as the arbitrator extended the scope of the applicability of Section 12(5) to a person appointed by a person statutorily ineligible to be appointed under the Seventh Schedule. The Court observed that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. Further, the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd* in continuance to its judgement in TRF held that a person having an interest in the dispute would not only be ineligible to act as an arbitrator but also be ineligible to appoint an arbitrator in the dispute. [6]

While the law on the unilateral appointment of an arbitrator seems to be settled after the Supreme Court's judgment in *TRF* and *Perkins,* there exists an ambiguity in relation to quasi-unilateral appointments. Quasi-unilateral appointment refers to the procedure whereby a name is forwarded by one party to another and the other party has to nominate the arbitrator from that list. The ambiguity arises from the Supreme Court's judgment in *Central Organisation for Railway Electrification v ECI-SPIC-SMO-MCML* [7] [referred hereinafter as "CORE"] wherein the Court had declared such a procedure to be

valid with the only caveat being that the list forwarded by the party should be 'broad-based'. Following the ratio laid down by the Supreme Court in CORE, the Delhi High Court in *Iworld Business Solutions P Ltd v Delhi Metro Rail Corpn. Ltd* [8] upheld the validity of the panel of three arbitrators proposed by DMRC on the ground that the panel consisted of retired Supreme Court Judges and their impartiality cannot be put to question.

As the decision of the Supreme Court in CORE runs afoul with the Supreme Court's ruling in Perkins, an uncertainty exists due to the fluctuating approach of the Courts. While in Perkins, the Supreme Court had extended the scope of applicability of Section 12(5) to appointments made by a person ineligible to act as an arbitrator and the concern of the Court was that no party shall get a disproportionate share in appointing the arbitrators. Limiting the autonomy of a party to nominate arbitrators from a list fixed by the other party to the dispute allows one party to determine the composition of the tribunal. In such a situation, one party to the dispute would have exclusive powers in determining the resolution mechanism. This goes against the observations of the Supreme Court in Perkins and runs counter to the objective of introducing Section 12(5) to the Act.

III. WAIVING OFF

Another question concerning the unilateral appointment of arbitrator is the right of the parties to waive off the applicability of Section 12(5). As explained above, once the dispute has arisen between the parties, they can decide to waive off the applicability of Section 12(5) by an 'express agreement in writing'. The Supreme Court in *Bharat Broadband Network Limited v. United Telecoms Limited* [9] elucidated the expression 'express agreement in writing' as an agreement made in words as opposed to an agreement which was to be inferred by conduct. To this effect, the Court referred to Section 9 of the Indian Contract Act, 1872 which provides as under:

> *" 9. Promises, express and implied.--In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

Thus, the Delhi High Court in Govind Singh v M/s Satya Group Private Limited [10] *observed in a Section 34 Petition that the mere fact that the party had not raised any objections to the appointment of the arbitrator does not mean that it had waived its right under Section 12(5).* Furthermore, the Delhi High Court set aside the said Award holding that, *"The arbitral award rendered by a person who is ineligible to act as an arbitrator cannot be considered as an arbitrator cannot be considered as an arbitral award. The ineligibility of the arbitrator goes to the root of his jurisdiction. Plainly an arbitral*

award rendered by the arbitral tribunal which lacks the inherent jurisdiction cannot be considered valid."

However, the Calcutta High Court recently in McLeod Russel India Limited v. Aditya Birla Finance Limited, while determining an application under Section 14 of the Act seeking a termination of the arbitrator has held that the admitting the jurisdiction of the arbitrator in the pleadings is enough for an express agreement for the purposes waiving off the right under Section 12(5). It is pertinent to note that here the applicant had earlier admitted to the jurisdiction of the arbitrator in a Section 16(3) application. Based on the said fact, the Hon'ble Calcutta High Court was of the opinion that –

"The alleged ineligibility of the appointment of the Ld. Arbitrator was regularised under the proviso to section 12(5) by the express written documents executed by the petitioners and their continuous participation in the arbitration…."

This decision again creates an ambiguity in inferring the approach of the Courts, as the Calcutta High Court has equated submission to the jurisdiction by participating in the arbitration proceedings and admission before the Tribunal to an '*express agreement in writing*'.

IV. CONCLUSION

It seems that time and again, the Courts have taken a foot forward and then a step back while determining the neutrality of procedure for appointment of arbitrator. This swinging approach between neutrality and autonomy, has led to confusion and has left some leeway for uncovering loopholes, thereby delaying and elongating the adjudicatory process. Thus, it is required that apt amendments in the Act are introduced thereby leaving limited scope of judicial interpretation, and ensuring consistency in the approach being adopted by the Courts throughout the country.

REFERENCES

[1] International Airport Authority vs K.D. Bali & Another AIR 1988 SC 1099

[2] McLeod Russel India Limited and Another v Aditya Birla Finance Limited and Others A.P. No. 106 of 2020, Calcutta HC

[3] Indian Oil Corporation Ltd v Raja Transport Pvt Ltd (2009) 8 SCC 520

[4] Ellora Paper Mills v. State of Madhya Pradesh AIR 2022 SC 280

[5] TRF Ltd v Energo Engg. Projects Ltd AIR 2017 SC 3889

[6] Perkins Eastman Architects DPC v. HSCC (India) Ltd *AIR 2020 SC 59*

[7] Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML [(2020)14SCC712]

[8] Iworld Business Solutions P Ltd v Delhi Metro Rail Corpn. Ltd *MANU/DE/20193/2020*

[9] Bharat Broadband Network Limited v. United Telecoms Limited AIR 2019 SC 2434

[10] *Govind Singh v M/s Satya Group Private Limited* 2023/DHC/000081

DOMESTIC ARBITRATION

Admission to the jurisdiction of the Arbitral Tribunal in the pleadings amount to 'express agreement' for the purpose of proviso under Section 12(5) of the Arbitration and Conciliation Act, 1996 :

The Calcutta High Court in *McLeod Russel India Limited & Anr v Aditya Birla Finance Limited & Ors*, held that admitting to the jurisdiction of the arbitral tribunal in the pleadings would amount to express agreement given under proviso to Section 12(5) of the Arbitration and Conciliation Act ("A&C Act"). The Court clarified that it is not necessary for the parties to execute a formal agreement and admitting to the jurisdiction of the Tribunal after being aware of the legal position in reference to unilateral appointment would be enough to satisfy the condition in the proviso under Section 12(5). Additionally, the Court also clarified that all unilateral appointments per se are not invalid and a unilaterally appointed arbitrator would only become ineligible if his relationship with the party, the counsel or the subject matter of dispute falls directly under the Seventh Schedule.

A petition under section 34 of the A&C Act cannot be amended to challenge the awards by introducing new grounds with new facts: The Delhi High Court ("Delhi HC") in New Delhi *Municipal Council V Decor India Pvt Ltd v Décor India Pvt Ltd*, held that while amendments are permitted in a Section 34 petition, introduction of new material facts cannot be allowed if the same had not been raised in the original petition or before the Arbitral Tribunal. The Court opined that the amendments sought to be introduced in a Section 34 must be in line with the Supreme Court's judgment in State of Maharashtra vs. Hindustan Construction Co. Ltd wherein the Supreme Court of India ("Supreme Court") had held that amendments can be permitted due to existence of peculiar circumstances or in the interest of justice.

Participation in arbitral proceedings does not constitute waiver of the right to challenge the appointment of an ineligible arbitrator: The Delhi HC in *BW Businessworld Media Pvt Ltd v Indian Railway Catering and Tourism and Corporation Ltd*, while terminating the mandate of an arbitrator held that mere participation in the arbitral proceedings does not constitute a waiver of right to challenge the unilateral appointment of an arbitrator. The Court also clarified that Section 4 of the Arbitration and Conciliation Act 1996, which deals

with deemed waiver of right by conduct of the parties would not be applicable as the proviso to Section 12(5) of the A&C Act clearly states that the waiver has to be through an express agreement in writing.

Sale notice issued by a secured creditor under Section 13(4) of the SARFAESI Act, 2002 is not arbitrable: The Delhi HC in *M/s Indiabulls Housing Finance Ltd & Anr v Shipra Estate Ltd* held that a specific right is vested in the secured creditor to issue a notice under Section 13 of SARFAESI Act and enforce its security interest and the same is not arbitrable. The Arbitral Tribunal under section 17 of the Act does not have the option to exercise any discretion, thus the Arbitrator has no jurisdiction to set aside the sale notice issued by the secured creditor under Section 13(4) of the SARFAESI Act seeking to enforce its "security interest".

INSOLVENCY AND BANKRUPTCY CODE

Provident fund, gratuity and workmen/employees dues to be paid in full: The National Company Law Appellate Tribunal ("NCLAT"), Chennai Bench, in *Mrs. C.G. Vijyalakshmi v Shri Kumar Rajan & Ors* held that the provident fund, gratuity and workmen/employees dues has to be paid in full. The Appellant relied on the Supreme Court's judgment in Jet Aircraft Maintenance Engineers Welfare Association v Ashish Chhawchharia wherein the Supreme Court had held that the workmen and employees are entitled for payment of full amount of provident fund and gratuity till the CIRP commencement date. The Appellate Tribunal found that the partial payment of the provident fund and gratuity dues are violative of Section 30(2)(e) of Insolvency and Bankruptcy Code ("IBC") and directed the successful Resolution Applicant to pay the amount in full.

Contributory Negligence of the Financial Creditor not a ground to dismiss a Section 7 Application under IBC: In *State Bank of India vs. N.S. Engineering Projects Private Limited,* the NCLAT, Delhi Bench, held that while determining a Section 7 Application, the Adjudicating Authority should not consider the reasons behind the default. The Appellate Tribunal overturned the decision of the Adjudicating Authority which had dismissed a Section 7 Application on the ground that the financial creditor had not disbursed a part of the sanctioned amount.

Section 9 IBC Application not a Suit, hence the bar operating under 69(2) of Partnership Act not attracted: The NCLAT, Delhi bench while adjudicating an appeal filed in *Rourkela Steel Syndicate v Metistech Fabricators Pvt. Ltd.*, has held that an application under Section 9 of IBC is not a suit and hence, the bar under Section 69(2) of Indian Partnership Act, 1932 is not applicable.

The Appellate Tribunal reasoned that since Section 5 of the Limitation Act, 1963 is applicable to Section 7 & 9 of IBC, such applications cannot be considered to be a suit. Thus, the Tribunal held that the Adjudicating Authority erroneously rejected the Section 9 Application on the ground that it is barred by 69(2) of the Partnership Act..

CORPORATE

Bombay High Court rules that Share Purchase Agreement with a resale option is not a 'forward contract': *The Bombay High Court in Percept Finserve Pvt Ltd & Anr. versus Edelweiss Financial Services Ltd has upheld the enforceability of a Share Purchase Agreement (SPA) that includes an option for the purchaser to require the seller to repurchase the shares under certain circumstances. The Court ruled that this type of agreement does not constitute a 'forward contract' and is therefore enforceable. The decision confirms a previous ruling by a Single Judge that set aside an arbitral award. The court held that the inclusion of a 'put option' in the SPA does not make it a derivative contract. The court's ruling means that the resale option included in the SPA is not prohibited by law.*

Supreme Court clarifies the role of Compliance Officer in SEBI's Buyback Regulations: The Supreme Court in *Securities and Exchange Board of India v V Shankar* has clarified that a Company Secretary acting as a compliance officer under the SEBI (Buyback of Securities) Regulations 1998, must ensure that the company complies with the regulations related to the buyback of shares. The Court noted that Regulation 19(3) mandates the company to nominate a compliance officer and an investors' service center for two purposes: to ensure compliance with the buyback regulations, and to address investors' grievances.

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