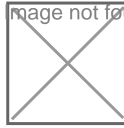

Update

30 January 2020, Thursday

Party appointed sole arbitrator ineligible in view of the Perkins decision et al. (Delhi High Court)

by

Proddatur Cable TV Digi Services v. SITI Cable Network Limited

Court: Delhi High Court | **Case Number**: OMP (T) (COMM) 109/2019 | **Citation**: 2020 SCC online Del 350 | **Bench**: Jyoti Singh J | **Date**: 20 January 2020

An agreement of August 2015 between the parties provided for resolution of disputes by a sole arbitrator appointed by Siti Cable (defined in the arbitration clause as "Company") ("Siti"). When disputes arose, Siti asserted its right to appoint a sole arbitrator and made a nomination. Proddatur Cable TV Digi Services ("Proddatur") did not consent and reserved its objections to "be raised in due course."

The judgment in *Perkins Eastman Architects DPC and another* v*. HSCC (India) Ltd.,* 2019 SCC OnLine SC 1517 ("*Perkins*"), was delivered by the Supreme Court on 26 November 2019. Proddatur requested the arbitrator to step down, and when she did not, it filed an application under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ("ACA") seeking a declaration that the mandate of the arbitrator is terminated.

Jyoti Singh, J., sitting singly, applied the ratio of *Perkins*, rejected all the arguments run to distinguish *Perkins*, and concluded that the arbitration clause "empowering the 'Company' to appoint the Sole Arbitrator … would be vitiated in the light of the law laid down by the Supreme Court." Accordingly, the arbitrator was declared ineligible, and substituted by a retired judge. These were the court's reasons: –

a. Following the ratio in *Perkins*, a unilateral appointment by an authority that is interested in the outcome or decision of the dispute is impermissible in law. The arbitration clause empowers the Company to appoint a sole arbitrator. It can hardly be disputed that the 'Company' acting through its Board of Directors ("BoD") will have an interest in the outcome of the dispute. The clause is directly hit by *Perkins*.
b. The underlying principle in arbitration is party autonomy but at the same time fairness, transparency and impartiality are virtues that are equally important. If the authority appointing the arbitrator is the head or an employee of a party to the agreement, then its interest in its outcome is only natural. Once such authority or a person appoints an arbitrator, the same ineligibility would translate to the arbitrator.

c. The argument that *Perkins* involved the power of a Managing Director, whereas this case is about the power of the Company "merits rejection." *Perkins* was decided on the "simple logic that a Managing Director of a company would always have an interest in the outcome of the arbitration proceedings". Here, 'interest' "takes the shape of bias and partiality." The "thread of biasness, partiality and interest in the outcome of the dispute would continue to run" even if the Managing Director were to appoint another person.
d. "Seen in this light", it can hardly be argued that *Perkins* will not apply only because the designated authority is other than the Managing Director.
e. The Company is run by the directors collectively. Section 166 of the Companies Act 2013, which sets out duties of directors, makes it clear that a director must always act in good faith to promote the objects of the company and in the best interest of the company, shareholders and employees.
f. The directors as a part of BoD would be interested in the outcome of the arbitration proceedings. The Company, therefore, acting through its BoD would suffer the ineligibility under Section 12(5) ACA read with the Seventh Schedule.
g. The argument that *Perkins* would not apply to an ongoing arbitration is also wrong. The issue has already been decided in *Bharat Broadband Network Limited* v*. United Telecoms Limited*, (2019) 5 SCC 755, where it was held that as soon as a clarificatory judgment is pronounced, Section 14 ACA comes into play automatically terminating the mandate *de jure*.
h. The argument that Section 12(5) ACA does not apply since the agreement was entered before the Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Amendments") is also not correct because: –
    i. First, Section 12(5) ACA itself has a *non obstante* clause stipulating that it will apply notwithstanding any prior agreement to the contrary.
    ii. Second, the date of commencement of arbitration is relevant which in this case was after the 2015 Amendments (citing to *Board of Control for Cricket in India* v. *Kochi Cricket Private Limited,* (2018) 6 SCC 287)).
i. *Voestalpine Schienen GMBH* v*. Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665 ("*Voestalpine*"), does not bar Proddatur's petition. Voestalpine was not a case of unilateral appointment. In fact, Perkins took note of *Voestalpine*.
j. Lastly, the judgment of the Supreme Court in *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV),* 2019 SCC OnLine SC 1635 is also of no avail because:
    i. The Supreme Court was dealing with an arbitration clause that required a panel of arbitrators to be provided by the Railways to the other party to the contract.
    ii. The court held that since one party was to provide a panel and the other party had the choice to shortlist the arbitrator of its choice from that panel, Railways was bound to appoint at least one arbitrator to constitute the Tribunal.
    iii. The parties had a level playing field. Railways' choice of appointing an arbitrator was balanced by the choice of the other party to appoint the second arbitrator. Thus, the elements of fairness, transparency, and impartiality were taken care of.

Categories: Appointment of Arbitrators | Entry 1 Seventh Schedule | Impartiality of Arbitrator | Independence and Impartiality of Arbitrator | Independence of Arbitrator | Neutrality of Arbitrator | Party Appointed Sole Arbitrator | Party Autonomy | Section 12 ACA | Section 13 ACA | Section

14 ACA | Section 15 ACA | Termination of Mandate and Substitution of Arbitrator | Voestalpine