



## ELP Arbitration Weekly Alert

April 22, 2019

### [Bharat Broadband Network Limited v. United Telecoms Limited<sup>1</sup>](#) (Supreme Court, 16 April 2019)

#### Introduction

In this case, the Supreme Court of India (**Supreme Court**) held that an arbitrator, appointed by a person who is ineligible to act as an arbitrator as per the provisions of section 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 (as amended by Arbitration and Conciliation (Amendment) Act, 2015 (**Amendment Act**)) (**Act**), is *de jure* unable to perform his functions. The Supreme Court also held that

---

<sup>1</sup> Civil Appeal No. 3972 of 2019.

the mandate of such arbitrator automatically terminates and in such an event, the parties are to appoint a substitute arbitrator under section 14 of the Act or if there remains any controversy between them, approach the courts for appointment of a substitute arbitrator.

### **Factual Background**

Bharat Broadband Network Limited (**Appellant**) floated a tender for certain works. United Telecoms Limited (**Respondent**) emerged as the successful bidder and was issued an advance purchase order (**Contract**). The General Conditions of the Contract contained an arbitration clause<sup>2</sup>, which provided that disputes would be referred to 'sole arbitration' of the Chairman and Managing Director (**CMD**) of the Appellant, and if he was unable to act as the arbitrator, to the 'sole arbitration' of some other person appointed by the CMD.

When disputes arose between the parties, the Respondent invoked arbitration in January 2017, and requested the CMD to appoint an independent sole arbitrator. On 17 January 2017, the CMD appointed a sole arbitrator (**Sole Arbitrator**) to adjudicate the disputes between parties.

On 3 July 2017, the Supreme Court pronounced its judgment in *TRF Ltd. v. Energo Engineering Projects Ltd.*<sup>3</sup> (**TRF Ltd.**). In that case, the Supreme Court, faced with an arbitration clause which was similar to the present case, held that the arbitrator named therein, or any substitute arbitrator appointed by him, would be ineligible to act as the arbitrator in light of the section 12(5)<sup>4</sup> read with the Seventh Schedule of the Act.

Taking note of the judgment in *TRF Ltd.*, the Appellant – who had appointed the Sole Arbitrator – made an application to him to withdraw from the proceedings, as he was *de jure* unable to act as arbitrator. However, the Sole Arbitrator dismissed the said application, without a reasoned order.

The Appellant filed a petition before the Delhi High Court (**High Court**) under sections 14 and 15 of the Act, praying for the appointment of a substitute arbitrator in place of the Sole Arbitrator, since the latter had become *de jure* unable to perform his functions. However, the High Court rejected the petition on the basis that since the Appellant had made the appointment, it was estopped from challenging the appointment after participating in the proceedings. Furthermore, the High Court opined that the Appellant's appointment of the Sole Arbitrator and Respondent's submission of its statement of claim without any objection to the appointment of the Sole Arbitrator – both acts done in writing – would suffice to fulfil the requirements of the proviso to section 12(5).

Aggrieved by the decision of the High Court, the Appellant approached the Supreme Court.

<sup>2</sup> **“III.20.1** *In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer.”*

<sup>3</sup> (2017) 8 SCC 377.

<sup>4</sup> **Section 12(5)** – *“Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*

*Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”*

## Issues and Findings

Before the Supreme Court, the Appellant relied on sections 12 to 14 of the Act to contend that the appointment of the Sole Arbitrator was void *ab initio*.

The Respondent argued that, as per section 12(4), a party could only challenge the appointment of an arbitrator whom it had appointed, if the reason for such challenge came to its knowledge after the appointment. Since the Amendment Act had come into force on 23 October 2015, and the Sole Arbitrator had been appointed on 17 January 2017, it was argued that the Appellant could not take benefit of section 12(4).

After hearing the parties, the Supreme Court observed that if a person was appointed to act as an arbitrator in contravention of the provisions of section 12(5) read with the Seventh Schedule, such person was rendered *de jure* ineligible. In such a situation, the mandate of the person would terminate automatically, and he could be substituted by the parties under section 14(1), without the need to make an application before him, challenging his appointment. As per section 14(2), in the event there is any controversy regarding the arbitrator's *de jure* ineligibility, the parties would have to approach the court. The Supreme Court also reiterated its ruling in *TRF Ltd.* i.e. if a person who is ineligible to act as an arbitrator as per the provisions of the Act appoints an arbitrator, such appointment is void *ab initio*. Accordingly, it held that the appointment of the Sole Arbitrator by CMD was void *ab initio*.

The Supreme Court further observed that while it was possible for parties to overcome the bar of section 12(5) by an express agreement in writing after the disputes had arisen, the present case could not be said to be covered by that scenario. In the facts of this case, on the date of appointing the Sole Arbitrator, i.e. 17 January 2017, the CMD could not have known that an arbitrator appointed by him would be ineligible as per section 12(5) of the Act and such appointment would be void *ab initio*, as that was only clarified by the *TRF Ltd.* judgment on 3 July 2017. Therefore, in the absence of knowledge on the implications of section 12(5) read with the Seventh Schedule, the parties could not possibly have entered into an agreement to supersede the same. Once the Supreme Court made a declaration of law under these provisions, which would be effective from the date of the Amendment Act coming into force, the Sole Arbitrator was *de jure* ineligible to act as such. The Supreme Court noted that in the present case the filing of the statement of claim before the Sole Arbitrator would not imply that there was an express agreement between the parties clarifying that they wished that Sole Arbitrator continued to act as an arbitrator despite him being ineligible to act as such under the Act.

### ELP Comment

The judgment in *TRF Ltd.* made it perfectly clear that a person who is ineligible to be an arbitrator as per section 12(5) read with the Seventh Schedule to the Act cannot appoint an arbitrator in his stead and such appointment (if made) would be void *ab initio*. In the present case, the Supreme Court while reiterating the foregoing, has provided a significant clarification that an arbitrator appointed in violation of the foregoing would be *de jure* ineligible, and in such an event there is no challenge procedure (before the tribunal) to be availed of; instead parties need to substitute the arbitrator. This clarification will serve to save time in arbitrations.

*Disclaimer: The information provided in this update is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This update is not intended to address the circumstances of any particular individual or corporate body. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*