UNILATERAL APPOINTMENT OF ARBITRATORS: LOOKING BEYOND PERKINS

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I. INTRODUCTION

Recently, the Delhi High Court, in the case of *Envirad Projects Pvt. Ltd. v. NTPC Ltd.* ***["Envirad"]***,[1] held that an arbitrator appointment procedure under an arbitration agreement which requires an interested party to appoint a sole arbitrator will be unenforceable in public-sector contracts. Following the judgment of the Supreme Court of India **["Supreme Court"]** in *Perkins Eastman Architects DPC v. HSCC (India) Ltd* ***["Perkins"]***,[2] this case highlights that it is now a settled position in India that such appointment procedures will no longer be enforceable across contracts, and that a court has the power to appoint an arbitrator instead in such cases. The Delhi High Court has adopted this approach in several cases[3] including the case of *Proddatur Cable TV Digi Services v. Siti Cable Network Limited* ***["Proddatur"]***[4].

It may, however, be time to reconsider whether such a settled position is desirable to begin with. A blanket ban on the unilateral appointment of sole arbitrators, without further analysis into the bargaining powers of the parties or any evidence of actual or evident partiality of nominated arbitrators, may be argued as infringing upon the principle of party autonomy.

II. PERKINS

In *Perkins*, the parties had entered into a contract for architectural designing and planning of the proposed All India Institute of Medical Sciences at Guntur, Andhra Pradesh in 2017. This contract provided for a detailed dispute resolution clause which held that

> "*except where the decision has become final, binding and conclusive in terms of sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD (Chairman and Managing*

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[1] *Id*.

[2] *Supra* note 1.

[3] Mahalakshmi Infraprojects Private Ltd v. NTPC Ltd, ARB.P. 230/2020 (India); Neha Aviation Management Pvt. Ltd v. Air India SATS Airport Services Pvt. Ltd., Arb. P. 546/2019 (India); Bilva Knowledge Foundation and Ors. v. CL Educate Limited, Arb. P. 816/2019 (India).

[4] Proddatur Cable TV Digi Services v. Siti Cable Network Limited, (2020) 267 DLT 51 (India).

> *Director) HSCC within 30 days from the receipt of request from the Design Consultant*."

When a dispute arose between the parties in 2019, the applicant, Perkins Eastman, filed a request with the Chief Managing Director **["CMD"]** of HSCC for the appointment of an arbitrator in accordance with the dispute resolution clause of the contract. Upon the CMD's failure to appoint an arbitrator within 30 days from the receipt of the request, Perkins Eastman filed an application under Section 11 of the Indian Arbitration & Conciliation Act, 1996 **["Act"]** seeking appointment of an arbitrator. On the 31st day, the CMD appointed an arbitrator.

The Supreme Court adjudicated on the issue of the maintenance of the Section 11 application upon the delay of one day in appointment of the arbitrator. The court found that CMD's appointment of an arbitrator on the 31st day from the receipt of request from Perkins Eastman will not constitute a refraction of a magnitude that would require the exercise of the court's powers under Section 11 of the Act. However, the Supreme Court went on to find that the dispute resolution clause which provided for such unilateral appointment of a sole arbitrator by an interested party is invalid under Section 12(5) of the Act. The Court held that if the relationship of the party(s) with the arbitrator falls within the scope of Schedule VII then the arbitrator will be ineligible to be appointed as arbitrator. The Supreme Court relied on the finding in *TRF Limited v. Energo Engineering Projects Limited* ***["TRF Limited"]***[5] for this purpose:

> *"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."*
> *(emphasis supplied)*

In Perkins, the court held that a party making an appointment under such clauses will *"always have an element of exclusivity in determining or charting the course for dispute resolution."*[6] Thus following the ratio as laid down by the Supreme Court in TRF limited the Court in the present case invalidated the nomination of an arbitrator on the grounds of ineligibility of the

[5] TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377 (India).
[6] *Id*.

nominator to be appointed as an arbitrator itself. Ineligibility under Section 12(5) strikes at the root of an arbitrator's power to arbitrate as well as its power to appoint a nominee to conduct the arbitration. The Delhi High Court followed this approach in *Proddatur* and a number of subsequent cases.

III. SNAPSHOT OF JUDICIAL PRECEDENTS

In *Proddatur*, a dispute arose between the parties to a distribution agreement in 2018. The distribution agreement provided that any dispute between the parties "*shall at first be subjected to an attempt at resolution by mutual amicable discussion, failing which the same shall be referred for Arbitration by the sole arbitrator appointed by the Company* (i.e., Siti Cable)". When the dispute arose and the parties could not amicably settle it, Siti Cable appointed a sole arbitrator in accordance with this dispute resolution clause. The appointed arbitrator issued a disclosure under Section 12 of Act and sought consent of Proddatur Cable for her appointment. However, the arbitrator continued with the proceedings despite Proddatur Cable's refusal to consent to her appointment.

Before the conclusion of these arbitration proceedings, the Supreme Court issued the *Perkins* judgment on November 26, 2019. Accordingly, Proddatur Cable filed an application before the arbitrator alleging that *Perkins* resulted in the *de jure* termination of the arbitrator's mandate. Upon the arbitrator's failure to recognise the termination of her mandate in the absence of a court order, Proddatur Cable filed an application with the Delhi High Court to seek such a judicial order. The Delhi High Court found that the *Perkins* ratio will clearly apply in this case and terminated the mandate of the arbitrator. The court held that like *Perkins*, the arbitration clause in *Proddatur* also permitted Siti Cable to unilaterally appoint a sole arbitrator. Accordingly, the Delhi High Court reiterated the *Perkins* ratio to hold that "*a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law*"[7] and termed the arbitration clause as invalid under Section 12(5) of the Act.

Similarly, in *Mahalakshmi Infraprojects Private Ltd v. NTPC Ltd* ***["Mahalaxmi"]***,[8] the parties had entered into a contract with a dispute resolution clause which set out that

[7] *Supra* note 4 at 23.
[8] Mahalakshmi Infraprojects Private Ltd v. NTPC Ltd, ARB.P. 230/2020 (India).

> "*except where otherwise provided for in the contract all questions and disputes…shall be referred to the sole arbitration of the General Manager of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and if the General Manager is unable/ or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director".*

The contract further provided that: (i) no person other than a person appointed by the CMD should act as arbitrator; (ii) the dispute shall not be referred to arbitration at all if no arbitrator is appointed by the CMD for any reason. The Delhi High Court found that this dispute resolution clause was violative of Section 12(5) of the Act for granting an exclusive right to appoint an arbitrator to one party.

In *Neha Aviation Management Pvt. Ltd v. Air India SATS Airport Services Pvt. Ltd* ***["Neha Aviation"]***,[9] the parties had entered into an agreement outsourcing manpower ground handling services at Indira Gandhi International Airport for a period of three years. The arbitration clause in the contract provided that any disputes between the parties would be resolved by an arbitrator appointed by the vice-president of the Respondent. The court, relying on *Perkins* and *Proddatur*, vitiated the arbitration clause by finding that such clauses violate Section 12 of the Act.

IV. ENVIRAD

In *Envirad*, the dispute stemmed from a contract entered between the parties pursuant to a tender awarded by the NTPC to Envirad Projects, a civil construction company, for the NTPC-Nanda Project in 2015. Owing to NTPC's alleged failure to pay Envirad Project's dues, Envirad Project commenced an arbitration under the arbitration clause of the contract in 2021. The arbitration clause of the contract provided that all

> "*disputes shall be referred to the sole arbitration of the General Manager of NTPC limited, and if General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, NTPC Limited, willing to act as such Arbitrator*".

In light of this clause, Envirad Projects filed an application under Section 11(6) of the Act seeking the appointment of a sole arbitrator by the court to adjudicate this dispute.

[9] Neha Aviation Management Pvt. Ltd v. Air India SATS Airport Services Pvt. Ltd., Arb. P. 546/2019 (India).

The Delhi High Court allowed Envirad Project's petition. It held that the appointment procedure provided under the arbitration agreement is unenforceable in India in light of the Supreme Court's decision in *Perkins* which provided that "*no single party can be permitted to unilaterally appoint the Arbitrator, as it would defeat the purpose of unbiased adjudication of dispute between the parties*."[10] Accordingly, the court found that an arbitrator may be appointed by the court or by consensus of the parties in such cases.[11] Referring to *Mahalakshmi*, the court found that when such an unenforceable appointment procedure has been provided in a contract, the "*task of appointing an arbitrator devolves on the court*."[12] Therefore, the court appointed a retired justice as the sole arbitrator in this matter.

V. ANALYSIS AND WAY FORWARD

Envirad forms part of a series of judgments which seem to put forward a now-established position that any unilateral appointment of a sole arbitrator by an interested party is prohibited.[13] Without conducting any further analysis on this issue, *Envirad* echoes the finding of *Perkins* and *Proddatur* that such an appointment procedure will "*always have an element of exclusivity*".[14] However, in *Perkins* as well as in *Proddatur*, the Supreme Court and the Delhi High Court respectively, reached this finding basis Section 12(5) of the Act even though the actual wordings of the section do not support any such prohibition.

Section 12(5) of the Act provides that "*any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator*". Further, the Seventh Schedule to the Act lists down situations when a person shall be ineligible to act as an arbitrator due to her relationship to the parties or the dispute, or due to any vested interest that she may have in the outcome of the dispute. These provisions, focused on an arbitrator's ineligibility, do not put down any restrictions on the appointing authority (i.e., they do not require that the appointing authority is also a neutral party). This can be differentiated from countries such as Germany and Netherlands where the legislature has explicitly provided that

[10] *Supra* note 2 at 8.
[11] *Id*.
[12] *Id*, at 9.
[13] TRF, (2017) 8 SCC 377; Perkins, 2019 SCC OnLine SC 1517.
[14] Proddatur, (2020) 267 DLT 51 at 8 citing Perkins, 2019 SCC OnLine SC 1517 at 21.

a party may request the court to appoint an arbitrator when an arbitration agreement places one party at a disadvantage regarding the composition of the arbitral tribunal.[15]

Consequently, the courts in these cases advocate for a blanket ban on a unilateral appointment procedure basis an argument that a person ineligible to act as an arbitrator should necessarily be disqualified from acting as an appointing authority as well. A more suitable avenue, in comparison to the non-appointment or disqualification of a unilateral arbitrator under Sections 11 and 12 respectively, might be for the courts to impose such a restriction under the public policy exception to enforcement of awards, under Section 34 of the Act, in the absence of a specific statutory prohibition under the Act. This would be similar to the position taken by the French courts which have refused enforcement of one-sided arbitrator appointment procedures in arbitration agreements owing to the principle of equality in their public policy.[16] During or before the commencement of arbitration proceedings, a court may also decide not to enforce such one-sided arbitration clauses when it is satisfied that the conditions for unconscionability of contract under Section 16 of the Indian Contract Act, 1872 are met.

This is more so as *Proddatur* disqualified an arbitrator when the petitioner did not seem to present any evidence that would suggest there were any concerns surrounding actual, evident or potential impartiality of the arbitrator. The arbitrator had, in fact, even provided a disclosure under Section 12 of the Act. *Proddatur*, therefore, discarded the principle of arbitration which requires courts to presume that an arbitrator is independent unless proved otherwise. A factual enquiry into any potential or actual impartiality of an arbitrator as well as the willingness of the parties to enter into an agreement with a unilateral arbitrator appointment clause may, therefore, better balance the foundation principles of party autonomy, transparency and fairness in arbitration.

These judgments correctly note that arbitration clauses which allow for unilateral appointment of a sole arbitrator may be a product of unequal bargaining powers between the parties. In *Envirad*, the court could have noted the possibility of unequal bargaining power between the parties since most government construction contracts are in the form of standard form contracts which are accepted in entirety by the other party. However, the court merely accepted a blanket ban upon such appointment procedures in India without conducting any

[15] German Code of Civil Procedure, Section 1034(2), 1997; Art. 1028(1), Dutch Code of Civil Procedure, 2015.
[16] PT Ventures SGPS SA v. Vidatel Ltd, 19/10666 (Paris Court of Appeal, 2021).

factual inquiry. A blanket ban fails to account for situations where such a clause may not be a product of inequity in bargaining powers. In such a situation, vitiating such clauses in carefully negotiated arbitration agreements between sophisticated parties may be a significant encroachment upon party autonomy. A fact-based inquiry into the bargaining powers of the parties may again be a better way to balance this principle of party autonomy with the need for fairness in the arbitration process.

Lastly, the Indian courts have taken a different position in arbitration agreements which provide for a "quasi-unilateral" appointment procedure.[17] For example, in *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited* ***["Voestalpine"]***,[18] the Supreme Court upheld an arbitration clause which required one of the parties to select an arbitrator from a list of arbitrators provided by the other party. This quasi-unilateral appointment in *Voestalpine* was upheld on the ground that it provided some authority to both parties in appointing an arbitrator. However, it is arguable whether a quasi-unilateral appointment procedure is likely to ensure impartiality of the arbitrator any more than a unilateral appointment procedure. It is possible that the responsible party curates a small list of potential arbitrators which consists of persons which are all closely related to the party – which may include its serving or former employees. This would effectively leave the other party with no real choice, and thereby it would not address the problem of "exclusivity".

For quasi-unilateral appointment procedures, the Indian courts have taken a fact-based inquiry to decide whether a panel selected by a party consists of sufficient impartial options for the other party to have an actual choice.[19] Such a fact-based inquiry, which delves into actual concerns regarding independence and impartiality of potential arbitrators, is desirable. It might also be desirable for courts to conduct a similar factual inquiry for clauses where parties agree that one of the parties, or any other interested party, shall unilaterally appoint a sole arbitrator.

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[17]Moazzam Khan & Tanisha Khanna, *NPAC's Arbitration Review: Validity of unilateral Appointment of Arbitrators: Indian courts blow hot and cold*, BAR AND BENCH (Oct. 4, 2022, 10:00 AM), available at https://www.barandbench.com/columns/validity-of-unilateral-appointment-of-arbitrators-indian-courts-blow-hot-and-cold.

[18] Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665 (India).

[19] The courts decide whether a panel curated by a party in such quasi-unilateral appointment clauses is "broad-based". Appointment through a broad panel has accordingly not been vitiated by the Supreme Court of India. Voestalpine, (2017) 4 SCC 665; Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML, (2020) 14 SCC 712 (India).