

**Ineligible Arbitrator can be challenged even in Pre- 2015 cases and at any point of time**

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Supreme Court of India in its recent Judgment dated 04<sup>th</sup> January 2022 pronounced by the bench consisting of Hon'ble Justices Mr M.R.Shah and Mrs Nagarathna in the case of Ellora Paper Mills<sup>1</sup> held that the mandate of the arbitrator can be challenged at any point of time during the proceedings, in view of Section 12(5) read with Seventh Schedule of the 1996 Act<sup>2</sup>. The Supreme Court of India reversed the judgment of the High court of Madhya Pradesh, which held that the Amendment Act, 2015 shall be made effective w.e.f 23.10.2015 and cannot have retrospective operation in the arbitration proceedings already commenced unless the parties otherwise agree and therefore in the present case Arbitral tribunal was constituted much prior to the Amendment Act, 2015 and commenced its proceedings, the Amendment Act,2015 – Section 12(5) of the Arbitration Act,2016 shall not be applicable. Hence, as per the above said Judgment, even in a Pre- 2015 case and even in an ongoing arbitration, in the absence of an express agreement in writing that was entered into after the disputes had arisen between them, waiving the applicability of the Section, specifically referring to a person who is interdicted by the seventh Schedule of the 1996 Act, ineligible arbitrator can be challenged.

The brief facts of the case are as follows: The Respondent herein issued a tender for supply of the cream woe paper and duplicating paper for the year 1993-1994. The appellant herein participated in the said tender process and was awarded the contract vide supply order dated 22.09.1993. A dispute arose between the appellant and Respondent. The Arbitral tribunal was constituted called as “stationary purchase committee” comprising the officers of the Respondent. The appellant filed its objections to the constitution of the Arbitral Tribunal/ stationery purchase committee on 12.09.2000. The appellant herein also challenged its jurisdiction by filing an application under Section 13 of the Arbitration Act,1996. The Arbitral tribunal vide order dated 02.02.2001 rejected the above said Application. Subsequently, the appellant filed the present application before the High Court under Section 14 read with Sections 11 & 15 of the Arbitration and Conciliation Act,1996 seeking termination of the mandate of the originally constituted Arbitral Tribunal- Stationery purchase committee comprising of officers of the Respondent and heavily relied upon Section 12(5) of the Act.

Relaying upon the decision of this court in the case of TRF Limited<sup>3</sup>, it was submitted on behalf of the appellant that all the five officers constituting the Stationery purchase committee, being the

<sup>1</sup> Ellora Paper Mills Limited Vs State of Madhya Pradesh 2022 SCC Online SC 8

<sup>2</sup> Arbitration and Conciliation Act 1996

<sup>3</sup> TRF Limited Vs Energo Engineering Projects Limited (2017) 8 SCC 377

employees of the respondent had rendered themselves ineligible to continue as arbitrators. Moreover, it was further submitted that since they have become ineligible to continue as Arbitrators, they also could not also appoint another arbitrator. It was also contended that the original members of the Arbitral Tribunal, who initiated the proceedings had since ceased to hold their respective offices, in any case, a new Arbitral Tribunal had to be constituted and therefore an impartial and independent arbitrator was required to be appointed in terms of Section 11 of the Arbitration Act,1996.

How ever after referring to and considering the decisions of this court in the cases of Aravali Power<sup>4</sup>, Parmar Construction case<sup>5</sup>, Pradeep vinod Construction case<sup>6</sup> etc., the High Court did not agree with the submissions made on behalf of the Appellant. Referring to the above said decisions of this court, it is observed and held by the High Court that Amendment Act, 2015 shall be made effective w.e.f 23.10.2015 and cannot have retrospective operation in the arbitration proceedings already commenced unless the parties otherwise agree and therefore when in the present case arbitration tribunal was constituted much prior to the commencement of the Amendment Act, 2015 and the Arbitral tribunal commenced its proceedings before the arbitral tribunal commenced its proceedings, the Amendment Act,2015 – Section 12(5)of the Arbitration Act,1996 shall not be applicable. The High Court dismissed the Application filed under S.14 read with Sections 11 & 15 of the Arbitration Act,1996 and hence the appellant approached the Supreme Court of India.

The Appellant relying on the recent Judgment of the Supreme Court of India, in the matter of Jaipur Zila Dugdhd case<sup>7</sup>, argued that the impugned judgment of the High court is just contrary to the said judgment because in the said judgment Supreme Court of India rejected the contention that it will not be open for a party to raise an objection under Section 12(5) after filing of the Statement of Claim. The Court further held that unless and until there is an express agreement in writing to continue the arbitration with the earlier tribunal, such an application to terminate the earlier arbitration tribunal and to appoint a fresh arbitrator would be maintainable. It was further observed that independence and impartiality of the arbitrator are the hallmark of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to judicial and quasi-judicial proceedings. It was further held that even though arbitrator is appointed as per the contract terms, notwithstanding the same non-independence and non- impartiality of such arbitrator would render him ineligible to conduct the arbitration. Hence it was held that the High Court judgment is contrary to the Law laid down by the Court in the Cases of TRF (supra), Bharath Broadband<sup>8</sup> and Jaipur Zila (supra).

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<sup>4</sup> Aravali Power Co Vs Era Infra Engineering (2017) 15 SCC 32

<sup>5</sup> Union of India Vs Parmar Construction Company (2019)15 SCC 682

<sup>6</sup> Union of India Vs Pradeep Vinod Construction Company (2020)2 SCC 464

<sup>7</sup> Jaipur Zila Dugdhd Utpadak Sakhari Sangh Limited Vs Ajay Sales & Suppliers 2021 SCC Online SC 70

<sup>8</sup> Bharath Broadband Network Limited Vs United Telecoms Limited (2019) 5 SCC 755



Hence, the law settled by the Supreme Court is that an ineligible arbitrator can be challenged by the parties, even in pre-2015 cases and at any stage of the proceedings if the parties have not waived the provision by an agreement in writing.

