

# INDIA JURIS

## DELHI HIGH COURT REINSTATES SUBSTANTIVE RIGHT TO APPEAL POST TRANSITION FROM COMMERCIAL COURTS ORDINANCE TO COMMERCIAL COURTS ACT

On 14 July 2017, the Hon'ble Delhi High Court, in the matter **Simplex Infrastructures Limited v. Energo Engineering Projects Limited & Anr**, (Review Petition No. 81 of 2016 in OMP (I) (COMM.) No. 55 of 2015) recalled its order dated 10 December 2015 and restored the petition originally filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") which was dismissed by a Commercial Appellate Division (Division Bench) during the transition from the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 (hereinafter referred to as "the 2015 Ordinance") to the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as "the 2015 Act").

### Background

The matter involved an interesting proposition of law in dealing with the fate of a petition filed under Section 9 of the 1996 Act which was adjudicated by the Commercial Appellate Division (i.e., a Division Bench) of the High Court under Section 10(2) of the 2015 Ordinance instead of the Commercial Division (i.e., a Single Bench) of the High Court during the intervening period while the 2015 Ordinance was still in force, i.e. between 21 October 2015 and 31 December 2015. Interestingly, the explanation to the 2015 Ordinance provided that a Commercial Appellate Division must be set up in all High Courts to hear appeals against orders made by the Commercial Courts and the Commercial Division of the High Courts. However, in view of a mistake in Section 10(2) of the 2015 Ordinance, there was ambiguity on whether the right to appeal under Section 37 of the 1996 Act – which is a substantive right of litigants against an order passed under Section 9 of the 1996 Act – was effectively removed. To add to this ambiguity, Section 23 of the 2015 Act provided that notwithstanding it being repealed, any action taken under the 2015 Ordinance must be deemed to have been taken under the 2015 Act. In other words, orders passed by the Commercial Appellate Division under Section 9 of the 1996 Act during the intervening period must be deemed to have been passed by the Commercial Division. This interpretation lead to an objectively absurd outcome, as parties aggrieved by an order of the Commercial Division were automatically prevented from preferring an appeal under

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Section 37 of the 1996 Act.

## Judgment

In view of the settled proposition of law that subsequent interpretation of law affecting the jurisdiction of this Court would constitute a valid ground for review and that issue of jurisdiction can be raised at any stage of the proceedings, the impugned order dated 10 December 2015 was recalled and reviewed and the petition under Section 9 of the 1996 Act was restored back to the file.

## Comments

The judgment delivered by the Hon'ble Delhi High Court is the first judgment which reviews an order passed by the Commercial Appellate Division (Division Bench) in a petition under Section 9 of the 1996 Act instead of the Commercial Division (Single Bench) on the ground of inherent lack of jurisdiction of the Division Bench and thereby restored the substantive right to appeal available to an aggrieved party under Section 37 of the 1996 Act. This judgment may also give respite to other aggrieved parties who suffered adverse orders during the transition period between 23 October 2015 to 31 December 2015 and were unable to avail their substantive right to appeal. The judiciary took a proactive approach and provided the litigant with substantial justice instead of leaving the litigant to contest the jurisdictional issues.

## SUPREME COURT: IF INELIGIBLE TO BE APPOINTED AS ARBITRATOR, YOU CAN'T NOMINATE

### Introduction

Recently, the Hon'ble Supreme Court of India (Supreme Court) in the case of **TRF Ltd. v Energo Engineering Projects Ltd** has held that once an arbitrator becomes ineligible to be appointed as an arbitrator by operation of law, he also loses his power to nominate another as an arbitrator, irrespective of the fact that such other person is an independent person i.e. he / she does not have any financial or other relationship with the person appointing him.

### Judgment of the Supreme Court

The Supreme Court firstly noted that there was no argument amongst the parties that the Managing Director had, indeed, by operation of law, become ineligible to arbitrate himself. As regards the primary issue of whether the Managing Director could exercise the power to now nominate an eligible arbitrator, the Supreme Court relying on the decision in *Firm of Pratapchand Nopaji v Firm of Kotrike Venkata Setty & Sons* and a host of other authorities,

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reiterated the maxim “qui facit per alium facit per se” and held that if an ineligible arbitrator was allowed to nominate another arbitrator, it would tantamount to carrying out the proceedings of arbitration himself. The Supreme Court has also recognized that the power of a party to nominate an arbitrator under the provisions of the contract would be different from the present case where the issue was regarding the power of the Managing Director to nominate an arbitrator, subsequent to himself becoming ineligible due to operation of law. In case of the former, what can be called in question is the procedural compliance and the eligibility of the arbitrator so appointed under the provisions of the Act and Schedules thereto. In light of the above, the Supreme Court, while setting aside the order of the Delhi High Court, remanded the matter back to the Delhi High Court for fresh consideration concluding that if the ability of the Managing Director to act as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is also obliterated

## Comment

The Supreme Court’s judgment seeks to apply the golden rule of interpretation (rather than a literal interpretation) to the Act in order to determine the true purpose of the said legislation. Interestingly, the Supreme Court has refused to consider the ratio in the case of Antrix Corporations which disallows a challenge to the appointment of the arbitrator by way of an application under Section 11 once the tribunal is constituted, on the basis that the same is distinguishable on facts as that was a matter under the International Chamber of Commerce Rules. On the other hand, this judgment clarifies aspects of procedure of appointment of arbitrators especially for various public sector undertakings which provide for arbitration clauses permitting their employees to nominate either employees / third parties as arbitrators. We are hopeful that this judgment would result in ushering in a more transparent and impartial arbitration regime and instill confidence in persons to adopt the fora of arbitration, rather than Court proceedings, to settle disputes.