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LAW RELATING TO UNILATERAL APPOINTMENT OF SOLE ARBITRATOR

- A CRITICAL ANALYSIS OF PERKINS EASTMAN
JUDGMENT

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Introduction

The jurisprudence on appointment of an arbitrator is filled with plethora of judgments by various High Courts and the Supreme Court. Yet, the law on appointment of an arbitrator always throws up some challenges, which results in new decisions being rendered by Courts. One such recent decision, which has set a new benchmark, is the decision of the Supreme Court in the case of *Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.* (“**Perkins**”).¹ The Supreme Court in order to ensure neutrality of arbitrators, has interpreted Section 11 and the Schedules to the Arbitration and Conciliation Act, 1996 (“**the Act**”), as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (“**Amendment Act**”), to hold that a person who is disqualified from acting as an “Arbitrator” is also disqualified to appoint an “Arbitrator”. Pursuant to the above said decision, several sole arbitrators appointed by one party to the arbitration agreement have resigned either on their own or at the instance of the other party to the agreement in view of the said decision which has created a flutter in various ongoing arbitration proceedings in the country. Further, we understand that petitions have been filed under Section 14 and Section 15 of the Act seeking termination of mandate of arbitrators appointed by one of the parties to an arbitration agreement even in ongoing arbitrations.²

In this article, we propose to closely/critically examine the said judgment in the context of the express provisions of the statute, 246th Law Commission Report (hereinafter referred to as “**Law Commission Report**”) including several other High Court decisions regarding appointment of arbitrator under Part I of the Act, both pre and post amendment in 2015 on the subject.

Background to Challenge

It is not unusual or uncommon in commercial contracts to have an arbitration clause for parties to grant the unilateral power to appoint a sole arbitrator to adjudicate upon their disputes. Moreover, the practice is largely prevalent in Government contracts and Public Sector Undertaking contracts. It is one of the recognized modes of appointment which has been there for a long time. Whether it is advisable to vest power in one party to appoint the sole arbitrator is a matter of debate and it is for the Parliament to make necessary amendments to the law.

(a) Party Autonomy under Arbitration and Conciliation Act, 1996

Consensus and party autonomy between the parties is the essence of arbitration process because an arbitration clause in a contract or agreement entered between the parties has far reaching and wide consequences. Such arbitration agreements take away the right of the parties to avail their remedies in a court of law for resolution of the disputes covered by the terms of the arbitration agreement; and makes the consequent award binding on parties, with a limited right of recourse in terms of section 34 of the Act. One of the foundational pillars of arbitration is the party autonomy in the choice of the procedure. It is virtually the backbone of an arbitration procedure.³ Hence, the Law Commission Report and the subsequent amendments made in 2015 to the Arbitration and Conciliation Act, 1996 have laid emphasis that party autonomy is to be respected.

(b) Trigger to approach High Court/Supreme Court for appointment of Arbitrator.

In view of the recommendations by the Law Commission Report, the Parliament amended the Act vide the Amending Act and introduced certain new provisions to the Act.

¹*Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, 2019 SCC Online 1517.

²*Proddatur Cable TV DIGI Services v. SITI Cable Network Limited*, O.M.P.(T)(COMM.)109/2019.

³*Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited*, AIR 2017 SC185.

Amended provisions relevant to the present discussion are as follows:

“Section 11

.....
(5) **Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator.....**

(6) ***Where, under an appointment procedure agreed upon by the parties, —***

(a) a party fails to act as required under that procedure; or

(b)

(c)

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

.....
(8) ***The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—***

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. (emphasis supplied)

“12. Grounds for challenge. — (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, —

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. —The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. —The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

Therefore, the trigger to approach the Court for appointment of arbitrator under Section 11(6) is activated when a party fails to follow the agreed procedure under Section 11(2) of the Act. If under the agreed procedure, one of the parties has the right to appoint an arbitrator and the said party has appointed an arbitrator, the other party has no right to approach the Court and the Court also does not have the jurisdiction to appoint an arbitrator. The Legislative scheme is very clear that, in

cases where the parties have agreed to settle their disputes by arbitration, the Courts` role is very minimal.

Prior to the 2015 amendment, the trigger for appointment of arbitrator was similar under the corresponding sections of the unamended Act. The only difference between the unamended Act and the amendments made to Section 11 of the Act was that earlier, the power to appoint an arbitrator was vested in the Chief Justice of the Court or his designate which post-amended in 2015 was transferred to Supreme Court/High Court as the case maybe.

Likewise, the Parliament amended Section 12 of the Act and, *inter-alia*, modified Section 12 (1), added Section 12(5), Fifth and Seventh Schedule to the Act to serve as a guide for appointment of independent and impartial arbitrator and also provided the exhaustive grounds for disqualification of arbitrator.

Before the amendment to the Act in 2015, the idea of balancing party autonomy and independence/ impartiality in appointment of sole arbitrator was extensively discussed by the Supreme Court in its judgment of *Indian Oil Corporation v. Raja Transport (P) Ltd.*⁴ The Court after examining the provisions of the Act as it stood prior to the amendment, held that the Act per se does not bar appointment of an employee of a party (Govt. or its instrumentalities) as a sole arbitrator especially where the named arbitrator is a senior officer of the Government/statutory body/Government company, and had nothing to do with execution of the subject contract, then there can be no justification for anyone doubting his independence or impartiality. However, the Supreme Court also noted that ground realities may differ with this observation of the Court and suggested that the Government should reconsider their policy providing for arbitration by employee-arbitrators in view of the concepts of independence/impartiality under the Act and a general shift may be necessary in future for understanding the word "independent" as referring to someone not connected with either party as that will increase the credibility of arbitration process. Even after recording this suggestion, the Court held that the jurisdiction of the Court under Section 11(6) of the Act, arises only when parties have not followed agreed procedure. Therefore, the Court allowed one of the parties to appoint their own employee as an arbitrator as per the agreed procedure between the parties. Further, the Court never expressed any view on one party having the right to appoint the arbitrator.

246th Law Commission Report

The Law Commission of India in its Law Commission Report,⁵ which served as the driving force behind 2015 amendments brought to the Arbitration and Conciliation Act, 1996, proposed to introduce certain changes which warranted safeguards to ensure that the arbitration proceedings are indeed unbiased. The Law Commission Report emphasized on the need for appointment of neutral and impartial arbitrators along with balancing the party autonomy at the same time.

The Commission in order to ensure that every arbitrator shall be independent and impartial at the time of his/her appointment, proposed to introduce the guidelines provided by International Bar Association ("**IBA**"), to determine the grounds of independence and impartiality in the form of Fifth and Seventh Schedule (referred as Fourth and Fifth Schedule respectively in the Law Commission Report) under the Act. The Fifth and Seventh Schedule introduced vide the 2015 amendment to the Act, find their source in the Red and Orange lists of the IBA (International Bar Association) Guidelines on Conflicts of Interest in International Arbitration.

The relevant paragraph 59 and 60 of the Law Commission Report has been reproduced as follows:

"59. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in

⁴*Indian Oil Corporation v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520.

⁵Law Commission of India, Report No. 246: Amendments to the Arbitration & Conciliation Act, 1996.

International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the 31 categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

Note- This amendment is in consonance with the principles of natural justice, that an interested person cannot be an adjudicator. The Fifth Schedule incorporates the provisions of the Waivable and Non-waivable Red List of the IBA Guidelines on Conflict of Interest. However, given that this clause would be applicable to arbitrations in all contexts (including in family settings), it is advisable to make this provision waivable, provided that parties specifically agree to do so after the disputes have arisen between them.

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule.”

The Hon’ble Supreme Court in the case of *HRD Corporation v. GAIL (India) Limited*,⁶ while interpreting the two Schedules held that the doubts as to the independence and impartiality of the arbitrator are justifiable only if a third person would reach a conclusion that an arbitrator would be influenced by factors other than the merits of the case. This test requires taking a broad common-sensical approach to the Schedules – a fair construction neither tending to enlarge or restrict unduly.

The Law Commission while proposing amendments to the Act to ensure that every arbitrator shall be independent and impartial did not think it to be appropriate to comment on rights of one party appointing the sole arbitrator. It was only dealing with the position that the arbitrator so appointed must have minimum level of independence and impartiality that is required in the arbitral process regardless of the parties apparent agreement.⁷

Relevant Judgments relating to Appointment of Sole Arbitrator

The Supreme Court in the judgment of *TRF Limited v. Energo Engineering Projects Limited*,⁸ (“**TRF judgment**”) was faced with a dispute resolution clause which stipulated that any difference or dispute between the parties shall be referred to sole arbitration of Managing Director of buyer or his nominee. The Supreme Court held 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. The Court in its final decision held that it is inconceivable in law that someone who is statutorily ineligible to be appointed as an arbitrator can nominate an arbitrator. Although it can be argued that the power to appoint an arbitrator is independent and severable from the right to act as an

⁶*HRD Corporation v. GAIL (India) Limited*, 2017(5) ARBLR 1 (SC).

⁷*Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers Pvt. Ltd.*, 249 (2018) DLT 619 (The judgment is under challenge before Hon’ble Supreme Court in SLP No. 7161-7162/2018. However, there has been no stay on the operation of judgment by the Hon’ble Court.).

⁸*TRF Limited v. Energo Engineering Projects Limited*, AIR 2017 SC 3889.

arbitrator, however, the Court did not examine the case from that perspective. It merely proceeded to hold that if the Managing Director was disqualified to act as an arbitrator; such disqualified person cannot appoint another person to act as an arbitrator.

Soon after this judgment, the High Courts around the country when faced with similar question of law, distinguished the TRF judgment and decided in favor of the rights of the party to nominate a sole arbitrator irrespective of the fact that the person nominating the arbitrator has himself been declared as ineligible under the Act.

The High Court of Delhi encountered a similar issue in the case of *Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers Pvt. Ltd. and Ors*⁹ ("**Bhayana Builders**") in which a petition under Section 14(2) of the Act was filed praying for termination of the mandate of the sole arbitrator appointed by the Managing Director of the respondent. The dispute resolution clause in this case provided that the dispute shall be finally resolved in accordance with the Act, by a sole arbitrator to be nominated by the Managing Director of the first party in New Delhi. It is important to highlight that the dispute resolution clause in this case did not stipulate that the Managing Director must act as an arbitrator and the rights of the Managing Director were limited to the nomination of sole arbitrator. Prior to arriving at its final decision, the High Court firstly distinguished the present judgment with the TRF judgment passed by the Supreme Court. The High Court held that in TRF judgment, the Managing Director was himself the designated as the sole arbitrator, while it was not so in the present case and hence, the TRF judgment cannot be relied upon by the petitioner. Finally, the Court held that the TRF judgment cannot be read to say that even if the parties agree that one of the party to the agreement shall appoint an arbitrator, the said power has been taken away and such agreement should be rendered void due to the amended Section 12(5) of the Act. Hence, the High Court was of the view that the dispute resolution clauses which provide the unilateral power of nomination to the disqualified person of a party will be valid under the Act and will survive the onslaught of Section 12(5) of the Act.

In another judgment, a Co-ordinate bench of the Delhi High Court in the case of *D.K. Gupta & Anr. v. Renu Munjal*,¹⁰ upheld the validity of a dispute resolution clause which provided unilateral power of nominating a sole arbitrator to the respondent. Similarly, in various other judgments of High Court of Delhi as late as August 2019, the Court has consistently upheld the validity of unilateral nomination of arbitrators by one of the parties of the contract.¹¹

The High Court of Calcutta also expressed a similar view in its judgment of *Divyendu Bose v. South Eastern Railway*,¹² wherein the High Court opined that the dispute resolution clause in the present case limited the power of the respondent to only nominate an arbitrator unlike the TRF judgment where the clause provided that the disqualified person himself could act as an arbitrator or can appoint his nominee and upheld the nomination of the arbitrator by one party. In a similar manner, various other judgments of the Calcutta High Court relied on the judgment of *Divyendu Bose (supra)* and decided in favour of dispute resolution clauses which unilaterally empowered one of the parties to nominate a sole arbitrator.¹³

The High Court of Bombay in the case of *DBM Geotechnics & Constructions Pvt Ltd v. Bharat Petroleum Corporation Ltd*,¹⁴ held that the right in a person to nominate an arbitrator who has

⁹Supra note 7.

¹⁰*D.K. Gupta v. Renu Munjal*, (OMP) (T) (COMM) 106/2017.

¹¹*Kadimi International Pvt. Ltd. v. Emaar MGF Land Limited*, 2019 (4) ArbLR 233 (Delhi); *Sriram Electrical Works v. Power Grid Corporation of India Ltd.*, 2019 SCC Online Del 977; *Worlds Window Infrastructure and Logistics Pvt. Ltd. v. Central Warehousing Corporation*, 2018 SCC Online Del 10600; *C P Rama Rao v. National Highways Authority of India* ARB.P. 345/2017.

¹²*Divyendu Bose v. South Eastern Railway*, A.P. No. 1075 of 2017.

¹³*Rockwell Automation India Pvt. Ltd. v. Steel Authority of India Ltd.*, AP 782 of 2018; *Paritosh Debnath. v. Magma Fincorp Limited*, AP No. 265 of 2019.

¹⁴*DBM Geotechnics & Constructions Pvt Ltd v. Bharat Petroleum Corporation Ltd*. [2017 (5) ABR 674].

become ineligible by the supervening change in law is not lost even under the amended Act. The High Court was also of the categorical view that the person authorized to nominate an arbitrator must exercise that power in the manner that the law requires, i.e., by appointing an independent and neutral arbitrator. Interestingly, the High Court in this case faced similar dispute resolution clause as TRF judgment. However, the Court applied the doctrine of severability and held that the invalid part of dispute resolution clause can be severed to give effect to the valid part and such conduct is not alien under law and upheld the validity of nomination.

Hence, major courts around the country have decided in favour of power of a party to unilaterally nominate an arbitrator as such nominations are not barred under the Act. Also, the Courts were of the consistent view that there is a distinction between the power of a disqualified party to act as an arbitrator and the power of a disqualified party to nominate an arbitrator as per the procedure agreed under the dispute resolution. Further, the Courts also held that while the former is explicitly barred under the amended section 12(5) of the Act, the latter is not barred under the Act. Subsequently, the Courts also held that principles of TRF judgment are only applicable to the dispute resolution clauses of former nature and not on the dispute resolution clause of latter nature.

Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd

The Supreme Court in Perkins judgment has stirred the controversy surrounding the TRF judgment. One of the issues before the Supreme Court was whether one party to the agreement can nominate the sole arbitrator, and if so, whether such appointment was illegal, and Courts can interfere in such appointment.

The Supreme Court after discussing the TRF judgment concluded that the Managing Director in the said case had two capacities under the dispute resolution clause i.e. first, as an arbitrator and secondly, as an appointing authority. In the first category of cases, the Supreme Court held that the element of invalidity would be directly related to the disqualified person as he will have interest in the outcome of the result and therefore disqualified under the Act. Surprisingly, the Supreme Court extended the similar invalidity to the second category of cases and held that if interest in outcome is to be taken as basis for possibility of bias, then it will be present in both categories of cases. Hence, the Supreme Court held that the dispute resolution clauses which merely provide rights to the Chief Managing Director of a party to nominate an arbitrator will also be invalid and unsustainable under the Act. While arriving at its decision, the Supreme Court was completely aware that this decision will disentitle any party to an agreement to appoint a sole arbitrator. However, the Supreme Court was of the view this is the logical deduction of TRF judgment. The Court clarified that the law has been laid down by Supreme Court in the cases of *Bharat Broadband Network Limited v. United Telecoms Limited*¹⁵ and TRF (supra), wherein it was held that ineligibility under Section 12(5) read with Schedule VII of the Act will have retrospective application and is not confined to only a prospective application.

Critical Analysis of Perkins Judgment

(a) Violation of Strict Provisions of Statute

Section 11(2) of the Amendment Act states that the parties are free to agree on the procedure for appointing the arbitrator(s). Section 11(5) of the Act applies only where the parties fail to agree on a procedure for appointing a sole arbitrator. Section 11(6) of the Act applies where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure. Similarly, under Section 12(4) of the amended Act, a party can challenge appointment of an arbitrator. From a combined reading of Section 11(2) and 12(4) of the amended Act, it is apparent that the Parliament has authorized the parties to agree on a procedure under an arbitration clause to appoint a sole arbitrator or unilaterally appoint a sole arbitrator.

¹⁵*Bharat Broadband Network Limited v. United Telecoms Limited*, (2019) 5 SCC 755.

However, if the intention of the Legislature was that the procedure for appointing an arbitrator cannot provide for one of the parties alone making the appointment of the arbitrator, it would have provided so in the amendment. It is also pertinent to note that it is only on the failure of a party to act as required under the agreed procedure, that the Court can exercise its powers under sub-section (6) of Section 11 to the amended Act.¹⁶

If the legislative intent was to do away with the appointment of sole arbitrator by one party, then every appointment of a sole arbitrator must be necessarily consensual failing which the appointment has to be ultimately done by Court. However, a bare reading of Section 11(2) and 11(5) does not seem to suggest such interpretation. Taking away the rights of a party to appoint the arbitrator as per the agreed procedure seriously impairs the party autonomy which is the backbone of alternate dispute redressal mechanism.

The Supreme Court both in the TRF judgment and Perkins Eastman judgment relied on and justified its intervention under Section 11(6) of the Act and held that unless the appointment of the arbitrator is *ex facie* valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Act, acceptance of such appointment as a *fait accompli* to debar the jurisdiction under Section 11(6) cannot be countenanced in law. It is pertinent to highlight that the observation made by the Supreme Court is applicable only when the Court is exercising its jurisdiction under Section 11(6) of the Act.

However, the Court erred in law by entertaining an application under Section 11 (6) of the Act as the explicit provisions of the Act do not provide any challenge procedure to appointment of arbitrator under Section 11 of the Act. The grievance regarding impartiality and independence of the arbitrator who is appointed by a party under procedure agreed between the parties to an arbitration agreement has to be raised as per the specific provisions of the Act, for example under Section 13 or 14 or under Section 34 of the Act at the time of setting aside of award, but in no way a party can take refuge under Section 11 of the Act as procedure to challenge an appointment.¹⁷ Finally, such intervention under Section 11 which is not provided under the Act will also fall foul of Section 5 of the Act which provides that Courts should endeavor to ensure minimum intervention in an arbitration proceeding.

The Parliament has provided necessary checks and balances to ensure fair, unbiased and independent arbitrators, even if they are sole arbitrators appointed by one party to the agreement, by introducing amendments to Section 12 and by providing Fifth and Seventh Schedules to the Act. Further, the mandatory requirement under Section 12 of having specific disclosures by a prospective arbitrator with respect to any interest or relationship of any kind with any of the parties which might raise doubts on the impartiality and neutrality of the arbitrators will serve no purpose if bias or conflict of interest is to be irrationally and unreasonably imputed to an arbitrator appointed by a party without any assessment of disclosures made. Such mandatory requirement of seeking a disclosure from a prospective arbitrator will be a futile exercise as the requirement has been incorporated in the statute to ensure that an arbitrator has no conflict of interest. As per the scheme of the Act, the enquiry of impartiality and independence has to be determined from the disclosures made by the prospective arbitrator and Schedules of the Act and not from the source of his appointment. If one of the parties still feels that the appointed sole arbitrator is biased and partial, then the remedy for such party lies under Section 13 and 14 of the Act.

The Fifth and Seventh Schedules cannot be expanded by the Courts to remove the remotest likelihood of bias and that is not an acceptable way of interpreting the Schedules.¹⁸ The Fifth and Seventh Schedule is rather quite comprehensive and leaves no room for any ambiguity or for any

¹⁶*Aravali Power Company Pvt. Ltd. v. Era Infra Engineering Ltd.*, AIR 2017 SC 4450.

¹⁷Supra note 6.

¹⁸Ibid.

implied inclusions and has to be looked at strictly. Mere allegations of bias are not a ground for removal of an arbitrator.¹⁹

The Parliament has enacted and included every reasonable possibility inspired by the IBA guidelines, which can possibly make a person ineligible due to conflict of interest to be appointed as an arbitrator. It is also interesting to note that the IBA guidelines which are internationally acknowledged guidelines also do not bar appointment of a sole arbitrator by one party if the arbitration clause provides for it. Considering the same, Perkins judgment requires reconsideration.

(b) Legislative Intent and Judicial Interference

It is a cardinal rule of the interpretation of statute that the Court is bound to interpret a provision according to the literal and plain meaning of the language used in the statute if no ambiguity exists. The Court cannot add, alter or modify the statute. It has been consistently held that the Court cannot be permitted to legislate in garb of the interpretation of the Statute.

The Constitution Bench of the Supreme Court in the judgment of *Bharat Aluminium Co v. Kaiser Aluminium Technical Services*,²⁰ held that where the meaning of the statutory words is plain and unambiguous, it is not for the judges to add and amend or, by construction, make up deficiencies which are left in the Act.

In another judgment delivered by a three-judge bench of the Supreme Court in the case of *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*,²¹ upheld party autonomy in commercial contracts and held as herein below:

"In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. In that context, particularly in agreements of arbitration, where party autonomy is the ground norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement."

It would appear that the decision given by the High Court in the TRF judgment seems more appropriate considering the 2015 amendment and the legislative intent behind it. The Perkins judgment failed to consider para 17 of the TRF case which states that, *"It has been observed by the designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions. He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth Schedule to the Act, there was no justification for interference."*

Both the judgments of the Supreme Court i.e. TRF and Perkins, expanded the intent of the Parliament to an extent that it could be construed as judicial legislation. The Legislature was never concerned with the powers of nomination of the appointing authority. The intent of the legislation has been succinctly and logically summarized by the High Court of Delhi in the case of *Bhayana Builders*.²² The relevant extracts of the judgment are reproduced hereinbelow:

".....In fact, paragraph 56 of the Report contains two issues: - (i) State appointing an arbitrator; (ii) Such arbitrator being employee of the State. The Law Commission confined

¹⁹*The Government of Haryana PWD Haryana (B and R) Branch v. M/s G.F. Toll Road Pot. Ltd.* (2019) 3 SCC 505.

²⁰*Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc.*, (2012) 9 SCC 552.

²¹*Bharat Aluminium Company v. Kaiser Aluminium Technical Services, Inc.* AIR 2016 SC 1285.

²²Supra note 7.

its examination only to the second issue and made no comment/recommendation on the first.

.....
24. *As noted above, the Agreements that provide for one of the party to choose the Arbitral Tribunal for the parties have been in existence even prior to the insertion of the Section 12(5) of the Act. If this was the mischief that the Law Commission as also the amendment by way of insertion of Section 12(5) of the Act sought to remedy, it would have said so in clear and unambiguous terms. The legislature, however, did not make such contracts unenforceable but only proceeded to safeguard the parties against appointment of Arbitrators against whom circumstances exist that can give rise to a justifiable doubt as to their independence or impartiality.*

.....
Party autonomy, therefore, has been taken away only to a limited extent and circumstances and it is not for this Court to expand such exclusion in the garb of interpretation of the Act.”

The Hon'ble Supreme Court in both TRF and Perkins judgment has added one more ground of disqualification under the Schedules i.e. Fifth and Seventh Schedule of the Act which was neither intended nor provided by the Parliament.

Lastly, the Supreme Court in the Perkins judgment while relying upon TRF judgment went a step ahead than the said judgment by holding that the logical deduction of TRF judgment is that the parties cannot nominate a sole arbitrator. The Supreme Court in its decision of *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. & Ors*,²³ has held that a decision, as is well-known, is an authority for which it is decided and not what can logically be deduced therefrom and a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. It is pertinent to note that the dispute resolution clauses in both TRF and Perkins judgment were completely different. Hence, the reliance of the Supreme Court on the TRF judgment in the Perkins judgment and arriving at a conclusion by logically deducing from the TRF judgment, something which was not provided under the said judgment, is against the settled principles of law. Therefore, the Supreme Court committed a grave error of law and should reconsider.

The Way Forward

As discussed in this paper, the Courts have perceived the agreement for procedure of arbitration between the parties as a manifestation of party autonomy in arbitration proceeding. In fact, the Courts have called party autonomy as a cornerstone of arbitration process. In view of the same, the Act provides an option to the parties to an arbitration proceeding to get their disputes resolved through a sole arbitrator as the method is fast and cost-effective. The amendments made to the Act in the year 2015 were a laudable attempt of the Parliament to strike a balance between independence/impartiality, neutrality of an arbitrator and party autonomy through the amendments made under Section 11 and 12 of the Act and introduction of Fifth, Sixth and Seventh Schedule to the Act in order to increase the credibility of arbitration proceeding. Hence, the intent of the Parliament was very clear that, irrespective of the party who is appointing an arbitrator, it must be ensured that the person who is appointed as an arbitrator is a neutral, independent and impartial arbitrator. The Courts have called this as limited curtailment of party autonomy of the parties.

However, the combined effect of Supreme Court of both TRF and Perkins judgment has taken away the right to appoint the sole arbitrator by one of the parties to the arbitration agreement. As held in the discussion hereinabove, that this was never the intent of Parliament and the same could not be deduced by the express provisions of the statute. The Supreme Court, through these two judgments, has made clear that the only option remaining with the parties is to approach the Court for appointment of an arbitrator in agreements which provide for appointment of sole arbitrator

²³*Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd.*, AIR 2003 SC 511.

agreement by one party if there is no consensus between the parties on the choice of arbitrator. Such practice will also be against the golden rule of minimum Court intervention, as provided under the Act. As a result, all the ongoing arbitration proceedings where one party has appointed an independent and impartial sole arbitrator as per the Act and agreements where one party has the right to appoint the sole arbitrator have been put in jeopardy.

In an attempt to find a middle ground, a three judge bench of Hon'ble Supreme Court in the judgment of *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*,²⁴ held that the power to nominate the arbitrator is counter-balanced by the power of choice given to the other party to select its nominee Arbitrator from the panel of arbitrators proposed by Railways. Interestingly the Railways had the right to appoint its nominee including the appointment of the presiding officer of the Tribunal. The other party had the choice of proposing two names from a panel of four given by Railways, of which the Railways had to right to choose one as the other party's nominee. The said judgment in a way upholds Railways right to constitute the Tribunal in terms of the agreement. The Court passed the said judgment after taking note of TRF and Perkins judgment. The Supreme Court also dismissed the view of High Court wherein it has observed that the powers of the Court to appoint arbitrator are independent of the contract between the parties and no fetters could be attached to the powers of the court. Therefore, the Supreme Court in above judgment has in a way diluted the effect of Perkins judgment. If Perkins has to be applied strictly in the facts of the above case, Railways had no right to compel the other party to choose its nominee from the panel suggested by Railways, as they will be interested in the outcome, by applying the extended logic of disqualification.

Therefore, the law regarding right of a party to appoint the sole arbitrator in cases where the agreement clearly provides for the same, requires reconsideration and law requires to be settled to clear the doubts. Either the Parliament should amend the law in line with the Perkins judgment or the Supreme Court has to reconsider its decision in the light of the statutory provisions, which it has not considered while rendering the Perkins judgment.

This paper has been written by R. Sudhinder (Senior Partner), Nikhil Kumar Singh (Associate) and Pierre Uppal (Associate).

²⁴*Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, 2020(1) ALT 70.

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