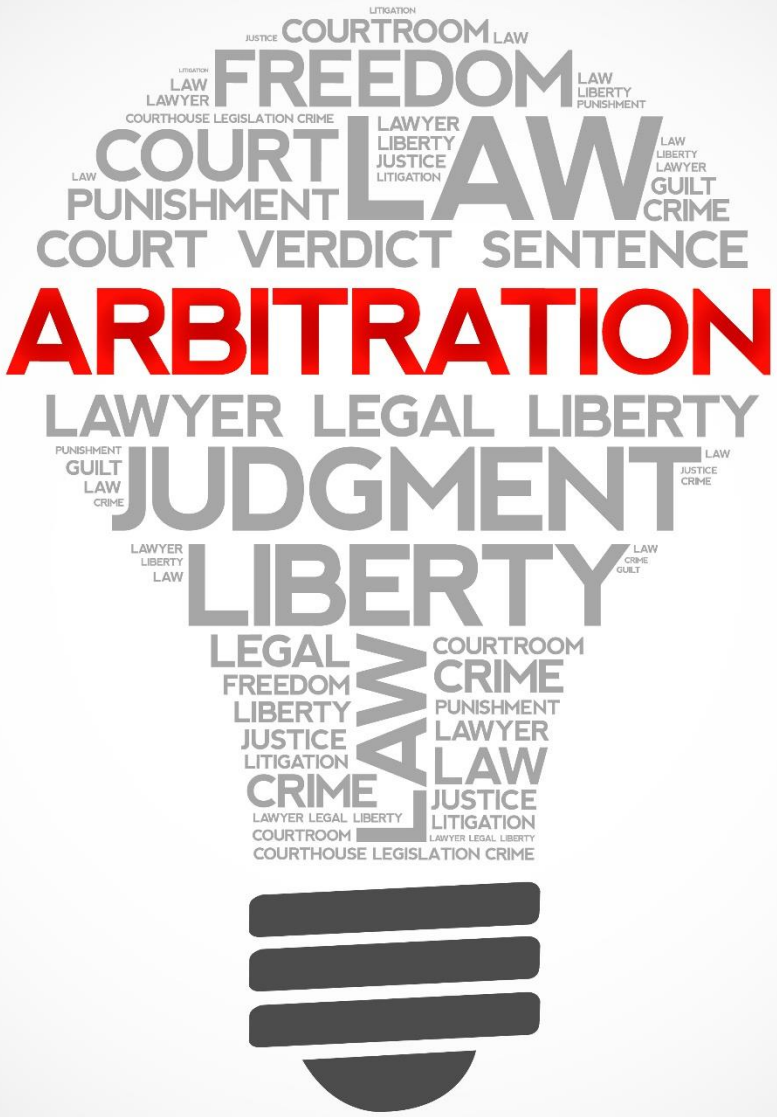

ELP Arbitration Weekly Alert

March 12, 2019

Meenu Arora and Ors. v. *Dewan Housing Finance Corporation Ltd.*[1] (Bombay High Court, 4 March 2019)

INTRODUCTION

In its recent judgment of *Meenu Arora*, the Bombay High Court ("**High Court**") opined that the amendment carried out in 2015 to the Arbitration and Conciliation Act, 1996 ("**1996 Act**"), has sought to introduce a stricter regime to ensure impartiality of arbitrators. Thus, interpreting section 12 read with the Fifth Schedule of the amended 1996 Act, the Bombay High Court found that an arbitrator being nominated in multiple

[1] Commercial Arbitration Petition No. 396 of 2017, Bombay High Court.

arbitrations by a particular party gives rise to justifiable doubts as to the independence of the arbitrator, and can constitute sufficient grounds for his disqualification. The Court also relied on a decision of the Supreme Court in *TRF Limited* v. *Energo Engineering Project Limited*[2] to hold that the appointment was in violation of section 12 read with the Seventh Schedule.

FACTUAL BACKGROUND

The Petitioners wished to purchase a flat in a housing project being developed by one M/s Hacienda Projects Pvt. Ltd. ("**Developer**"). The Developer insisted that the Petitioners avail housing loans only from the Respondent company, which was also financing the housing project. The Petitioners agreed, and entered into a tripartite loan agreement dated 28 February 2014 ("**Loan Agreement**") with the Developer and the Respondent.

Soon thereafter, the housing project was halted by the Developer, ostensibly in pursuance of certain orders of the Supreme Court. Consequently, the Petitioners informed the Developer in January 2015 that they wished to cancel the allotment of the flat. However, in May 2016, the Respondent called upon the Petitioners to repay the loan amount along with the pending EMIs and penal interest. The Petitioners disputed this claim, but the Respondent once again addressed a letter dated 4 August 2016, claiming an amount of Rs. 2,40,04,119/- and also invoking arbitration under the Loan Agreement.

The arbitration clause under the Loan Agreement provided that disputes would be *"referred to the to the Sole Arbitration of the Managing Director, Executive Director(s), President(s) or Vice President(s) of the DHFL* [the Respondent] *or any other authorized person to be appointed / nominated by the Managing Director, Executive Director(s), President(s) or Vice President(s) or any other Officer / Executive not below the level of Senior Manager of the DHFL as his nominee."*

However, by its letter dated 4 August 2016, the Respondent informed the Petitioners that it wished to appoint Mr. Anis Ahmed as a sole arbitrator ("**the Sole Arbitrator**"). The Petitioners objected to the unilateral appointment of the Sole Arbitrator, as it contended that such an appointment was illegal in light of the arbitration clause not conforming with the requirements section 12 of the 1996 Act as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (collectively, "**Amended Arbitration Act**").

Notwithstanding the Petitioners' objection, the Respondent filed its Statement of Claim with the Sole Arbitrator. The Sole Arbitrator, on the same day, addressed a notice to the Petitioners, calling upon them to appear before him, and also made disclosures[3] under the Sixth Schedule of the Amended Arbitration Act stating that, though he was acting as an arbitrator in more than three matters involving the Respondent, there were no circumstances which would call into question his independence or impartiality.

The Petitioners filed an Application under section 12 of the Amended Arbitration Act ("**Section 12 Application**"), challenging the Sole Arbitrator's appointment on the basis that, *inter alia*, he had failed to disclose the number of arbitrations in which he had been appointed as an arbitrator by the Respondent, and also certain other connections which he had with the Respondent company, which gave rise to justifiable doubts as to his independence and impartiality.

The Sole Arbitrator proceeded to hear the Section 12 Application *ex-parte* – even though the Petitioners had informed him in advance that their advocate would not be available on the indicated day – and dismissed

[2] (2017) 8 SCC 377.

[3] *Inter alia*, the Sole Arbitrator declared that he had *"no relationship with any of the parties nor has any interest in the subject matter in dispute whether financial, business, professional or other kind, save and except the fact that within the past three years* [he had] *been appointed as arbitrator on more than three occasions by* [the Respondent]" (emphasis supplied).

the same. Within two weeks of dismissing the Section 12 Application, the Sole Arbitrator also passed an *ex-parte* arbitral award ("**Award**") in favour of the Respondent.

The Petitioners challenged this Award before the High Court under section 34 of the Amended Arbitration Act.

ISSUES AND FINDINGS

The High Court noted that the Fifth Schedule provides various grounds which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Entry 22 thereof states that such doubts arise if the arbitrator has been appointed as an arbitrator by one of the parties (or its affiliates) on two or more occasions in the preceding three years.

In the present case, the High Court noted at the outset that the Sole Arbitrator had failed to disclose the exact number of arbitrations in which he had been appointed by the Respondent and has merely stated that he has been appointed by the Petitioner on more than three occasions. The Court further observed that in any event the fact that he had so been appointed "on more than three occasions" in the past three years by itself fell foul of Entry 22. The High Court noted that such recurring appointments increase the likelihood of an arbitrator ceasing to be independent, and therefore, the Sole Arbitrator ought not to have accepted his appointment in the present dispute.

The High Court further looked into the arbitration clause under the Loan Agreement and found it to be violative of section 12 of the Amended Arbitration Act read with the Seventh Schedule, as interpreted by the Supreme Court in *TRF Limited* v. *Energo Engineering Project Limited*[4]. This being the case, the Respondent could not have unilaterally appointed any arbitrator, and ought to have approached the courts under section 11 of the Amended Arbitration Act for such appointment, or mutually agreed to an appointment with the Petitioners.

In the circumstances, the appointment of the Sole Arbitrator was found to be illegal, and therefore the Award was quashed and set aside by the High Court.

ELP COMMENT

It is pertinent to note that while the Fifth Schedule provides ground which gives rise to justifiable doubts as to the independence and impartiality of an arbitrator, the seventh Schedule prescribes relationships between the arbitrator and party which would disqualify the arbitrator from being appointed.

Therefore, it is heartening to see an Indian court taking a dim view of an especially egregious violation of the Fifth Schedule, and disqualifying an arbitrator based on the same. Such an approach, if consistently applied by courts, would lend some teeth to the Fifth Schedule, and not render it merely a paper tiger. This is even more so important in the Indian context, where, as alluded to by the High Court itself, in most cases the party with the greater bargaining power attempts to skew the appointment of an arbitrator/tribunal so as to increase the likelihood of obtaining an award in its favour.

[4] (2017) 8 SCC 377. For ELP's analysis of this judgment, please refer to the attached document.