



August 2022

## **Supreme Court refers question of “Whether a person being himself ineligible to be an arbitrator can appoint an arbitrator?” to larger bench.**

Recently, the Hon’ble Supreme Court of India (“**Supreme Court**”) of India in the case of *JSW Steel Limited vs. South Western Railway and Anr.*<sup>1</sup> referred the issue of appointment of an arbitrator by a person himself being ineligible to be appointed as an arbitrator, to the larger bench. The Supreme Court observed that there are several conflicting findings and decisions of the courts on the validity of appointment of an arbitrator by an ineligible person.

### **Brief Facts & Procedural History**

In the present case, the arbitration clause empowered the respondent’s general manager (“**GM**”) to appoint an arbitrator. Subsequently disputes arose between the parties. Accordingly, the respondent sought petitioner’s consent for appointment of a sole arbitrator out of the panel consisting of respondent’s retired officer. The petitioner did not agree to the respondent’s procedure to appoint one of its retired officer as a sole arbitrator. The respondent appointed one of its retired officer as a sole arbitrator.

Thereafter, the petitioner filed a petition before the Karnataka High Court (“**High Court**”) under Section 11 (6) Arbitration and Conciliation Act, 1996 (“**Act**”) challenging the appointment of the sole arbitrator.

The petitioner contended that the GM being himself ineligible can’t appoint any other person as the sole arbitrator. To such end, the petitioner relied on the following:

1. TRF Ltd. v. Energo Engineering Projects Ltd.<sup>2</sup>, (“**TRF**”);
2. Bharat Broadband Network Limited vs. United Telecoms Limited<sup>3</sup> (“**Bharat Broadband**”);
3. Perkins Eastment Architects DPC & Anr. Vs. HSCC (India) Limited<sup>4</sup> (“**Perkins**”).

The respondent countered the petitioner’s submissions on the following grounds:

1. The petitioner had a choice to choose 2 (two) out of the 4 (four) names suggested by the respondent.
2. An employee can be appointed as an arbitrator and any challenge to such appointment should be made before the Arbitral Tribunal.<sup>5</sup>

<sup>1</sup> SLP(C) No. 9462 / 2022, Order dated August 16, 2002.

<sup>2</sup> (2017) 8 SCC 377.

<sup>3</sup> (2019) 5 SCC 755.

<sup>4</sup> (2020) 20 SCC 760.

<sup>5</sup> S.P. Singla Constructions Pvt. Ltd. vs State Of Himachal Pradesh (2019) 2 SCC 488.

### 3. A retired officer is not ineligible to be appointed as an arbitrator.<sup>6</sup>

The High Court agreed with the reasoning laid down in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)* (“**Central Organisation**”) judgment, which had distinguished the applicability of TRF and Perkins to the fact situation involved therein. In view of this, the High Court by way of its judgement held that since the power of the GM to nominate the arbitrator is counter-balanced by the choice given to the petitioner, the appointment made by the GM is not illegal. It further held that in view of specific provision like Section 14 of the Act, it would not be appropriate to examine the validity of the appointment of the arbitrator in a proceeding under Section 11 of the Act.

Aggrieved by the High Court’s judgment<sup>7</sup>, the petitioner approached the Supreme Court challenging the appointment of the arbitrator as being contrary to the law laid down in TRF & Perkins.

## Issue

Whether the appointment of the arbitrator is in conformity to the law laid down in TRF & Perkins.

## Decision

The Supreme Court observed that ratio in *Central Organisation* case was doubted by a subsequent bench of three Judges. The Supreme Court noted that in the case titled *Union of India v. M/s. Tania Constructions Ltd*<sup>8</sup>, the Supreme Court has prima facie expressed its disagreement with the view taken in *Central Organisation*. It had requested the Hon’ble Chief Justice of India (“**CJI**”) to constitute a larger Bench to look into the correctness of decision in *Central Organisation*.

In view of this, the Supreme Court directed that the present matter be placed before the CJI for constituting a larger Bench for an authoritative decision.

There are several conflicting decisions in respect of appointment of arbitrator. This method of appointment of arbitrator is widely followed by government departments which has led to rampant confusion and a large number of challenges before various courts. In such a situation, a more authoritative decision undoubtedly commands greater respect and priority, being binding on both the courts and the litigants, laying to rest the controversy once and for all.

## JSA Comment

In conclusion and to clarify, even though the issue concerning the appointment of arbitrator in *JSW Steel Limited vs. South Western Railway and Anr.*, has been referred to larger bench by the Supreme Court, the ratio laid down in the case of *Central Organisation* and TRF still holds the fort.

<sup>6</sup> *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712.

<sup>7</sup> *JSW Steel Limited vs. South Western Railway and Anr*; CMP 100015/2021, Judgment dated December 23, 2021.

<sup>8</sup> Order dated 11.01.2021 in SLP(C) No. 012670 / 2020.

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