PERKINS EASTMAN ARCHITECTS DPC AND ANOTHER V. HSCC (INDIA) LTD., 2019 SCC ONLINE SC 1517

Supreme Court of India; 2-judge bench, **Uday Umesh Lalit** and Indu Malhotra JJ; decided on 26 November 2019

A party to an agreement (or any other interested party) is dis-entitled to select an arbitral tribunal comprising of a sole arbitrator

(A) BACKGROUND—THE SUPREME COURT'S RULING IN *TRF CASE*

As has been noted earlier in the introductory passage of this chapter, in *TRF Limited* v. *Energo Engineering Limited*, (2017) 8 SCC 377 ("TRF")[24], the arbitration clause provided that any dispute "shall be referred to sole arbitration of the Managing Director of buyer or his nominee." Given the 2015 Amendments, it was common ground that the Managing Director was disqualified to himself act as an arbitrator.[25] The question was if he could nonetheless nominate another person? The court held: "once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator."

(B) THE MAIN QUESTION IN PERKINS—CAN THE CHAIRMAN OF A PARTY APPOINT A SOLE ARBITRATOR?

A consortium comprising of Perkins Eastman Architects, a New York-based architectural firm, and Edifice Consultants Private Limited, a company organized in Mumbai ("Perkins"), was appointed design consultants by the respondent HSCC, a government of India enterprise.

Like in *TRF*, parties in *Perkins* also intended arbitration by a sole arbitrator. But while in *TRF*, as we have seen, a party's Managing Director or his nominee was to act as the sole arbitrator, in *Perkin*s, the Chairman & Managing Director ("CMD") of the respondent just had the right to nominate one (and not himself be the arbitrator). The CMD was requested, but the ap-

[24] Supreme Court 3-judge bench, Dipak Misra, A.M, Khanwilkar and Mohan M. Shantanagoudar JJ.

[25] Section 12 (5)—Grounds for Challenge; *Cf.* Items 1, 5 and 12 of the Seventh and Items 1, 22 and 24 of the Fifth Schedule.

pointment made a day after the stipulated time. It was also (allegedly) made by the Chief General Manager instead of the CMD.

Perkins filed an application under Section 11 ACA for appointment by the court. It argued that (i) the CMD did not discharge its obligations and thus lost the right to appoint, and (ii) an independent and impartial arbitrator was required to be appointed.

The main question was whether the clause giving the right to the respondent's office[26] to nominate a sole arbitrator was enforceable?[27]

(C) THE COURT'S ANSWER: A PARTY OR ANYONE INTERESTED IN THE DISPUTE CANNOT APPOINT THE SOLE MEMBER TRIBUNAL

These were the court's reasoning: -

(i) There are two categories of cases: –

   a. First, like *TRF,* where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator.

   b. Second, the Managing Director is not to act as an arbitrator himself but is empowered or authorized to appoint any other person of his choice or discretion as an arbitrator.

(ii) In the first category, the Managing Director was found incompetent[28] because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such an outcome or decision.

(iii) If that be the test, similar invalidity would always arise and spring, even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of

[26] It goes without saying that this right vested with the respondent. The clause just identified who among the respondent enterprise would make the appointment.

[27] The court phrased the question generally, "whether a case has been made out for exercise of power by the Court for an appointment of an arbitrator".

[28] The incompetency in *TRF* was with regard to acting as an arbitrator.

bias, it will always be present irrespective of whether the matter stands under the first or second category of cases.

(iv) We are conscious that if such deduction is drawn from the decision in *TRF*, all cases having similar clauses, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party of an official or an authority having interest in the dispute would be disentitled to appoint an arbitrator.

(v) But that has to be the logical deduction from *TRF* case: –

a. The ineligibility referred to in *TRF* was as a result of the operation of law, in that a person having an interest in the dispute and its outcome must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else.

b. *TRF* case further shows that the situation where both parties could nominate respective arbitrators was completely different. Whatever advantage a party may derive by nominating an arbitrator of its choice would get counterbalanced by equal power with the other party. But, where only one party has a right to appoint a sole arbitrator, the choice will always have an element of exclusivity.

c. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That is the essence of the 2015 Amendments recognized by the *TRF* case.

The court then also concluded that if there are justifiable doubts as to the independence and impartiality, and if other circumstances warrant the appointment of an independent arbitrator by ignoring the procedure prescribed, the appointment can be made by the court. This conclusion was stated: –

(i) Relying on and following *Indian Oil Corpn. Ltd* v. *Raja Transport (P) Ltd.*, (2009) 8 SCC 520, where the scope of the then-existing text of Section 11 was summarised by a 2-judge bench of the Supreme Court (R.V. Raveendran and D.K. Jain JJ).

(ii) Citing to paragraphs 53 to 60 (under the heading "Neutrality of Arbitrators") of the 246th Law Commission Report of August 2014.

(iii) Following *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665, a Section 11 proceeding, where the 2-judge bench of Dr. A.K. Sikri and R.K. Agrawal JJ has explained the concept of independence and impartiality.

(D) THE POWER UNDER SECTION 11 IS AVAILABLE EVEN IF A PARTY HAS ALREADY MADE AN APPOINTMENT

The court held this relying on *Walter Bau AG* v. *Municipal Corpn. of Greater Mumbai*, (2015) 3 SCC 800, a decision by the designated judge (Ranjan Gogoi J) under the old Section 11 provision.[29]

(E) DELAY BY THE APPOINTING AUTHORITY IN MAKING THE APPOINTMENT—HOW RELEVANT?

The contractual time limit for appointment expired on 28 July 2019. The next day, 29 July, was a working day, but the appointment was made on the 30 July. It was not within time, but such delay is not an "infraction of such magnitude" that the court must appoint an arbitrator on that ground alone.

(F) DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION

Perkins Eastman and Edifice were a consortium and thus 'association' under Section 2(1)(f) of the ACA. Perkins Eastman was the lead member. So, the central management and control of the association was exercised out of India [relying on *Larsen and Toubro Limited* v. *SCOMI Engineering BHD*, (2019) 2 SCC 271, a decision by R.F. Nariman and Navin Sinha JJ].

[29] *Walter Bau* distinguished *Antrix,* (2014) 11 SCC 560 and *Pricol Ltd.*, (2015) 4 SCC 177. In both decisions by the designated judge it was said that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11(6) ACA.