

NEWSLETTER 11

Unilateral Appointment of an Arbitrator: The TRF-Perkins Judgment Perspective

Arbitration plays an instrumental and exceptional role in the legal system to resolve disputes outside the structure of the judiciary. The main objective of arbitration in Alternative Dispute Resolution is to adjudicate the conflicts and differences between the interested parties through independent and impartial arbitrators in consonance of party autonomy. The principle of natural justice is painstakingly implanted in Arbitration and Conciliation Act, 1996 (the 1996 Act) to make the non-judicial technique dear and effective. However, a persistent obstacle in functioning of the 'dear' technique is 'unilateral appointment of arbitrator'.

The unilateral appointment of arbitrator waives the principle of natural justice as *nemo judex in causa sua*. According to Section 11(2) of the 1996 Act the parties are free to agree on a procedure for appointing the arbitrator. However, various companies, banks and dominant parties majorly enjoy a dominating position over the other party, incorporate the procedure for the appointment of arbitrator in their agreements in such a way that the other party has no say in the appointment of the arbitrator. The appointer of arbitrator or the arbitrator himself is a *pucca adatia* ipso facto and tilts procedures towards the dominating party. Post the 2015 amendment, the law became constrained and the focus was ushered in '*who cannot be appointed as an arbitrator*'. The Hon'ble SC has attempted to fix the problem in the landmark judgments of TRF Limited v Energo Engineering Project Ltd. (TRF case) and Perkins Eastman Architects DPC & Anr v HSCC (India) Ltd (Perkins case). The SC, in said cases tried to address the issue of validity of the appointment of a person as sole arbitrator through a party having an interest in the dispute.

The SC held that S. 12(5) of the 1996 Act (as amended) has commenced with a non-obstante clause. The section lays down that if a person has relationship with the parties or the counsels or the subject matter of dispute or falls under any of the categories specified in Seventh schedule, he *shall* be ineligible to be appointed as an arbitrator. The Court further highlighted a qualifier which indicates that parties may waive the applicability by express agreement in writing. The Court while reiterating the same principle in Perkins case held that, the element of invalidity would be directly relatable to and arise from the interest that he would be having in the result of the dispute.

The nomination of an arbitrator is void ab initio if there is ex facie contravention of the inherent facet of the arbitration clause. In TRF case, the Court was of the view that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. In another words if the arbitrator becomes ineligible as prescription contained in sec. 12(5) of the 1996 Act (as amended) then he would not be eligible to nominate another arbitrator. The Court, while dealing with the issue, distinguished the current situation with another, where both parties are allowed to appoint their respective arbitrator, the authority cannot be questioned as the interest of a party through an arbitrator counterbalances the interest of another. Further, the Court heavily relied upon the maxim of '*qui facit per alium facit per se*' meaning 'he who does an act through another is deemed in law to have done it himself'. In other words, something which cannot be done directly may not be done indirectly by engaging another person. It is immaterial whether, for doing such an illegal act, the agent employed is given the wider power or authority of *pucca adatia*. And when an ineligible person nominates an arbitrator, the nomination itself becomes bad in law.

Hence, it is unconceivable in law that a person who is statutorily ineligible can nominate another for the same role. The Court explained the nomination of an arbitrator with the analogy of infrastructure where once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without a plinth.

In the Perkins case, the Court dealt with two categories of cases, the first, similar to the TRF case, and the second, where the Managing Director (MD) was not to act as an arbitrator himself but is empowered to appoint any person of his choice as an arbitrator. The Court, in the first category, found that the MD as incompetent because the invalidity would be directly relatable to and arise from the interest he would be having in the outcome of the dispute. Further, the Court found the possibilities of biasness irrespective of the above categories. The Court, while reiterating the principles of the TRF judgement, also opined and included that, "*the ineligibility referred to therein was a result of the operation of law, in that person having interest in the dispute or outcome must not only be eligible to act as an arbitrator, or to appoint anyone as an arbitrator and should not have any role in charting out any course in dispute resolution by having the power to appoint an arbitrator*".

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