The appointment of sole-arbitrator by the Government in a dispute where one party is a public sector undertaking is valid (Punjab & Haryana High Court)

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Reliance Infrastructure Ltd. v. State of Haryana and another

Court: Punjab & Haryana High Court | **Case Number:** Civil Revision 7191 of 2019 | **Citation:** MANU/PH/0428/2020 | | **Judge:** Alka Sarin J | **Date:** 03 June 2020 | **Available at:** https://indiankanoon.org/doc/157439483/

A. The arbitration clause and appointment of sole arbitrator by the government on the recommendation of HPGCL

Haryana Power Generation Corporation Limited ("HPGCL") is a state-government company of the Government of Haryana.[1] A construction contract HPGCL had with Reliance Infra provided that the dispute shall be settled by a sole arbitrator appointed by the Government of Haryana.

After disputes arose, the Managing Director of HPGCL recommended the appointment of the former Chief Secretary, Ms Promila Issar as the sole arbitrator. She was already an arbitrator in a dispute from another similar contract between the same parties. The Chief Minister accepted the recommendation, and Ms Issar was appointed.

B. Appointment challenged after the *TRF* judgment

The appointment was challenged first before the judgment in *TRF* v. *Energo Engineering Project Limited*, (2017) 8 SCC 377 on the ground that she did not disclose that she was the former Chief Secretary. The matter travelled to the Supreme Court, where Reliance Infra ultimately withdrew the petition.

After the *TRF* judgment, the challenge was resurrected. A petition was filed under Section 14 ACA in a court at Gurgaon to declare that the appointment was *void ab initio*, or for a declaration that the mandate stood terminated. The petition was dismissed. The dismissal was challenged in the High Court. HPGCL mainly argued that Ms Issar became disqualified under the Seventh Schedule of ACA as interpreted by the Supreme Court because the Managing Director of HPGCL, a party to the dispute, had recommended her name, which was merely approved by the Government. In effect, this was an appointment by the Managing Director and, therefore, wrong in law.[2] It was also argued that the non-

[1] https://www.zaubacorp.com/company/HARYANA-POWER-GENERATION-CORPORATION LTD/U45207HR1997SGC033517.

[2] In *TRF Limited v. Energo Engineering Limited*, (2017) 8 SCC 377, the arbitration clause provided that any dispute "shall be referred to sole arbitration of the Managing Director of buyer or his nominee." By the time this matter was heard, several provisions relating to the neutrality of arbitrators had been introduced in the ACA. Given the amended provisions, it was common ground that the Managing Director was disqualified to himself act as an arbitrator. The question was if he could nonetheless nominate another person? The court held: "once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator." 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 cannot unilaterally appoint

disclosure went to the root of the matter, and also there was evident bias (because she was dealing with another arbitration).

C. Alka Sarin J rejected all arguments and dismissed the petition

First, Alka Sarin J considered the law on Section 12 ACA and concluded that in a petition under Section 14 ACA, the court "is only to delve into the question as to whether the Sole Arbitrator falls in any one of the categories specified in the Seventh Schedule and has become ineligible to act as Sole Arbitrator."[3] Second, she considered the argument that in light of *Perkins* (see fn. 1), the appointment of Ms Issar was bad in law because, in effect, it was an appointment by the Managing Director of HPGCL (her name having been recommended and merely approved by the Government). She rejected the argument concluding that:

(a) HPGCL's Managing Director was neither the sole arbitrator nor the power to appoint the sole arbitrator vested with him.

(b) The sole arbitrator was appointed by the Government of Haryana, which was neither a party nor a signatory to the contract/agreements.

(c) The case did not fall in either of the two situations discussed in *Perkins*.

(d) It is not Reliance's case that the Government of Haryana could not have appointed the arbitrator or that the Government of Haryana is a stakeholder in HPGCL had been rendered ineligible to nominate a sole arbitrator.

She also concluded that Reliance was not able to establish that the case fell either under the Seventh Schedule "or the parameters laid down by the Supreme Court" in *TR*F, *Bharat Broadband*, or *Perkins*.
Third, Sarin J noted that the next argument that "there are common interests of both [the Government and HPGCL] in the arbitration as [HPGCL] is a government-owned Corporation and, therefore, the nomination by [HPGCL] is a contravention of the Seventh Schedule …"
She rejected that argument observing that:

(a) Merely because the State of Haryana has some financial interest in the setting up of HPGCL, or has a nominee on the Board of HPGCL would not *ipso facto* mean that it has any interest in the arbitral proceedings.

(b) "That apart, no material is available on the record to substantiate this point."

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a sole arbitrator.

[3] The court referred to *HRD Corporation* v. *GAIL (India) Limited*, (2018) 12 SCC 471 for this proposition. The scheme of Sections 12, 13 and 14 ACA" was also discussed in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, (2019) 5 SCC 755 where the court noted as follows at paragraph 17: "where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such a person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch the arbitrator becomes, as a matter of law (i.e.de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties."

(c) "If the contention is accepted then virtually in every dispute involving a State Board, Corporation, Organization, etc. the State Government would not be in a position to appoint an Arbitrator."

Fourth, Sarin J then considered another strand of the argument, namely, that the Government "would be interested in the outcome of the arbitration and would, therefore, be disentitled from playing any role in the appointment of the Sole Arbitrator." She said the argument was also unacceptable because:

(a) The Government was neither a party nor a signatory to the contract.

(b) Merely because the Government also zeroed down on the same person as recommended by the Managing Director of HPGCL would not imply that the Government did not independently apply its mind.

(c) There is no material on the record, nor has it even been argued by Reliance Infra that the Government was interested in the outcome of the decision in the arbitral proceedings.[4]

(d) That being so, it cannot be held that the appointment of the Sole Arbitrator was bad given the provisions of Section 12(5) of the Act.

Fifth, the ground that the arbitrator was dealing with a similar matter between the same parties was rejected by noting that there is no such ground in the Seventh Schedule. Sarin J also pointed out that the argument was never raised in the earlier round of litigation.

Sixth, Sarin J next considered the argument on non-disclosure and concluded that the ground had been raised and rejected in the previous round of litigation.

Lastly, Sarin J made two additional points. She said that the supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the subordinate courts "within the bounds of their jurisdiction and has to be used sparingly and only in appropriate cases, where the judicial conscience of the High Court is pricked to act to avoid grave injustice." Moreover, she added that the object of ACA is to minimize judicial intervention. Two, the matter had been pending for a long time, and some ground which had attained finality were agitated again.

[4] Sarin J was considering the argument whether the arbitrator's appointment was bad in law because the Government was interested in the outcome. It appears odd to negate this argument by saying Reliance has never argued that the Government was interested in the outcome.