**A critique of the Perkins Ruling**

1. The law on appointment of an arbitrator has undergone myriad of changes. The efforts, both at the legislative level as well as the judiciary, have been to ensure and retain the impartiality in the process of arbitration. However, at the same time, the significance of maintaining and upholding the principle of minimal interference by the Courts in the arbitration process has also been recognized. The challenge faced is to maintain a balance between the two well-established principles in the Indian Arbitration Law.

2. A recent decision wherein the Supreme Court was faced with a dilemma of the nature can be found in the case of ***Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.[[1]](#footnote-1) (“Perkins”).*** To sum up the decision in a sentence, the Court has invalidated and nullified the effect of Arbitration Clauses stipulating appointment of Sole Arbitrator by one of the parties to the dispute. The implications of the said decision have been felt by the entire legal fraternity. In our critical analysis of the said decision, we shall consecrate on the issue whether the judiciary has correctly applied the principles of judicial interpretation in arriving at its decision. Further, the effect of the decision, which has sent ripples over the entire arbitration system of our country, shall also be highlighted in the present analysis.

3. The Supreme Court was presented with the opportunity in view of the common and well-recognized practice in commercial contracts to have an arbitration clause wherein a unilateral is given to one of the parties to appoint a sole arbitrator to adjudicate upon their disputes. The Perkins Judgment, in effect, invalidates such an arbitration clause by holding that the said clause adversely impacts the impartiality by giving the unilateral power to one of the parties to appoint the sole arbitrator.

4. The Arbitration and Conciliation Act itself stipulates the significance of impartiality of an arbitrator(s) in various provisions contained in the Act. Firstly, it is incumbent to underscore and highlight the said legislative provisions in order to determine to understand the true and correct import of the decision in Perkins case. The relevant provisions are reproduced below:

“Section 11

 ………….

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator……...

(6) Where, under an appointment procedure agreed upon by the parties, —

(a) a party fails to act as required under that procedure; or

(b) ………………..

(c) ………………….

a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

………

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.” (emphasis supplied)

12. Grounds for challenge. — (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, —

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1. —The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2. —The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(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.”

5. From a bare perusal of the said provisions it comes to fore that the parties have been given complete autonomy over the procedure for conducting the arbitration which includes the process of appointment of Arbitrator as well. Thus the parties are bound by the procedure agreed upon in the commercial contracts for the appointment of an arbitrator and the role of the Courts, if construed in the spirit of the scheme of the Arbitration Act stands extremely narrowed and limited. That being said, it is also condign to point out that Section 12, the Fifth and the Seventh Schedule provide exhaustive grounds for disqualification of an arbitrator and thereby act as regulators to maintain the impartiality and independency of the arbitration.

6. The Supreme Court in the case of ***Indian [[2]](#footnote-2)Oil Corporation v. Raja Transport (P) Ltd.*** has carried out and in-depth analysis of the relevant provisions of the Act and held that the Act per se does not bar appointment of an employee of a party (Govt. or its instrumentalities) as a sole arbitrator especially where the named arbitrator is a senior officer of the Government/statutory body/Government company, and had nothing to do with execution of the subject contract. The Supreme Court further took the opportunity to point out that arbitrations conducted by employee-arbitrators affect the credibility of the process of arbitration as well as the final award passed. However, the Court refrained from proceeding on the analysis as the role of the Courts is limited to examine whether the parties have adhered to the procedure agreed upon under the arbitration agreement. The law, therefore, as laid down in the case permitted one of the parties to appoint their own employee as the Sole arbitrates if the arbitration agreement stipulates so.

7. Even the Law Commission in its 246th Law Commission Report which served as a basis for the 2015 Amendment of the Arbitration, while emphasizing on the importance of preserving the impartiality and independency of the arbitration proves did not place any bar on appointment of employee-arbitrators as sole arbitrator by one of the parties.

8. Before proceeding to conduct a critical analysis of the Perkins Judgment, it would be deemed appropriate, at this stage, to refer to the pronouncement of the Supreme Court in the case of ***TRF Limited v. Energo Engineering Projects Limited[[3]](#footnote-3)*** (referred to as “TRF judgment hereinafter ). The Court was called to consider the validity of an arbitral clause which stipulated any difference or dispute between the parties shall be referred to ‘sole arbitration of Managing Director of buyer or his nominee’.

9. The Supreme Court tested the validity of the said clause on the touchstone of Section 12 as well as the Seventh Schedule of the Arbitration Act and observed that when the Managing Director who was nominated the first choice as Sole Arbitrator is her/himself disqualified and ineligible to act as an Arbitrator by virtue of Section 12(5) of the Act, then any nominee of such disqualified Arbitrator cannot be held to be valid nomination of an Arbitrator, even if the arbitration clause in the agreement stipulates otherwise. Thus, the Court held that a nominated arbitrator who has become ineligible cannot further make a valid nomination.

10. It would be apt to note that the Court never dealt with the issue of validity of appointment of a sole employee-arbitrator by one of the parties.

11. The law as laid down in the TRF judgment has been discussed and relied upon by various High Courts and a reference of the decisions in the said judgments would throw further light on the ratio laid down in the TRF judgment.

12. The High Court of Delhi in the case of ***Bhayana Builders Pvt. Ltd. v. Oriental Structural Engineers Pvt. Ltd. and Ors.[[4]](#footnote-4)*** in which the appointment of sole arbitrator by the Managing Director of the Respondent therein was challenged. The Court upheld the appointment and differentiated the facts of the said case with the facts in the ***TRF judgment*** case. The Court noted that in the case of ***TRF judgment*** the Managing Director was himself nominated as the Sole Arbitrator and in the alternative he could nominate another as Sole Arbitrator in his place. However in the case before the High Court of Delhi the Managing Director was not nominated as the Arbitrator but was only named as the appointing or nominating authority. Thus the High Court held that the ratio in the TRF judgment could not be relied upon in the ***Bahayana Builders case*** (supra) and further refused to invalidate arbitration clauses which stipulated the power of a single party involved in a dispute to appoint the sole arbitrator.

13. This view of the High Court of Delhi in the ***Bhayana Builders case*** (supra) has been reiterated in several other cases of the same Court as well as other High Courts. In this context, the decision of the High Court of Calcutta in ***Dibyendu Bose v. South Eastern Railway[[5]](#footnote-5)*** wherein again the High Court was of the firm view that the disqualification of nomination by the Managing Director in the case of ***TRF judgment*** applied only in those situations where the Managing Director was at the nominee as Sole Arbitrator and in the alternative his nominee could act as a Sole Arbitrator. The disqualification would not apply where the Managing Director has not been nominated as Sole Arbitrator but only as an appointing authority.

14. Such a consistent view taken by various High Courts leads to the undeniable conclusion that the appointment of a sole arbitrator by any one of the parties does not fall within the purview of disqualifications under Section 12(5) of the Arbitration Act.

15. In view of the aforesaid background, I shall now proceed to critically analyze the ratio in ***Perkins Judgment*** which can be classified under the following heads:

***(i) Expanding the scope of the Arbitration Act beyond the legislative intent***

16. The Arbitration Act contains various provisions for ensuring impartiality and independency in the Arbitration process. All the provisions, whether individually read or collectively, are absolutely clear to the effect that the Act does not bar the appointment of sole arbitrators by one party to the dispute. In fact, the Amendment of 2015 to the Arbitration Act places several checks and balances in order to ensure that the essential ingredient of impartiality in such arbitrations, where the sole arbitrator has been appointed by one of the parties, remains intact.

17. Once the statute is explicitly clear on what is barred, the Judiciary cannot overstep its domain and expand the scope of the legislation by making any implied inclusions which were never intended by the Legislature in the first place.

18. The Parliament has enacted and included every reasonable possibility which can possibly make a person ineligible due to conflict of interest to be appointed as an arbitrator. Any new inclusion, as attempted by the Judiciary in the ***Perkins Judgment***, can only be made by an Amendment to the Statute by the Parliament, and not by the Judiciary.

19. It is a cardinal rule of the interpretation of statute that the Court is bound to interpret a provision according to the literal and plain meaning of the language used in the statute if no ambiguity exists. The Court cannot add, alter or modify the statute. It has been consistently held that the Court cannot be permitted to legislate in the garb of interpretation of the Statute. To this effect, the observations made by the House of Lords in ***Duport Steels Ltd. v. Sirs.[[6]](#footnote-6)*** are reproduced thus:

“…the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral”

***(ii) Incorrect Interpretation and Application of the TRF Judgment***

20. Another ground on which the ***Perkins judgment*** falls short of being legally valid and sound judgment is that the Court in ***Perkins Judgment*** has wrongly interpreted and applied the ***TRF judgment***. Despite recognizing the distinction between the facts in both the cases, the Court in ***Perkins judgment*** proceeded, under the garb of logical deduction, to expand the scope of the ratio in ***TRF judgment*** and modify it in a manner to befit the facts in ***Perkins Judgment.*** To highlight this, I shall reproduce the relevant para of the Perkins Judgment as follows:

“We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

 16. But, in our view that has to be the logical deduction from TRF Limited…”

(Emphasis supplied)

21. From the said observations it becomes amply clear that the facts in both cases differ starkly from one another and the Court itself has made a conscious reference to the said fact. Having done, the Court in ***Perkins judgment*** could not have proceeded on the faulty premise of logical deduction to apply the ratio of ***TRF judgment*** to its own fact. The said principle has been recognized by the Supreme Court in ***Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. & Ors[[7]](#footnote-7)***, wherein it was observed:

“A decision, as is well-known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well-settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.”

21. Further, such judicial interpretations based on logical deduction of other decisions, become more vulnerable and susceptible when they have the effect of transgressing into the domain of the legislative as in the case of ***Perkins Judgment***.

22. When we speak of the interpretation of a judgment, one of the cardinal and well-recognized principles of interpretation of a judgment is that a judgment cannot be read as a statute which the Court in ***Perkins Judgment*** has completely forgone in its interpretation of the ***TRF Judgment.***

23. In ***Vishal N. Kalsaria vs. Bank of India and Ors***.[[8]](#footnote-8) the Court observed that it is a well settled position of law that a judgment cannot be read as a statute and interpreted and applied to fact situations.

24. Similarly in the case of ***J.I.K. Industries Ltd. and Ors. vs. Amarlal v. Jumani and Ors.[[9]](#footnote-9)*** the Court made the following observations:

“It is well-settled that a judgment is always an authority for what it decides. It is equally well-settled that a judgment cannot be read as a statute. It has to be read in the context of the facts discussed in it.”

25. The said principle emphasizes that a judgment must be construed having regard to the text and context in which the judgment was passed. The factual matrix and the issues involved in a judgment must be considered for the purpose of its interpretation. Further, a word or sentence or clause in a judgment cannot be read in isolation and the same has to be read in the context in which it is used. Further an interpretation, by which a clause or a sentence or word read in isolation is treated as exposition of law on a question when, in fact, the question did not even fall to be answered in the judgment, falls foul to the well-established principles of interpretation of a judgment. Similar observations to this effect were made by the Supreme Court in ***Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Ors. v. Union of*** ***India[[10]](#footnote-10)*** wherein it was stated:

“It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.”

26. Hence, the reliance of the Supreme Court on the ***TRF judgment*** in the ***Perkins judgment*** and arriving at a conclusion by logically deducing from the ***TRF judgment***, something which was not provided under the said judgment, is against the settled principles of law. Therefore, the Supreme Court committed a grave error of law and should reconsider.

***(iii) Opening Floodgates to litigation***

27. Apartfrom having an adverse impact on the party’s autonomy over the arbitration proves, another catastrophic effect of the ***Perkins Judgment*** is the drastic increase in the number of cases before the Judiciary which would, in turn, lead to docket explosion in the Courts. Arbitration agreements containing clauses stipulating the right of one party to unilaterally appoint Sole Arbitrator can be challenged in the Courts. Further, the award passed by Arbitrators appointed in view of such arbitration clauses have also found a leeway to be easily challenged on the ground of bias and partiality. This would not only defeat the purpose and object of the Arbitration and Conciliation Act but also defeat the goals of ‘speedy justice’ and ‘justice for all’.

28. The purpose of introducing Arbitration as an alternative dispute redressal mechanism was twofold, that is to reduce the burden of the Courts and to provide a mechanism, for easy redressal of disputes, which was free from the procedural technicalities involved in the traditional method of dispute resolution. Further, both the legislative as well as the judicial intention and object has been to curb and minimize the interference of the Courts. The ***Perkins Judgment*** manifestly defeats the entire purpose and calls into question a multitude of commercial contracts containing clauses for appointment of Sole Arbitrator unilaterally by one party to the dispute which would disrupt and dismantle the laborious efforts made towards setting up a balanced dispute redressal mechanism.

29. It can be concluded from the said analysis that the Court in ***Perkins Judgment*** has failed to consider well-established principles of law and interpretation and further traversed beyond its judicial domain and onto the legislative sphere. Further, the Court has failed to take into account the eventual dilemma that shall be presented before the Courts, the litigants and the country at large. Ergo, the Perkins judgment requires a revisit after due consideration of the legal principles and impact on the system.

1. . 2019 (9) SCC OnLine SC 1517 [↑](#footnote-ref-1)
2. . (2009) 8 SCC 520 [↑](#footnote-ref-2)
3. . (2017) 8 SCC 377 [↑](#footnote-ref-3)
4. . O.M.P. (T) (COMM.) 101/2017 [↑](#footnote-ref-4)
5. . 2018 SCC Online Cal 13253 [↑](#footnote-ref-5)
6. . (1980) 1 All ER 529 [↑](#footnote-ref-6)
7. . (2003) 2 SCC 111 [↑](#footnote-ref-7)
8. . (2016) 3 SCC 762 [↑](#footnote-ref-8)
9. . 2012 (2) ACR 1328 (SC) [↑](#footnote-ref-9)
10. . (1971) 1 SCC 85 [↑](#footnote-ref-10)