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The Conundrum Surrounding the Unilateral Appointment of Arbitrators and its Implications on the Enforceability of Arbitral Awards

AN ANALYSIS

by

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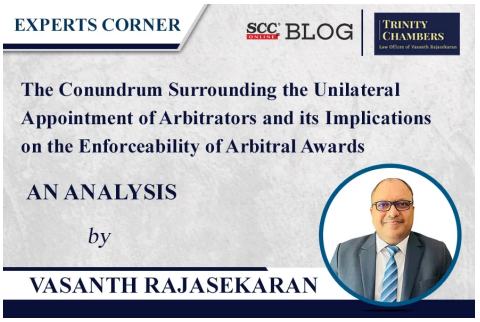

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Over the last two-and-a-half decades, the Indian arbitration law jurisprudence has witnessed remarkable growth with rising emphasis on the independence, impartiality, and neutrality of arbitrators. With the enactment of the Arbitration and Conciliation Act in 1996 (Arbitration Act) and the amendments introduced thereafter, a paradigm shift has been witnessed in the approach towards arbitrators' independence and neutrality. Over time, several judgments have been passed by the Supreme Court of India (Supreme Court) and the High Courts across the country, which have crystallised the Indian legal position on the illegality of unilateral appointment of arbitrators. However, what happens if a unilaterally appointed arbitrator renders an arbitral award? Can it be

challenged under the Arbitration Act? If so, what is the appropriate stage to challenge such an arbitral award? In this article, the author analyses the applicable provisions of the Arbitration Act and examines the jurisprudential trends to answer the above questions.

A. The importance of the principles of impartiality and the independence of an arbitrator

(I) 246th Report of the Law Commission of India

The 246th Report of the Law Commission of India[1] (Law Commission Report) recommended several vital amendments to the Arbitration Act to introduce globally accepted standards of independence and neutrality of arbitrators. In the section titled "Neutrality of Arbitrators", the Law Commission of India (Commission) emphasised that it is universally accepted that any quasi-judicial process, including arbitrations must comply with principles of natural justice. Based on the judicial trends prevalent at that time, the Commission observed that in the balance between procedural fairness and the binding nature of the contractual covenants, the Supreme Court appeared to be tilted in favour of the latter, which as per the Commission, was "far from satisfactory". To offer an example, the Law Commission Report[2] referred to a catena of judgments[3] wherein it was held that arbitration agreements in government contracts providing for arbitration by a serving employee of the department were valid and enforceable.

While setting the context for the proposed amendments, the Commission noted that a sensible law could not permit the appointment of an arbitrator who is a party to the dispute or is employed by one party, even if this was the agreed position between the parties at dispute. It was also observed that the concept of party autonomy could not be stretched to a point where it negates the very basis of having impartial and independent adjudicators to resolve disputes. Accordingly, elaborate amendments were proposed to the provisions under the Arbitration Act concerning the impartiality and neutrality of arbitrators. Firstly, the Commission proposed the insertion of a "Fourth Schedule", which was drawn from the "red" and "orange" lists of the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) to be treated as a guide to determine whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. Secondly, the Commission recommended the introduction of a "Fifth Schedule" incorporating the categories from the red list of the IBA Guidelines.

Further, it was suggested that if a person proposed to be appointed as an arbitrator fell within any one of the categories mentioned in the Fifth Schedule, he would be de jure ineligible to be an arbitrator. The Commission, however, in its recommendations, left a foot in the door by stating that real and genuine party autonomy must be respected, and in certain situations, parties should be allowed to waive the conditions of ineligibility as set out under the Fifth Schedule. More specifically, the Commission proposed that a proviso could be added to Section 12(5) stating that the parties at dispute may waive the applicability of Section 12(5) by way of an express agreement in writing entered into after

the disputes have arisen. The above recommendations of the Commission were accepted and introduced in the Arbitration Act by way of the Arbitration and Conciliation Act (Amendment) Act, 2015[4] (2015 Amendment).

(II) The decision in *Voestalpine*

In what can be said to be a seminal decision on the critical importance of independence and impartiality of arbitrators, the Supreme Court in *Voestalpine Schienen GmbH* v. *DMRC Ltd.*[5] referred to the recommendations made in the Law Commission Report[6] and rendered several important observations. Firstly, the Supreme Court opined that the principles of impartiality and independence were the foundation of any adjudicatory process and could not be discarded at any stage of the arbitral proceedings. In this regard, the Supreme Court referred to a few international decisions and authorities[7] to indicate the jurisprudential trends in other jurisdictions. The Supreme Court observed that to say that party autonomy can be exercised in complete disregard of these principles would be incongruous and illegal. Secondly, the Supreme Court noted that Section 12, as amended in the 2015 Amendment[8], made it manifestly clear that the primary purpose of amending the provision was to provide for the neutrality of arbitrators.

B. The judicial trends on the unilateral appointment of arbitrators

Even prior to the enactment of the Arbitration Act, in the erstwhile regime under the Arbitration Act, 1940, the Supreme Court, while dealing with a case involving the unilateral appointment of an arbitrator in *Dharma Prathishthanam* v. *Madhok Construction (P) Ltd.*[9] held as below:

> "A unilateral appointment as well as unilateral reference – both will be illegal. It would make a difference if in respect of a unilateral appointment and reference if the other party had submitted to the jurisdiction of an arbitrator so appointed and if the rights which it has under such an agreement has been waived, then an arbitrator so appointed may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on not be allowed to raise any objection in with regard to such appointment of arbitrator."

With the introduction of the new regime and the 2015 Amendment[10], the position regarding the illegality of unilateral appointment of arbitrators has only gotten clearer and stricter. In *TRF Ltd.* v. *Energo Engg. Projects Ltd.*[11], the Supreme Court discussed about the implications of the introduction of Section 12(5) and Schedule 7 in the Arbitration Act. The issue before the Supreme Court was whether a person upon becoming ineligible to preside as an arbitrator, on account of the provisions contained in Section 12(5) read with Schedule 7, could still be permitted to nominate another person as an arbitrator. The Supreme Court, answering the moot point in the negative, and held as below:

> "*54*. 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. Once cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as a sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated."

As would be seen above, the Supreme Court while deciding the matter in *TRF Ltd.*[12] observed that once the infrastructure collapses, the superstructure is bound to collapse, hinting that anything that fell out of the illegal and unilateral appointment of an arbitrator is mired with illegality. In simpler terms, when the root is bad, the fruit is also bad.

A case pertaining to unilateral appointment also came before the Supreme Court in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*[13] Interestingly, in this case, the appellant, after having appointed the sole arbitrator unilaterally, approached the High Court of Delhi with a petition under Sections 14 and 15 of the Arbitration Act. It was the appellant's case that subsequent to the pronouncement of the dictum in *TRF Ltd.*[14], the arbitrator appointed in the matter was de jure unable to perform his function of an arbitrator. Accordingly, the appellant prayed for the appointment of a substitute arbitrator. However, the petition filed by the appellant came to be rejected by the High Court of Delhi on the ground that the very person who appointed the arbitrator is estopped from raising a plea on the alleged de jure ineligibility of the arbitrator to continue to act as one.

Eventually, the Supreme Court, in *Bharat Broadband*[15], held that it is inconceivable in law that a person who is statutorily ineligible to act as an arbitrator may nominate a person to act as one. It was further opined that there was only one way by which a unilateral appointment could be upheld in law, where subsequent to the disputes having arisen, the parties agree in writing to waive the applicability of Section 12(5). Accordingly, while setting aside the impugned decision of the High Court of Delhi, the Supreme Court observed as below:

> "*15*. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to as such. Under this provision any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be 'ineligible' to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. ... Obviously, the 'express agreement in writing' has reference

to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."

As seen above, the threshold for allowing the unilateral appointment of an arbitrator to pass the muster of the Arbitration Act is very high. It is only after the disputes have arisen that the parties may agree in writing that they would be waiving the applicability of Section 12(5) of the Arbitration Act in relation to the proposed arbitrator.

The issue of unilateral appointment once again came to be discussed extensively in *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*[16] The Supreme Court, while referring to the decision in *TRF Ltd.*[17] opined that what cannot be done directly may not be done indirectly. Thus, once an arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator.

Over time, several other decisions[18] came to be rendered on unilateral appointment from which the following principles emerge:

(i) In general, the unilateral appointment of a sole arbitrator is void ab initio, and any person who is proposed to be appointed as an arbitrator unilaterally is de jure ineligible to become an arbitrator in terms of Section 12(5) read with the Seventh Schedule of the Arbitration Act.

(ii) The applicability of Section 12(5) can be waived off by the parties at dispute by way of a written agreement entered subsequent to the disputes have arisen between the parties.

(iii) A person's ineligibility to act as an arbitrator strikes at the root of the matter. Accordingly, anything and everything that flows from such illegal appointment is also non est in law.

C. Enforceability of arbitral awards rendered by a unilaterally appointed arbitrator

(I) Whether arbitral awards rendered by unilaterally appointed arbitrators are enforceable under the Arbitration Act?

In *Bharat Broadband*[19] the Supreme Court while rendering observations on the illegality of unilateral appointments reiterated the law laid in *TRF Ltd.*[20] and held that, "it was inconceivable in law that a person who is statutorily ineligible to be an arbitrator can nominate another person as an arbitrator. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without a plinth".

Thereafter, the Supreme Court in *Bharat Broadband*[21], observed that since there was no order of a stay operating in the matter, the underlying arbitral proceedings continued

parallelly and culminated into two awards. The said awards were brought to a challenge under Section 34 of the Arbitration Act. Since the appointment of the arbitrator had already been declared illegal and non est, the awards under challenge were set aside by the Supreme Court, and the Section 34 proceedings were held to be infructuous.

As seen above, the decision in *Bharat Broadband*[22] provides much needed guidance on the fate of awards that are rendered by unilaterally appointed arbitrators. It is clear that such arbitral awards arising out of an illegality going to the root of the matter would be non est and not enforceable in law.

(II) When can the validity and the enforceability of an arbitral award rendered by a unilaterally appointed arbitrator be put to challenge?

It is a well-settled principle of law that arbitral awards which violate the fundamental policy of Indian law, or the most basic notions of morality or justice are patently illegal and contrary to canons of public policy.[23] Accordingly, the award can be put to challenge under Section 34(2)(*b*)(*ii*) of the Arbitration Act.

However, since the unilateral appointment of an arbitrator is a matter going to the root of it, a challenge concerning the same may also be brought in the course of the enforcement proceedings. In *Cholamandalam Investment and Finance Co. Ltd.* v. *Amrapali Enterprises*[24] the Calcutta High Court (High Court) was dealing with an application filed under Section 36 of the Arbitration Act seeking the execution of an arbitral award which was rendered by a unilaterally appointed sole arbitrator. The High Court upon placing reliance on a catena of judgments[25] held that unilateral appointment of an arbitrator, especially in absence of an express waiver in writing as contemplated under the proviso to Section 12(5), is void ab initio and anything that emerges out of such appointment is also non est in law. Thereafter, the High Court referred to various other decisions[26] of High Courts across India to hold that an arbitral award rendered by a unilaterally appointed sole arbitrator would also be void and non est in law.

The High Court while arriving at its conclusion in *Cholamandalam*[27] observed that:

> "*17*. … the impugned award, which was passed by a de jure ineligible arbitrator, suffers from a permanent and indelible mark of bias and prejudice which cannot be washed away at any stage including the execution proceedings. In fact, as the arbitrator was de jure ineligible to perform his functions and therefore, lacked inherent jurisdiction or competence to adjudicate the disputes in hand, the impugned award cannot be accorded the privileged status of an award."

The High Court then answered the question as to whether objections on the enforceability of the award on grounds of non-compliance of the statutory mandate set out in Section 12(5) of the Arbitration Act could be raised at the stage of enforcement/execution proceedings under Section 36 of the Arbitration Act. In this

regard, the High Court opined that there is no denying that the Arbitration Act is a complete code in itself and there is no express provision providing for the scope of an adverse interference with an arbitral award under Section 36 of the Arbitration Act. However, the High Court took note that in terms of Section 36 of the Arbitration Act, an arbitral award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (CPC) "in the same manner as if it were a decree a court". Accordingly, the High Court opined that while Section 47 CPC was not directly applicable, the jurisprudence and principles thereunder could be applied in appropriate cases involving arbitral awards passed by Arbitral Tribunals lacking inherent jurisdiction. In this regard, the High Court placed reliance on the decision in *Sunder Dass* v. *Ram Prakash*[28] and a few other decisions[29] where, in the context of the provisions of CPC, it was held that an executing court could entertain an objection that the decree is a nullity and mired with illegality going to the root of the matter. The High Court even went to the extent of stating that a court could not shut its eyes to a grave irregularity that would occur if the execution of the award was not prevented. Accordingly, the award was set aside, and a new arbitrator was appointed. Subsequently, a similar decision[30] came to be rendered by the same Bench of the High Court after placing reliance on the findings of the decision in *Cholamandalam*[31].

D. Conclusion

The Indian arbitration jurisprudence has come a long way in recognising and adopting global standards for the independence and neutrality of arbitrators. The position regarding the illegality of unilateral appointments made in contravention of the statutory mandate under Section 12(5) of the Arbitration Act is well settled. It is also recognised in Indian law that the illegality of an arbitrator's appointment goes to the root of the matter and anything that emerges out of such appointment is non est. Therefore, any arbitral award that emerges from an appointment made in contravention of Section 12(5) of the Arbitration Act is a nullity and cannot be enforced. The objections on the enforceability of such arbitral awards may be put forth in the form of a challenge under Section 34 of the Arbitration Act and can also be taken up at the stage of execution/enforcement under Section 35 of the Arbitration Act.

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1. Law Commission of India, Report No. 246 <http://www.scconline.com/DocumentLink/N7O69Zxv>.
2. Law Commission of India, Report No. 246 <http://www.scconline.com/DocumentLink/N7O69Zxv>.
3. *Executive Engineer* v. *Gangaram Chhapolia*, (1984) 3 SCC 627; *Govt. of T.N.* v. *Munuswamy Mudaliar*, 1988 (Supp) SCC 651; *International Airports Authority of India v. K.D. Bali*,

(1988) 2 SCC 360; *S. Rajan* v. *State of Kerala*, (1992) 3 SCC 608; *Indian Drugs & Pharmaceuticals Ltd.* v. *Indo Swiss Synthetics Gem Mfg. Co. Ltd.*, (1996) 1 SCC 54; *Union of India* v. *M.P. Gupta*, (2004) 10 SCC 504; and *ACE Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304.

4. Arbitration and Conciliation (Amendment) Act, 2015

5. (2017) 4 SCC 665.

6. Law Commission of India, Report No. 246 <http://www.scconline.com/DocumentLink/N7O69Zxv>.

7. *Hashwani* v. *Jivraj*, (2011) 1 WLR 1872; and *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 562 (Emmanuel Gaillard and Eds., 1999) quoting *Consorts Ury* v. *S.A. des Galeries Lafayette*, No. 17189 (1972) (France).

8. Arbitration and Conciliation (Amendment) Act, 2015

9. (2005) 9 SCC 686.

10. Arbitration and Conciliation (Amendment) Act, 2015

11. (2017) 8 SCC 377, 404-405.

12. (2017) 8 SCC 377.

13. (2019) 5 SCC 755.

14. (2017) 8 SCC 377.

15. (2019) 5 SCC 755, 768.

16. (2020) 20 SCC 760.

17. (2017) 8 SCC 377.

18. *Haryana Space Application Centre* v. *Pan India Consultants (P) Ltd.*, (2021) 3 SCC 103; *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd.* v. *Ajay Sales & Suppliers*, 2021 SCC OnLine SC 730; and *Ellora Paper Mills Ltd.* v. *State of M.P.*, (2022) 3 SCC 1.

19. (2019) 5 SCC 755.

20. (2017) 8 SCC 377.

21. (2019) 5 SCC 755.

22. (2019) 5 SCC 755.

23. *Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644; *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705; *McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263; *Associate Builders* v. *DDA*, (2015) 3 SCC 49.

24. 2023 SCC OnLine Cal 605.

25. *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471; *TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377; *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760;

Bharat Broadband Network Ltd. v. *United Telecoms Ltd.*, (2019) 5 SCC 755; *Yashovardhan Sinha (HUF)* v. *Satyatej Vyapaar (P) Ltd.*, 2022 SCC OnLine Cal 2386; and *B.K. Consortium Engineers (P) Ltd.* v. *Indian Institute of Management*, 2023 SCC OnLine Cal 124.

26. *Ram Kumar* v. *Shriram Transport Finance Co. Ltd.*, 2022 SCC OnLine Del 4268; *JV Engg. Associate* v. *CORE*, 2020 SCC OnLine Mad 4829; and *Naresh Kanyalal Rajwani* v. *Kotak Mahindra Bank Ltd.*, 2022 SCC OnLine Bom 6204.
27. 2023 SCC OnLine Cal 605.
28. (1977) 2 SCC 662.
29. *Hiralal Moolchand Doshi* v. *Barot Raman Lal Ranchhoddas*, (1993) 2 SCC 458.
30. *SREI Equipment Finance Ltd.* v. *Sadhan Mandal*, 2023 SCC OnLine Cal 831.
31. 2023 SCC OnLine Cal 605.