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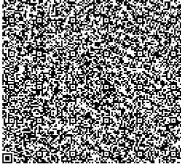

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Case Comment

Perkins Eastman Architects DPC v. HSCC (India) Ltd: The End of Unilateral Appointment of Arbitrator in India

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1. Introduction

The power of a party to unilaterally appoint a sole arbitrator in India has been a subject of much litigation and debate for quite some time. The unilateral appointment of an arbitrator refers to a scenario in which one party to the arbitration agreement is given sole authority to appoint an arbitrator, in case a reference to arbitration is made by either of the parties. Such clauses are very common in government contracts, contracts with financial institutions etc., where a high ranking official of the tendering authority, say the Chief Engineer, is given the authority to appoint an arbitrator in case a reference to arbitration is made by either the tendering authority or the contractor.

Recently, the Supreme Court in the case of *Perkins Eastman Architects DPC v. HSCC (India) Ltd*[1] (hereinafter referred to as "Perkins judgement") has finally laid to rest this controversy by holding that no party who has any interest in the dispute can unilaterally appoint a sole arbitrator. In this paper, the author makes a case that the Perkins judgment is flawed and at the same time the author discusses the possible implications of the same.

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[1]Perkins Eastman Architects D.P.C. v. H.S.C.C. (India) Ltd., 2019 S.C.C. Online SC 1517 (India).

2. Position of Law

Prior to examining the Perkins case, it is pertinent to briefly describe the jurisprudence with regards to the unilateral appointment of an arbitrator in India. Before the commencement of Arbitration and Conciliation (Amendment) Act, 2015, the Arbitration and Conciliation Act, 1996 (the Act)[2] had no restrictions regarding the unilateral appointment of arbitrators by one party. Subsequently, the Arbitration and Conciliation Amendment Act, 2015 amended Section 12[3] and introduced the Fifth and Seventh Schedules in the Act, to prohibit the appointment of certain persons as arbitrators. However, the Act remained silent on the unilateral authority of one party to appoint an arbitrator.

In the case of *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd* (hereinafter referred to as Voestalpine judgement),[4] the Supreme Court held that the power of one party to unilaterally appoint an arbitrator is valid. In this case, the arbitration clause provided that the respondent shall appoint a sole arbitrator from a panel of arbitrators provided by the petitioner. Therefore, the Supreme Court, while upholding the appointment procedure prescribed in agreement, held that the respondent could only appoint an arbitrator from such a panel.

Thereafter, the case of *TRF Limited v. Energo Engineering Projects Ltd* (hereinafter referred to as the TRF judgement)[5] proved to be a turning point with regard to unilateral appointment of an arbitrator. In this case, the Managing Director of the respondent or his nominee was to act as the sole arbitrator. However, pursuant to the 2015 Amendment, the Managing Director became ineligible to act as an arbitrator as per Section 12 of the Act. Consequently, he had appointed a former Judge as his nominee. Therefore, the

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[2]The Arbitration and Conciliation Act, No.26, Acts of Parliament, 1996 (India).

[3]§12, The Arbitration and Conciliation Act, No.26, Acts of Parliament, 1996 (India).

[4]Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd (2017) 4 S.C.C. 665 (India).

[5]TRF Ltd. v. Energo Engineering Projects Ltd. (2017) 8 S.C.C. 377 (India).

question arose whether the nominee of an ineligible person could act as an arbitrator. The Supreme Court while applying the maxim *Qui facit per alium facit per se* (He who acts through another does the act himself) held that the nominee of an ineligible arbitrator cannot act as an arbitrator. However, the Supreme Court did not comment upon the unilateral appointment of an arbitrator.

3. Facts

In the light of the aforementioned situation, the author now turns to the Perkins judgment. The relevant facts of the case are that the respondent had invited tender for certain design consultancy work, which was allotted to the applicant. Subsequently, disputes arose between the two parties and the applicant sent a notice to the Chairman and Managing Director (CMD) for the appointment of an arbitrator in accordance with clause 24 of the contract, which provided for the appointment of a sole arbitrator by CMD of the respondent Corporation. Subsequently, Major K.T. Gajria was appointed as the sole arbitrator. Aggrieved by the said appointment, the applicant filed a Section 11 application before the Supreme Court, alleging that an independent and impartial arbitrator be appointed instead of Major K.T. Gajria.

4. Judgment

The first issue before the Court was whether the present arbitration is an international commercial arbitration or not. The Court held that since the applicant was the lead member of the consortium that had its registered office in New York, the present matter would be classified under international commercial arbitration.[6]

The next and the more crucial issue was whether the Court could exercise its powers under Section 11 of the Act. The Supreme Court while relying on the TRF judgement held that, "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."[7] The

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[6]Perkins Eastman Architects D.P.C. v. H.S.C.C. (India) Ltd., 2019 S.C.C. Online SC 1517 (India).

[7]*Id at 10*

basis given by the Supreme Court for such reasoning was that in cases where there is a sole appointment of an arbitrator, there is always some degree of exclusivity in charting the course of dispute resolution.[8] Furthermore, while referring to its earlier rulings and the 246th Law Commission Report, the Court held that neutrality of arbitrators is of utmost importance.[9] Consequently, the appointment of Major K.T. Gajria was quashed and Retd. Justice A.K. Sikri was appointed as the arbitrator.

5. Aftermath of Perkins: An Analysis

The Supreme Court has given its reasoning by extending the rationale of the TRF judgment and has laid down a blanket prohibition on the appointment of an arbitrator by an ineligible party. However, according to this author, the Court has failed to distinguish the facts of the TRF judgement and the current case. In the former, the appointment of a nominee of an ineligible arbitrator was quashed, whereas in the Perkins judgement, there was appointment by one of the parties. Incidentally, the Delhi High Court was faced with a similar question of law. The Court while interpreting the TRF judgement had given the reasoning that TRF does not fetter the power of one party to appoint a sole arbitrator, as Section 11(2) of the Act gives an option to the parties to agree on any form of the procedure for appointment. The Court, in another case, held that proviso to Section 12(5) of the Act also gives an option to waive off any grounds for a challenge by an agreement in writing.[10] Thus, the Supreme Court has failed to take into account this interpretation and has wrongly relied upon the rationale of the TRF judgement. The correct procedure in such cases would be to test the independence and impartiality, adhering strictly to the grounds mentioned in the Act. The fact that an arbitrator is appointed by one party, cannot be termed as a ground for removal of the arbitrator.

Another argument which can be put forward is that the Apex Court has resorted to unnecessary judicial legislation. The 2015

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[8]*Id at 16*

[9]*Id.*

[10]D.K. Gupta v. Renu Munjal, 2017 S.C.C. Online Del. 12385 (India).

Amendment Act had specifically incorporated the Fifth and Seventh schedules in the Act, to maintain the bare minimum standards of independence and impartiality. Moreover, as noticed in the aforementioned case of *D.K. Gupta v. Renu Munjal*[11], the legislature has provided the parties with an option to waive off the requirements of Section 12. Therefore, if the legislature would have desired to abolish the concept of unilateral appointment, it would have done so by means of the 2015 Amendment or the more recent 2019 Amendment Act. By extending the TRF rationale, the Court has created an entirely new ground for removal of the arbitrator. Furthermore, whether the parties can waive off this ground is a question which still remains open for interpretation.

Even if mutual consent is accepted as a basis of appointment of an arbitrator, it is unclear as to what are the contours of such consent. In other words, it is unclear whether the judgment of *Voestalpine* still holds good or not. In the author's opinion, the *Voestalpine* judgment still holds good, as in that case a panel of arbitrators is submitted by one party and the sole arbitrator is appointed out of this panel of arbitrators. Such an appointment procedure can be construed as a broad form of appointment by mutual consent and not a case of unilateral appointment, as both parties have a say in the appointment of the arbitrator.

In spite of its various flaws, it would be prudent to assume that the Perkins judgment is here to stay. Therefore, it is necessary that the impact of this judgment is analyzed as it directly hits arbitration clauses envisaged in government contracts, contracts with financial institutions etc. The most immediate impact of this judgment would be on future arbitrations which would arise from contracts containing unilateral appointment clauses. In this respect, it would be advisable that to avoid Section 11[12] proceedings, an independent and impartial arbitrator is appointed with mutual consent of the parties, until necessary amendments are made in such contracts. This can be done in a number of ways. For instance, one party can suggest a panel of arbitrators and the other party may choose one

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[11] *Id.*

[12] §11, The Arbitration and Conciliation Act, No.26, Acts of Parliament, 1996 (India).

arbitrator from amongst the panel. Another way could be by substitution of a sole arbitrator with a panel of three arbitrators. In such a scenario, each party could appoint its nominee arbitrator and the two arbitrators could appoint the presiding arbitrator. However, it is also necessary to mention here that it is a rare sight to see appointments by mutual consent, especially in cases of government contracts. Therefore, in light of such difficulty, Vikas Mahendra and Shalija Agarwal have emphasized on the role of arbitral institutions as appointing authority, for appointing a sole authority under the agreement.[13] Such an alternative appears to be lucrative in the light of the Arbitration and Conciliation (Amendment) Act, 2019, which seeks to promote institutional arbitration in India. Moreover, appointment from arbitral institutions may prove to be more beneficial, as such institutions can appoint a specialized arbitrator from a panel of qualified arbitrators. However, it is also noteworthy to mention here that the present system of institutional arbitration in India is substandard and underdeveloped. Currently, there is a lack of credible arbitral institutions, as most arbitral institutions lack the requisite digital infrastructure, such as web pages.[14] Therefore, such an alternative may be implemented after institutional arbitration becomes more developed in the country.

Another issue which requires immediate discussion is the effect of the Perkins judgment on ongoing arbitrations in which a sole arbitrator has been unilaterally appointed. The Delhi High Court in the case of *Proddatur Cable TV Digi Services vs. Siti Cable Network Limited*[15] has held that the Perkins judgment is applicable to

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[13]Vikas Mahendra & Shalija Agarwal, *Paving the way for Institutional Appointment of Arbitrators and Use of Technology in Arbitration*, BAR & BENCH (Nov. 29, 2019), https://barandbench.com/paving-way-for-institutional-appointment-of-arbitrators-use-of-technology-in-arbitration/.

[14]*See* Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, Department of Legal Affairs (July 30, 2017), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[15]Proddatur Cable Tv Digi Services v. Siti Cable Network, 2020 SCC Online Del 350.

ongoing arbitrations and in such cases, the mandate of an arbitrator terminates under Section 14(1)(a) of the Act. [16] In the light of this ruling, the only possible solution to continue ongoing arbitration proceedings would be that the arbitrator obtains written consent from both the parties. Such ex-post-facto consent can be construed as retrospective consent operating from the date of appointment. This would satisfy the requirement of mutual consent for the appointment of an arbitrator and make unilateral appointments valid.

6. Conclusion

In conclusion, it can be stated that the present judgment is a notable development in as much as it has finally resolved the issue of unilateral appointment of the arbitrator, which remained unaddressed by the 2015 Amendment as well as the 2019 Amendment. On the other hand, the judgment is flawed, as the Court has misinterpreted the TRF judgment and has resorted to judicial legislation. Nevertheless, it can be seen that the Perkins judgment has already started affecting the appointment procedure of arbitrators in India. Therefore, it's important to determine what amendments would need to be made in the procedure of appointing arbitrators and further determine what the role of arbitral institutions would be within that sphere.

[16] *See also* Bharat Broadband Network Limited vs. United Telecoms Limited, (2019) 5 S.C.C. 755 (India).