DISPUTE RESOLUTIONS

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Message to the Readers

An important ruling relating to appointment of arbitrator/s

Who can appoint an arbitrator? The Supreme Court in its recent decision in ***Perkins Eastman Architects DPC vs. HSCC (India) Ltd.***, ("**Perkins Case**") has held that *"A person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator*." In the Perkins Case, Clause 24 of the impugned Agreement empowered the Chairman and Managing Director of the company to appoint a sole arbitrator and the said Clause also stipulated that no person other than a person appointed by such Chairman and Managing Director of the company would act as an arbitrator.

The Bench considered the ratio of the Supreme Court in ***TRF Limited vs. Energo Engineering Projects Limited*** where the Court had examined a Clause which nominated the Managing Director himself to be the sole arbitrator and also empowered the said Managing Director to nominate another person to act as an arbitrator. It was held therein that since the Managing Director had become ineligible to act as an arbitrator by operation of law, specifically pursuant to Section 12(5) of the Arbitration and Conciliation Act 1996 read with the provisions of the fifth and seventh schedules thereto, he could not also nominate another person to act as an arbitrator and that, once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated.

In this context the Court in the Perkins Case observed as follows:

"15. 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."

"16. *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".*

This judgment is extremely important in the fillip it can give to institutional arbitration. Now it is no longer possible for a party that has an interest in the outcome of a dispute to stipulate the manner of appointment of an arbitrator. Therefore, standard form contracts usually rolled out by companies in a methodical manner empowering them to appoint arbitrators instantly lose their sanctity. Finance and hire purchase firms are most likely to be affected by this. It would be advisable for them and all similarly placed companies to enter into a supplemental agreement providing for arbitration by an independent arbitral institutional if disputes arise under the contract.

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SUPREME COURT STRIKES DOWN SECTION 87 OF THE ARBITRATION & CONCILIATION ACT, 1996 INSERTED BY THE 2019 AMENDMENT ACT, AND OMISSION OF SECTION 26 OF THE 2015 AMENDMENT ACT[1]

Brief Facts

Hindustan Construction Company Ltd. ("Petitioner") through the public tendering system, undertook building projects as a contractor for government bodies such as NHAI, NHPC, NTPC and IRCON International Ltd. In the petition, the Petitioner has claimed to have arbitral awards ("Awards") amounting to INR 6,070 crores in its favour. However, the said Awards have been challenged by the respondents under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996 ("Act"), which affects their enforcement and the Petitioner is unable to recover the awarded amounts. The Petitioner therefore sought formulation of a process that would amount to immediate payment the moment an arbitral award is passed in its favour. The Petitioner also sought to challenge various provisions of the Insolvency & Bankruptcy Code, 2016 ("IBC") and sought quashing of proceedings under the IBC initiated by its creditors before various National Company Law Tribunals. The Petitioner premised its case on the basis that government bodies other than government companies are exempt from the IBC as they are statutory authorities or government departments, and submitted that 'corporate person' as defined by Section 3(7) of the IBC should include government bodies other than government companies (which are already included). This is because on the one hand, on an automatic stay of arbitral awards in the Petitioner's favour granted under the Act, those monies cannot be used to pay off the debts of its client's creditors. On the other hand, any debt of over INR 1 lakh owed to a financial or operational creditor which remains unpaid, would attract the provisions of the IBC against Petitioner No. 1, making these provisions arbitrary, discriminatory and violative of Articles 14 and 19(1)(g) of the Constitution of India.

The Petitioner also challenged the constitutional validity of Section 87 of the Act inserted vide the Arbitration and Conciliation (Amendment) Act, 2019 ("2019 Amendment Act"). The effect of Section 87 is such that filing of a petition challenging an award under Section 34 of the Act, in relation to an arbitral proceeding which commenced before 23 October 2015, leads to an automatic stay on the enforcement of the award because of the operation of Section 36 as it stood before its amendment in 2015.

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[1]Authored by Tejas Karia, Partner & Head-Arbitration, Shardul Amarchand Mangaldas & Co and Member of the NPAC Delhi Advisory Committee, Gauhar Mirza, Principal Associate, Avlokita Rajvi, Senior Associate, and Manavendra Gupta, Associate at Shardul Amarchand Mangaldas & Co; *Hindustan Construction Company Limited & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 1074 of 2019, Supreme Court, 2019 SCC OnLine SC 1520, judgment dated 27 November 2019.

Team of Shardul Amarchand Mangaldas & Co led by Tejas Karia, Partner & Head-Arbitration and comprising of Gauhar Mirza, Principal Associate, Amee Rana, Senior Associate, Nishant Doshi and Manavendra Gupta, Associates, represented IRCON Limited (Respondent No. 7) and assisted the Solicitor General, Mr. Tushar Mehta.

Quorum: RF Nariman, Surya Kant and V. Ramasubramanian, JJ.

Petitioner argued that Section 87 takes away the vested right of enforcement and binding nature of award and reverses the beneficial effect of the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**"), which remedied the original mischief in the Act. The Petitioner further sought to challenge the omission of Section 26 of the 2015 Amendment Act, vide the 2019 Amendment Act.

The Petitioner also challenged NITI Aayog's Office Memorandum No.14070/14/2016-PPPAU dated 5 September 2016 ("**Scheme**") because to retrieve amounts payable under Awards which would get automatically stayed, it was able to get 75% of a "pay-out amount" under the Scheme, which is the awarded amount plus interest. This could only be done against a bank guarantee of the equivalent amount. However, apart from such bank guarantee, an additional bank guarantee of 10% per year on the pay-out amount would also have to be given, which is then compounded annually. Given that 75% of such pay-out amount can only be released on the bank guarantee of the equivalent amount, asking for anything over and above this would amount to an arbitrary exercise of power, which is liable to be struck down.

Issues

(I) Whether Section 87 of the Act inserted vide the 2019 Amendment Act is unconstitutional?

(ii) Whether provisions under the IBC are unconstitutional?

(iii) Whether the requirement of a top up bank guarantee of 10% per annum as stipulated by the Scheme is unconstitutional?

Judgment

Issue (i)

Section 36 of the Act after the 2015 Amendment Act, did away with the position of automatic stay on enforcement of an award on filing of a petition challenging the award. Section 26 of the 2015 Amendment Act was to apply in relation to arbitral proceedings commenced after 23 October 2015, meaning that for a petition under Section 34 of the Act filed after 23 October 2015, amended Section 36 of the Act was applicable. The Srikrishna Committee Report recommended that the Section 26 of the 2015 Amendment Act shall be prospective in nature. Later, the Supreme Court in ***BCCI vs. Kochi Cricket Pvt. Ltd.*** ("**BCCI**")[2] held that Section 36, which provides for enforcement of award, being procedural and not substantive in nature, shall apply retrospectively to ensure Section 34 is not misused and does not act as a clog to the very process of execution of awards.

Section 87 of the Act, in contradiction to *BCCI's* (*supra*) position, stated that 2015 Amendment Act shall only apply prospectively (after commencement of the 2015 Amendment Act) and not retrospectively. In essence, this again created divergence in the way the cases will be dealt with pre-2015 Amendment Act and post-2015 Amendment Act, particularly in regard to stay under Section 36 of the Act.

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[2] (2018) 6 SCC 287.

The Court held that "*Whatever uncertainty there may have been because of the interpretation by different High Courts has disappeared as a result of the BCCI judgment, the law on Section 26 of the 2015 Amendment Act being laid down with great clarity. To thereafter delete this salutary provision and introduce Section 87 in its place, would be wholly without justification and contrary to the object sought to be achieved by the 2015 Amendment Act*". The Court held that Section 87 retrospectively resurrects automatic stay, turns the clock backwards, fails to adequately determine the application of Section 36, is contrary to public interest and therefore being manifestly arbitrary, is struck down.

The Court also struck down omission of Section 26 of the 2015 Amendment Act, vide the 2019 Amendment Act. The Court also held that ***National Aluminium Company Ltd. (NALCO) vs. Pressteel& Fabrications (P) Ltd. and Anr.***[3] and ***Fiza Developers and Inter-trade Pvt. Ltd. vs. AMCI (India) Pvt. Ltd. and Anr.***[4] are *per incuriam* and have laid down the law incorrectly. The said judgments enforced automatic stay on the mere filing of the Section 34 applications rendering the purpose of Section 36 vitiated. The Court held that Section 36 was enacted for a different purpose and "*to state that an award when challenged under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect*".

Issue (ii)

The Court held that NHPC, NTPC and IRCON who owe money to Petitioner No. 1, would be subsumed within the definition of 'Government Company' in Section 2(45) of the Companies Act, 2013. Further, NHAI is a statutory body functioning as an extended limb of the Government and such authority cannot be wound-up. Therefore, the Court held that it is "*not possible to either read in, or read down, the definition of 'corporate person' in Section 3(7) of the IBC*". The Court reiterated that the moment challenges are made to the arbitral awards, the amount said to be due by an operational debtor would become disputed, and therefore be outside the clutches of the IBC. Further, the Court held that IBC is not a debt recovery legislation and therefore debts owed by a third party to persons like the Petitioner cannot be fastened on to PSUs. Therefore, the Court rejected Petitioner's plea for rendering the provisions of IBC unconstitutional.

Issue (iii)

The Court noted that the Scheme was formulated due to the hardship faced by the construction sector, so that it can get the fruits of arbitral awards. The Court held that the Petitioner was free to avail or not avail the benefits of the Scheme. However, having availed the benefits, it is not possible for the Petitioner to now turn around and state that one part of the Scheme is onerous and should be struck down. Therefore, the Court upheld the Scheme.

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[3](2004) 1 SCC 540.

[4](2009) 17 SCC 796.

Analysis

This is a landmark judgment since it will promote a pro-arbitration regime in India. It clarifies that the Act never contemplated automatic stay on the enforcement of an award upon filing an application for challenge of the award under Section 34. It further holds that the 2015 Amendment Act providing for need for seeking specific stay of enforcement was only clarificatory in nature. Striking down of Section 87 inserted by the 2019 Amendment Act, which provided that the provisions of the 2015 Amendment Act shall only apply to arbitral proceedings commenced on or after 23 October 2015 and to court proceedings arising out of or in relation to such arbitral proceedings, is a welcome step and reinstates the law laid down by the Supreme Court in the *BCCI case* (*supra*). The Court also rejected challenge to the provisions of IBC ensuring both IBC and the Act co-exist in their respective realms.

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NANI PALKHIVALA CENTENARY CELEBRATIONS by Palkhivala Foundation

To mark the birth centenary of Nani Palkhivala, the Palkhivala Foundation, Chennai has brought out in book form a compilation of selected speeches from the Palkhivala Memorial Lectures delivered between 2003 and 2019. We are happy to announce that this book is proposed to be released by Ms. Nirmala Sitharaman, Hon'ble Minister of Finance and Corporate Affairs, Government of India in an event scheduled to be conducted on 19th January, 2020 (Sunday) at 4:30pm at P. S. Dakshinamurthy Auditorium, P.S.Higher Secondary School, 215, Ramakrishna Mutt Road, Mylapore, Chennai 600 004. The Hon'ble Minster would also be delivering the Centenary Celebrations Lecture on the topic **"Road Map to US$ 5 Trillion Economy".** There would be live streaming of the event. For further details, please contact us at Palkhivalafoundation2002@gmail.com.

WORKSHOP ON STRENGTHENING ARBITRATION REGIME

A one day workshop on Strengthening Arbitration Regime was conducted by the Tamil Nadu State Judicial Academy ("**TNSJA**") in association with the Nani Palkhivala Arbitration Centre on 17th November, 2019 at the TNSJA at Chennai. The welcome address was delivered by Hon'ble Mr. Justice T.S Sivagnanam, Judge, High Court of Madras and a member of the Board of Governors of the TNSJA. The emphasis was on the need for such a workshop and on the requirement to improve the arbitral regime in India. This was followed by a special address by Hon'ble Dr. Justice Vineet Kothari, Judge, High Court of Madras, who stressed on the need for institutional arbitration and praised the Nani Palkhivala Arbitration Centre for conducting effective arbitration sessions.

The inaugural address was delivered by Hon'ble Mr. Justice Amreshwar Pratap Sahi, Chief Justice, High Court of Madras and Patron-in-Chief, TNSJA. He spoke on how the judiciary should treat the claims arising out of arbitral awards and the need to improve the system which would in turn help in having effective arbitration. The inaugural session concluded with the vote of thanks delivered by Hon'ble Mr. Justice M. Sundar, Judge, High Court of Madras and a member of the Board of Governors of the TNSJA.

The workshop was divided into three sessions with distinct topics. Mr. Arvind P. Datar, Senior Advocate, Supreme Court of India briefed the gathering before the sessions started. He highlighted the need to increase India's rank in 'enforcement of contracts' and said that this was possible only through speedy disposal of cases and claims.

The first session was chaired by Hon'ble Mr. Justice C. V. Karthikeyan, Judge, High Court of Madras and a member of the Board of Governors of the TNSJA and Mr. Anirudh Krishnan, Advocate High Court of Madras spoke during the session. The session focused on the interpretation of Sections 8 and 9 of the Arbitration and Conciliation Act, 1996 ("**Act**") and the application of CPC and the provisions of the Specific Relief Act 1963.The second session was chaired by Hon'ble Ms. Justice P. T. Asha, Judge, High Court of Madras. While Mr. P. H. Arvind Pandian, Additional Advocate General of Tamil Nadu addressed the implications of Section 34 of the Act, Ms. Payal Chawla, Advocate and Partner at Jus Contractus elaborated on Section 37 of the Act.

The third session was chaired by Hon'ble Justice R. Subramaniam, Judge, High Court of Madras. The theme for this session was the Impact of the Commercial Courts Act. The speakers, Mr. N. L. Rajah, Senior Advocate, High Court of Madras and Mr. R. S. J. Arun Mohan, Advocate, High Court of Madras provided an extensive insight into the Commercial Courts Act while focussing on how to deal with claims arising out of arbitral awards. This discussion also stressed on the need for institutional arbitration and on the need to reduce court interference to facilitate time bound and speedy disposal of cases.

All sessions were interactive and provided scope for audience questions, which were addressed by the speakers. The workshop concluded with final remarks from Mr. V. S. Jayakumar, Advocate and Director of the Nani Palkhivala Arbitration Centre.

NPAC - COMMERCIAL LAW PODCASTS

It is a pleasure to announce the NPAC - Commercial Law Podcasts - a series of audio recordings (i.e. podcasts) on commercial law hosted by the Nani Palkhivala Arbitration Centre. The idea of these podcasts is to bring together eminent lawyers and academics to discuss varied issues of commercial law, atleast once every fortnight. Each episode attempts to examine the principle behind a legal position and critically analyse the current trends in India.

Episode 1 is on 'Liquidated Damages in India' where Mr. Gaurav Pachnanda, Senior Advocate and Ms. Renu Gupta, Advocate have shared their insightful views.

Listen to Episode 1 - Liquidated Damages by NPAC Podcasts on #SoundCloud
Https://soundcloud.com/npac-podcasts/Episode-1-liquidated-damages

12th ANNUAL INTERNATIONAL CONFERENCE ON ARBITRATION

Arbitration as a means of resolving disputes among parties is one of the most effective dispute resolution mechanisms if properly implemented and effectively regulated. The need for institutional arbitration is recognized now, more than ever before and provides a timely and cost effective solution for resolving disputes. Nani Palkhivala Arbitration Centre (NPAC) strives to educate stakeholders on the benefits of institutional arbitration as a viable mode of dispute resolution and is the only arbitration institution in South India, to be formally recognized by the Madras High Court. NPAC endeavours to make effective contributions towards building a competent arbitral regime in India and also is in the forefront in training arbitrators.

In this regard, NPAC conducts an annual International Conference on arbitration. The Conference aims to provide answers to the most pressing challenges faced by the arbitration regime in India. It would feature international speakers from various disciplines who would provide theoretical and practical inputs on the law and practice of arbitration.The Conference usually witnesses a confluence of Heads of Legal Departments from public and private corporate houses in India and abroad, Partners/Associates from domestic and foreign law firms, academicians, industrialists and students of law and is a distinctive occasion to network and build lasting relationships.

The Governing Council, the Board of Directors and the entire team of NPAC have the pleasure of inviting you to the 12th edition of the Annual Conference of the NPAC on the theme **"Re- Inventing Arbitration: Ways and Means"**, scheduled to be held on the **15th of February, 2020** (Saturday) at **Shangri La's- Eros Hotel,19, Ashoka Road, Connaught Place, New Delhi- 110001**. The topics for discussion include 'Current best practices in international arbitration Can they be applied in the Indian context', 'Interplay between arbitration and the Insolvency and Bankruptcy Code' and discussions on emerging trends in arbitration. For further details or queries relating to registration and/or sponsorship, please reach out to Dr. J. Durgalakshmi, Registrar, NPAC, at nparbitration@gmail.com

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