

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. No. 106 of 2020

McLeod Russel India Limited & Anr.

vs

Aditya Birla Finance Limited & Ors.

For the petitioners	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Jishnu Chowdhury, Adv. Mr. Rajarshi Dutta, Adv. Mr. Chayan Gupta, Adv. Mr. Reetoban Sarkar, Adv. Mr. Prasun Mukherjee, Adv. Mr. Deepak Agarwal, Adv.
For the respondents	:	Dr. Abhishek Manu Singhvi, Sr. Adv. Mr. Ranjan Bachawat, Sr. Adv. Mr. Sanjeev Kumar, Adv. Mr. Rohit Das, Adv. Mr. Dwaipayan Basu Mullick, Adv. Ms. Suchismita Ghosh Chatterjee, Adv. Mr. Abhishek Kisku, Adv. Mr. Pranshu Paul, Adv. Mr. Anshul Sehgal, Adv. Mr. Subhankar Das, Adv. Mr. Nidhi Ram, Adv.
Last Heard on	:	08.02.2023.
Delivered on	:	14.02.2023.

Moushumi Bhattacharya, J.

I. Introduction

1. This is an application under section 14 of The Arbitration and Conciliation Act, 1996, for termination of the mandate of the Ld. Sole Arbitrator and stay of all further proceedings in the arbitration pending disposal of the present application.

2. The dispute between the petitioners and the respondents arises out of an Agreement for Arbitration made on 24.3.2018 wherein the respondent no. 1 was described as the “Investor”. The Arbitrator was appointed under clause 3, the material part of which is set out below:

“Clause 3. Any dispute(s), difference(s) and/or claim(s) arising in connection with the Transaction or as to the construction, meaning or effect thereof in relation to any Transaction Document or as to the rights and liabilities of the Parties under any Transaction Document shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments, modifications and/or replacements thereof and the rules framed thereunder, which shall be referred to a sole arbitrator to be appointed by the Investor. The seat of the arbitration shall be India and the venue of the arbitration shall be at such place as determined by the Investor at its sole discretion.”

3. The petitioners say that the appointment is invalid having regard to the unilateral appointment of the Arbitrator by one of the parties to the dispute. Learned counsel appearing for the petitioners further submits that the petitioners did not execute any express agreement in writing to circumvent the invalidity of the appointment. Counsel submits that the unilateral appointment of the Arbitrator is void *ab initio* and the Arbitrator

would hence lack inherent jurisdiction to entertain the arbitration proceeding. It is also submitted that the petitioners' participation in the arbitration would not amount to a waiver as contemplated under the proviso to section 12(5) of the Act. Counsel relies on the applicability of the Seventh Schedule of the Act in this regard and particularly Entry 12 thereof. Counsel also relies on some of the Minutes of the Arbitration Sitzings to urge that there was no express agreement in writing by the petitioners at any point of time as envisaged under the proviso to section 12(5) of the Act. Counsel places at least two instances reflecting the bias of the Arbitrator.

4. Learned counsel appearing for the respondent no. 1 places reliance on the sequence of events to show that the petitioners were aware of a disclosure made by the Arbitrator as far back as in 12.5.2019 and cites several instances thereafter to show that the petitioners knowingly and willingly participated in the Arbitration from 11.5.2019 to 12.2.2020. Counsel submits that the petitioners were also aware of the judgments pronounced by the Supreme Court in *TRF Ltd. vs. Energo Engineering Projects Ltd.* as well as *Bharat Broadband Network Limited vs. United Telecoms Limited* and *Perkins Eastman Architects DPC vs. HSCC (India) Limited* (which will be dealt with later) on the application of section 12(5) but nonetheless continued to participate in the arbitration. Counsel submits that the present application is an afterthought and has been filed only for the purpose of wriggling out of consent orders obtained by the petitioners on 15.7.2019 on the basis of statements made in its affidavit/Statement of Defence. Counsel submits that the pleadings and affidavits filed by the

petitioners including the unequivocal stand taken in the arbitration amounts to an express written agreement under the proviso to section 12(5) and hence a waiver of any alleged disqualification of the Arbitrator.

5. Counsel urges that the Arbitrator is not struck by the disability contemplated in section 12(5) and relies on the specific stand taken by the petitioners of not questioning the integrity of the Arbitrator. Counsel places emphasis on the conduct of the petitioners in filing several applications before the Arbitrator, this Court and the Supreme Court under diverse sections of the Act and pursuing parallel proceedings on the same issue before different forums.

I.A Cases relied on by the petitioners and the respondent no. 1:

6. The decisions cited on behalf of the petitioners have laid emphasis on the absolute requirement of impartiality and independence under Section 12(5) of the Act. The judgments cited are briefly referred to below, from the most recent to backwards.

7. *Ellora Paper Mills Limited vs. State of Madhya Pradesh*; (2022) 3 SCC 1, negated the argument that participation in an arbitration proceeding before the concerned arbitrator will amount to a waiver of the arbitrator's ineligibility. The Supreme Court relied on *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. Vs. Ajay Sales & Suppliers*; which in turn relied on *Bharat Broadband Network Ltd. Vs. United Telecoms Ltd.*; (2019) 5 SCC 755 to reinforce the point of an express agreement in writing to satisfy the requirement of section 12(5) proviso.

8. In *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. vs. Ajay Sales & Suppliers*; (2021) 17 SCC 248, the Supreme Court relied on *Bharat Broadband Network Ltd. vs United Telecoms Ltd.*; (2019) 5 SCC 755 and held that the mandate of an arbitrator who has become ineligible to perform his functions under section 12(5) would automatically stand terminated and the arbitrator shall then be substituted by another arbitrator. The Supreme Court relied on *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665 to stress on concepts of independence and impartiality of an arbitrator. The Supreme Court also rejected the contention that the respondents had forgone their right to approach the High Court for appointment of an arbitrator under section 11 of the Act by participating in the arbitration proceedings before the sole arbitrator.

9. *Perkins Eastman Architects DPC vs. HSCC (India) Limited*; (2020) 20 SCC 760 relied on the pronouncement of the Supreme Court in *TRF Ltd. vs. Energo Engineering Projects Ltd.*; (2017) 8 SCC 377 to hold that the interest of a person rendered ineligible to act as arbitrator will colour a nomination made by that (ineligible) person and give rise to the possibility of bias with reference to the person's interest in the outcome of the dispute.

10. In *Bharat Broadband Network Limited vs. United Telecoms Limited*; (2019) 5 SCC 755, the Supreme Court again stressed on the firmness of an express agreement in writing for waiving the applicability of section 12(5); namely of a person rendered ineligible by way of his/her relationship with the parties or being rendered thus under any of the categories in the Seventh Schedule. The Supreme Court also placed emphasis on the

agreement being made with full knowledge of the parties and express words reposing favour and confidence in the arbitrator.

11. In *TRF Limited vs. Energo Engineering Projects Limited*; (2017) 8 SCC 377, the Supreme Court opined that if the Managing Director of the Corporation has become ineligible by operation of law, the ineligibility will extend to any nomination by the Managing Director of any person to act as an arbitrator.

12. In a recent decision of a Division Bench of the Delhi High Court in *Govind Singh vs. M/s Satya Group Pvt. Ltd.*; *FAO (COMM) 136/2022 and CM Nos. 41441/2022 & 41443/2022*, the Court declined to impute any implied waiver of the right under section 12(5) by conduct or otherwise. In that case the applicant had participated in the arbitral proceedings without raising any objection to the appointment of arbitrator.

13. A Co-ordinate Bench of this Court in *Yashovardhan Sinha HUF vs. Satyatej Vyapaar Private Limited*; *A.P. No.156 of 2022* followed the pronouncement of the Supreme Court in *TRF* and *Perkins* in the matter of an individual being rendered ineligible himself under the provisions of the Act to be appointed as an arbitrator and hence being ineligible to nominate a sole arbitrator. The Court accordingly terminated the mandate of the present arbitrator and appointed a new arbitrator to resolve the disputes between the parties.

14. The respondent no. 1 has cited *Sadanand Das vs. The State of West Bengal*; *CO No. 1676 of 2018* on the point that a challenge under section 13

is different from termination of an arbitrator's mandate under section 14 of the Act.

II. Decision

II.A. Incorporating the concept of Independence and Impartiality of an Arbitrator in the Act of 1996 :

II.A. a. General Scheme of the Act :

15. Sections 12 to 15 of the 1996 Act address the concerns of an arbitrator's ineligibility and impossibility to act on a reference and continue as the master of the proceeding until the making of the award. A substantial part of section 12 was brought in by the Amendment Act of 2016 with effect from 23.10.2015 whereby the earlier pre-amendment requirement of the person appointed as an arbitrator to disclose in writing any circumstance likely to give rise to justifiable doubts as to his independence or impartiality was replaced by a post-amendment sequentially graded situations which would give rise to a presumption of conflict.

16. The second thrust of the amendment was to subject the situations under section 12 outlining the varied scenarios of non-independence to a challenge to the appointment itself. The challenge receives a stage-wise procedure with timelines under section 13 and gives an option to the arbitrator confronted with the challenge to withdraw from his office or to decide on the challenge. The concept of termination of an arbitrator's mandate on lack of independence or impartiality is continued to sections 14 and 15 which provide for the substitution of the arbitrator whose mandate has come to an end.

17. The provisions on ineligibility in section 12 include the arbitrator's inability to devote sufficient time to the arbitration coupled with his inability to complete the entire arbitration within a period of 12 months [12(1)(b)]. The challenge to the appointment of an arbitrator on the grounds provided under section 12 or 14 is not an unconditional legislative grant; the challenge must be accompanied by supporting circumstances which give rise to justifiable doubts as to the arbitrator's independence or impartiality or the arbitrator's lack of qualifications [12(3)(a) and (b)]. The entire procedure of challenge is premised on the party being made aware of the conflict post- appointment.

II.A. b. Waiving the Disqualification – section 12(5) :

18. Section 12 (5) nullifies any agreement made between the parties before the appointment of an arbitrator where the person appointed comes within any of the relationships and categories specified in the Seventh Schedule. The person appointed as an arbitrator shall be rendered ineligible if he or she falls within any of the categories under the Seventh Schedule.

19. The Seventh Schedule - brought into the Act with effect from 23.10.2015 - is a list of broad-based relationship - guidelines encompassing all gradations of relationships between: i) the arbitrator and parties, ii) arbitrator and counsel, iii) arbitrator and the dispute and iv) arbitrator's direct or indirect interest in the dispute. The gradations contemplate the arbitrator not only as a lawyer who may have advised or represented one or more of the parties, but also as a person with a corporate background who may have been part of the management of a company and even as a person

trading in stocks and shares or having close family ties with a third party who may have a present or future interest in the dispute. In essence, the Seventh Schedule covers every possible situation giving rise to a presumption of the arbitrator's interest in the arbitration proceeding. The family members of the arbitrator are also brought within the ambit of interest (*Explanation 1*).

II.A. c. Significance of the Proviso to section 12(5) :

20. The proviso gives an option to the parties to waive the applicability of 12(5) after disputes have arisen between the parties by way of an express agreement in writing. The proviso to section 12(5) provides for an alternative to section 12(4) which requires a party making the challenge to an arbitrator's appointment of becoming aware of the situations giving rise to a conflict, post-appointment.

21. The proviso to section 12(5) is an innovation which is somewhat antithetical to the independence context and in fact to the general scheme of The Arbitration and Conciliation Act, 1996; which would be evident from the following. The proviso also strikes a discordant note to party autonomy.

22. The Arbitration and Conciliation Act, 1996 was amended in 2016 to incorporate the Fifth and Seventh Schedules to the Act. The Fifth and Seventh Schedules were adapted from the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. The purpose of the Guidelines was to introduce a scheme of parameters for providing uniformity in arbitration proceedings, more specifically, in situations of conflicts or potential conflicts concerning the arbitrators.

23. Part I of the 2014 (IBA) Guidelines on Conflicts of Interest in International Arbitration, as updated in August, 2015, deals with “General Standards” with reference to impartiality, independence and disclosure. Part II of the Guidelines consists of the practical application of the General Standards and consists of three colour-coded lists; Red, Orange and Green. These lists contain specific scenarios which are likely to occur in arbitration proceedings and seek to determine whether the appointment of the arbitrator would violate the Conflict of Interest Rules. The broadly-classified situations are demarcated by way of four lists :

- Non-Waivable Red List – Circumstances which objectively present a conflict of interest wherein an arbitrator cannot act even with the consent of all the parties.
- Waivable Red List – A serious but not severe situation whereby the parties can agree to waive the conflict.
- An Orange List – Factual matters which will lead to justifiable doubts regarding the impartiality and independence of the arbitrator.
- A Green List – Matters which do not, objectively, present any apparent or actual conflict of interest.

24. Although the IBA Guidelines forms the inspiration behind the Seventh Schedule, the proviso to 12(5) cuts through the Non-Waivable Red List and the Waivable Red List to make the entire set of disqualifications in the Seventh Schedule waivable by an express agreement in writing by the parties. This means that notwithstanding the absolute bar contained in the

situations in the Non-Waivable Red List as envisaged in the IBA Guidelines, the 1996 Act permits the parties to waive all, even the obvious areas of conflict of interest, by an express agreement in writing subsequent to disputes having arisen between the parties. In other words, the Act bestows the final choice of deciding upon the parties as to whether a person can continue to act as an arbitrator despite an obvious or potential absence of independence or impartiality giving rise to conflict of interest.

II.A. d. “Express Agreement in writing”

25. The parties to the disputes and after such disputes have arisen, may express their intention to circumvent and obliterate any disqualification in the form of a written agreement. The express written agreement is the substratum of the proviso in line with the *mantra* of party autonomy in alternative dispute redressal mechanisms. The proviso thus reinforces the defining characteristic of an arbitration proceeding where the parties are given the statutory nod for deciding on the procedure of the arbitration and every other aspect of it. The only caveat is that the agreement should not be by words, conduct or unspoken understandings but fulfill the benchmark of an express promise as defined under section 9 of The Indian Contract Act, 1872. The requirement further presumes that the agreement in writing must be made by the party who takes the objection to the appointment of the arbitrator and seeks recourse under section 12(5). The requirement does not entail both the parties executing a formal agreement since the other party (who has made the appointment) may not raise the issue at all. The deeming

feature of the proviso further presumes that the express written agreement must be made without undue delay.

II.B. Putting the facts in this case within the section 12(5) framework read with the Proviso

II.B. a. The petitioners' full, complete and repeated participation in the Arbitration:

26. The relevant dates are

i) 24.3.2018: The Arbitration Agreement was entered into by the parties.

ii) 11.5.2019: The respondent no. 1 issued the Arbitration Notice and appointed the Ld. Sole Arbitrator under Clause 3 of the Arbitration Agreement.

iii) 12.5.2019: The Ld. Sole Arbitrator made the disclosure under section 12 and communicated the same to all the parties including the petitioner. The disclosure was also recorded in the Minutes of the Meeting and the Procedural Order dated 27.5.2019.

iv) 15.7.2019: The petitioners (respondents in the arbitration) filed their Statement of Defence to the Statement of Claim and the respondent no. 1's application under section 17 and offered to provide security for disposal of the proceedings subject to consent by the respondent no. 1 for vacating of the injunction order dated 19.6.2019.

v) 15.7.2019: The Arbitrator passed a consent order in view of the affidavit/Statement of Defence of the petitioner whereby the respondent no. 1 gave up on all other securities and consented to vacating of injunction

order dated 19.6.2019 subject to the offered securities being provided by the respondents in the arbitration.

vi) 10.9.2019: The petitioner executed a Registered Agreement to Mortgage in compliance with the consent order dated 15.7.2019 and registered the Charge in CHG-1 form along with Memorandum of Entry in favour of the respondent no. 1.

vii) 9.12.2019: The petitioners filed an application under section 16(3) challenging the application dated 24.9.2019 filed by the respondent no. 1 under section 31(6) of the 1996 Act and admitted therein to the jurisdiction of the Arbitrator by specifically stating that *“the jurisdiction of this Hon’ble Tribunal is limited to disputes that had arisen either on or before 11.5.2019”*.

27. The above dates show that the petitioner’s participation in the Arbitration was not a one-off act or a mindless entry into the Arbitrator’s jurisdiction; the petitioners made a conscious and deliberate decision to stay on and live with the Arbitration Agreement and the arbitration proceedings from March, 2018 – February, 2020. The petitioners decided to slip out of the arbitration only in 2020 by filing four applications for challenging the appointment of the Arbitrator.

II.B. b. The petitioners’ participation was with full knowledge of the Supreme Court judgments in TRF Limited, Bharat Broadband and Perkins.

28. The steps taken by the petitioners follows the citations.

- *TRF Limited vs. Energo Engineering Projects Limited; (2017) 8 SCC 377* was pronounced on 3.7.2017.

The petitioners entered into the Arbitration Agreement after this judgment, on 24.3.2018.

- *Bharat Broadband Network Limited vs. United Telecoms Limited*; (2019) 5 SCC 755 was pronounced on 16.4.2019.

The respondent no. 1 appointed the Arbitrator as the Sole Arbitrator to adjudicate all the disputes under the transaction documents on 11.5.2019. The disclosure made by the Arbitrator under section 12 was communicated to the petitioner on 12.5.2019. The petitioners by an affidavit offered to provide security for disposal of the proceedings subject to the consent of the respondent no. 1 for vacating of the injunction order dated 19.6.2019. The Arbitrator passed a consent order on 15.7.2019 pursuant to the petitioner's affidavit and the respondent no. 1 gave up on all other securities and consented to vacating of the injunction order dated 19.6.2019. The petitioners executed a Registered Agreement to Mortgage along with registration of charge in favour of the respondent no. 1 on 10.9.2019.

- *Perkins Eastman Architects DPC vs. HSCC (India) Limited*; (2020) 20 SCC 760 was pronounced on 26.11.2019.

On 9.1.2.2019, the petitioners filed an application under section 16(3) wherein the petitioners admitted to the jurisdiction of the Arbitrator by specially stating that the jurisdiction of the Arbitrator is limited to the disputes that have arisen either on or before 11.5.2019.

29. The petitioners hence took an informed decision to continue with their participation in the arbitration proceedings despite having full knowledge of the implications of the decisions pronounced by the Supreme Court. The petitioners now seek to rely on these very decisions in 2023 to upend the arbitration.

II.B. c. The petitioners waived the perceived disqualification of the Arbitrator under section 12(5) by an express agreement in writing :

30. The pleadings filed by the petitioner at various stages in the arbitration proceeding amounts to an “*express agreement in writing*” as contemplated in the proviso to section 12(5) of the Act. These include :

- i) Minutes of the Meeting dated 27.5.2019 which recorded that both the parties had agreed to the practice and procedure to be followed by the parties in the arbitration.
- ii) The petitioner’s affidavit/Statement of Defence dated 15.7.2019 wherein the petitioner stated that the affidavit may be treated as a reply to the Statement of Claim filed by the respondent no. 1 and the proceedings initiated by the respondent no. 1 may be disposed of based on the security and undertaking provided by the petitioner before the Arbitrator.
- iii) The consent order passed by the Arbitrator based on the offer made by the petitioner in its affidavit which was accepted by the respondent no. 1.
- iv) The petitioner’s compliance of the order 15.7.2019 passed by the Arbitrator and the Agreement to Mortgage executed by the petitioner

pursuant to the order. The petitioner's compliance included filing of the relevant Form and the Memorandum of Entry before the Registrar of Companies for registration of charge.

- v) The petitioner's application under section 16(3) of the Act (that the Arbitrator is exceeding the scope of its authority) which contained a specific statement that the jurisdiction of the Arbitrator is limited to the dispute which had arisen either on or before 11.5.2019.
- vi) The petitioner replied to the application of the respondent and affirmed the jurisdiction of the Arbitrator by reiterating the statement that the jurisdiction is limited to the dispute which arose either on or before 11.5.2019.
- vii) The petitioner's reply to the application of the respondent no. 1 under section 31 for an interim arbitral award wherein the petitioner again affirmed the jurisdiction of the Arbitrator by making a similar statement as above.
- viii) The petitioner's application dated 11.2.2020 seeking disclosure from the Arbitrator containing a specific statement that the petitioner and his advocate have no doubt and do not question the integrity of the Arbitrator.
- ix) The consent order before the Mediation Courts, Dwarka, Delhi in a case under section 138 of the Negotiable Instruments Act settled on 31.8.2022 where the petitioner no. 1 acknowledged the consent order dated 15.7.2019 and agreed to creation of a charge in compliance with the consent order.

II.B. d. The above leads the Court to hold :

31. The statements contained in pleadings filed by the petitioner before the Arbitrator constitute an express agreement as contemplated under the proviso to section 12(5) of the Act. The statements are distinct from a deemed waiver as contemplated in section 4 of the Act where a party proceeds with the arbitration without stating his / her objection to the non-compliance of the provisions or the arbitration agreement. The decisions cited hold that the term “express agreement” must be in the nature of express promise as contemplated in section 9 of The Indian Contract Act, 1872 where the acceptance of any promise made in words is deemed to be expressed while those made otherwise, than in words, is deemed to be implied. One may also draw a parallel to section 7(2)(e) of the Act where exchange of statements of claim and defence and existence of arbitration agreement being alleged by one party and not denied by the other amounts to an arbitration agreement. The petitioner and the respondent no. 1 had exchanged their respective Statement of Claim and Statement of Defence/affidavit in the present proceeding.

III. Conclusions

III.A. The law

32. Section 12(5) is a relationships-conflict provision. The disqualification of an arbitrator is premised on the intersections of the arbitrator’s relationship with the parties/counsel/subject matter of the dispute which falls under any of the categories specified in the Seventh Schedule. The ineligibility is

hence to be fixed on the Seventh Schedule, in specific, as provided for in section 12(5). The proviso to section 12(5) green-lights the parties to waive all objections to ineligibility which fall under the Seventh Schedule. The proviso does not carve out any exception akin to the non-waivable Red List of the IBA Guidelines where certain conflicts remain outside the purview of waiver by agreement. Since the Act gives the right to the parties to circumvent any and all relationship-based conflicts which would disqualify an arbitrator under the Seventh Schedule, no appointments can be treated as *void ab initio* or incapable of being cured by an express written agreement.

33. Section 12(5) specifies the disqualification of an arbitrator and *not* of the party appointing the arbitrator.

34. The proviso to section 12(5) which allows the parties to a dispute to waive the applicability of section 12(5) by an express agreement in writing would hence take from and be confined to section 12(5). In other words, the express agreement of the parties to get around the disqualification under the categories mentioned in section 12(5) can only be in relation to the Seventh Schedule. This is clear from the words “... *wave the applicability of this sub-section ...*” in the proviso (underlined for emphasis).

35. The *de jure* or *de facto* termination of mandate of an arbitrator under section 14 must not only be assessed in light of the proviso to section 12(5) but also with reference to the express agreement entered into between the parties subsequent to the dispute having arisen between the parties.

36. The proviso to section 12(5) must be read in sync with the momentum of the 1996 Act. The proviso to section 12(5) is not a speed-breaker in the momentum to be achieved through arbitration but an accelerator to the process so that parties may resolve any lingering ineligibility issues and put such matters at rest once and for all. The proviso is not to be treated as an escape-route to a disgruntled party who is dissatisfied with a decision of an arbitrator and decides to do a *volte-face* after participating in the proceedings for a considerable length of time.

37. The provisions of The Arbitration and Conciliation Act, 1996, including section 12(5) read with the proviso are not fact-neutral. The statutory leeway given to parties is for a purpose; which is to facilitate the speed and ease of the arbitration procedure. The Act aims to aid parties who are ready to flow with the momentum built into the statute and not parties who change their positions consequent to adverse orders in the arbitration. Section 12(5) is certainly not context-indifferent where a party's continuous, repeated and unequivocal acceptance of the arbitrator's appointment and subsequent participation in the arbitration is wiped out simply on an application being filed for termination of the arbitrator's mandate.

38. All unilateral appointments of arbitrators cannot automatically be nullified on the application of section 12(5). The perceived disqualification must be assessed only on the mandate of section 12(5) which is within the guard-rails of the Seventh Schedule. Entry 12 of the Seventh Schedule specifically deals with a situation where the arbitrator is a manager, director or part of the management or has a controlling influence in one of the

parties. This is not the same and cannot be put on an equal footing as an arbitrator being appointed by one of the parties to the dispute. A distinction must be made on the obvious dissimilarity between an arbitrator being hit by any one or all of the conflicted relationships in the Seventh Schedule and an arbitrator being rendered ineligible simply by reason of being appointed by one of the parties to the dispute.

39. The named arbitrator being the CMD/MD of one of the parties to the dispute and his nominee is but one degree of separation in the chain of disqualification. This is entirely different from a party nominating an arbitrator where the test of independence starts with the arbitrator on the multiprongs of the Fifth and the Seventh Schedules.

40. The petitioners' present challenge to the appointment of the arbitrator is also contrary to section 12(4) of the Act. Under section 12(4), a party may challenge an arbitrator in whose appointment he has participated only for reasons of which he becomes aware after the appointment has been made. The petitioners participated in the arbitration for almost 2 years before lodging the challenge. The petitioners have also not disclosed any facts which came to the petitioners' knowledge after the appointment warranting termination of the Arbitrator's mandate. The petitioners were parties to the Arbitration Agreement containing the clause of the appointment made by the respondent no.1; the petitioners were also aware of the disclosures/declarations made by the Arbitrators in May, 2019 and June, 2020. The petitioners were also aware of *Perkins* from 26th November, 2019 onwards. Section 12(4) also makes it clear that the reasons calling for the

challenge must be under section 12 read with the Fifth and Seventh Schedules. Hence, the petitioners' challenge to the appointment after full participation in the arbitration falls foul of section 12(4) of the Act.

41. The decisions in *TRF*, *Bharat Broadband*, *Perkins* and *Jaipur Zila Parishad* proceed on the basis of the named arbitrator also serving as the MD/CMD or a Director of one of the parties. In other words, these three cases are of a *persona designata* arbitrator where the *persona designata* was to be the arbitrator or had the right to nominate an arbitrator in his place. (for emphasis). The Supreme Court therefore, held that the person designated was *per se* ineligible under the Seventh Schedule read with section 12(5) of the Act to act as an arbitrator. These cases hence involve a person who chose himself to act as the arbitrator and hence was automatically disqualified by the amendments brought to the Act in 2015 and specifically under the Seventh Schedule. This person naturally could not appoint a substitute in his or her place since that would be a mere extension of the ineligibility extended by one degree.

42. The ratio of *TRF*, *Bharat Broadband* and *Perkins* is therefore essentially that of an arbitrator who becomes ineligible by a statutory bar and consequently renders himself ineligible to nominate someone else to act as the arbitrator. The logic is that a disqualified person cannot delegate his position to another as that would amount to arbitration by the disqualified arbitrator himself. Hence, once the MD loses his position/identity as a sole arbitrator, the MD's right to nominate is automatically wiped out – *TRF* and *Perkins*.

43. In the present case, Clause 3 of the Arbitration Agreement provides for a “*Sole Arbitrator to be appointed by the Investor*”. There is (a) no named / designated Arbitrator and (b) the Investor / any of its Directors has not claimed a right to act as the Arbitrator itself. The Investor has appointed a retired Judge of a High Court. Hence, the analogy sought to be drawn between the facts of the present case and those in *TRF*, *Bharat Broadband* and *Perkins* is factually distinguishable since in *TRF* the MD himself was a sole arbitrator and was disqualified to act as such by reason of the amending Act of 2016. *Bharat Broadband* and *Perkins* considered the facts of *TRF* and the consequent disqualification.

44. Unilateral appointments being impermissible in law must be read to mean an unilateral appointment made by a person who himself is disqualified to act as an arbitrator under the Seventh Schedule and not each and every unilateral appointment made by one of the parties to the arbitration. Treating these situations as one and the same would amount to conflation of two different and distinct scenarios which is not what the Act mandates.

45. The reality of the arbitration model which is presently followed cannot also be discounted. Arbitrators are usually nominated from a pool of persons and include retired Supreme Court and High Court Judges who are known in the circuit. Such a person being nominated cannot automatically translate to a disqualification unless the appointment falls foul of the disclosure and conflicts which are specifically set out in the Fifth or the

Seventh Schedule. The nomination must also be seen as a facilitator of party-autonomy which is intrinsic to arbitration.

III.B. The (perceived) Perkins Problem

46. The decision of the Supreme Court in *Perkins Eastman Architects DPC vs. HSCC (India) Limited*; (2020) 20 SCC 760, involved a Dispute Resolution clause whereby the disputes were to be referred to arbitration of a sole arbitrator appointed by the CMD of the respondent before the Supreme Court (HSCC). The Supreme Court relied on paragraph 50 of *TRF* to hold that the CMD not only became ineligible to act as the arbitrator but was also disqualified from nominating an arbitrator. The Supreme Court accordingly annulled the appointment of the arbitrator and appointed a retired Judge of the Supreme Court as the Sole Arbitrator to decide the disputes arising out of the agreement executed between the parties subject to the mandatory disqualification under the amended section 12 of the Act.

47. The petitioner banks on the decision in *Perkins* to contend that any advantage which a party may derive by nominating an arbitrator of its choice will carry an element of exclusivity in determining the course of the dispute resolution. The petitioner also places emphasis on *Perkins* to say that a person who has an interest in the outcome of the dispute cannot have the power to appoint a sole arbitrator.

48. On the factual score, *Perkins* was pronounced on an application under section 11 of the Act for appointment of an arbitrator. The Arbitration Agreement was of 22nd May, 2017 and the arbitrator was appointed on 30th July, 2019. The petition was filed immediately thereafter and the decision in

Perkins was pronounced on 26th November, 2019. Second, the facts in *Perkins* did not involve any express written agreement under the proviso to section 12(5). Further, the contract between the parties was entered into after the amendment to the Act but before the decision in *TRF* (pronounced on 3rd July, 2017) where the law was declared on section 12(5) of the Act. Hence, the parties were not aware of the implications of *TRF* with regard to automatic disqualification of the MD/CMD of one of the parties to be designated as the arbitrator.

49. The more material distinguishing factor is that paragraph 21 of *Perkins* clubs all unilateral appointments by one of the parties to an arbitration as falling within the statutory bar of section 12(5) but without reference to the Seventh Schedule. This would be clear from the reliance placed by the Court on *TRF* which was specifically a case under section 12(5) read with the Seventh Schedule. Therefore, *Perkins* amplifies and extends the disqualification under section 12(5) to all unilateral appointments divorced from any of the categories specified in the Seventh Schedule. *Perkins* also proceeded on the ratio of *TRF* namely whether the Managing Director, after becoming ineligible by operation, is still eligible to nominate an arbitrator.

50. The absence of any issue with regard to an express written agreement under the proviso to section 12(5) in *Perkins* amounts to a crucial difference in facts. As discussed above, the proviso allows the parties to the dispute to waive the ineligibility of an arbitrator under the Seventh Schedule by an express agreement in writing. The proviso hence enables the parties to

obliterate any disqualification which an arbitrator may be visited with under the Seventh Schedule. In the present case, the express and unequivocal written statements made by the petitioner amounts to a waiver. Without doubt, the pleadings and statements made in the petitioner's applications wipe out any objections to the appointment of the Sole Arbitrator. There was no such unequivocal acceptance of the arbitration by conduct or otherwise in *Perkins*. This has a transformational legal bearing on the disputes in the present case. Therefore, *Perkins* is not at all a problem for the respondent no. 1.

III.C. The other decisions cited by the petitioners are distinguishable on facts ∴.

51. The other decisions are

- *TRF vs Energo ; (2017) 8 SCC 377* : The arbitration agreement provided for the Managing Director of the respondent or his nominee to be appointed as an arbitrator. Hence, this was a case of the arbitrator as *persona designate* with the power to nominate an arbitrator in his place. This was also a case under section 11 of the 1996 Act and the contract was entered into before the amendment brought into the 1996 Act with effect from 23.10.2015. There was also no express agreement in writing under the proviso to section 12 (5) of the Act.
- *Bharat Broadband vs. United Telecoms; (2019) 5 SCC 755* : The arbitration clause in the agreement provided for the arbitration to be referred to the sole arbitration of the CMD of the appellant and if the CMD is unwilling to act as such, then to the sole arbitration of some

other person appointed by the CMD. There was also no agreement in writing under the proviso to section 12(5) and more important, the party who had unilaterally nominated sought termination of the mandate. Moreover, the appellant Bharat Broadband filed a petition immediately after the judgment in *TRF*. This would appear from paragraph 20 of the Report which records that the Managing Director of the appellants was not aware that the arbitrator could not be appointed by the MD under section 12(5) read with Seventh Schedule which only became clear after the declaration of the law by the Supreme Court in *TRF*. The said paragraph also notes that the moment the appellant came to know of the invalidity of the arbitrator's appointment, it filed an application before the sole arbitrator for termination of his mandate. The contract in this case was also entered into before the amendment of 23.10.2015 and the involved a *persona designata* with the power to nominate an arbitrator in his place.

- *Jaipur Zila Dugdh vs. Ajay Sales & Suppliers; AIR 2021 SC 4869* : The arbitrator was again the Chairman of the appellant. The respondent approached the High Court for an appointment of the arbitrator under section 11 of the Act. There was no express agreement under the proviso to section 12 (5) in these facts.
- *Ellora Paper Mills vs. State of Madhya Pradesh; (2022) 3 SCC 1* : The arbitrator was an employee of the respondent and hence it was contended that the arbitrator had rendered himself ineligible to continue as an arbitrator and also could not appoint any other person as an

arbitrator. This was also a case under section 11 for an appointment of an arbitrator instead of a nominated arbitrator and there was no express written agreement under the proviso to section 12(5) of the Act.

- *Govind Singh vs M/s Satya Group* – Division Bench decision of the Delhi High Court in FAO(COMN) 136/2022 : The decision was given on an appeal filed under section 37 of the Act challenging an order passed by the Commercial Court rejecting appellant’s application under section 34 of the Act. The appellant Govind Singh also raised an objection to the appointment of the arbitrator at the very beginning and did not appear in the arbitration proceedings thereafter. The arbitrator proceeded *ex-parte* and delivered the impugned award. The objection taken by the appellant was before the decisions in *TRF* and *Bharat Broadband*.
- *MS Bridge Building Construction Co. Pvt. Ltd. vs. Bharat Heavy Electricals Ltd.* - Single Bench decision of the Delhi High Court in O.M.T (COMM) 87/ 2022 : The facts did not concern any express written agreement under the proviso to section 12(5) and the Court clarified that non-disclosure of the arbitrator under section 12(1) would not make the arbitrator ineligible to act as such.
- *Prodattur Cable TV Digi Services vs. Siti Cable Network Limited; (2020) 2 Arb LR 260* : The facts did not involve any express written agreement under the proviso to section 12(5) and further the objection to the arbitrator’s appointment was taken by the petitioner even before the first procedural hearing. The Court relied solely on *Perkins* to hold that a unilateral appointment by an authority interested in the outcome of the case would be hit by *Perkins*. The Court also presumed that the

Company operating through its Board of Directors will have an interest in the outcome of the dispute. The present case is different on facts since the respondent no. 1 appointed a retired Judge of the High Court as a Sole Arbitrator. Hence, the continuation of interest from a Company to its Directors cannot apply in the present case.

- *Yashovardhan Sinha vs. Satyatej Vyapaar Pvt. Ltd.; A.P. No. 156 of 2022:*
A Coordinate Bench of this Court likewise relied on *TRF* and *Perkins* to hold that the ineligibility of a sole arbitrator would continue with any nomination made by the arbitrator. There was however no facts shown or argued with reference to displaying conduct akin to that of the petitioners in this case or the petitioner in *Yashovardhan* waiving the objection under the proviso to section 12(5) of the Act.

52. The above decisions disclose a common factual thread; namely of the arbitrator being a designated person of one of the parties, usually the MD / CMD, with the power to appoint another person to act as the arbitrator in his/her place. All the decisions therefore proceeded on the basis that if the designated person becomes ineligible under section 12(5) read with the Seventh Schedule, the ineligibility would extend to the person being appointed by the designated arbitrator. Once *Perkins* amplified the ineligibility to all unilateral appointments, the decisions post-*Perkins* proceeded to invalidate all unilateral appointments as an omnibus disqualification without fixing the ineligibility to one or more of the specific entries in the Seventh Schedule.

53. The other decisions cited are not being dealt with since they are on the points already discussed above.

III.D. The particular facts of this case

54. The Arbitrator in the present case does not fall under any of the prohibited relationships/categories in the Seventh Schedule including Entry 12 therein.

55. Entry 12 is being specifically mentioned following the contention of learned counsel appearing for the petitioners. Entry 12 applies where the arbitrator himself is a manager, director or part of the management or has a similar controlling influence in one of the parties. The Arbitrator in the present case is neither a manager or a director nor a part of the management of the respondent no. 1. The Arbitrator also does not have any controlling influence in the respondent no. 1 or any of the parties to the arbitration. The Arbitrator is a retired Judge of the Madhya Pradesh High Court.

56. The alleged ineligibility of the appointment of the Ld. Arbitrator was regularised under the proviso to section 12(5) by the express written documents executed by the petitioners and their continuous participation in the arbitration. The petitioners continued to participate in the arbitration despite having knowledge of the curable invalidity of the arbitration agreement and being aware of the implication of the judgments pronounced by the Supreme Court in *TRF*, *Bharat Broadband* and *Perkins Eastman*.

57. The present case is of a unilateral appointment which is factually distinguishable (as in the decisions cited) from an arbitrator whose eligibility is compromised by any one or more of the Entries in the Seventh Schedule. There is an obvious difference - and so the decisions say - between an arbitrator who is disqualified under the Seventh Schedule and an arbitrator who himself is a party to the dispute. The two situations are different in fact, in logic as also in the decisions shown to the Court. The arbitration clause in the present case belongs to the first category since the Arbitrator was appointed by the respondent no. 1.

58. The petitioner filed an application under section 13 of the Act challenging the Arbitrator's appointment on 11.2.2020 which is 10 months after the dispute had arisen between the parties and 7 months after the petitioner had obtained consent orders pursuant to Statement of Defence/affidavit filed by it. The petitioner sought for a fresh disclosure from the Arbitrator despite being fully aware that the Arbitrator had made such disclosure much earlier on 12.5.2019.

59. The petitioner bombarded the arbitration with multiple applications filed before different forums: a) the section 13 application before the Arbitrator; b) an application under section 14 for termination of the Arbitrator's mandate; c) a section 34 application for setting aside the Award passed by the Arbitrator on 30.6.2020 and d) an SLP before the Supreme Court challenging the order of the High Court dated 4.8.2020 whereby the petitioner was directed to secure an additional amount of Rs. 40 crores. The petitioner did not secure this amount and filed the SLP. The petitioner

however withdrew the SLP after 2 years on 2.5.2022 without complying with the order of the High Court with regard to furnishing of security.

60. It is also significant to note that the petitioner raised an issue of bias against the Arbitrator without waiting for the Arbitrator to decide on the application filed under section 13 of the Act (challenging the appointment of the Arbitrator) and without waiting for the respondent no. 1 to file their response to the application.

61. The petitioner has obtained the benefit of the consent orders dated 15.7.2019 based on the statements made by the petitioner in the Statement of Defence/affidavit whereby the respondent no. 1 had given up the security prevailing at the time. The petitioner therefore persuaded the respondent no. 1 to alter its position and obtained consent orders while failing to comply with the directions passed by the High Court on furnishing of security.

62. The petitioners' actions amount to a clear and unambiguous agreement, express and in writing, under the proviso to section 12(5). Any other construction would encourage a *context-abhorrent* construction of the Act of 1996.

IV. Finally and for the above reasons;

63. Section 14 of the Act provides for two instances whereby the mandate of an arbitrator shall terminate. The dispute is not with regard to the Arbitrator withdrawing from his office or the parties before the Court agreeing to the termination of his mandate or the Arbitrator acting with

undue delay. The controversy is whether the Arbitrator has become *de jure* or *de facto* unable to perform his functions by reason of the statutory bar under section 12(5) of the Act.

64. After discussing the import of section 12(5) read with the proviso, this Court finds and accordingly holds that section 12(5) is not applicable to this case since the alleged disqualification does not breach any one or more of the conflict-protections in the Entries of the Seventh Schedule. Even if it is assumed that the Arbitrator became ineligible by reason of the Seventh Schedule, the petitioners waived such disqualification by their express writings, conduct and agreement as envisaged under the proviso to section 12(5) of the Act.

65. Therefore, there is no material disclosed in the petition for terminating the mandate of the Arbitrator. The law does not support the petitioners' case.

66. AP 106 of 2020 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)