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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 18.12.2019

% Date of Judgment: 20 .01.2020

\+ O.M.P. (T) (COMM.) 109/2019 and I.A. 17896/2019

PRODDATUR CABLE TV DIGI SERVICES ..... Petitioner

Through Mr. R.V. Yogesh, Ms. Sindoora and Ms. Snigdha Singh, Advocates.

versus

SITI CABLE NETWORK LIMITED ..... Respondent

Through Ms. Ritwika Nanda, Ms. Petal Chandhok and Mr. Abhishek Bose, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present petition has been filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (Act) seeking a declaration that the mandate of the Arbitrator appointed by the respondent be terminated and an Arbitrator be appointed by this Court in accordance with the provisions of the Act.

2. The present petition arises out of a Distribution Agreement entered into between the parties on 03.08.2015. Clause 13 of the Agreement provides for resolution of the disputes between the parties by way of arbitration.

3. Certain disputes arose between the petitioner and the respondent as to the amounts due to the petitioner during the subsistence of the Distribution Agreement. It is the petitioner's case that all his efforts to

amicably recover the amount from the respondent failed and upon which the petitioner invoked the Arbitration Clause, vide notice dated 29.10.2018. The petitioner nominated an advocate as his Arbitrator. The respondent replied to the notice on 28.11.2018 and disagreed with the name proposed by the petitioner. Placing reliance on clause 13.2 of the Agreement and claiming power to unilaterally nominate the Arbitrator, the respondent appointed Ms. Charu Ambwani as the Arbitrator.

4. On 09.01.2019, the petitioner requested the Arbitrator vide a letter to enter upon reference and on 19.01.2019, the first procedural hearing was conducted. The petitioner avers that on 10.01.2019, the Arbitrator addressed a letter to the counsels for the parties seeking consent of the petitioner to her appointment alongwith a disclosure under Section 12 of the Act. The petitioner responded vide a letter dated 14.01.2019 declining consent to her appointment.

5. The petitioner avers that through its counsel it sent an email dated 28.01.2019 to the Arbitrator pointing out that objections regarding procedure and jurisdiction would be raised in due course by the petitioner as per provisions of the Act. On 26.11.2019, the Supreme Court delivered its judgment in ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd. 2019 SCC Online SC 1517*** in view of which the unilateral appointment of the Arbitrator by the respondent is vitiated under Section 12(5) of the Act.

6. The petitioner avers that in view of the said judgment, the petitioner conveyed to the nominated Arbitrator not to proceed with the arbitration as her mandate stands terminated *de jure*. The

Arbitrator vide an email dated 07.12.2019 communicated that she would continue with the proceeding unless there was a judicial order terminating her mandate. Hence the petitioner has filed the present petition.

7. Both parties have been heard at length and have filed written submissions elaborating the arguments made.

8. The contention of the counsel for the petitioner is that the case of the petitioner is squarely covered by the judgment in the case of ***Perkins (supra)*** and ***Bharat Broadband Network Limited vs. United Telecoms Limited (2019) 5 SCC 755***. He contends that it is undisputed that the respondent had unilaterally appointed the Arbitrator and thus the appointment is vitiated in terms of the above judgment. Learned counsel has relied on the following paragraph of the judgment in the case of ***Perkins (supra)***:

> *"20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in*

the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, 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. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited"

9. Counsel has also drawn the attention of the Court to the Arbitration Clause between the parties which reads as under :-

> "13. PROPER LAW, JURISDICTION AND DISPUTE RESOLUTION
>
> 13.1 This Agreement shall be construed and the legal relations between the Parties hereto shall be determined and governed according to the laws of India and the Courts of Delhi shall have sole jurisdiction. No other court shall have jurisdiction in this regard.
>
> 13.2 All disputes or differences whatsoever which shall at any time hereafter (whether during the continuance and in force of this Agreement in this regard or upon or after discharges or determination) arise between the parties hereto or their respective successors in title and assigns touching or concerning this Agreement or its interpretation or effect or as to the rights, duties, responsibilities and liabilities of the parties or either of them under or by virtue of this Agreement or otherwise as to any other matter in any way connected with, arising out of or in relation to the subject matter of this Agreement shall at first be subjected to an attempt at resolution by mutual amicable discussion, failing which the same shall be referred for Arbitration by the sole arbitrator appointed by the Company, within thirty days of the invocation of the arbitration, under the provisions of the Arbitration and Conciliation Act, 1996, read with

> rules made thereunder. The award shall be rendered in English Language and shall be final and binding between Parties. The venue of the arbitration shall be Delhi and the language for the conduct of the arbitration proceedings shall be English."

10. Learned counsel submits that the arbitration clause envisages the appointment of a Sole Arbitrator by the 'Company' i.e. the respondent herein. The clause is thus hit by the ratio of the judgment in ***Perkins (supra)*** wherein the Supreme Court has clearly held that where only one party has a right to appoint a Sole Arbitrator, its choice will always have an element of exclusivity in determining the course of dispute resolution. Thus, the person who has an interest in the outcome or decision of the dispute must not have power to appoint a Sole Arbitrator.

11. Learned counsel also contends that the applicability of de jure termination under Section 12(5) to on-going arbitrations has also been settled by the Supreme Court in the case of ***Bharat Broadband (supra)***. In the said case the issue had arisen in the context of applicability of the judgment of the Supreme Court in ***TRF Limited vs. Energo Projects Limited (2017) 8 SCC 377*** to an on-going arbitration. The Supreme Court held that as soon as a clarificatory judgment is pronounced, Section 14 of the Act comes into play, automatically terminating the mandate de jure. Relevant part of the judgment in the case of ***Bharat Broadband (supra)*** is as under :-

> *"**18.** On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act*

as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

*"**Arbitrator's** relationship **with the parties or counsel***

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***5.** The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."*

Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] on 3-7-2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 3-7-2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility" i.e. to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book, and Shri Khan was appointed long after 23-10-2015. The judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] nowhere states that it will apply only prospectively i.e. the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23-10-2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27-1-2016, by which the Managing Director of the respondent nominated a former Judge of

this Court as sole arbitrator in terms of Clause 33(d) of the purchase order dated 10-5-2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Considering that the appointment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] of a retired Judge of this Court was set aside as being non est in law, the appointment of Shri Khan in the present case must follow suit.

19. *However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellant's application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.*

20. *This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in*

documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

*"**9. Promises, express and implied**.—Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he

has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2) and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."

12. Per contra, learned counsel for the respondent contends that the autonomy of the parties to the choice of procedure as contained in an Arbitration Agreement is a foundation pillar of arbitration. Parties are at liberty to choose the procedure for arbitration including but not limited to the appointment of an arbitrator. Reliance is placed on the judgment of the Supreme Court in the case of ***Centrotrade Minerals & Metal Inc vs. Hindustan Copper Ltd. (2017) 2 SCC 228*** and it is submitted that the judgment was delivered post the 2015 amendment to the Act.

13. It is next contended that under Section 7 of the Act, parties can decide on the procedure for appointment of the Arbitrator. The

petitioner by executing the Distribution Agreement had on its free will and without coercion agreed for appointment of the Arbitrator as per the terms of clause 13. The respondent in appointing the Arbitrator has acted in terms of the agreement between the parties. It is also contended that right of one party to an arbitration agreement, to appoint a Sole Arbitrator has been in existence and has been upheld by the courts in various judgments. Reliance is placed on the judgments in the case of ***Indian Drugs & Pharmaceuticals Ltd. vs. Indo Swiss Synthetics Gem Manufacturing Ltd. (1996) 1 SCC 54*** and ***Yashwith Construction Pvt. Ltd. vs. Simplex Concrete Piles India Ltd. (2006) 6 SCC 204***. It is also argued that post the Amendment Act, 2015, a Co-ordinate Bench of this Court has upheld the right of a party to an Arbitration Agreement to appoint a Sole Arbitrator. Reference has been made to the judgments in OMP(T)(COMM) 106/2017 titled ***D.K. Gupta & Anr. vs. Renu Munjal***, OMP(T)(COMM) 101/2017 titled ***Bhayana Builders Pvt. Ltd. vs. Oriental Structural Engineers Pvt. Ltd.***, Arb. Pet. 485/2019 titled ***Kadimi International Pvt. Ltd. vs. Emaar MGF Land Limited*** and OMP 18/2017 titled ***Gammon India Ltd. vs. Ambience Private Ltd.***

14. Learned counsel for the respondent contends that the petitioner had chosen not to file objections under Section 13 of the Act before the Arbitrator and participated in the proceedings. Therefore, the petitioner is deemed to have waived its objections under Section 12(5) of the Act. It is also argued that the Arbitration Agreement in the instant case was entered into on 30.08.2015, before the Amendment

Act, 2016 came into force and thus the judgment of ***Perkins (supra)*** will not apply to the present case.

15. It is further contended by the respondent that 246th Law Commission Report deemed it fit not to recommend any change on the issue of appointment of an Arbitrator by one party to the agreement, on the ground that there has been a long practice to that effect. It is observed in the Report that the intention of Section 12(5) of the Act was not to prohibit unilateral appointment of an Arbitrator.

16. Learned counsel seeks to distinguish the judgment of the Supreme Court in the case of ***Perkins (supra)*** on the ground that the facts of the present case are not the same as in the case of ***Perkins (supra)***. It is argued that the Arbitration clause examined by the Supreme Court was distinct from the clause in the instant matter. In the said case, the arbitration clause provided for the Managing Director of one party to appoint an Arbitrator, whereas in the instant case the "Company" has to appoint the Arbitrator. There is a distinction between a Managing Director and Company acting through its Board of Directors. The judgment in ***Perkins (supra)*** seeks to eliminate the purported evil of partiality and bias associated with the appointment of an Arbitrator by the Managing Director when tested on the anvil of Section 12(5) of the Act. The judgment has relied on the principle laid down by the Supreme Court in the earlier case of ***TRF Limited (supra)*** which has a different connotation. However, in ***Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665***, the Supreme Court has distinctly detailed the persons rendered ineligible to act as an Arbitrator under Section

12(5) of the Act. It is argued that though a Managing Director of a Company was held to be ineligible, the same test cannot be applied to a Board of Directors of a Company, who is authorized by the MOA and AOA of the Company to run the Company. Thus, the judgment in the case of ***Perkins (supra)*** relied upon by the petitioner would not apply to the instant case. Moreover, it is argued, that the Supreme Court in Civil Appeal Nos. 9486-9487/2019 titled ***Central Organization for Railway Electrification vs. M/s. ECI-SPCI-SMO-MCML (JV) a Joint Venture Company*** has upheld the appointment of a Sole Arbitrator by one party from a panel of arbitrators nominated by the other party. It is thus prayed that the petition be dismissed and the Arbitrator appointed by the respondent be permitted to continue with the arbitration proceedings.

17. Learned counsel for the petitioner in rejoinder, responding to the arguments of the respondent, contends that there was no requirement for the petitioner to file objections under Section 13 of the Act. It is settled that the objections under Section 12 (1) read with Section 13 of the Act are different from objections under Section 12(5) read with Section 14 of the Act. Objections under Section 13 of the Act have no relevance to the objections under Section 12 (5) of the Act. Therefore, it cannot be said that by not filing objections before the Arbitral Tribunal under Section 13 of the Act, the petitioner has waived its objections under Section 12(5) of the Act.

18. Learned counsel for the petitioner submits that the argument of the respondent that the arbitration agreement between the parties was entered into on 30.08.2015 before the Amendment Act of 2016 and

therefore, the judgment of ***Perkins (supra)*** will not apply, is incorrect. Section 12(5) starts with a non-obstante clause and moreover the date to decide the applicability of Section 12(5) of the Act is not the date of agreement but the date on which the disputes arise and the arbitration commences under Section 21 of the Act. In the present case, the arbitration commenced on 28.10.2018, when the notice invoking arbitration was issued.

19. The petitioner contends that the judgments relied upon by the respondent on unilateral appointment are no longer good law in view of the judgment of the Apex Court in the case of ***Perkins (supra)***. Arbitration Clauses which enable unilateral appointments by the persons or Authorities interested in the outcome of the arbitration can no longer be valid in view of the said judgment.

20. The petitioner further argues that the respondent cannot distinguish the principle laid down in the judgment of ***Perkins (supra)*** on the ground that the present Arbitration Clause enables a "Company" to appoint an Arbitrator unlike the clause in the case of ***Perkins (supra)*** where it was the Managing Director, who had the authority to appoint the Arbitrator. He submits that the underlying principle is that no authority having interest in the dispute would be entitled to make an appointment. It is argued that be it a party as an individual or Board of Directors or a Company, no distinction can be drawn applying the principle laid down in the case of ***Perkins (supra)***.

21. I have heard the learned counsels for the parties and examined the various contentions raised.

22. The issue that arises for consideration before this Court is the eligibility of the "Company" referred to in the Arbitration Clause between the parties, to unilaterally appoint a Sole Arbitrator to adjudicate the disputes between the parties. The principle contention of the petitioner is that in view of the recent judgment of the Supreme Court in the case of ***Perkins (supra)***, the 'Company' as provided in the Arbitration Clause between the parties herein cannot unilaterally appoint an Arbitrator. This Court finds merit in the contention of the petitioner. Supreme court in the case of ***Perkins (supra)*** was concerned with an Arbitration Clause wherein the CMD of the respondent was designated to appoint a Sole Arbitrator. Supreme Court after examining the said clause held that there could be two categories of cases, one where the Managing Director himself is made as an Arbitrator with an additional power to appoint any other person as an Arbitrator and the second where the Managing Director is not to act as an Arbitrator himself but is empowered to appoint any other person of his choice or discretion as an Arbitrator. Reliance was placed on the judgment of the Supreme Court in the case of ***TRF Limited (supra)*** in which case the Arbitration Clause fell in the first category. In the case of ***TRF Limited (supra)***, the Court had held that the Managing Director was incompetent because of the interest that he would have in the outcome of the dispute. The element of ineligibility was relatable to the interest that he had in the decision. The Supreme Court thus relying on the rationale of the decision in ***TRF Limited (supra)*** observed that if the test is the interest of the Appointing Authority in the outcome of the dispute then similar ineligibility

would always arise even in the second category of cases. It was observed that if the interest that the authority has in the outcome of the dispute is taken to be the basis for possibility of bias, it will always be present irrespective of whether the matter stands under the first or the second category of cases. The Supreme Court also significantly noted that they were conscious that if such a deduction was drawn from the decision in ***TRF Limited (supra)***, in all cases with similar clauses, a party to the agreement would be disentitled to make a unilateral appointment.

23. Thus, following the ratio of the judgment in the case of ***Perkins (supra)***, it is clear that a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law. The Arbitration Clause in the present case empowers the company to appoint a Sole Arbitrator. It can hardly be disputed that the 'Company' acting through its Board of Directors will have an interest in the outcome of the dispute. In the opinion of this Court, the clause is directly hit by the law laid down in the case of ***Perkins (supra)*** and the petition deserves to be allowed.

24. The respondent is right in its contention that the autonomy of the parties to the choice of procedure is the foundational pillar of arbitration and that the petitioner had entered into the Distribution Agreement with the Arbitration Clause, out of its free will. The facts in the case of ***Perkins (supra)*** were similar where the parties had entered into an agreement in which there was a clause for Dispute Resolution and which empowered the CMD to appoint the Sole Arbitrator. Despite the parties having agreed upon such an Arbitration

Clause, the Supreme Court held that the CMD suffered from the disability of appointing the Arbitrator as he was interested in the outcome of the dispute. The underlying principle in arbitration no doubt is party autonomy but at the same time fairness, transparency and impartiality are virtues which are equally important. If the Authority appointing an Arbitrator is the Head or an employee of a party to the agreement then its interest in its outcome is only natural. It goes without saying that once such an Authority or a person appoints an Arbitrator, the same ineligibility would translate to the Arbitrator so appointed. The procedure laid down in the Arbitration Clause cannot be permitted to override considerations of impartiality and fairness in arbitration proceedings.

25. Insofar as the reliance by the respondent on the judgments permitting unilateral appointment by the Authority designate of one party to the agreement is concerned, in my view, the same will have no relevance in view of the judgment of the Supreme Court in the case of ***Perkins (supra)***. The argument of the respondent that in the Arbitration Clause before the Supreme Court in the case of Perkins was with regard to the power of a Managing Director to appoint an Arbitrator whereas in the present case it is the Company only merits rejection. First and foremost, one has to see the rationale and the reasoning behind the judgment in the case of ***Perkins (supra)***. The Supreme Court held that the Managing Director was ineligible from appointing an Arbitrator on the simple logic that a Managing Director of a Company would always have an interest in the outcome of the arbitration proceedings. The interest in this context takes the shape of

bias and partiality. As a natural corollary, if the Managing Director suffers this disability, even if he was to appoint another person as an Arbitrator, the thread of biasness, partiality and interest in the outcome of the dispute would continue to run. Seen in this light, it can hardly be argued that the judgment in ***Perkins (supra)*** will not apply only because the designated Authority empowered to appoint an Arbitrator is other than a Managing Director. Moreover, as brought out by the respondent itself, Company here is run by the Board of Directors. The 'Board of Directors' is defined in Section 2(10) of the Companies Act, 2013 as under:

> "2*(10) "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company."*

Thus, the Company is run none other than the Directors collectively. Duties of the Directors have been stipulated in Section 166 of the Companies Act, 2013. A bare perusal of the duties clearly reveals that the Director at all times, has to act in good faith to promote the objects of the Company and in the best interest of the Company, its employees and the shareholders. A Director shall not involve in a situation in which he may have a direct or an indirect interest that conflicts or possibly may conflict with the interest of the Company. It goes without saying that the Directors of the Company as a part of the Board of the Directors would be interested in the outcome of the Arbitration proceedings. The Company therefore, acting through its Board of Directors would suffer the ineligibility under Section 12(5) read with Schedule VII of the Act. The same ineligibility would also

apply to any person appointed by the said Company. Thus, in my view, for the purposes of Section 11(6) and Section 12(5) read with Schedule VII, there cannot be a distinction based on the appointing authority being a Company.

26. Insofar as the argument of applicability of the judgment in ***Perkins (supra)*** case to on-going arbitration proceedings is concerned, the Supreme Court in the case of ***Bharat Broadband (supra)*** has already decided the said issue. Relevant paras of the judgment in the case of ***Bharat Broadband (supra)*** have been extracted above.

Thus, following the ratio of said judgment, once the Supreme Court has laid down the law under Section 12 (5) of the Act, Section 14 of the Act gets attracted and the mandate of the Arbitrator is terminated *de jure*.

27. The respondent is not right in its contention that only because the arbitration agreement was entered into on 30.08.2015, i.e. before the coming into force of the Amendment Act, 2016, the judgment of ***Perkins (supra)*** and Section 12(5) of the Act would not apply. First and foremost, Section 12(5) of the Act itself begins with a non-obstante clause stipulating that Section 12(5) would apply notwithstanding any prior agreement to the contrary. Secondly, the relevant date to decide the applicability of Section 12(5) is not the date of the agreement but the date on which the Arbitration commences. By virtue of Section 21 of the Act, the Arbitration commences when the notice invoking arbitration is sent. In the present case, the notice invoking the arbitration agreement was sent by the petitioner on 28.10.2018, which is after the insertion of Section 12(5) of the Act by

the Amendment Act, 2016. Thus, there is no doubt that Section 12(5) would apply to the present case and the Company is debarred in law from appointing the Arbitrator. I am fortified in my view by the judgment of the Supreme Court in the case of ***Board of Control for Cricket in India vs. Kochi Cricket Private Limited & Ors. (2018) 6 SCC 287***, the relevant paras of which read as under:

> "***39.*** *Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to*

court proceedings which have commenced on or after the Amendment Act came into force."

28. The respondent has also sought rejection of the petition in view of the judgment of the Supreme Court in the case of ***Voestalpine (supra)***. In my view, the said judgment would not help the respondent for more than one reason. The Arbitration Clause in the said case was completely different from the present case, as therein the party was to draw up a panel of Arbitrators from which the other party was to choose. It was not a case of unilateral appointment by one party to the agreement. Secondly, the Supreme Court in the case of ***Perkins (supra)*** has taken note of the said judgment. The Supreme Court in the case of ***Voestalpine (supra)*** in fact emphasized on the independence and impartiality of the Arbitrator as being hallmarks of any arbitration proceedings. The Court held that notwithstanding the fact that relationships between the parties arise out of the contract, non-impartiality of the Arbitrator would render him ineligible to conduct the arbitration. The genesis behind the rationale is that even when the Arbitrator is appointed under the Contract and by the parties thereto, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to further the interest of any particular party. Having relied on some passages from this judgment, the Supreme Court in fact noted in the case of ***Perkins (supra)*** that the decision in ***Voestalpine (supra)*** case has only emphasized the imperative of creating healthy arbitration

environment. Thus, in my view, the said judgment in no way helps the respondent.

29. Lastly, the reliance of the respondent on the judgment of the Supreme Court in the case of ***Central Organisation (supra)*** is also of no avail to the respondent. In the said case, the Supreme Court was dealing with an arbitration clause which required a panel of Arbitrators to be provided by the Railways to the other party to the contract, in terms of clause 64.3(a)(ii) of the GCC. The Court held that since one party was to provide a panel and the other party had the choice to short list the Arbitrator of its choice from the panel and only from the shortlisted names, Railways was bound to appoint at least one Arbitrator to constitute the Arbitral Tribunal, the parties had a level playing field. The Arbitrator appointed by the Railways of its choice was balanced by the second Arbitrator being of the choice of the other party. Thus, the elements of fairness, transparency and impartiality were taken care of.

30. In my view, none of the contentions raised by the respondent can be sustained.

31. The Arbitration Clause empowering the 'Company' to appoint the Sole Arbitrator in the present case would be vitiated in the light of the law laid down by the Supreme Court in the case of ***Perkins (supra)***. As a corollary to that, the ineligibility of the Company would translate and percolate to the Arbitrator appointed by the Company and thus the Arbitrator presently conducting the arbitration proceedings is declared to be ineligible to act as an Arbitrator.

32. Since the present Arbitrator has become *de jure* unable to perform her functions as an Arbitrator, I hereby terminate the mandate of the present Arbitrator and substitute by another Arbitrator.

33. Mr. Justice Mukul Mudgal, former Judge of this Court, is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

34. The address of the learned Arbitrator is as under:

Mr. Justice Mukul Mudgal
A-1, 2nd floor, Nizamuddin East,
New Delhi-110013
Mobile: 9818000250

35. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

36. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

37. The petition is allowed in the aforesaid terms. All pending applications are accordingly disposed of.

JYOTI SINGH, J

JANUARY 20, 2020
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