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An Analysis On The Emerging Scope of Challenging The Appointment of Sole Arbitrator Vis-À-Vis Judicial Interpretation In India

INTRODUCTION

The law relating to arbitration in India is contained in the Arbitration and Conciliation Act, 1996. It came into force on the 25th day of January, 1996. The law on arbitration in India at the time of adoption of the new Act was substantially contained in the three major enactments: the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. However, it was widely felt that the enactment of 1940, which contained the general law of Arbitration, had become outdated. It was in the year 1985, when the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration, wherein the General Assembly of the United Nations recommended that all countries should give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The Arbitration and Conciliation Act, 1996 seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules.[1] It was in the case of ***Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd,***[2] that the Hon'ble Supreme Court described the beneficial features of the Act as follows: (i) fair resolution of a dispute by an impartial tribunal without any unnecessary delay or expense; (ii) party autonomy is paramount subject only to such safeguards as are necessary in public interest; and (iii) the Arbitral Tribunal is enjoined with a duty to act fairly and impartially.

Part I of the Arbitration and Conciliation Act, 1996 contains provisions of **'Arbitration under Agreement'.** The new Act has ruled out the categories of arbitration in suits and arbitration with the intervention of the court. It reduces the process of arbitration only to one type, namely, Arbitration under Agreement. Under this Part, Sections 10, 11, 12, 13, 14, 5th Schedule and 7th Schedule reflects the importance of impartiality and independence of the arbitrators. It is significant to understand that the jurisprudence on appointment of the arbitrators, including the appointment of sole arbitrator, has been filled with a plethora of landmark judgments by various High Courts and

Supreme Court. Yet, the most contentious issue revolves around the appointment of arbitrators under Section 11 of the Act, as the said section has been exposed to many significant challenges and diverse interpretations across many rulings. This Article attempts to throw some light on varied landmark judicial rulings and their interpretations against the emerging scope of challenging the appointment of sole arbitrator in India.

RELEVANT PROVISIONS UNDER THE ACT

Section 10 of the Act provides for **'Number of Arbitrators'**. It stipulates that it is the discretion of the parties to determine the number of arbitrators, provided that such number shall not be an even number. Thus, the parties are conferred with the liberty to determine the number of arbitrators. The section also provides that, failing such determination of the number of arbitrators, the Arbitral Tribunal shall consist of a sole arbitrator. However, if the parties wishes to have more than one arbitrator, they will have to expressly so provide in the agreement, otherwise the reference is to be to a sole arbitrator appointed with the consent of the parties. In the case of ***M.M.T.C. Ltd vs. Sterlite Industries (India) Ltd,*** [3] it was held that *"an agreement is not to be invalidated simply because it provides for appointment of an even number of arbitrators."* This is further supported by the Supreme Court in the ruling of ***Narayan Prasad Lohia vs. Nikunj Kumar Lohia,*** [4] wherein it was observed and held that *"Undoubtedly, Section 10 provides that the number of arbitrators shall not be an even number. However, if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3), the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator."*

Section 11 of the Act provides for **"Appointment of Arbitrators".** This section is deemed to be the 'essence' of the Arbitration and Conciliation Act, 1996, even though the same section is highly contentious and challenging in the entire statute. It lists in detail the procedure for appointment of the arbitrators with court intervention and also empowers the court to examine the existence of an arbitration agreement while deciding the application for such appointment. The sole object of seeking court assistance under the Act is to secure constitution of the arbitral tribunal expeditiously. Parties to an arbitration agreement can agree upon a procedure for appointment of a sole arbitrator or arbitrators as contemplated under **Section 11(2).** In case of failure of the procedure in securing the appointment agreed between the parties, the aggrieved party can invoke sub-sections (4), (5) or (6) of Section 11, as the case may be.[5] One common feature between these sub-sections is about securing the appointment of arbitrators upon request of a party to the Supreme Court or High Court or any person or institution designated by such court, on account of failure to do the same within thirty days from the receipt of a request to do the same or within thirty days from the date of the appointment of two arbitrators. **Section 11(4)** provides for the existence of an arbitration procedure and failure of a party to appoint an arbitrator within thirty days from the receipt of a request from the other party or when two appointed arbitrators fail to agree on a third arbitrator within thirty days from the date of their appointment, then such an appointment shall be made upon a request of a party to the Supreme Court or High Court. **Section 11(5)** deals with the parties failing to agree in appointing a sole arbitrator within thirty days from receipt of a request by one party from the other party, then such appointment shall be made, upon request to the Supreme Court or High Court or any person or institution designated by such court. **Section 11(6)** of the Act comes into application only when a party has failed to act in terms of the arbitration agreement. It contemplates that a request be made to the Supreme Court or High Court or any person or institution designated by such court, to take necessary measures when under an

appointment procedure agreed upon by the parties-

- A party fails to act as required under that procedure; or
- The parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- A person, including an institution, fails to perform any function entrusted to him or it under that procedure.

For filing an application under Section 11(6), no time limit has been prescribed, as compared to thirty days' time period given under Sections 11(4) and 11(5) of the Act.

Section 11(3) and Section 11(5) comes into application only when there is no agreement between the parties, as referred to under Section 11(2), i.e., the parties have not agreed on a procedure for appointing the arbitrator or arbitrators.

Section 11(7) makes the decision of the Supreme Court or High Court or any person or institution designated by such court on the matters entrusted by sub-section(4) or sub-section (5) or sub-section (6) to be final and no appeal, including Letters Patent Appeal (LPA) shall lie against such decision.

Section 12 of the Act stipulates for **'Grounds for Challenge.'** In brief, **Section 12(1)** states that when a person has been approached for his appointment as an arbitrator, he has to disclose in writing any circumstances direct or indirect, past or present, which may show any relationship with or interest in any of the parties, or in relation to subject-matter of the dispute. It may be of any nature like financial, business, professional or other kind. They should be such as to cast any justifiable doubts as to his independence or impartiality and which are likely to affect his ability to devote sufficient time to the arbitration and ability to complete the work within 12 months. Further, the **Explanation 1** appended to the section provides that the applicable grounds have been stated in the **Fifth Schedule,** which shall guide in determining whether circumstances exist, which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Also, **Explanation 2** provides that such disclosure shall be made in the form specified in **Sixth Schedule.**

Section 12(2) provides that if any such circumstances referred to in Section 12(1) arise subsequently, the parties have to be informed in writing. **Section 12(3)** stipulates challenging the appointment of an arbitrator on one or more of the following grounds:

- That circumstances exist which give rise to justifiable doubts as to his independence or impartiality; or
- That he does not possess the qualifications agreed to by the parties.

Thus, an arbitrator can be challenged on the ground of his impartiality or independence and also if he lacks qualifications required by the parties. **Section 12(4)** provides that a party can challenge his own arbitrator only if he became aware of the ground of challenge subsequently to appointment. **Section 12(5)** mentions that if the categories specified in the **Seventh Schedule** are applicable to an arbitrator, he becomes ineligible. The **Proviso** appended to this sub-section provides that subsequently, to arising of the dispute, parties may waive application of Seventh Schedule by an express agreement in writing.

The above-mentioned provisions are relevant and significant for the purpose of an elaborate

discussion in this Article on challenging the appointment of sole arbitrators.

JUDICIAL TRENDS AND INTERPRETATIONS ON CHALLENGING THE APPOINTMENT OF SOLE ARBITRATORS

Surprisingly, the Supreme Court has paved way to diverse significant interpretations on challenging the appointment of Sole Arbitrators. There have been a plethora of judgments wherein each time, each significant ruling has rendered noteworthy interpretations against the same line of issue, thereby enabling the development of interpretative judicial trends. Each ruling has its significance to the interpretation that is has rendered and the scenario of judicial trends towards analyzing and determining the issue of challenging the appointment of sole arbitrators, has taken a whole new path which is not only contentious but also equally stimulating. An insight into each of such significant yet contentious interpretations rendered and closely analyzed by the Supreme Court across diverse judgments on the similar line of issue, is necessary to be highlighted and emphasized upon.

1. **Statutory Disqualification for Appointment of Arbitrator Renders Disqualification to Nominate Another Arbitrator**

The judicial evolution of Section 11 has its significance and influence in a landmark ruling rendered by the Hon'ble Supreme Court in the year 2017. In the very renowned case of ***TRF Ltd. vs. Energo Engineering Projects Ltd.,*****[6]** the issue under consideration was **whether the appointment of an arbitrator by the Managing Director of the Respondent Company was a valid one and whether a statutory disqualification also meant a disqualification of the power to nominate?** In this case, there was a dispute regarding the enforcement of bank guarantee, wherein in the year 2014, the respondent issued a purchase order to the appellant for various articles. The appellant had given an advance bank and performance guarantee. However, the appellant approached the High Court to restrain the encashment of the guarantee. In the meanwhile, the appellant invoked the arbitration clause of the General Terms and Conditions of the Purchase Order (GTCPO), wherein it mentioned the appointment of Managing Director or his nominees as the Sole Arbitrator. It was argued by the appellant that the High Court should appoint the arbitrator under Section 11(6) because in light of Section 12(5), the Managing Director was ineligible to act as an arbitrator and thus, consequently ineligible to arbitrate as well. However, the High Court rejected this argument and stated that *"merely because the MDD is disqualified to act as an arbitrator, he is not devoid of his power to nominate"*.**[7]** This ruling was challenged before the Hon'ble Supreme Court. The Supreme Court analyzed the arbitration clause under GTCPO and invalidated the same that allowed the appointment of Managing Director or his nominees as the Sole Arbitrator, on the reasoning that *"when the person who was to act as an arbitrator in terms of the arbitration clause became statutorily incompetent to act as an arbitrator (by virtue of Section 12(5) of the Act), such a person was also disqualified to nominate another arbitrator even if so provided in the arbitration clause."***[8]**

The decision rendered by the Hon'ble Supreme Court in the case of *TRF Ltd,***[9]** was highly followed and relied upon in the 2019 significant case of ***Bharat Broadband Network Ltd. vs. United Telecoms Ltd,*****[10]** wherein the Apex Court held that *"an arbitrator, appointed by a person who is ineligible to act as an arbitrator is de jure unable to perform his functions. Further, if the ineligible person appoints an arbitrator in its place, such appointment is void ab initio."***[11]**

However, it is significant to note that a deviation in the observation and ruling laid down by the

Hon'ble Supreme Court in the case of ***TRF Limited,*** was taken and a contrary observation was ruled in the Bombay High Court's significant case of ***DBM Geotechnics & Constructions Pvt. Ltd. vs. Bharat Petroleum Corporation Ltd.,*****[12]** wherein it was held that *"the right in a person to nominate an arbitrator who has become ineligible by the supervening change in law is not lost even under the Amended Act and 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."* In this case, the Bombay High 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 consequently, upheld the validity of nomination."****[13]**

2. **Unilateral Appointment Power of Sole Arbitrator is Deemed Invalid**

The concept of 'Unilateral Appointment Power of Arbitrators being Invalid' is an extension of the analysis rendered in the *TRF Ltd case and Bharat Broadband case,* signifying another important interpretation on the appointment of sole arbitrator or arbitrators unilaterally by one party, as invalid. This concept was first analyzed and discussed elaborately by the Apex Court in the landmark case of ***Perkins Eastman Architects DPC & Anr vs. HSCC (India) Ltd.*** **[14]** The Supreme Court in order to ensure neutrality of arbitrators, has interpreted Section 11 and the Schedules to the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015, "*to hold that a person who is disqualified from acting as an 'Arbitrator' is also disqualified to appoint an 'Arbitrator'.****[15]***" The Hon'ble Supreme Court followed this approach where under the instant case, an arbitration clause empowered only the respondent to appoint a sole arbitrator. Further, in this case the Apex Court seems to have applied one of the facades of the fundamental principle of laws of natural justice, i.e., *"nemo judex in causa sua", (No one can be a judge in his own cause)*. The issues before the court were as follows:

- **Whether an arbitration clause authorizing one of the parties to the contract to appoint the 'Sole Arbitrator' for adjudication of disputes, would be valid in law or not?**
- **What would be the consequence of a situation where the party so authorized to appoint the Sole Arbitrator under the contract, has failed to do so within a period of 30 days from the date of receipt of notice?**

As per the clause 24 of the contract dated 22.05.2017, the Chief General Manager (CGM) of HSCC India Ltd. was authorized to appoint a Sole Arbitrator within 30 days from receipt of notice from the Petitioner. However, the appointment was delayed beyond 30 days and the Petitioner moved to the Supreme Court for appointment of arbitrator, by attacking the arbitration clause giving complete discretion to the CMD of HSCC India Ltd. to appoint the sole arbitrator. It was contended by the Petitioner's that since the CMD of HSCC India Ltd. would be interested in the outcome/ decision of the dispute, the pre-requisite of impartiality would be missing if the HSCC were to appoint an arbitrator.**[16]**

It was held by the Supreme Court that *"the person who has an interest in the outcome of the decision of a dispute, must not have the power to appoint a Sole Arbitrator."* The court also clarified that a case where both the parties have the right to nominate their respective arbitrators, such a clause would be on a different footing for the reason that whatever advantage one of the parties may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. On determining the second issue, the court observed that *"since the appointment of sole*

*arbitrator by one of the parties, i.e., HSCC was not invalid, the court has the power to entertain this petition, barring the 30 days limitation failure."**[17]***

The Bombay High Court in a significant ruling of ***Lite Bite Food Pvt. Ltd. vs. AAI,**[18]* facing the similar issue of unilateral appointment of sole arbitrator by the Respondent, relied upon the *Perkins Case*, holding that *"the procedure of unilateral appointment of sole arbitrator as invalid. Moreover, the Court also invalidated the Respondent's offer to appoint arbitrators from a panel, as the panel was a tailored one and not broad enough to give freedom of choice to opposite party."**[19]***

In less than two months after the *Perkins Case,* the **Delhi High Court in the year 2020** delivered another significant ruling having relied and followed the principles laid down in the *Perkins Case.* In another significant case of ***Proddatur Cable TV Digi Services vs. SITI Cables Network Ltd.,**[20]* the Petitioner had entered into a distribution agreement with the Respondents. Owing to certain disputes between them, the Petitioner appointed a lawyer as its arbitrator, which was rejected by the Respondents and replaced him with another individual on the basis of Clause 13.2, which gave the respondent the power to unilaterally appoint an arbitrator. The issue under consideration being determining **whether the eligibility of the 'Company' referred to in the arbitration clause between the parties, to unilaterally appoint a Sole Arbitrator to adjudicate the disputes between the parties is valid or not?** The Delhi High Court on looking into the underlying basis of the decision of the Supreme Court in *Perkins Case*, concluded that *"while party autonomy is an underlying principle in an arbitration agreement, the procedure laid down in the arbitration clause cannot be permitted to override considerations of impartiality and fairness in arbitration proceedings."**[21]* Thus, on emphasizing the underlying principle laid down in the *Perkins Case*, it was concluded that what sought to be avoided was in fact the appointment of a sole arbitrator by a person having interest in the outcome of the dispute. On the basis of this, it can be concluded that even the Respondent's acting through its Board of Directors, was not eligible to unilaterally appoint a sole arbitrator, as it was an interested party.**[22]**

Similarly, in the case of ***Arvind Kumar Jain vs. Union of India,**[23]* **delivered on 4th February 2020,** the issue under consideration was **whether the respondent can insist on the appointment of a Gazetted Officer of Railways as the Arbitrator, especially in light of the apprehension that the petitioner has justifiable doubts regarding the impartiality of the arbitration proceedings when the respondent's own officer has been proposed as the Sole Arbitrator?** The Hon'ble Delhi High Court held that *"the respondent could not pressurize the petitioner to agree to furnish a waiver under Section 12(5) of the Act, to appoint a sole arbitrator of the respondent's choice and further, that the respondent cannot be allowed to contend that only a Gazetted Railway Officer ought to be appointed as the Arbitrator." **[24]***

3. **Appointment of Sole Arbitrator/ Arbitrators from a Limited Panel – Apprehension of Bias, Independence and Impartiality**

The concept of independence and impartiality is not new to the Arbitration and Conciliation Act, 1996. However, the 2015 Amendment gave a prescriptive guidelines of independence and impartiality to make it convenient for the arbitrators, counsels and court while appointing the arbitrators. These guidelines were recommended by the **246th Law Commission**[25] in their report to ensure that the arbitration proceedings are unbiased and efficient.**[26]**

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 Hon'ble Supreme Court in the 2009 case of ***Indian Oil Corporation vs. Raja Transport Pvt. Ltd.***[27] 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 (Government 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 the execution of the subject-contract, then there can be no justification for anyone doubting his independence or impartiality."* Further, it was also observed that the jurisdiction of the Court under Section 11(6) of the Act, arises only when parties have not followed the 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.**[28]**

Subsequently, the Hon'ble Supreme Court in the year 2017, relied and followed the concept of independence/impartiality and party autonomy laid down in the *Indian Oil Corporation Case,***[29]** in a significant ruling of ***HRD Corporation vs. GAIL (India) Ltd.***[30] The Apex Court while interpreting the 5th Schedule and 7th Schedule of the Arbitration and Conciliation Act, 1996 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."***[31]**

There has been a plethora of significant rulings discussing on the issue of **'Appointment of Sole Arbitrator/ Arbitrators from a limited panel of nominees'.** The Courts have analyzed this particular issue and have consistently concluded that such an appointment of a sole arbitrator/arbitrators from a limited panel of nominees would mean no free choice to a party to nominate a person as an arbitrator and such panel being not broad-based, would certainly create a reasonable apprehension of bias and impartiality.

This particular issue for the very first time was challenged before the Apex Court in the significant case of ***Voestalpine Schienen GmbH vs. DMRC.***[32] **This was the first case adjudicated by the Apex Court after the 2015 Amendment was passed.** In this case, the parties were required to nominate their respective arbitrators from a panel of arbitrators suggested by DMRC, who made a list of arbitrators consisting of serving or retired engineers with requisite qualifications and professional experience. The DMRC shortlisted 5 names from the panel wherein, DMRC and Voestalpine were to choose one arbitrator from the list and then both of these arbitrators shall choose the third arbitrator from the same list. This process was challenged being contrary to Sections 11(6), 11(8) and Section 12(5) of the Act by the Petitioner, stating that such a mechanism for appointment would raise questions over the neutrality of the arbitrator. While determining this issue, the Apex Court observed and reasonably concluded that *"the choice given to the opposite party is limited and there is no free choice to nominate a person out of the entire panel prepared by DMRC. Further, DMRC choosing 5 names out of the list and then opposite party, choosing their respective arbitrator from those 5 names, this would instill the idea of bias in mind of the opposite party. Thus, the opposite party shall be given the full freedom to nominate an arbitrator from the entire panel."***[33]** The Court also suggested that the panel should be broad-based and it should not only involve retired government employees, but also experienced and eminent engineers from private sector.

However, there seems to be issues with this judgment, on the grounds that-**[34]**

- Firstly, there is no clarity on what number of names on a panel is appropriate for it to be not struck down.
- Secondly, there is no clarity on what constitutes a 'broad-based panel".

Subsequently, in the year 2019, the Supreme Court in the case of ***Central Organization for Railway Electrification vs. M/S ECI-SPIC-SMO-MCML (JV),*** [35] upheld an arbitration clause in the agreement that the Arbitral Tribunal was to comprise of three serving and/or retired 'Railway Officers', where one arbitrator would be chosen by Contractor from a panel of Railway Officers prepared by Central Organization for Railway Electrification (CORE) General Manager who also had the right to appoint the other two arbitrators, including the presiding arbitrator. The Contractor argued that applying the decisions of *TRF Limited and Perkins Case,* CORE's General Manager could not select / appoint the arbitrators as he was himself ineligible to serve as an arbitrator [pursuant to Section 12(5)]. However, the Supreme Court distinguished these two decisions on the basis that *"the right/role of the CORE's General Manager in appointing the arbitral tribunal was counter-balanced by the contractor's right to select its nominee from the panel of retired Railway Officers prepared by the CORE's General Manager."* [36] Thus, the Supreme Court upheld the arbitration clause and also observed that *"merely being a retired employee of an organization does not necessarily attribute bias against such employee while acting as an arbitrator."* [37] This decision has been heavily criticized for taking a contrary view from the ***Perkins Case and Voestalpine Case.***

Subsequently, the Delhi High Court in two another significant rulings rendered in the year 2020, in ***SMS Ltd. vs. Rail Vikas Nigam Ltd,*** [38] **and in** ***BVSR-KVR (JV) vs. Rail Vikas Nigam Ltd.,*** [39] held that *"the appointment procedure is invalid as the panel suggested by the authority is not broad-based, as it majorly include retired or serving employees of the respondent, creating a reasonable apprehension of bias and impartiality."* [40] In the ***SMS Ltd Case***, the respondent provided the petitioner a panel of thirty-seven candidates to choose its nominee from. Only eight of the thirty-seven candidates were not employed by the respondent in some capacity. The Delhi High Court relied on the ***Perkins case and Voestalpine case,*** to hold that *"the panel did not satisfy the test of neutrality of arbitrators, and consequently, allowed the petitioner's appointment of its nominee outside of the panel."* [41]

4. **Denial of Appointment of Sole Arbitrator As Per Terms of Contract on Grounds of Bias and Impartiality**

The Supreme Court in a very significant case of ***Denel (Proprietary Limited) vs. Govt. of India, Ministry of Defense,*** [42] exercising its powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 reiterated that ***"right to appointment of an Arbitrator does not get automatically forfeited after expiry of 30 days as prescribed under Section 11(4) and 11(5) of the Act, unless petition is filed for appointment of Arbitrator under Section 11(6) of the Act prior to appointment by opposite party."*** [43]

In this case, the parties entered into a contract for supply of certain amount of base bleed units. As per the terms of the contract entered into by the parties, the amount of supplying the base bleed units were increased subsequently. The Petitioner supplied substantial amount of the goods by January 2005, however, some were rejected by the Respondent. The Petitioner was willingly to supply the remaining units to the Respondent, but having received no response from the Respondent regarding the same, led to losses and damages being suffered by the Petitioner. Subsequently, there arose a dispute between the parties on account of non-refund of the claimed

amounts. The parties on failing to resolve the disputes, relied on Clause 19(F) of the Contract on appointing an Arbitrator by the Respondent. The Petitioner challenged the appointment of the said arbitrator on the grounds of apprehension of bias and terminated the appointment vide Notification dated January 23, 2009, under Section 14 of the Act. However, the Arbitrator continued with the proceedings despite the passing of the said Notification. Therefore, in light of the same, the Petitioner filed application before the District Court of Chandrapur for termination of the mandate of Arbitrator. The Hon'ble Court passed orders terminating the mandate of arbitrator and provided for the appointment of Director General, Ordnance Factory (DGOF) as the Arbitrator. However, the DGOF did not commence the arbitration proceedings within 30 days of the passing of the order of the Court. Thus, the Petitioner filed the present petition under Section 11 before the Hon'ble Supreme Court.

There were two predominant issues that came up for consideration before the Hon'ble Supreme Court:

- Whether delay in appointment of an arbitrator by the Respondent amounted to forfeiture of its right?
- Whether apprehensions of bias and impartiality of the appointment of Arbitrator by the Respondent in violation of the principles of natural justice?

It was observed by the Supreme Court after hearing both the parties that the petition is maintainable as the same was filed prior to the Appointment of a new Arbitrator by the Respondent. The Supreme Court having relied on the decisions of ***Datar Switchgears Ltd. vs. Tata Finance Limited,[44]*** **and** ***Punj Lloyd Limited vs. Petronet MHB Ltd.,[45]*** held that *"non- appointment of an Arbitrator within 30 days does not amount to forfeiture of rights under Section 11(6) of the Act. Unlike Sections 11(4) and 11(5) which prescribes a period of 30 days for appointment of an arbitrator, there is no time limit for filing petition under Section 11(6) of the Act. The right to appointment continues provided that the same is made prior to the other party filing the petition."**[46]**

Now, with regard to the second issue on appointment of DGOF or a government servant as an Arbitrator, the Supreme Court relying on its previous ruling of ***Indian Oil Corporation vs. Raja Transport Pvt. Ltd.[47],*** held that *"it is settled law that arbitration agreements in government contracts providing that an employee of the department will be the arbitrator are neither void, nor unenforceable. These officers are expected to act independently and impartially. Thus, referring the disputes to the named arbitrator shall be the rule, and ignoring the named arbitrator and nominating an independent arbitrator shall be the exception to the rule."**[48]** However, the Supreme Court in the present case, refused to appoint an Arbitrator as per the terms of the contract as the apprehensions put forth by the Petitioner had merits.

Therefore, this case has laid down two clear principles with regard to appointment of Arbitrator under Section 11(6) of the Act.

- **Firstly**, failure to appoint an Arbitrator within 30 days as prescribed under Sections 11(4) and (5) of the Act do not amount to forfeiture of rights unless the opposite party has filed their petition under Section 11 (6) prior to the said appointment.
- **Secondly,** though it is a well-established principle that appointment is required to be done as per the terms and conditions of the contract, however if circumstances exist an independent Arbitrator may be appointed as an exception to the general rule, if there is reasonable

apprehension of bias and impartiality.**[49]**

CONCLUSION

Therefore, in light of the significant rulings made by the Hon'ble Supreme Court and various High Courts, as elaborately discussed above, the trend of judicial interpretations on Sections 11 and 12 of the Arbitration and Conciliation Act, 1996 seems to have developed imperative challenges on the way the appointment of sole arbitrators in India is taking place and the very issue of biasedness and impartiality/ independence of the arbitrators pursuant to Section 12, 5th Schedule and 7th Schedule, is revolving around the center of the Arbitration and Conciliation Act, 1996. Each decision rendered has got a whole different scenario in delivering the jurisprudence of appointment of sole arbitrators, vide its interpretative judicial trends. There is a ray of hope in looking forward to many such influential and renowned decisions, revolving around the issue of appointment of sole arbitrators in India, thereby delivering significant interpretations on the same.

Reference:

[1] *TDM Infrastructure Pvt. Ltd vs. UE Development India Pvt. Ltd,* (2008) 14 SCC 271.

[2] (2006) 11 SCC 245

[3] (1996) 6 SCC 716

[4] (2002) 3 SCC 572

[5] https://www.hg.org/legal-articles/law-of-and-procedure-for-appointment-of-arbitrators-in-india-27514

[6] (2017) 8 SCC 377

[7] https://blog.ipleaders.in/appointment-arbitrator-grounds-challenge/

[8] https://www.mondaq.com/advicecentre/content/4428/Sole-Arbitrator-Cannot-Be-Appointed-Solely-By-One-Party

[9] TRF Ltd. vs. Energo Engineering Projects Ltd, (2017) 8 SCC 377

[10] Civil Appeal No. 3972 Of 2019

[11] https://www.mondaq.com/india/arbitration-dispute-resolution/988884/legality-of-unilateral-appointment-of-arbitrator

[12] 2017 (5) ARB 674

[13] https://www.argus-p.com/uploads/blog_article/download/1588417843_Perkins_-_A_Critical_Analysis.pdf

[14] 2019 SCC Online 1517

[15]

https://www.argus-p.com/uploads/blog_article/download/1588417843_Perkins_-_A_Critical_Analysis.pdf

[16] https://www.mondaq.com/advicecentre/content/4428/Sole-Arbitrator-Cannot-Be-Appointed-Solely-By-One-Party

[17] *Ibid*

[18] MANU/MH/3423/2019

[19] https://www.mondaq.com/india/arbitration-dispute-resolution/988884/legality-of-unilateral-appointment-of-arbitrator

[20] 2020 SCC Online Del 350

[21] http://arbitrationblog.kluwerarbitration.com/2020/03/03/the-legality-of-unequal-arbitrator-appointment-powers-in-india-the-clarity-the-mist/

[22] https://www.mondaq.com/india/arbitration-dispute-resolution/904892/arbitrations-by-unilaterally-appointed-arbitrators-in-jeopardy

[23] ARB.P. No. 779 Of 2019

[24] http://arbitrationblog.kluwerarbitration.com/2020/03/03/the-legality-of-unequal-arbitrator-appointment-powers-in-india-the-clarity-the-mist/

[25] https://lawcommissionofindia.nic.in/reports/report246.pdf

[26] https://www.mondaq.com/india/arbitration-dispute-resolution/988884/legality-of-unilateral-appointment-of-arbitrator

[27] (2009) 8 SCC 520

[28] *Law Relating to Unilateral Appointment of Sole Arbitrator-A Critical Analysis of Perkins Eastman Judgment,* Argus Partners, (May 2, 2020)

[29] *Indian Oil Corporation vs. Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520

[30] 2017 (5) ARBLR 1 (SC)

[31] https://www.mondaq.com/india/arbitration-dispute-resolution/988884/legality-of-unilateral-appointment-of-arbitrator

[32] (2017) 4 SCC 665

[33] https://www.mondaq.com/india/arbitration-dispute-resolution/988884/legality-of-unilateral-appointment-of-arbitrator

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