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TO ‘PERKINS’ OR NOT TO ‘PERKINS’

argus partners
SOLICITORS AND ADVOCATES

MUMBAI I DELHI I BENGALURU I KOLKATA

1. Introduction:

1.1 Recently, a Single Bench of the High Court of Calcutta has delivered a judgment, *McLeod Russel India Limited* v. *Aditya Birla Finance Limited* ("**McLeod Russel**")[1] in an application under Section 14 of the Arbitration and Conciliation Act, 1996[2] ("**Act**").

1.2 In this matter, a challenge to the appointment of a Sole Arbitrator was made on the ground that such Arbitrator was appointed unilaterally by the 'Investor', as provided in the arbitration agreement between the parties, thus falling foul of the decision of the Supreme Court of India in *Perkins Eastman Architects DPC.* v. *HSCC (India) Limited* ("**Perkins**")[3]. The Court rejected the challenge on the ground of existence of an "*express agreement in writing,*" as inferred from the facts and circumstances of the case.

1.3 In the backdrop of the aforesaid decision, it may be useful to take another look at Perkins and analyse whether McLeod Russel indeed defeats the spirit of the Supreme Court decision, or steers clear of the boundaries set by it.

2. Bias and its treatment:

2.1 Before delving into Perkins and all it brought, it may be useful to glance at the provisions relating to bias in arbitrators in the Act. The amendments made to the Act *vide* the Arbitration and Conciliation (Amendment) Act, 2015 ("**the Amendment Act**"), *inter-alia*, attempted to introduce safeguards which warrant fairness in the conduct of arbitration proceedings and minimise bias.

2.2 Section 12(1) of the Act mandates an arbitrator to disclose in writing existence of any direct/ indirect past or present relationship with any of the parties to such dispute, which may raise justifiable doubts as to his impartiality. Schedule V to the Act provides guidance on what constitutes such "justifiable doubts". Section 12(5) to the Act, read with Schedule VII, specifies certain categories that render an arbitrator ineligible to act. Only an '*express agreement in writing*' between the parties to the arbitration waiving such disqualification, after the disputes have arisen, would entitle the 'ineligible' arbitrator to act.

2.3 The Supreme Court of India has carved out a difference between independence and impartiality of an arbitrator. An arbitrator may be independent and yet, lack impartiality, or vice versa. Independence, which is a more objective concept, may be more straight forwardly ascertained by the parties at the outset of the arbitration proceedings in light of the disclosures made by the arbitrator, while partiality will more likely surface during the arbitration proceedings[4].

2.4 It is interesting to note that while considering the question of bias and whether an arbitrator will be ineligible to act, the Courts have not always restricted themselves to the four corners of the statute, and a gradual movement is perceived from ascertaining the existence of 'actual bias' in an arbitrator to the existence of an 'apparent bias'.

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[1] *McLeod Russel India Limited* v. *Aditya Birla Finance Limited* (AP No. 106 of 2020) decided on February 14, 2023.

[2] Act No. 26 of 1996.

[3] (2020) 20 SCC 760.

[4] *M/s. Voestalpine Schienen GMHB* v. *Delhi Metro Rail Corporation Limited*, AIR 2017 SC 939.

2.5 In the Supreme Court's decision in *TRF Limited* v. *Energo Engineering Projects Limited* ("**TRF Limited**")[5], the Court held that where an agreement provides that the managing director of a company will be appointed as a sole arbitrator and such power is lost as the proposed arbitrator should not be an employee of one of the parties to the arbitration (as provided in Schedule VII), his/ her power to nominate someone else as an arbitrator is also obliterated. This does not appear in the statute.

2.6 In Perkins, taking the TRF Limited legacy a step further, the Court eloquently held that based on the same reasoning, an arbitration clause which provides exclusive power to one party to appoint a sole arbitrator cannot be valid.

2.7 The aforesaid principle established by Perkins also resonates in judgment delivered by the Delhi High Court in the case of *Proddatur Cable TV Digi Services* v. *SITI Cable Network Limited*[6] where the court held that even a 'company' acting through its Board of Directors will have an interest in the outcome of the dispute and thus, the arbitration clause which envisaged the appointment of a sole arbitrator by the 'company', would be rendered unworkable. The decision was also followed in numerous other occasions.[7]

2.8 In light of the jurisprudential development, it may be safely assumed that the Courts have gradually accepted that the test now is not whether there is 'actual bias' in an arbitrator in a given circumstance, for that would entail an onerous standard of proof, but whether the circumstances create room for justifiable apprehensions of bias[8]. This indeed bodes well, since nations across the globe, especially countries where international commercial arbitration thrives, independence of arbitrators is an important building block of party autonomy. Bias in arbitrators is a nagging issue and complete independence of arbitrators would mean ruling out bias that may not necessarily be attributable to the identity of the person appointed alone, but also to the process of appointment.

3. The decision:

3.1 In light of the aforesaid discussion, it may now be fruitful to look into the reasoning of the Court in McLeod Russel. Here, the arbitration agreement provided for appointment of a Sole Arbitrator unilaterally by the 'Investor', being one of the parties to the agreement. Following appointment of the Sole Arbitrator, the petitioners, (being the party without any say in the appointment of the Sole Arbitrator), had participated in the proceedings and even agreed to passing a consent order by the Sole Arbitrator.

3.2 Subsequently, the petitioners applied to the High Court at Calcutta seeking termination of the Sole Arbitrator's mandate. Such challenge was rejected by the Court, on the ground that the petitioners had actively participated in the proceedings, and the pleadings filed by the petitioners at various stages in the arbitration proceeding amounted to an "*express agreement in writing*" as contemplated in the proviso to section 12(5) of the Act, thereby waiving the objection in respect of the

[5] (2017) 8 SCC 377.

[6] (2020) 2 Arb LR 260.

[7] *Envirad Projects Private Limited* v. *NTPC Limited,* Arbitration Petition No. 27/2022 decided on January 18, 2022.

[8] In *Director General of Fair-Trading* v. *The Proprietary Association of Great Britain,* [(2001) 1 WLR 700, decided on December 21, 2001 (Court of Appeal)] *the* UK Court of Appeal drew a distinction between 'actual bias' and 'apparent bias'. While 'actual bias' denotes a demonstrable situation where a judge has been influenced by partiality or prejudice in reaching his decision, 'apparent bias' denotes existence of a reasonable apprehension that the judge may have been, or may be, biased.

purported disqualification of the Arbitrator.

3.3 The Court also noted that unlike the present matter, there was no such unequivocal acceptance of the arbitration by conduct or otherwise in Perkins. Thus, the Court distinguished the instant case on this ground and refused to terminate the mandate of the Sole Arbitrator, even when the appointment was unilateral.

4. Critical analysis of the decision:

4.1 Three aspects of the decision may be particularly interesting to consider are as follows:

4.2 To participate or not to participate:

4.2.1 Firstly, although the Court recognised that Perkins amplifies and extends disqualification under section 12(5) to all unilateral appointments, divorced from any of the categories of disqualification specified in the Seventh Schedule, the Court in Mcleod Russel, held that participation of a party (which has not played a role in the appointment of arbitrator) in the arbitration process would amount to a waiver of any objection towards unilateral appointment of an arbitrator.

4.2.2 It may be pertinent to note that Courts have, on numerous occasions, while placing reliance on Perkins, dealt with the question whether participation of parties in the arbitration process would disentitle them from challenging a unilateral appointment of an arbitrator by the other party.

4.2.3 Section 12(5) provides that only an '*express agreement in writing*' between the parties to the arbitration waiving disqualification of an arbitrator, after the disputes have arisen, would entitle the 'ineligible' arbitrator to act. In *Bharat Broadband Network Limited* v. *United Telecoms Limited*[9], the Court had clarified that the expression "*express agreement in writing*" in Section 12(5) refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. This was followed in *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited* v. *Ajay Sales & Suppliers*.[10]

4.2.4 The Madras High Court, in a recent decision[11], has held that even if a party has not challenged the unilateral appointment of the sole Arbitrator under Section 13 of the Act, after participating in the arbitration proceeding, it would not take away their right to challenge the award on such ground under Section 34 of the Act. The Court opined that even if a counterstatement would have been filed before the Arbitrator, the award would still be liable to be set aside for the violations of the provisions of Section 12(5) of the Act. Even otherwise, the Supreme Court has already held that it is possible to agitate lack of jurisdiction of the Arbitrator for the first time even at the stage of challenge to an award under Section 34 of the Act[12].

4.2.5 The Bombay High Court, too, has echoed such sentiment to hold that as the specific manner of waiving the applicability of Section 12(5) of the said Act is mandated, if such procedure was not followed, the petitioners' participation in the

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[9] (2019) 5 SCC 755.

[10] 2021 SCC OnLine SC 730.

[11] *Hina Suneet Sharma* v. *M/s. Nissan Renault Financial Services India Private Limited,* Arb.O.P. (Com.Div.) No.159 of 2022 decided on February 15, 2023.

[12] *Lion Engg. Consultants* v. *State of Madhya Pradesh* (2018) 16 SCC 758.

arbitration proceedings would not dis-entitle them from raising an objection in respect of unilateral appointment of the Arbitrator by the respondent[13]. Here the petitioners had even filed a Statement of Defence before the Arbitrator.

4.2.6 The Delhi High Court, while considering a case where the petitioner had participated in the arbitral proceedings before the Sole Arbitrator, has held that such conduct cannot be construed as the petitioner waiving its right under Section 12(5) of the Act. The Court, in effect, held that filing of applications for extension of time for continuance and completion of the arbitral proceedings, or applications before the arbitrator for extension of time to file the affidavit of evidence, etc., cannot be construed as an agreement as contemplated under proviso to Section 12(5) of the Act. Once it is held that the appointment of the Arbitrator has been made unilaterally, it would follow that the said appointment is void ab initio[14].

4.2.7 In McLeod Russel, the Court noted that the petitioners' continued participation in the arbitration proceeding despite having knowledge of the implications of TRF Limited and Perkins tantamounted to waiving the applicability of Section 12(5)[15].

4.2.8 The question that may be posed here is whether, in view of the decisions of the Supreme Court as well as the High Courts, conduct of the parties such as participating in the arbitration proceeding, filing pleadings etc. waive the applicability of the disqualifications in Section 12(5). In case, such answer is in the affirmative, can there be a scale to measure the degree as to how much participation is too much participation, and can a line be drawn?

4.3 An 'express' agreement:

4.3.1 Secondly, on the issue of an *"express agreement in writing"* as contemplated in Section 12(5) of the Act, the Court drew a parallel to section 7 of the Act which recognises that 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.[16] The Court held that as the parties here had exchanged their respective Statement of Claim and Statement of Defence in the present proceeding, the same would amount to an *"express agreement in writing"* even under Section 12(5) of the Act.

4.3.2 It is a settled proposition of law[17] that legal fictions are created only for some definite purpose. A legal fiction is to be limited to the purpose for which it was created, and it would not be legitimate to travel beyond the scope of that purpose, and read into another provision, no matter how attractive the proposition[18]. Section 7 contains a legal fiction whereby an exchange of statements of claim and defence is equated to existence of an arbitration agreement. It may not have been justified

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[13] *Naresh Kanayalal Rajwani* v. *Kotak Mahindra Bank Limited*, Comm. Arbitration Petition (L) No. 1444 OF 2019 decided on November 23, 2022

[14] *Delhi Integrated Multi Modal Transit System Limited* v. *Delhi Jal Board* O.M.P. (T) (COMM.) 16/2021 decided on December 22, 2022.

[15] Paragraph 56 of the judgment.

[16] *Section 7(4) An arbitration agreement is in writing if it is contained in –*
(a)…
(b)…
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

[17] *Bengal Immunity* v. *State of Bihar*, (1955) 2 SCR 603.

[18] (2020) 10 SCC 1

for the Court in McLeod Russel to extend such legal fiction in Section 7 of the Act to conclude that exchange of statement of claim and defence between the parties would even be tantamount to an '*express agreement in writing*' for the purpose of Section 12(5) of the Act.

4.3.3 This is particularly important when considered against the backdrop of the fact that Courts have always maintained that an '*express agreement in writing*' waiving the applicability of Section 12(5), is the statutory sine qua non, for a person, who is otherwise subject to the rigour of Section 12(5), to remain unaffected by it. "*Nothing less would suffice; no conduct, howsoever extensive or suggestive, can substitute for the express agreement in writing*"[19].

4.4 To Perkins or not to Perkins:

4.4.1 Thirdly, the Court held that though Perkins lays down that unilateral appointment by an authority interested in the outcome of the arbitration proceeding is invalid, in the instant case, as the Investor appointed a retired Judge of the High Court as a Sole Arbitrator, it would not conflict with Perkins.

4.4.2 In this context it is important to remember that Perkins held:

> *"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.[20]"*

4.4.3 In TRF Limited too, Supreme Court has clarified that without going into the question of ineligibility or impartiality, if nomination of an arbitrator by an ineligible arbitrator is allowed, it would be tantamount to carrying on the proceeding of arbitration by himself, and that cannot be allowed[21].

4.4.4 The spirit of Perkins signifies that what is important to rule out is the perception of bias. In view of the same, the Court's observation in McLeod Russel to the effect that the appointment of the Arbitrator does not fall foul of Perkins just because the Investor has appointed a purportedly independent and impartial person as the Sole Arbitrator, cannot be correct. If the Investor could not act as an arbitrator in a dispute with itself, it could not have appointed an Arbitrator to adjudicate upon such dispute as well.

5. Parting thoughts:

As far as the provisions of the statute and the judicial precedents are concerned, it appears that just because a party has participated in an arbitration proceeding, they may not be precluded from taking an objection to the unilateral appointment of an arbitrator by the counterparty.

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[19] *JMC Projects India Limited* v. *Indure Private Limited*, O.M.P. (T) (COMM.) 33/2020 decided on August 20, 2020; relied upon in *Larsen and Toubro Limited* v. *HLL Lifecare Limited,* O.M.P. (T) (COMM.) 59/2021 decided on September 21, 2021.

[20] Paragraph 16 of the judgment.

[21] Paragraph 53 of the judgment.

On the other hand, however, it must be remembered that law assists only those who are vigilant, and not those who sleep over their rights. If a party has failed to challenge a unilateral appointment of an Arbitrator at the first instance, and has participated in the arbitration proceeding without any demur or protest whatsoever, is it equitable that they should be allowed to set the clock back by challenging a contested award, solely on the basis that the Sole Arbitrator has been appointed unilaterally? In fact, some Courts have refused to interfere with such awards.[22]

It is, however, also imperative that positive signals to the international business community are sent, to create healthy arbitration environment and conducive arbitration culture in this country. Negating actual as well as perceived bias in arbitrators is an integral component of party autonomy, and decisions like Perkins restore the parties' faith in the process. Is Perkins absolute or is it susceptible to exceptions?

Possibly, the Supreme Court of India will answer such questions soon.

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[22] In *Kanodia Infratech Limited* v. *Dalmia Cement (Bharat) Limited, 2021 SCC OnLine Del 4883*, the arbitrator had been unilaterally appointed by a party. No challenge as to the jurisdiction of the was made by the counterparty. After an award was published, the Court negated the challenge to the award on ground of unilateral appointment.

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