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DECODING LAW OF CHALLENGING ARBITRAL APPOINTMENTS IN INDIA

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1 Introduction

1.1 An Arbitrator is entrusted with a duty to adjudicate upon disputes. Independence and Impartiality of the arbitrators are the hallmarks of arbitration. This requirement is extremely important in circumstances wherein the appointment of the adjudicator is left to the parties to a dispute or sometimes to only one of the parties. The Arbitration and Conciliation Act, 1996 (for short "**Arbitration Act**") aims to bolster the neutrality of arbitrators.

2 Legislative Framework

2.1 Section 12 of the Arbitration Act sets out the grounds for challenge of the appointment of an arbitrator. Clause 1 of Section 12, makes it mandatory for the arbitrator to disclose in writing any circumstances, which may give rise to justifiable doubts about his/her appointment as an arbitrator. The second condition provides for circumstances, which are likely to affect the arbitrator's ability to devote sufficient time to complete the arbitration within a period of 12 months. The Fifth Schedule shall be referred to determine circumstances, which may give rise to justifiable doubts regarding the impartiality of an arbitrator.

2.2 The Circumstances in the Fifth Schedule majorly includes arbitrator's relationship with the counsel or parties for instance: arbitrator is an employee or affiliate of one of the parties, relationship of the arbitrator with the dispute, arbitrator's direct or indirect interest in the dispute, previous services for one of the parties, relationship between an arbitrator and another arbitrator, other circumstances such as arbitrator is a manager, director or part of the management, or has a similar controlling influence, is an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

2.3 The second part of Section 12 sets out conditions under which the appointment of an arbitrator may be challenged. The two conditions include circumstances which may give rise to justifiable doubts about the appointment as an arbitrator or the arbitrator does not possess the qualifications as agreed to by the parties.

2.4 The appointment of an arbitrator can be challenged only for reasons about which the party becomes aware after the appointment has been made. The Seventh Schedule provides the circumstances such as any relationship with the parties or counsel or subject matter of the dispute under which the appointment of an arbitrator may be challenged. The Circumstances are arbitrator's relationship with the counsel or the parties, relationship of the arbitrator with the dispute and arbitrator's direct or indirect interest in the dispute etc.

3 Judicial Pronouncements on the issue whether employee or ex-employee of a party may be appointed as an Arbitrator

3.1 The Arbitration Act does not disqualify a former employee or an employee of party from acting as an arbitrator, provided there are no justifiable doubts as to his independence and impartiality. The Supreme Court through various judicial pronouncements has held the same in the affirmative.

3.2 However, the same is subject to the facts and circumstances of the case.

a **Indian Oil Corporation Limited -Vs- Raja Transport, (2009) 8 SCC 520** [Paras 13, 14, 30 to 39]

The Supreme Court considered the question where in a contract with a PSU, an employee is named as an arbitrator whether such an appointment is valid. The Court held the following:

- If the party with open eyes enters into a contract with a government department or a PSU containing a clause that the directors/ secretaries shall be the arbitrator he cannot turn around subsequently and challenge the appointment of the arbitrator

- The named arbitrator is an employee of the company is not ipso facto ground to raise a presumption of bias or partiality or lack of independence on his part
- Where the named arbitrator being a secretary or director had nothing to do with the subject matter of the contract becomes a named arbitrator such appointment is valid
- Government Companies should reconsider their policy providing for employee arbitrators

b **TRF Limited -Vs- Energo Engineering, (2017) 8 SCC 377** [Paras 27 to 34, 41 to 53]

The Supreme Court considered the question whether an ineligible arbitrator can nominate an arbitrator. The Court held the following:

- If the Managing Director as an arbitrator is interested in the outcome of the dispute, he cannot be eligible to be an arbitrator
- Once an arbitrator becomes ineligible to be an arbitrator in dispute, he cannot nominate another arbitrator
- The Court followed the principle of "Quit facit per alium facit per se" i.e. what cannot be done directly cannot be done indirectly.

c **Perkins Eastman Architects -Vs- HSCC India Ltd, 2019 SCC Online 1517** [Relevant Paras 18 to 26]

The Supreme Court considered the question whether an arbitrator who has become ineligible could nominate an arbitrator. The Court held the following:

- If the CMD could not be an arbitrator, he could nominate someone else as an arbitrator
- CMD is a person interested in the outcome of the disputes

d **Bharat Broadbands Network Limited -Vs- United Telecoms Limited, (2019) 5 SCC 719** [Paras 15 to 22]

The Supreme Court considered whether the requirement of Section 12 (5) could be waived by the parties. It was held that:

- If the arbitrator becomes ineligible, he cannot nominate another arbitrator. However, the parties may by an express agreement in writing waive the applicability of Section 12 (5) of the Arbitration Act.

e **Voestalpine -Vs- DMRC (2017) 4 SCC 665** [Paras 18, 21 to 30]

The Supreme Court considered in a contract with a government whether employees or ex government employees can be an arbitrator. The Supreme Court held that:

- The panel of arbitrators suggested by DMRC i.e. respondent in the present case were government employees or ex government employees.
- The Supreme Court held that the mere fact that the panel had government employees will not make the arbitrators ineligible.
- Bias or likelihood of bias could not be attributed simply on the ground that the suggested panel of arbitrators served the government.

4 Conclusion

4.1 The Supreme Court has settled the procedure that must be followed by parties to challenge the appointment of the arbitrator. The following may be concluded from the above discussion:

a An arbitration agreement e.g. may contain a clause for Chief Managing Director or Managing Director to be the Arbitrator:

- Such clause is common in contracts with the government department/PSU
- CMD or MD has direct interest in the outcome of arbitration
- As such CMD or MD is disqualified from being an arbitrator
- Hence such a clause is bad in law

b An arbitration agreement e.g. may say CMD/MD will nominate:

- CMD or MD has direct interest in the outcome of arbitration
- As such CMD/MD is disqualified from being an arbitrator
- Hence CMD/MD is also disqualified from appointing an arbitrator
- If the CMD is ineligible, he cannot nominate another arbitrator
- Hence such a clause is bad in law

c An arbitration agreement e.g. may say CMD/MD to give a panel of three names and other side may choose one:

- CMD/MD has direct interest in the outcome of arbitration
- CMD/MD is disqualified from appointing an arbitrator
- Hence most likely CMD/MD will be disqualified from giving names of three person to other side for choosing one, to be as arbitrator
- Hence most likely such clause may be held bad in law, if contested at any point of time in future

d An arbitration agreement may say that one arbitrator to be nominated by CMD/MD and another by other side and that both such nominees will appoint chairman arbitrator.

- Both the parties will have interest in outcome of the arbitration.
- Both parties, respectively, will be disqualified to appoint their nominees as arbitrators
- No doubt, the chairman arbitrator appointed, will not be connected to the parties
- Most likely such clause may be held bad in law, if contested at any point of time in future

e Waiver

- The parties may voluntarily decide to waive the requirement Section 12(5) of the Arbitration Act by an express agreement in writing
- However, if there is no agreement for waiver in writing, the appointment happening under section 11 (6) of the Arbitration Act should not be ruled out.
- We are of the view that waiver should not be limited to express agreement in writing. The waiver can be based on acts of the parties, where they have acted and changed their position both in law and equity e.g. parties went ahead with appointment of arbitrator, tribunal constituted and proceeding commenced.