CORE V. ECI - STRENGTHENING IMPARTIALITY IN PUBLIC-PRIVATE CONTRACT ARBITRATIONS

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INTRODUCTION

The Arbitration is a quasi-judicial process where parties to dissolve their disputes amicably while enjoying benefits, including Party Autonomy in deciding the Arbitrators, procedures, and so on. This case note aims at analysing Central Organisation for Railway Electrification vs ECI A Joint Venture Company. This case deals with the party's autonomy and power in the appointment of arbitrators governed under the Arbitration and Conciliation Act, 1996. This case note provides how the court in an instance decided the power imbalance between a PSU and a private party in an arbitration agreement. This case note further discusses the findings of the case and analyses it in light of the Principles of Natural Justice.

FACTS OF THE CASE

The appellant awarded a work contract worth 165 crores to the respondent, the general conditions of the contract contained an arbitration clause, where the dispute having a value of less than one crore will be referred to a sole arbitrator. If the dispute is worth more than one crore, then a panel of three arbitrators will be appointed by the parties. The arbitrators will be selected from the four-member panel of potential arbitrators, who are Retired railway officials appointed by the appellant.

In case of any dispute being raised, any party can request that the arbitral tribunal to the general manager, and the GM has to constitute the tribunal within one month. The appellant will send the list of 4 retired officials, where the Respondent will select two members and will send it to the GM, where the GM will select one among them and appoint the other two arbitrators from the 4-member panel, or they can be anyone outside the panel. Due respondent didn't complete

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the work on time. The contract was terminated by the appellant. A claim of 75 crore was raised by the respondent.

The respondent requested the constitution of the arbitral council on 27-07-2018. The appellant sent a list of a 4-member panel to the respondent on 25-10-2018. According to the arbitration clause, the appellant ought to have sent the list within 30 days of the request. The Respondent, not giving any reply to the letter of the appellant, approached the High Court under section 11(6) for the appointment of a sole arbitrator. Section 11(6) provides the High Court with the power to appoint the arbitrator when the procedure for appointment of an arbitrator is not followed. The arbitration clause mandated that the appellant constitute the arbitral tribunal within thirty days of a request by the other party. The High Court passed an order of appointment of a sole arbitrator. This was appealed before the Supreme Court.

APPEAL IN SUPREME COURT 2019

The Apex court held that the appointment made by the High Court is not valid for the reasons stated below.

Right to Appoint Arbitrators: The appellant's right to appoint the arbitral tribunal remains until the respondent files a plea under Section 11(6), even if the tribunal was not constituted within the 30 days.

Adherence to Contractual Procedures: The Supreme Court emphasised that the procedures outlined in the general contract agreement must be followed, and the High Court erred in appointing a sole arbitrator.

Retired Officials as Arbitrators: Retired officials from the appellant corporation are not barred by law from becoming arbitrators, as no statute expressly prohibits them. Their professional expertise is deemed valuable.

General Manager's Appointment Power: The General Manager can appoint arbitrators but must ensure the respondent has the opportunity to participate in the selection process, ensuring fairness.

REVIEW PETITION

The Supreme Court in the case of **Union of India v. Tantia Constructions Limited**[1] had prima facie disagreed with the Supreme Court judgement and has requested a Larger Bench to review its judgement. This was later referred to a Constitutional Bench. This Bench had put forth a variety of issues.

ISSUES

1. Whether an appointment process that allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator, or curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel is valid in law;
2. Whether the principle of equal treatment of parties applies at the stage of the appointment of arbitrators, and
3. Whether an appointment process in a public-private contract, which allows a government entity to unilaterally appoint a sole arbitrator or a majority of the arbitrators of the arbitral tribunal is violates Article 14 of the Constitution.

SUBMISSIONS

Appellant Side:

- By the language of Section 18, the equality principle only applies to the proceedings of the Arbitral Tribunal. While it does not apply at the time of the constitution of the Arbitral Tribunal. Section 18 starts its operation not at the time of appointment of the Arbitrators but only after the commencement of the Arbitral proceedings. The Arbitrators must give fair and equal opportunity to both parties to present their case.

- Party Autonomy is the Fundamental principle in the Arbitration method of Dispute resolution. The parties choose to take up the Arbitration method because of the benefits of party autonomy, and it spreads across the process of Arbitration. If the Party Autonomy is taken away, then the Arbitration mode will not achieve its objective.

- The Supreme Court or High Court can appoint an independent arbitrator only if the appointment under section 11(4), 11(5), 11(6) fails to achieve.

[1] [2023] 12 SCC 330 (SC)

- The Statute does not expressly prohibit the ineligible person from being appointed as an arbitrator, or from appointing the arbitrators on his own.

Respondent Side:

- The party autonomy in the process of appointment of arbitrators is a key feature in the Statute, but it is not an absolute right. It is subject to section 12(5) and section 18 of the Statute.

- Section 18 of the Statute, i.e., equal opportunity to the parties, applies even in the process of appointment of arbitrators. The respondent does not have the right to an appointment to the same extent as the appellant has. The rule to select the arbitrators from the panel of four members enlisted by the appellant restricts the free exercise of the respondent to appoint the arbitrators. The appellant would select officials who are very proximate to them. A reasonable person would apprehend the likelihood of bias.

- Unilateral appointment of a sole arbitrator is a violation of section 18 of the statute. These kinds of appointments give apprehension or likelihood of Bias; the impartiality and independence of the arbitral tribunal would be compromised and fail to instil confidence in the party over the proceedings of the Arbitral Tribunal.

- An arbitration agreement has to abide by the provisions of the Constitution and should not be in contradiction of its values. Article 14 will be violated in the cases of unilateral appointment of sole arbitrators, and also appointment being made outside the panel.

LEGAL PRINCIPLES/REASONING

The judgment was given by a 5-judge constitutional bench. It had a 3:2 majority. **CJI D.Y. Chandrachud** penned down the judgment on behalf of the majority, whereas **Hrishikesh Roy** and **P.S. Narasimha** gave their separate dissenting judgments.

Equality Applies at the Stage of Appointment: The Arbitration method resembles the process of the ordinary court system. In Arbitration, along with the objective of party autonomy, emphasis should also be given to ensure Equal opportunity is given to parties in presenting the case, and Justness in the process should also not be compromised. Section 18 of the Statute provides Procedural Equality. It gives every party an equal right to present the case. The right remains across the proceedings. No party can be deprived of its right. If not so they

cannot present the case efficiently. Section 18 also applies at the stage of the Appointment of Arbitrators. This aligns with Article 14 of the Constitution. Parties have the autonomy to have their own procedure for the appointment of an Arbitrator. But the procedure cannot be designed in a way that the outcome of the procedure violates the Parties' rights provided in Section 18. In this case, the arbitrators were to be appointed from the panel of retired officials, which was formed by the appellant. The respondent was restricted to picking an arbitrator from the panel. The appellant had more power in appointing the arbitrators. The appointment of a Biased Arbitrator may vitiate the whole proceedings. The Arbitrator may act in a way that violates the parties' Right of Fair Hearing. Section 18, which provides for Equal Opportunity of the party in the proceedings, will be threatened. Both parties should be given equal opportunity to participate in the process of appointment of Arbitrators, which ensures the standards mentioned in Sections 12 and 18 are fulfilled. Independence, Impartiality, and Equality are related principles. Participation of the parties in the appointment process ensures an impartial proceeding.

Unilateral Appointment of Sole Arbitrator violates Section 18: The two concepts of Natural justice are that no party can be a judge in their case, and a Reasonable opportunity should be given to the party to present the case. In case of unilateral appointment of an Arbitrator, the party who has the upper hand in the procedure of appointing of arbitrator may choose an Arbitrator of their choice. There is a high chance that the Arbitrator will be biased throughout the process. The principles of Natural Justice will not be abided by in the proceedings. The principles provide Procedural Fairness and ensure in having an impartial and reasonable outcome. The objective is not only to have an impartial outcome but also to create a belief of fair proceedings being done in the minds of the parties. Justice is not only to be made but also shown to be made to the parties. These principles draw inspiration from Article 14 and Article 21.

The Public Sector Undertakings cannot mandate the Other Party to choose the Arbitrators from the Curated Panel of Potential Arbitrators formed by them: The Supreme Court held that the PSU cannot compel the other party to choose the arbitrators from the panel of potential Arbitrators. Because this curtails the right of the party to appoint the arbitrator of its own choice. They are restricted to choosing the arbitrator from the panel of potential Arbitrators. It is against section 18. Secondly, the PSU may choose potential Arbitrators in the panel of their choice. Ultimately, the opposite party has to choose the

Arbitrator from the list. There is a real likelihood of bias throughout the proceedings. By applying a Reasonable test, it can be objectively found out that there is an apprehension of bias. This may affect the outcome of the Proceedings. The GM appointing the presiding officer in a three-member panel and other powers gives rise to reasonable doubts in the process. The mandatory Standard of Impartiality and Independence of the arbitral tribunal contemplated in Section 12(5) cannot be met in these cases.

ANALYSIS

The Judgement in this case provides a balance of principles of Party Autonomy and Impartiality, and Independence of the Arbitral Tribunal. The Harmonious Construction is made of Sections 12 and 18 to avoid a miscarriage of justice. The Apex Court, while interpreting Section 18, was right in concluding that the Equality principle applies from the process of appointment of the arbitrator. It is important to note that an Arbitration tribunal is a Quasi-Judicial body, which has the statutory duty to act impartially between the parties. Fair process can be realised only if every party has equal opportunity in appointing the arbitrators. This case has a significant relief to private parties, which are vulnerable because of the fiduciary position that a PSU has. This case avoids any such situations that curtail the party's right to appoint the Arbitrator of its own choice. The Court was right in ruling that no unilateral appointment of a Sole Arbitrator should be made, as this would bring in Bias and would adversely affect the interest of the other party. The Supreme Court was right in reversing its own decision.

The court reversed its ruling in **Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd[2],** where the court had allowed for appointment from a broader panel where there are many potential arbitrators; the court in the present case has corrected its wrong. The reasoning is that, although there may be many members in the panel, the members will be named by the PSU itself. This raises concerns of bias and limiting the right of appointment of the other party. Any party cannot be compelled to select the arbitrators from the panel. It is important to note that the court in this case didn't bar the appointment of Retired officials as arbitrators.

This is a private-public agreement, where principles of administrative law don't apply. But Section 18 provides for Equal Opportunity in the arbitrary process; this principle of Equality lays the foundation for the principle of Natural Justice. So, it is necessary to draw inspiration

[2] 2017 4 SCC 665 (SC)

from the natural law principles. The arbitration process is devoid of judicial interventions, but in reality, it does need minimal interventions in times when fairness, independence, and impartiality will be compromised. The court has intervened to protect and ensure that Procedural Equality is maintained in the process. The IBA Guidelines on Conflict of Interest in International Arbitration[3] are followed by practitioners and forms the basis of domestic arbitration law, suggests for not giving an option to waive the application of provision which provides for Impartiality and Independence of Arbitrary Tribunal and foreign courts have interfered and developed the law to protect the sanctity of the arbitral tribunal by providing for equal participation of parties in appointment of arbitrators.

CONCLUSION

The Court in the CORE 2 case has rightly interpreted Section 18 in the light of the Arbitration and Conciliation Amendment Act, 2015, and also considered Section 12. The judgment has a significant bearing on future Arbitral proceedings. The court has it will instil confidence in the parties to resolve disputes through the means of Arbitration and have no doubts over the process. The parties may feel content with the award of the Arbitral Tribunal. The appeal rate from the award would go down. This would be a relief to the High Courts and the Supreme Court, which are already overburdened with cases.

[3] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2024) https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024 accessed 23 April 2025.