LITE BITE FOODS PVT. LTD. V. AIRPORTS AUTHORITY OF INDIA, 2019 SCC ONLINE BOM 5163

Bombay High Court; single-judge bench, **G. S. Patel J**; decided on 04 December 2019

Legal principles on the appointment of a sole arbitrator, as declared by the Supreme Court of India in various decisions, summarised

The principle enunciated by the Supreme Court in *Perkins Eastman Architect DPC* v. *HSSC (India) Ltd.*, 2019 SCC OnLine SC 1517, was invoked in this case. In *Perkins*, taking forward the principle of *TRF Limited* v. *Energo Engineering Limited*, (2017) 8 SCC 377, the Supreme Court had ruled that a party (or any official of the party) or anyone having an interest in the dispute cannot unilaterally appoint a sole arbitrator.

Lite Bite had proposed its sole arbitrator; AAI appointed its own. Lite Bite rejected AAI's appointment as statutorily impermissible. According to it, a sole arbitrator could be appointed only (i) by mutual consent of the parties or (ii) by order of a High Court in a commercial arbitration petition.

Lite Bite then filed a petition under Section 11 of the ACA for the appointment. It argued that the choice by AAI of a person from a panel that it has itself drawn up, and to which Lite Bite never consented, violates Section 12(5) and the Seventh Schedule of the ACA. Further, the *non-obstante* clause in Section 12 overrides any previous agreement permitting a unilateral appointment by one side.

The court held that the Perkins principle hit the clause: – "I see no means to separate or distinguish the case at hand from Perkins Eastman at all. It is entirely within the frame of that decision."

It rejected the argument that *Perkins* was *per incuriam* (as contrary to a previous two-judge bench decision in *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd.*, (2017) 4 SCC 665.

The court examined the law and summarised the legal principles: –

(i) An officer or employee of one party cannot be the arbitrator or the person empowered to appoint an arbitrator. This is the *TRF* category or rule.

(ii) Where the arbitration clause provides for nomination by each side, and the appointment of an umpire by the two nominee arbitrators, of a person from a panel: (i) that panel cannot be hand-picked by one side; and (ii) it must be broad-based and inclusive, not narrowly tailored to persons from a particular category. The opponent and the two nominee arbitrators must have the plenitude of choice. This is the rule in *Voestalpine*. Conceivably, a broad-based panel commonly agreed in the contract by both sides would serve the purpose.

(iii) A clause that confers on one party's employee the sole right to appoint an arbitrator, though that employee is himself, not the arbitrator, is also not valid, and this is a logical and inescapable extension of *TRF*. It makes no difference whether this power is to be exercised by choosing from a panel or otherwise. This is the rule in *Perkins*.

The court also then remarked that the guiding principle is neutrality, independence, fairness, and transparency, even in the arbitral-forum selection process.