

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Misc. Civil Application (ARBN) No.565/2021

Mech Components Private Limited,
58, Co-operative Indl. Estate,
Expansion Program, Gandhinagar,
Balangar, Hyderabad-500037
Represented by its Director Mr. Mudit Patodia. Applicant.

Versus

1. The General Manager,
Ordnance Factory Chanda,
Chandrapur 442501, Maharashtra.
2. The Director General,
Ordnance Factories,
Government Of India,
Ordnance Factory Board,
10A, S.K. Bose Road,
Kolkata- 700 001.
3. Sharad Kumar Maltare,
Director,
Regional Controllarate of Safety, Ambajhari,
Ambajhari, Nagpur 440021 Maharashtra. Respondents.

Misc. Civil Application (ARBN) No.608/2021

Mech Components Private Limited,
58, Co-operative Indl. Estate,
Expansion Program, Gandhinagar,
Balangar, Hyderabad-500037
Represented by its Director Mr. Mudit Patodia. Applicant.

Versus

1. The General Manager,
Ordnance Factory Chanda,
Chandrapur 442501, Maharashtra.
2. The Director General,
Ordnance Factories,
Government Of India,
Ordnance Factory Board,
10A, S.K. Bose Road,
Kolkata- 700 001.
3. Sharad Kumar Maltare,
Director,
Regional Controllerate of Safety, Ambajhari,
Ambajhari, Nagpur 440021 Maharashtra.

**(Amendment careid out as per Court's order
dated 04-07-2022)**

2. The Director General,
Ordnance Factories,
Government Of India,
Ordnance Factory Board,
10A, S.K. Bose Road,
Kolkata- 700 001.
3. Sharad Kumar Maltare,
Director,
Regional Controllerate of Safety,
(Central Region) Ambajhari, Nagpur 440021,
(Dec-161) Maharashtra.

.... Respondents.

Mr. A.C. Dharmadhikari, Adv for applicant.

Ms. N.G. Choubey, Adv for resp. nos.1 and 2.(MCA 565/21)

Mr. A.C. Dharmadhikari, Adv for applicant.

Mr. K.A. Patil, Adv for resp. nos.1 and 2.(MCA 608/21)

CORAM : AVINASH G GHAROTE, J.
DATE : 10-02-2023

ORAL JUDGMENT

Heard Mr. A.C. Dharmadhikari, learned Counsel for the applicant and Mr. K.A. Patil and Ms. N.G. Choubey, learned Counsel for the respondent nos.1 and 2.

2. The present application seeks the appointment of an arbitrator on the ground that the appointment of the earlier arbitrator i.e respondent no. 3, was invalid in view of Section 12 (5) r/w Schedule IV (1) and IV (5) of the Arbitration and Conciliation Act, 1996 (for short, the "A and C Act"), on two grounds. The first ground was, that the respondent no.2, who was the appointing authority, was disqualified in view of the judgment of the Hon'ble Apex Court in Perkins Eastman Architects DPC and another vs HSCC (India) Limited,(2020) 20 SCC 760. The second ground was, that the respondent no. 3, being under the overall control of the respondent no.2, thus was then affiliated to respondent no. 1, and therefore was also disqualified from being appointed as an arbitrator. Though, an objection in that regard was raised before respondent no. 3, he has rejected the same and passed an award, which according to the applicant, is a nullity, for which reliance is placed upon Sarup Singh and another vs Union of India and another (2011) 11 SCC 198 (para 20 and 21) and Chandrabhai K. Bhoir and others vs Krishna Arjun Bhoir and others, (2009) 2 SCC 315 (para 26). It is therefore submitted that since both the cases fall within Schedule VII Items (1) and (5), of the A and C Act, 1996, the appointment of respondent no. 3

was itself invalid and therefore there was need of appointment of an independent arbitrator.

3. The notice to respondent no.3, has been dispensed with as the respondent no. 3 is an arbitrator.

4. The aforesaid submission is opposed by Ms Choubey, learned Counsel for respondent nos. 1 and 2 in MCA No.565/21 and Mr Patil, learned Counsel for respondent nos. 1 and 2 in MCA No.608/21, by contending that since the award has already been passed by respondent no. 3, the only course of action available was to take up the matters by way of an application u/s 34 of the A and C Act, which having not been filed, the award has attained finality. It is further contended that since the respondent no.3 was appointed as an arbitrator upon the request of the applicant by invoking the arbitrator clause and award dated 05-06-17 (pg 82) is in favour of the applicant, there is no need to appoint an arbitrator afresh.

5. The position in this regard in pursuance to introduction of Sec. 12(5) and the VIIth Schedule which was inserted by Act No.3 of 2016 w.e.f. 23-10-15 came up before the Hon'ble Apex Court in **TRF Ltd vs Energo Engineering Projects Limited (2017) 8 SCC 377**, in which, while considering the arbitration clause which appointed the Managing Director of one of the parties or his nominee as the arbitrator, it was held, that since the arbitrator to be appointed as per the clause in the contract was the Managing Director of one of the parties, he incurred the disqualification as contemplated by clause 5 of the VIIth Schedule. It was also held that since the Managing Director

himself was disqualified to act as an arbitrator he could not have been held to be qualified to nominate one. The following is what the Hon'ble Apex Court in paras 50 and 54, has said about this position.

"50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned senior counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned senior counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate

one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in *State of Orissa and others v. Commissioner of Land Records and Settlement, Cuttak and others* ((1998) 7 SCC 162. In the said case, the question arose can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held:

“25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in *Roop Chand v. State of Punjab* (AIR 1963 SC 1503). In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an “officer”, an order passed by such an officer was an order passed by the State Government itself 20 (1998) 7 SCC 162 and “not an order passed by any officer under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which

was disposed of by an officer acting as its delegate.”

(emphasis in original)

54. *In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”*

(emphasis supplied)

6. The position thereafter was considered in **Bharat Broadband Network Ltd vs United Telecoms Limited** (Civil Appeal No.3972 of 2019 (Arising out of Special Leave Petition (Civil) No.1550 of 2018) and Civil Appeal No.3973 of 2019 (Arising out of Special Leave Petition (Civil) No.1644/2018)). It is therefore necessary to quote paras 17 and 18 therein as under :-

"17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Section 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to

Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

Arbitrator's relationship with the parties or counsel

XXX XXX XXX

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration”

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to “eligibility”, i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd. (supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it

clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit."

(emphasis supplied)

7. The position thereafter, has been considered by the Hon'ble Apex Court in **Perkins Eastman Architects DPC and another** (supra) in which after considering **TRF Ltd** (supra) and **Bharat Broadband Network Limited** (supra), it was held as under :

"19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned

with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited. Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator” The

ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Limited."

(emphasis supplied)

8. The position therefore stands clarified, by the aforesaid judicial pronouncements, inasmuch as the plea under Section 12(5) r/w Sec 14(1)A of the A and C Act where the arbitrator becomes *de jure* unable to perform his function on account of being ineligible to be appointed as an arbitrator, his mandate automatically terminates and he shall then be substituted by another arbitrator and there is no challenge procedure for this.

9. In **Perkins Eastman** (supra) while considering both the categories the one dealt with in **TRF Ltd** (supra), where the Managing Director himself was named as arbitrator with an additional power to appoint any other person as an arbitrator and the second category where the Managing Director was not to act as an arbitrator himself but is empowered or authorized to appoint any other person of his choice or discretion as an arbitrator, it has been held, that if in the first category, if the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases.

10. Considering the position in the instant matter in light of the above judicial pronouncements, it is not in dispute that the respondent no.2 has an overall control over all the Ordinance Factories in India and therefore, could be said to be a person falling within clause 5 of VIIth Schedule of the A and C Act, 1996. The respondent no.3, who is the Director, Regional Controllerate of safety, Ambajhari, is also one of the employee of the Ordinance Factory over which the respondent no.2 exercises control. Since all the Ordinance Factories in the country, are under the control and supervision of respondent no. 2, it can be said, that they are affiliated to each other.

11. Upon a query being made by the Court, Mr. Patil, learned Counsel and Ms Choubey, learned counsel for respondent nos.1 and 2, upon instructions, states that the respondent no. 1, falls under the control of the respondent no.3, since the respondent no.3, is the Regional Controllerate of Safety. This would clearly indicate that the respondent no. 3 in some manner or the other exercises his control over the affairs of the respondent no. 1.

12. It would thus be apparent that the respondent no.2, being the Directorate General of Ordnance Factory having the overall control and supervision of all the Ordnance Factories including respondent no.1, is clearly a person who falls within clause 5 of the VIIth Schedule under Section 12(5) and therefore was ineligible to appoint/nominate as an arbitrator in view of what has been held in para 20 of **Perkins Eastman** (supra).

13. The arbitration clause 14 in the instant case (pg 29) unilaterally permits the Director General, Ordnance Factories-respondent no.2, to appoint and nominate an sole arbitrator. The position therefore is akin to the situation as contemplated in para 54 of **TRF Ltd** (supra) and para of 20 of **Perkins Eastman** (supra).

14. Though, reliance is placed upon **Central Organization for Railway Electrification Vs ECI-SPIC-SMO-MCML (JV) a Joint Venture Company (2020) 14 SCC 712**, by Mr Patil, learned Counsel and Ms Choubey, learned Counsel for respondent nos.1 and 2, what is material to note is that **Central Organization** (supra) was a case in which it has been held that since the arbitration clause required the

constitution of an Arbitration Tribunal from the panel of surviving officers of junior administrative grade and since the other side was granted a right to select any two from the list there was counter balancing, which is not the factual position in the instant case.

15. It is contended that as **Central Organization** (supra) has been referred to a Larger Bench in **Union of India vs Tania Constructions Limited 2021 SCC Online SC 271**, however considering the factual position which was under consideration in **Central Organization** (supra) as indicated above, the same would not have any effect on the instant matter.

16. It is not disputed that the objection regarding the appointment of the respondent no.3, was taken on 14-03-17 by a communication of the same date which was addressed to the respondent no.2, who however vide his communication dated 28-04-17 had summarily rejected the objection. The same objection regarding the ineligibility of the respondent no. 3 under Sec. 12 of the A & C Act, 1996 was also before the respondent no.3 by communication dated 28-04-17 (pg 80) as well as by the communication dated 04-05-17 (pg 81), without considering which the respondent no.3 proceeded ahead with the arbitration proceeding.

17. The award dated 05-06-17 (pg 82), makes a very interesting reading inasmuch as though it records, that the claimant/applicant did not file a statement of claim nor participated in the proceedings, on this count instead of dismissing the proceedings, the respondent no.3 proceeded to pass an award on 05-06-17 which is totally inexplicable as

there was no statement of claim at all filed by the applicant/claimant.

18. The above position would clearly indicate the state of affairs which have ensued on account of the arbitration clause no.14 in the agreement.

19. It is therefore apparent that since there was a unilateral right to appoint a sole arbitrator with respondent no.2, and considering the position of respondent no.3 *vis-a-vis* the respondent nos.1 and 2, as discussed above the case would squarely be covered by what has been held in **TRF Ltd** (supra), **Bharat Broadband** (supra) and **Perkins Eastman** (supra) and therefore the appointment of respondent no.3 as an arbitrator was clearly invalid in view of Clauses 1 and 5 of Schedule VII u/s 12(5) of the A and C Act. In view of this, the case is made out for appointment of an independent arbitrator, considering which, Mr. Z.A. Haq, (former Judge of this Court), is hereby appointed as an arbitrator for deciding the dispute between the parties.

20. The parties shall appear before the learned arbitrator on 20-02-2023. Prior to which, the processing charges shall be deposited in the Court, without which, the copy of order shall not be delivered.

21. Both the applications stand disposed of.

JUDGE