When the agreement specifically provides for the appointment of an arbitral tribunal from a panel of serving or retired Railway Officers, the appointment should be in terms of the agreement; TRF case and Perkins case distinguished (Supreme Court of India)

Update by Editor

Published on 6 January 2020

Central Organisation for Railway Electrification v. ECI-SPIC-SMO_MCML (JV)

Court: Supreme Court of India | **Case Number**: Civil Appeal Nos. 9486-9487 of 2019 | **Citation**: 2019 SCC OnLine SC 1635 | **Bench**: R Banumathi, AS Bopanna & Hrishikesh Roy JJ | **Date**: 17 December 2019

A. The Context

This is a recent addition to the list of cases on the appointment of arbitrator versus the principles of neutrality.

Several provisions relating to the neutrality of arbitrators were introduced in the Arbitration and Conciliation Act, 1996 ("**ACA**") in 2015. The Seventh Schedule provides for "arbitrator's relationship with the parties or counsel". Under Section 12 (5), ACA, a person whose relationship with the parties or counsel falls under the Seventh Schedule is ineligible to act as arbitrator. But the parties, subsequent to the dispute having arisen, may waive the applicability of Section 12 (5) by an express agreement in writing.

In *TRF Limited* v. *Energo Engineering Limited*, (2017) 8 SCC 377, a 2-judge bench of the Supreme Court held that a person ineligible to be an arbitrator (like officer or employee of one party) could not be the person empowered to appoint another. Another 2-judge bench in *Perkins Eastman Architect DPC* v. *HSSC (India) Ltd.*, 2019 SCC OnLine SC 1517 extending the *TRF* principle held that a party (or any official of the party) or anyone having an interest in the dispute could not unilaterally appoint a sole arbitrator.

See our update on Perkins here. See also here the update on Lite Bite, a recent Bombay High Court decision 'summarising' the legal principles.

B. The background of this case

This case involved the Indian Railways' Standard General Conditions of Contract ("GCC"),[1] revised after the 2015 amendments, which provides the following appointment mechanism of the arbitral tribunal: –

(a) where the applicability of Section 12 (5) **has been waived**, but the claim is below one crore [***Clause 64 (3) (a) (i)***]: –

(i) Serving Railways officer as sole arbitrator to be appointed by General Manager, Railways.

[1]The petitioner, CORE, is an organisation set up under the Ministry of Railways to carryout railway electrification over the entire network of Indian Railways.

www.nfral.in
© National Forum for Research in Arbitration Law. All rights reserved.

(b) where the applicability of Section 12 (5) **has been waived**, but the claim is more than one crore [***Clause 64 (3) (a) (ii)***]: –

   (i) Three serving railways officers or 2 serving railway officers plus one retired officer >Railway to send a panel of names to the contractor >Contractor to choose at least two names, from which one to be appointed (by General Manager, Railways) as contractor's nominee >The General Manager to appoint the remaining two from the panel or outside it, also indicating the presiding arbitrator.

(c) where Section 12 (5) of the ACA has **not been waived** [***Clause 64 (3) (b)***][2]: –

   (i) Three retired officers >Railways to send a panel of names to contractor >Contractor to choose at least two names, from which one to be appointed by General Manager, Railways as contractor's nominee>The General Manager to appoint the remaining two from the panel or outside it, including the presiding arbitrator.[3]

When disputes arose, the respondent JV ("**JV**") was sent by the petitioner CORE a list of names of serving officers (under the clause which applied if Section 12 (5) was waived). The JV did not make the waiver. Then, CORE sent a list of names of retired officers (under the clause which applied in the case of non-waiver). The JV did not select from this list either and applied to the court under Section 11 of the ACA for an appointment of a sole arbitrator. The High Court appointed a retired judge of that court.[4]After that, CORE approached the Supreme Court.

The question was if appointment of an arbitrator independent of the GCC provisions was right? In the course, other questions arose around the neutrality provisions and applicability of previous judgments of the Supreme Court.

C. "Appointment of an independent arbitrator without reference to the Clauses of the GCC—whether correct?" The court said NO.

The court first noted the parties' arguments.

Then it referred to the clauses of the GCC and concluded as follows (in one paragraph, broken into two sentences below for convenience): –

(a) After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified *inter alia* providing for constitution of a tribunal consisting of three arbitrators, either serving or retired railway officers;

(b) The High Court is not justified in appointing a sole independent arbitrator without resorting to the procedure for appointment as prescribed under Clause 64(3)(b) of the General Conditions of Contract [the clause applicable if Section 12 (5) had been waived].

---

[2]This clause too had a segregation depending on the claim amount of 50 lakhs and more. The terms summarized above are the ones that were applicable to the case.

[3]As will be seen, the court does not address the power of the General Manager to even appoint the presiding arbitrator.

[4]In its short order the High Court noted that the list was not made available at an earlier point in time, and in any case since no agreement could be reached, the court's jurisdiction had clearly arisen. It also said that court can appoint an arbitrator *de hors* parties' contract. From the facts set out in the Supreme Court's judgment, it appears the lists were sent before the petition was filed.

www.nfral.in
© National Forum for Research in Arbitration Law. All rights reserved.

Secondly, the court referred to the fact that the JV itself, in its application under Section 11(6), prayed for appointment of a sole arbitrator in terms of the clauses of the tender and Clause 64 of the GCC, and had identified a name (which CORE did not agree to since he was not empaneled).[5]

Thirdly, the court referred to and applied its earlier 2-judge decision in *Union of India* v. *Parmar Construction Company* 2019 SCC OnLine SC 442. In *Parmar*, the Supreme Court set aside the appointment of an independent arbitrator and directed the General Manager of Railways to appoint the tribunal in terms of the agreement. The court in *CORE* also referred to *Union of India* v. *Pradeep Vinod Construction Company*, 2019 SCC Online SC 1467 (a 3-judge bench presided by Banumathi J), where relying on *Parmar,* it was held that the appointment should be in terms of the agreement.[6]

D. Are retired Railways officers statutorily ineligible? No, they are not.

The court held: –

(a) As held in *Voestalpine SchienenGmbh Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665, the very reason for empanelling retired railway officers is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise. Therefore, merely because they are retired does not make them ineligible.

(b) The same view was reiterated in *Government of Haryana PWD Haryana (B and R) Branch G.F. Toll Road Private Limited*, (2019) 3 SCC 505 where the Supreme Court held that there is no bar under Section 12(5) of the ACA for appointing a retired employee as arbitrator.

E. Being ineligible by operation of law to be appointed as arbitrator, could the General Manager nominate another? YES

The JV argued, relying on *TRF* and *Perkins* that the General Manager was ineligible to nominate any other person to be an arbitrator; "that which cannot be done directly, may not be done indirectly."

The court rejected the argument and held as follows: –

(a) In *TRF*, though the court observed that one who is ineligible to act as an arbitrator could not nominate another, the court also discussed, at paragraph 50 (SCC version), another situation "where both the parties could nominate respective arbitrators of their choice and that it would get counter-balanced by equal power with the other party."[7]

(b) In *Perkins*, after referring to paragraph 50 of *TRF*, the court referred to the situation where both parties have the advantage of nominating an arbitrator of their choice and observed that the

[5]The court does not state any legal principle applicable to this fact. It appears to be that of acquiescence.
[6]See our update on *Pradeep Vinod* here. Both in Parmar as well as *Pradeep Vinod*, the court had found that the pre-2015 provisions applied.
[7]Paragraph 50 of TRF (SCC Online version) "50. …..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…." (emphasis of CORE judgment).

www.nfral.in
© National Forum for Research in Arbitration Law. All rights reserved.

advantage of one party in appointing an arbitrator would get counter-balanced by equal power with the other party.[8]

(c) In this case, CORE sent a panel of four names of retired Railways officers to act as arbitrators requesting the JV to select any two [from which the General Manager would have appointed the JV's nominee]. Since the JV has been given the power to select two names from out of the four names of the panel, the power of CORE in nominating its arbitrator gets counterbalanced by the power of choice given to the JV. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of JV to select any of the two nominees.[9]

(d) In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot be said that the General Manager has become ineligible to act as the arbitrator.[10] *TRF* is not applicable.

(e) When the agreement specifically provides for the appointment of the tribunal consisting of three arbitrators from out of the panel serving[11] or retired[12] Railway Officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties.

F. CORE did not forfeit the right to appoint

The JV had argued that the request for an appointment was made on 27 July 2018, but no steps were taken within thirty days–CORE, thus, forfeiting the right.

Rejecting the argument, the court first noted that *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.*, (2006) 2 SCC 638 (and *Union of India* v. *Bharat Battery Manufacturing Co. (P) Ltd.* (2007) 7 SCC 684 which followed *Punj Lloyd Ltd.*) where it was held that if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files an application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.[13]

Then it noted the following dates: –

(a) The JV requested to refer the dispute to arbitration on 27 July 2018. On 24 September 2018 (which is within sixty days provided under the agreement), CORE sent a panel of names as the contract required (the applicable clause if Section 12 (5) had been waived).

(b) On 26 September 2018, the JV respondent conveyed it was not waiving Section 12(5) of the ACA.

---

[8]The expression "counter-balanced" was used in Perkins while explaining paragraph 50 of *TRF*.
[9]The court does not discuss the General Manager's power in the GCC to also appoint the presiding arbitrator.
[10]The court here possibly means to refer to the General Manager's power under the GCC to nominate an arbitrator since the clause did not empower her to be an arbitrator. Or, the court may be referring to the General Manager's ability to act as an arbitrator where Clauses 64(3)(a)(ii) applies (that is where Section 12 (5) has been waived).
[11]Where Section 12 (5), ACA has been waived.
[12]Where Section 12 (5), ACA has not been waived.
[13]The court cited *Punj Lloyd*, and reproduced the relevant passages, but when summarizing its holding, expressed it in the following words: "if the opposite party has not made any application for appointment of the arbitrator within thirty days of demand, the right to make appointment is not forfeited but continues; but the appointment has to be made before the former files application under Section 11 of the Act seeking appointment of an arbitrator".

www.nfral.in
© National Forum for Research in Arbitration Law. All rights reserved.

(c) On 25 October 2018, in terms of Clause 64(3)(b) of GCC (the applicable clause if Section 12 (5) had *not* been waived), CORE sent a panel of names and requested the respondent to make its selection.

The court then concluded, when without responding to the letter (communicating the panel of names) the JV filed the petition, it cannot contend that CORE's right extinguished.

www.nfral.in
© National Forum for Research in Arbitration Law. All rights reserved.