

ADVANCED COURSE FOR JUSTICES HANDLING COMMERCIAL MATTERS (P-940)

August 24-27, 2015

PROGRAMME REPORT

Programme Coordinator - Ms. Shruti Jane Eusebius, Law Associate, National Judicial Academy

Day I

Session I

Theme - Investor Protection and Disclosure Measures through the Exchange Ecosystem for the Securities Market

Speaker – Mr. Nehal Vora

Panel – Hon'ble Justice Ruma Pal

The Programme commenced with a round of self introduction by the participant justices. Hon'ble Justice Ruma Pal introduced the speaker for the session Mr. Nehal Vora . Mr. Vora discussed the important measures introduced in the securities market to ensure transparency and protection of the investor. Mr. Vora broadly discussed the following aspects –

- The Listing Agreement and the Listing Regulation as a tool to monitor the functioning of the company and to ensure a fair market for the investor.
- Role of Stock Exchanges in monitoring the adequacy of disclosures made by listed companies and the actions that can be taken by the stock exchanges in cases of non-compliance of the regulations by the companies.
- Disclosure of Material events by the companies.

- Regulation of Client-Broker Relation and Redressal of grievances of client against Stock Exchange Members

Mr. Vora then presented a few case studies on the theme to highlight the practical cases where the role of the stock exchange comes into play to ensure that the companies disclose important information that is necessary for the investors to make an informed decision. Thereafter, Mr. Vora addressed some of the queries raised by the participants on the issues regarding investor protection fund, the mechanism adopted by the stock exchanges to monitor disclosures and the system in place to determine the materiality of events and disclosures.

Session II

Theme - Takeover Offers, Substantial Acquisition of Shares, Buy-back of Shares and Delisting

Speaker – Mr.Somasekhar Sundaresan

Panel – Hon’ble Justice Ruma Pal

The Session commenced with a brief introduction of the speaker by Hon’ble Justice Ruma Pal. Mr. Sundaresan briefly discussed the listing requirements and its development from contractual terms to statutory requirements. The Listing Regulation ensures regular disclosure of material developments by the company and also ensures that the company maintains a minimum public shareholding. Furthermore as the company is identified by the public by the promoter or the major shareholder any change in the holding is an important event in the life of the company. Mr. Sundaresan further discussed the Substantial Acquisition of Shares and Takeover Regulations and highlighted its major requirements –

- The obligation of the majority shareholder to make an open offer to buy shares from the public

- Open offers in cases of Indirect Acquisition by acquiring ability to exercise voting rights.
- Exemptions under the Takeover Regulations
- Process and regulatory requirements of the Takeover process
- Disclosure Obligations in the Takeover Regulations
- Penalties for Violation of the Takeover Regulations
- Delisting Regulations

Mr. Sundaresan discussed some important Supreme court Judgments including Sahara, Technip SA and Swedish Match AB. The participants raised questions on -

- the stock exchanges' role in regulating delisted companies
- the time limit envisaged under law with regard to operation of requirement of listing
- operation of automatic stay under Section 34 of Arbitration and Conciliation Act on the Arbitration award by the Stock Exchange Arbitration Panel.
- Legal validity of the Regulations and Circulars issued by SEBI.

Session III

Theme – Insider trading, Fraud and Manipulation in the Securities Markets

Speaker – Mr. Sandeep Parekh

Panel – Hon'ble Justice Ruma Pal

The session was commenced by Hon'ble Justice Ruma Pal by introducing the speaker for the session. Mr. Parekh commenced the discussion by giving a view on Fraud and Manipulation with a historical background on bubble schemes. Mr. Parekh discussed the concepts of fraud and misrepresentation under common law and its applicability to stock exchange transactions. Mr. Parekh discussed the major ways in which fraud and manipulations are done in the securities market. Mr. Parekh also dwelt on the significance and gravity of the fraud committed in the securities market and the public interest involved in such cases. The discussion also centered on the role of SEBI and the stock exchanges in prevention of fraud and manipulation in the stock market. Mr. Parekh also discussed insider trading in the securities market – the concept of an insider and price sensitive information that is unpublished. He discussed the theories under US Law relating to insider trading. Mr. Parekh concluded by discussing the genesis and evolution of the Tippee Liability with the case of Dirks v. SEC. Before concluding the session, Hon'ble Justice Ruma Pal and Mr. Sundaresan posed a question to the judges as to the position of public servants who had possession of information which can have a serious impact on market price. If a judge possesses information in the course of adjudication which would be reflected in his judgment and would on the delivery of the judgment affect the price of the stock of a party to the matter, would the judge be an insider who is in possession of unpublished price sensitive information.

Session IV

Theme –SEBI Act –Scheme and Scope of Powers, Checks and Balance

Speaker – Mr. Lalit Kumar

Panel – Hon'ble Justice Ruma Pal

The session commenced with a short introduction of the speaker by Hon'ble Justice Ruma Pal. Mr. Lalit Kumar discussed the role and functions of SEBI in the regulation

of intermediaries in the stock market. He also discussed the ambit of the power given to SEBI under the SEBI Act to issue directions. Mr. Kumar also discussed the major offences under the SEBI Act and the monetary penalties that SEBI was empowered to impose in such cases. Mr. Kumar discussed the adjudicatory mechanism and enquiry proceedings under the SEBI act. Mr. Kumar briefly set put the criminal offences under the SEBI Act and the punishments prescribed under the SEBI Act. He concluded by discussing the measures under the SEBI act which provide a check and balance to the powers given to SEBI under the Act. The views of the participant justices was taken on the subject. It was the unanimous view that the SEBI had been given excessive powers and that the constitutionality of the SEBI Act needed to be challenged in a court of law. It was the view of the house that the fact that under the SEBI Act the separation of powers was not done and as a result the SEBI was exercising executive, legislative and judicial functions. Mr. Sundaresan also pointed out a fact that most of the major amendments to the SEBI Act were brought about by promulgating an ordinance and hence most of these major changes in law have not been discussed in the floor of the legislative houses. Another issue that was highlighted was that most major changes to the securities law has been a knee jerk reaction to major scams and in the opinion of the panelist such changes have been excessive in comparison to the event. In the view of the panelist one of the reasons for the lack of importance given to securities law by the legislature and also the reluctance by the judiciary to take up these issues for adjudication is the perception that securities law is a highly specialized technical field which does not impact the public at large. Another issue that was discussed was the validity of the regulations and circulars enacted by SEBI.

Day II

Session V

Theme – Intellectual Property and the Internet

Speaker- Mr. Rodney D. Ryder

Mr. Ryder discussed the legal framework relating to intellectual property and the internet. He discussed the major features of the Information Technology Act in relation to intellectual property. Mr. Ryder also discussed the concept of intermediary under the Information Technology Act and the role and responsibilities of intermediary. Mr. Ryder dwelt on the role of UDRP as a global online dispute resolution system and the ICANN as a global uniform dispute resolution policy. Mr. Ryder also discussed the major internet intellectual Property cases.

Session VI

Theme – Injunctions in Intellectual Property Cases

Speaker – Prof. Shamnad Basheer

In this session Prof. Basheer dwelt on the evolving nature and scope of Intellectual Property and the machinery in place to deal with intellectual property matters. He also dwelt on the standards evolved by the Courts to determine feasibility of granting interim injunctions in IPR suits. Mr. Basheer discussed on the landmark cases in which the standards for grant of injunctions were established and the benefits and pitfalls of these approaches. Prof Basheer stressed on the need to avoid granting interim injunctions routinely in view of the commercial and the public interest involved in IPR cases. He advocated the removal of the interim stage altogether and that the trials of IPR cases be expedited.

Session VII

Theme – Passing Off Action in Design Infringement

Speaker- Mrs. Prathiba M. Singh

In this session the participant justices were given a simulation exercise on the theme. The speaker then made a short presentation on the concept of passing off in designs and the statutory provisions regarding the same. The speaker discussed the major cases decided by the Supreme Court and the High Courts on passing off in design and thereafter in view of the decisions of the courts requested the participant justices to give their views and decision on the simulation exercise presented to them. A participant justice was of the view that the extension of design protection to mere colour or basic shapes of objects would be stretching the concept too far and would result in a situation where claimants would want to claim design protection for basic functionalities and mere appearance of the device. Another participant justice was of the view that the right to claim damages for infringement under the Designs Act and the common law right of claiming passing off cannot be exercised together and that simultaneous use of both these rights would result in claiming monopoly of the market and would be contrary to the provisions of the Designs Act. The party needs to elect to either be governed by the Designs Act or common law.

Session VIII

Theme – Compulsory Licensing in Pharmaceutical Patents

Speakers- Dr. Deepa Tiku & Mr. Swaraj Paul Barooah

In this Session Dr. Tiku traced the major milestones in the development of patent law in India. Dr. Tiku dwelt on need to maintain a balance in patent law between the rights of the inventor and the interests of the public. Dr. Tiku then discussed the concept of compulsory licensing and the international developments in this area. The speaker also discussed the statutory provisions relating to compulsory licensing of patents in India. The discussion also centered on the Bayer v. Natco Decision and other recent cases on compulsory licensing. The speakers then discussed the major issues and concerns regarding the grant of compulsory licensing including the determination of

affordability and the need for greater attention to the submission of Form 27C by the patent owners to determine whether the patent is being suitably worked.

Day III

Session IX

Theme – Basic Disputes under Sale of Goods Act

Panel –Hon'ble Justice Mukundakam Sharma & Mr. Anand Desai

The session was commenced by the Director NJA. The Director introduced the panelists for the session and welcomed them to NJA. Thereafter Justice Mukundakam Sharma stressed on the need for this conference in light of the Commercial Courts Bill 2015 and the need for NJA to take up this subject. In this session the participant justices were given a simulation exercise and were requested to give their views and decision on the facts in the simulation. Justice Sharma thereafter discussed the judgment that formed the basis of the simulation exercise and shared the decision that was taken by the court in the case. Mr. Desai posed a question as to whether the outcome of the case would differ if it had been adjudicated through a different channel i.e. through the consumer forums rather than through arbitration. Mr. Desai dwelt on the change in the nature of commercial transactions and the popularity of e-commerce transactions and the impact it would have on commercial litigation with respect to the nuanced issues that would crop up in such cases. The discussions also centered on the applicability of the Sale of Goods Act to the transactions of online sale and purchase and the liability of the online marketplace. The participant justices also raised the issue of the determination of jurisdiction of the courts in online purchase transactions

Session X

Theme – Basic Disputes under Partnership Act

Speaker – Mr. Neeraj Malhotra

Panel – Hon'ble Justice Sanjay Kishan Kaul

The session commenced with a brief introduction of the resource persons by Dr. Geeta Oberoi Director NJA. Thereafter the speaker for the session referred to a judgment in the reading material - Firm Ashok vs. Gurmukh Das Saluja and in view of the said judgment raised a few issues relating to Section 69 of the Partnership Act and the impact of non-registration of the partnership firm. The participant judges were invited to share their views on whether an unregistered partnership firm can maintain petition under section 11 of the Arbitration and Conciliation Act 1996 and whether the analogy of section 20 of the Arbitration Act 1940 would apply or whether section 9 of the arbitration and conciliation act 1996 would have some bearing in this. The participant justices shared their views on the subject and also the decisions given by their respective High Courts on this issue.

Session XI

Theme – Basic Disputes under Carriage Act

Panel - Hon'ble Justice Mukundakam Sharma & Mr. Anand Desai

In this session the participant justices were given a simulation exercise and their views were sought on the fact scenario provided in the exercise. The exercise was based on a judgment of a High Court on the liability of a Carrier under the Carriers Act. The exercise also raised the issue of applicability of the provisions of the Contract Act and the interplay of Contract Law and Carriage Law. The discussion were guided by the panel of resource persons who posed questions and raised issues on the theme under discussion to encourage a greater understanding and analysis of the provisions of Carriage Laws and Contract Law. Mr. Desai discussed the change in the transactions of carriage and the impact it has on the law and the disputes for adjudication. Mr. Desai dwelt on how the carriage transactions are now multimodal and are often intercountry

transactions as well. The applicability of several laws makes the issues complex. Mr. Desai stressed on the need to have a consolidated law on carriage. The participant justices also discussed the proposed changes to the judicial system by the Commercial Courts Bill, 2015.

Session XII

Theme – Basic Disputes under Contract Act

Panel – Hon’ble Justice Mukundakam Sharma & Hon’ble Justice Sanjay Kishan Kaul

In this session a simulation exercise on the subject of negative covenants in contracts was given to the participant justices and their views were sought. The participant justices were required to give a decision on the basis of the facts placed before them. The resource persons posed questions and raised pertinent issues to enable the participant justices to have a deeper understanding of the issues involved in this subject. The resource persons discussed the precedents of the Supreme Court on the subject. The discussions also centered on the pendency of cases before the High Courts and the challenges faced and the solutions evolved by the High Courts to deal with this pendency.

Day IV

Session XIII

Theme – Construction & Infrastructure Contracts

Speakers – Mr. Atul Sharma & Mr. Sujit Ghosh

Panel – Hon’ble Justice Kurian Joseph

The session was commenced by Dr. Geeta Oberoi, Director NJA. Dr. Oberoi welcomed the resource persons and introduced the speakers. Mr. Atul Sharma discussed the Public Private Partnership in Infrastructure projects in India and the types of infrastructure contracts . Mr. Sharma discussed the structure and standard forms of contracts in infrastructure projects. Mr. Sharma also gave a simulation exercise on a case of a tender bid for a design and build contract and engaged the participant justices in a discussion of the conceptual understanding of infrastructure contracts.

Mr. Sujit Ghosh discussed the contractual matrix in an infrastructure project and the major concerns and issues that parties seek to address in the structuring of the contract. He also discussed the key risks in contractual relations and the party who bears these risks in infrastructure projects. Mr. Ghosh also discussed the practice of splitting of contracts and the relevance of this from a tax efficiency perspective.

Session XIV

Theme - Commercial Courts Bill 2015 - New Future Envisaged

Speaker – Mr. R. Venkataramani

Panel – Hon’ble Justice Kurian Joseph & Hon’ble Justice Sanjay Kishan Kaul

The session was commenced by Dr. Oberoi who introduced the speaker for the session. Mr. Venkataramani dwelt on the need for a different approach to handling commercial litigation in the judicial system and the purpose which the Commercial Courts Bill 2015 seeks to achieve. He also dwelt on the issue of defining the contours and ambit of the definition of commercial dispute. Mr. Venkataramani also dwelt on certain areas of concern in the Bill including the procedure provided in the schedule to the bill and stressed on the need to have wider publicity and discussions on the Bill to improve it.

Hon’ble Justice Kaul dwelt on the system of tribunalisation in india and the reasons for its failure and compared the system sought to be introduced by the Bill. Justice Kaul also stressed on the need for judges who are well versed in commercial law to man these commercial court in

order to make it a success and also on the need to avoid protracted trials in commercial cases. Justice Kaul expressed his view that the scope of the definition of commercial disputes under the bill was very wide and this would prove to be an issue in the future. Another issue that was discussed was whether under the Commercial Courts Bill all the pending cases would also get transferred to the commercial courts. The resource persons and the participant justices were of the opinion that this would not be feasible and recommended that only the cases of a few recent years which were ripe for adjudication should be transferred to the commercial courts under the bill. Justice Kaul also stressed on the need for legislative impact studies to be done especially in the Commercial Courts Bill to identify the impact the bill would have on the judicial system and the backlog of cases pending. Another issue that was discussed was the use of the provision of Article 224A of the Constitution of India to appoint retired judges and senior advocates on adhoc basis to assist in dealing with the backlog of cases and to reduce the pendency and it was opined that this provision should be used to use the services of able experienced judges and senior advocates. The house was also of the view that an Indian legal service should be set up to deal with legislative drafting.

Hon'ble Justice Kurian Joseph dwelt the scope fo Article 226 of the Constitution of india and urged the participant justices to focus on the scope rather than the limitations of Article 226. Justice Kurian Joseph also discussed the Swiss challenge method system and the bonus point method in commercial contracts. Justice Kurian Joseph also discussed the recent order of the Supreme Court in an Infrastructure Contract disput. In conclusion, Justice Kurian Joseph advised the participant justices to ensure that their decisions reflect the idea of the legislation rather their own views and ideas.

The programme concluded with the concluding remarks by Dr. Geeta Oberoi - the Director (In Charge), National Judicial Academy.
