Supreme Court of India puts an end to one party appointed sole Arbitrator system

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Without having system to ensure impartiality and independence of Arbitrators, arbitration cannot gain confidence in the minds of the parties to the dispute. It is not sufficient that many arbitrators by nature are independent and impartial. To gain the confidence of a common man, the arbitration system provided in the Procedural law of a country should provide sufficient checks and balances and make arbitration, an impartial dispute resolution system.

In India, even today parties believe in adhoc arbitration and hence the responsibility of appointing of arbitrators is either in the hands of High Courts or in the hands of one of the parties. Where ever the appointment procedure is not prescribed, parties approach High Court and High Courts appoint arbitrators after checking their declaration under S.12(5) and hence it is safe. But the difficulty is in the arbitration clauses allowing the one of the parties to appoint the arbitrator. Arbitral institutions and High Courts without fail collect declarations of Arbitrators regarding their impartiality and independence and evaluate them before appointment but in the cases of appointment by one party mostly the party appoints someone who is known to them. The parties having such a right, consider themselves to be privileged and they can appoint anybody close to them as the arbitrator. The said clauses have been protected by the Courts in India for a long time mostly keeping in mind the Government Institutions and Public Sector under takings. Even the serving officers of one of the parties were allowed to act as arbitrators in an arbitration arising out of the same parties. The said situation became worse when many private companies also followed such clauses.

In the meantime Government of India, developed a dream of making India as a hub for international Arbitrations and brought in many changes to the 1996 Act. The amendments made to the Arbitration and Conciliation Act,1996 in the year 2015[2] created a lot of enthusiasm among the arbitration community. The Schedules V, VI & VII were similar to the IBA Rules on Conflict of interest[3] prohibiting certain category of persons from getting considered to be an arbitrator because of their relationship with the parties or the counsels. More over Section 12(5) mandates the arbitrator to declare and disclose any relationship with the parties or the counsels. Schedule V, is a guideline for the potential arbitrators to make the declaration under the format provided under Schedule VI but the relationships listed in schedule V does not disqualify the arbitrator from getting appointed. But if an arbitrator falls under any of the items mentioned in Schedule VII, then he is disqualified to be appointed as the arbitrator. If an arbitrator falls in any of the relationships mentioned in Schedule VII then parties may approach the High Court under S.14 of the Act and seek for removal of that arbitrator, if the arbitrator

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[2] Arbitration and Conciliation (Amendment) Act,2015

[3] IBA Rules on Conflict of interest in International Arbitration

does not recuse himself. If any arbitrator falls within the relationships mentioned in Schedule V, then a party if having justifiable doubts about the impartiality and independence of the arbitrator shall file an application under S.13 before the arbitral tribunal. If the said arbitrator after hearing the application recuse himself after the said application, then a new arbitrator shall be appointed. But if the said application is rejected then the aggrieved party will have the liberty to raise bias as an additional ground while challenging the award under S.34 of the Act.

But still the above amended provisions could not address the problem of "one party appointed sole Arbitrator". The most important judgment of Supreme Court of India that is considered to be a land mark in the objective of achieving a system that ensures appointment of impartial and independent arbitrators is, TRF Limited[4] Vs Energo Engineering Projects Limited (2017) 8 SCC 377. A three-judge bench of Supreme Court of India held that a disqualified arbitrator cannot nominate another arbitrator. While giving the decision it that "*which cannot be done directly cannot be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area*" in TRF Limited Vs Energo Engineering (2017) 8 SCC 377 case, applying the maxim "*What one does through another is done by oneself*" (qui facit per alium facit per se") relying on another Judgment of Supreme Court of India Pratap Chand Nopaji Vs Kotrike Venkata Setty & Sons (1975) 2 SCC 208. This Judgment put an end to one branch of the regime of appointment of Sole Arbitrators, where the arbitration clause empowered the officer of one party, "*either to act as arbitrator or appoint another person as arbitrator*".

Now the Supreme Court of India dealt with the sustainability of arbitration clauses empowering of an officer of one of the parties to appoint the sole arbitrator while dealing the case of Perkins[5] case. In the said case the arbitration clause empowered the Respondent to appoint the sole arbitrator and the respondent appointed an arbitrator. But the Petitioner Perkins approached the Hon'ble Supreme Court of India seeking to appoint an arbitrator under S.11(6) of the Act[6]. The Supreme Court of India examined various Judgments including the above said TRF case (supra) and came to the conclusion that an interested party cannot have the authority to appoint the arbitrator, when sole arbitrator is provided in the arbitration clause. The said Judgment has put an end to the era of one party appointing Sole Arbitrator, which is one of the historical development in the Arbitration history of India.

[4] TRF Limited Vs Energo Engineering Projects Limited (2017) 8 SCC 377
[5] Perkinson Eastman Architects DPC Vs HSCC (India) Limited
[6] Arbitration and Conciliation Act,1996