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## Supreme Court applies Section 12 (5) of the Arbitration Act to an arbitral tribunal (comprising officers of a party to the arbitration as members) constituted much before the Amendment Act, 2015 and declares them ineligible to continue as arbitrators.

In a recent case of *Ellora Paper Mills Limited Vs The State of Madhya Pradesh* (Civil Appeal No. 7697 OF 2021 decided on January 4, 2022), the Supreme Court applied Section 12 (5) read with Seventh Schedule of the Arbitration Act, 1996, to declare an arbitral tribunal, constituted in the year 2000, ineligible to act/continue as arbitrators. Supreme Court relying upon its earlier judgments in *TRF Limited v. Energo Engineering Projects Limited*:(2017) 8 SCC 377, *Bharat Broadband Network Limited v. United Telecoms Limited*: (2019) 5 SCC 755 and *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales & Suppliers*: 2021 SCC OnLine SC 730 rejected the plea of the Respondent—State of MP—that Section 12(5) read with Seventh Schedule, which has been inserted in the statute by Amendment Act, 2015 w.e.f. October 23, 2015 will not be applicable retrospectively.

### Background

A dispute arose between the appellant and the respondent under a contract dated September 22, 1993, to supply cream wove paper and duplicating paper. It was the appellant's case that the respondent failed to make the payment as per the terms of the contract. Contrarily, the respondent argued that the paper supplied by the appellant did not conform to the specification and could not be utilized.

The appellant failing to restrain the respondent from awarding the supply order to a third party in a Civil Suit filed in 1994, filed another suit in 1998 seeking recovery of Rs.95,32,103/- before the Bhopal Civil Court. In the suit, the respondent applied under Section 8 of the Arbitration Act, 1996, seeking a stay of the proceedings basis existence of an arbitration clause in the contract between the parties. The Civil Court rejected the application. While allowing the revision petition against the rejection order, the High Court referred the parties to arbitration by the Stationery Purchase Committee comprising of the officers of the respondent. The SLP filed by the appellant against the High Court's order was dismissed.

The appellant filed its objections to the constitution of the Arbitral Tribunal/Stationery Purchase Committee on September 12, 2000 and also challenged its jurisdiction by filing an application under Section 13 of the Arbitration Act, 1996. The Arbitral Tribunal vide order dated February 2, 2001 rejected the S.13 application. The High Court dismissed the Writ Petition filed by the appellant against the Tribunal's order in January 2017 with liberty to the appellant to raise objections before the appropriate forum.

Subsequently, in the year 2019, the appellant filed an application before the High Court under Section 14 read with Sections 11 & 15 of the Arbitration Act, 1996 seeking termination of the mandate of originally constituted Arbitral Tribunal and for appointment of a new arbitrator. Before the High Court, the appellant relying upon Section 12(5) of the Arbitration Act, 1996 and the decision of Supreme Court in *TRF Limited (supra)* argued that all the five officers constituting the Stationery Purchase Committee, being the employees of the respondent had rendered themselves ineligible to continue as arbitrators. It was also contended that the original members of the Arbitral Tribunal, who initiated the proceedings had since ceased to hold their respective offices, in any case, a new Arbitral Tribunal had to be constituted and therefore an impartial and independent arbitrator was required to be appointed in terms of Section 11 of the Arbitration Act, 1996.

However, the High Court rejected the above contention of the appellant and held that the Amendment Act, 2015 is effective w.e.f. October 23, 2015 and cannot have a retrospective operation in the arbitration proceedings already commenced unless the parties agree. Therefore, when in the present case the Arbitral Tribunal was constituted much before the Amendment Act, 2015 and the Arbitral Tribunal commenced its proceedings, the Amendment Act, 2015 – Section 12(5) of the Arbitration Act, 2016 shall not be applicable.

Aggrieved by the above judgment, the appellant filed an SLP before the Supreme Court.

### Decision

The Supreme framed the following question for consideration: ***whether the Stationery Purchase Committee – Arbitral Tribunal consisting of the officers of the respondent has lost the mandate, considering Section 12(5) read with Seventh Schedule of the Arbitration Act, 1996.***

The Supreme Court observed that though it is true that initially the Arbitral Tribunal was constituted by the High Court in the year 2001, however, Arbitral Tribunal could not commence the arbitration proceedings because the several proceedings initiated by the appellant and the stay granted by the High Court from May 4, 2001 to January 24, 2017.

Relying upon the case of *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra)*, the Supreme Court held that this Court considered an identical question in the Jaipur Zila case. After considering the decisions of this Court in the case of *TRF (supra)* and other decisions on the point, the Supreme Court in the *Jaipur Zila* case had rejected the submission of the petitioners that since the agreement was before the insertion of S.12(5) read with Seventh Schedule to the Act, the disqualification under the above provisions shall not be applicable. In the above decision, the Supreme Court had also rejected the argument that once an arbitrator started the arbitration proceedings, thereafter, the High Court is not justified in appointing an arbitrator.

The Supreme Court after referring to the *Jaipur Zila* judgment held:

- that the Arbitral Tribunal consisted of officers of the respondent-State and therefore, as per Amendment Act, 2015 – S.12(5) read with Seventh Schedule, all of them have become ineligible to become arbitrators and to continue as arbitrators.
- that Section 12 has been amended by Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of “neutrality of arbitrators”. To achieve the main purpose for amending the provision, namely, to provide for “neutrality of arbitrators”, S.12(5) lays down that 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, he shall be ineligible to be appointed as an arbitrator.
- that in such an eventuality, i.e., when the arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would be beyond the pale of the arbitration agreement, empowering the Court to appoint such an arbitrator as may be permissible. That would be the effect of the non obstante clause contained in S.12(5) and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement.

Basis the above reasoning and the law laid down by the Supreme Court in the cases of *TRF (supra)*, *Bharat Broadband Network Limited (supra)* and *Jaipur Zila (supra)*, the Supreme Court held that the impugned judgment and order passed by the High Court is contrary to the law laid down in the above-referred decisions. Accordingly, the Court held that the earlier Arbitral Tribunal had lost its mandate by operation of law in view of Section 12(5) read with Seventh Schedule and a fresh arbitrator must be appointed under the provisions of the Arbitration Act, 1996.

### Comment

The Supreme Court has shown its inclination to apply S.12 (5) even to arbitration proceedings commenced much before the 2015 amendment. In the present case, the Supreme Court negated the respondent's objection regarding the applicability of S.12(5) retrospectively. It held that after the constitution of the Arbitral Tribunal in 2001, no further steps had been taken in the arbitration proceedings, and therefore, technically, it cannot be said that the arbitration proceedings by the Arbitral Tribunal have commenced. Prima facie, this view seems not in consonance with Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015, which stipulates that the provisions of the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act, 2015 (w.e.f. October 23, 2015). In the present case, arbitration proceedings commenced way back in 2000, much before coming into force of the amended Act. Therefore, the Supreme Court could not have invoked the provisions of the Amended Act. The effort of the Supreme Court, it seems, is to provide for the "neutrality of arbitrators" as envisaged by the Amendment Act, 2015.

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