

Dispute Resolution Hotline

May 15, 2018

ANOTHER CHALLENGE FOR THE JUDICIARY

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A small but very significant change made by the government is in the appointment of judges to commercial courts.

For a government that likes report cards, the World Bank's ease of doing business rankings has been a crucial grade. India's recent spike in rankings has been attributed to business reforms introduced by this government since it took over. One such reform was the constitution of the designated commercial courts for dealing with commercial disputes of a specified value.

The government on May 3, 2018 promulgated the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018, amending the Commercial Courts Act. The ordinance introduced changes aimed at improving the ease of doing business ranking of India. While the idea behind these changes is good, the government has also used this as an opportunity to further impinge upon judicial independence.

A small but very significant change made by the government is in the appointment of judges to commercial courts. The Commercial Courts Act was based on the recommendations made in the 253rd Report of the Law Commission of India. The Law Commission had suggested that the judges of commercial courts be appointed by the high courts.

The Commercial Courts Act as passed by Parliament diluted the suggestion of the Law Commission. It provided for appointment of judges by the state governments but with the mandatory concurrence of the chief justice of the high court. However, pursuant to the new ordinance, this has been further diluted. Now even the concurrence of the chief justice of the high court is not mandatory. Thus, the government is now the sole authority for appointing judges to commercial courts.

Coupled with such change is the reduction in the pecuniary threshold for invoking the jurisdiction of commercial courts. Earlier, commercial courts exercised jurisdiction in relation to claims of Rs 10 million or above. Now, any commercial dispute exceeding Rs 300,000 in value will be heard by the commercial courts. This figure of Rs 300,000 has been chosen as the World Bank, while evaluating the enforcement of contracts in India, takes the sample claim value as \$5,000.

This sample claim value led to the World Bank evaluating city civil courts for their efficiency in dealing with commercial claims, as opposed to commercial courts specifically constituted under the Commercial Courts Act. Therefore, the government has now reduced the pecuniary jurisdiction of commercial courts to Rs 300,000. However, the effect of this is that a wide array of disputes will now be decided by courts where the judges are appointed by the government itself.

It now remains to be seen whether this amendment will withstand a challenge in court. The ordinance requires the appointment of persons at or below the level of district judge as the judge of a commercial court. The Constitution of India provides that the appointment and posting of district judges shall be made by the governor in consultation with the high court. This consultative process has been held by the Supreme Court to be mandatory (See Registrar (Admn.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy, (1999) 7 SCC 725).

Further, the high court determines the posting and promotion of judges below the level of district judges. The control of the high court over the subordinate judiciary is supposed to be comprehensive, exclusive and effective, and it is to sub-serve a basic feature of the Constitution — independence of the judiciary (see Prakash Singh Badal v. State of Punjab, (2007) 1 SCC 1). It seems that the position of the high court and the independence of the judiciary is being undermined through the constitution of commercial courts and appointment of judges thereof.

Apart from the constitutional validity of the change, this inherent inclination of a majority government to usurp dominion over those responsible for disseminating justice must be curbed. History is full of examples where such conduct of parties in power has resulted in grave deprivation of rights. We face a stark reality where the actions, in this case commercial, of the government or those finding favour with the government, would be determined by those handpicked by the government itself.

This change would also have an impact on investor sentiment. Investors normally seek to insulate themselves from changes in the political landscape of a jurisdiction. The role of the judiciary in this is critical, as investors rely on it to ensure that they receive a fair deal. Thus, the government's assertion of power over judges of commercial courts may further cause investors to seek resolution of their disputes in courts or tribunals outside India. These are testing times

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for the judiciary and this ordinance throws up another challenge. We will now have to watch for the judiciary's response.

Ashish Kabra

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