

National Conference of the Judges of the District Judiciary on Commercial & Economic Laws (P-889)

January 16-18, 2015

Programme Report

The National Judicial Academy organised the “National Conference of the Judges of the District Judiciary on Commercial & Economic Laws” from 16th – 18th January, 2015 to build judicial capacity to decide commercial and economic disputes expeditiously and accurately. To this effect, the sessions were designed to restrict to nature and kinds of economic & commercial disputes that are raised before the district judiciary. The resource persons included Mr. Surya Senthil, Mr. A. Ramesh, Mr. Rahul Narichania, Justice V.M. Kanade, Justice K.M. Thaker, Justice Suneet Kumar, Ms. Narmadha Sampath and Justice S. Ravindra Bhat.

Following are the main issues discussed in the Conference:

SESSION 1: ADJUDICATION OF COMMERCIAL AND ECONOMIC DISPUTES - ISSUES & CHALLENGES

In this session, Mr. Senthil and Mr. Ramesh emphasized upon the challenges which the Indian judiciary is facing in dealing with the commercial and economic disputes. The main highlights of the discussion are as follows:

1. The parties to such disputes are mainly rich and powerful, who make a deliberate attempt to prolong the process by filing frivolous interim applications. This causes large-scale economic injury to the other party.
2. Parties are resorting to criminal law in order to get quick adjudication of the disputes. On the other hand, civil litigations are costly and loaded with technical procedure, leading to delay in delivering justice. Further, execution of civil reliefs is also time taking.
3. Justice Thomas was referred to state that when admissibility of a document is contested, then courts should admit the document and then later decide upon its veracity. This saves time of the court and shortens the litigation.
4. The following recommendations were made:
 - a. For deciding interim and miscellaneous applications, a Chief Administrative Officer should be appointed in each court. This saves time for adjudicating the main dispute.
 - b. Courts should be more liberal in awarding compensation and cost in commercial matters.
 - c. Separate courts should be established with expert judges in that field for commercial matters.
 - d. Video conferencing should be permitted.
 - e. There is a need for amending the definition of “cheating” in IPC.

SESSION 2: TRADE MARKS ACT, 1999

Mr. Senthil highlighted following points in his discussion:

1. According to the Trade Marks Act, 1999, the 'trade mark' means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one

person from those of others and may include shape of goods, their packaging and combination of colours.

2. The duration of registration shall be for a period of ten years from the date of registration but it may be renewed from time to time in accordance with the provision of this Act.
3. The registration of a trade mark confers upon the owner the exclusive right to use the registered trade mark and to seek the relief of infringement in appropriate courts in the country.
4. The trade mark shall not be registered if it is of nature so as to deceive public, cause confusion, has identity with or similar to an earlier trade mark or comprises or contains scandalous or obscene matter, etc.
5. Even if marks are not identical, but deceptively similar, then also it is trademark violation. But here intention of the infringer is to be seen. This was held in *Rasiklal Manickchand Dhariwal v. M/S M.S.S. Food Products*.¹
6. If prima facie case is made out by the plaintiff, then courts are also empowered to grant interim reliefs like injunction if balance of convenience is in the favour of the plaintiff.
7. The statutory provisions for institution of suits for infringement of Trade Mark are provided under Code of Civil Procedure, 1908 and the Trade Marks Act, 1999. However, Section 20 of Code of Civil Procedure, 1908 is the fundamental law which governs the procedure and law to institute any suit in a competent court of law. But Section 134(2) of the Trade Marks Act, 1999 provides for additional forum to the proprietor of a registered trade mark to institute a suit for infringement of trade mark in whose jurisdiction, the said proprietor actually and voluntarily resides or carries on business or works for gain, at the time of institution of suit.
8. For passing off actions, suits are to be filed as per jurisdiction given under Section 20 of Code of Civil Procedure, 1908.
9. Composite suits for passing off and trademark infringement can be filed, but the jurisdictions of the courts should not clash. It was held in *Dhodha House & Patel Field Marshal Industries v S.K. Maingi*².
10. In *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Anr*, a division bench of the Delhi High Court clarified jurisdiction regarding infringing websites. The court held that merely accessing a website in Delhi would not satisfy the exercise of jurisdiction by the Delhi court. Rather, it has to be shown that the defendant “purposefully availed” itself of such jurisdiction, by demonstrating that the use of the website was with intent to conclude a commercial transaction with the site user, and such use resulted in injury or harm to the plaintiff.

SESSION 3: NEGOTIABLE INSTRUMENTS ACT

Mr. Ramesh highlighted following points in his discussion:

1. The judgment of Supreme Court in *MSR leathers v. Palaniappan* was referred to wherein the Apex Court avoided strict interpretation of Section 138 as it will help the dishonest drawers of cheques and defeats the very purpose of the Negotiable Instruments Act, 1881.
2. In *Dasrath Rupsingh Rathod v. State of Maharashtra* the Supreme Court held that Section 138 of NI Act read in conjunction with Section 177 of CrPC leaves no doubt that return of the cheque by the drawee bank alone constitutes the commission of offence and the place,

¹ 2012 AIR SCW 1101

² (2009) 9 SCC 41

situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank, is located.

3. In HUFs, a complaint under Section 138 can be filed only against the karta and not against all the members of such HUF.
4. But in cases of trust, he referred to the case of *Abraham Memorial Education Trust v. C. Suresh Babu*³ wherein it was held that a complaint under Section 138 can be initiated against a trust, whether it carries on business or not.

SESSION 4: INDIAN COPYRIGHT ACT, 1957

Mr. Senthil highlighted following points in his discussion:

1. Philosophy of the Copyright law is: ‘The law does not permit one to appropriate to himself, what has been produced by the labour, skill and capital of another’
2. The subject matter of copyright, the thing protected is called a “work”. No copyright exists in any work, except as provided in the Act (Section 16).
3. Copyright protects the expression of ideas and not the idea itself. It was given in *R.G Anand vs M/S. Delux Films & Ors.*⁴
4. Copyright is a creation of the statute. Unlike trade marks, there is no such thing as common law copyright.
5. Unlike trade mark, registration of copyright is not essential for bringing an infringement suit. But the registration becomes important in proving the existence of copyright.
6. Infringement of copyright is both a civil wrong and an offence. Thus the same cause of action can give rise to both civil and criminal proceedings.
7. In copyright criminal action, the law can be set in motion by anyone due to its criminal nature.
8. He also referred to the role of Anton Pillar orders and Mareva Injunctions in copyright infringement cases.

SESSION 5: DECISION MAKING IN INSURANCE CLAIMS BY THE DISTRICT JUDICIARY

Mr. Rahul Narichania, Senior Advocate, emphasized following concerns:

1. Insurance policy should be interpreted strictly according to its terms and conditions.
 2. That courts should take equity in favour of the insured. But in case of conflict, law should be applied.
 3. It is not open for the courts to make a new contract unless parties have not made one for themselves.
 4. Insurance is a unilateral contract where parties do not negotiate while entering onto a contract. Thus in case of ambiguity, courts should interpret the policy in favour of insured where insured is a common man and not where insured is a big business house.
 5. Insurance is a contract of adhesion. Thus rule of “contra preferendum” should apply.
 6. If the terms and conditions of the policy are too harsh, then courts should see whether notice of the insured was brought to those terms or not.
1. He talked about following duties of the insured:

³ 175 CompCas 361 (2012)

⁴ AIR 1978 SC 1614

- a. Duty of utmost good faith, which is a continuing duty
 - b. Provide all necessary documents
 - c. Immediately notify the insurance company of the happening of insured event so that it can appoint a surveyor
 - d. Claims can be denied by the insurance company only in case of breach of warranties and not conditions. In case of breach of conditions, courts have to see the proximate cause of loss.
 - e. Insured has to take steps for right to recovery under the policy.
 - f. Doctrine of subrogation
2. Duties of insurer are:
 - a. Utmost good faith
 - b. It should not appoint 2nd surveyor as a means to avoid claims.
 3. If an insured has taken full and final settlement from the insurer and then file a suit for recovering the balance, then such suits should be dismissed with heavy cost.
 4. Contract of insurance is a contract of indemnity. Parties cannot make profit out of this.
 5. For jurisdiction, there is Section 46 of the Insurance Act 1938. He referred to the case of *ABC Laminart* wherein it was held that parties on their own can confer jurisdiction upon one of the several courts having jurisdiction. But they cannot confer jurisdiction upon courts not having jurisdiction on the matter.
 6. Courts should award interest at the prevailing market rate.
 7. If a insurance company delays claim unnecessarily, then heavy cost should be imposed upon it. It was said by Justice Patil in a case law.

SESSION 6: PROCEDURAL CHALLENGES FACED IN DISPOSING OF CASES UNDER THE NEGOTIABLE INSTRUMENTS ACT

Justice Kanade began his discussion with the history of cheques and the need for Section 138 of the NI Act, especially when Section 420 IPC was already there. He emphasized upon the need to shorten the pendency of 138 matters in magistrate courts across the country. He stated that:

1. After the case of *KSL Industries v. Mannalal*, Bombay High Court appointed additional magistrates to clear the backlog of 138 matters.
2. Bombay High Court introduced court fee which led to a decline in the number of 138 matters in its jurisdiction.
3. He said that Section 138 gives a summary remedy against the offence. Thus courts should avoid extensive cross examination and technicalities which cause delay. Further, there is no need for verification of evidences also.
4. Magistrates cannot impose cost more than Rs. 50,000, but they can award compensation against frivolous complaints.
5. He also said the solution is the promotion of ADR mechanisms and lok adalats to clear pendency of such cases.
6. On jurisdiction issue, he referred to the case of *Dasarth Rupsingh Rathod Vs State of Maharashtra* and said this judgment frustrate the very object of Section 138.

SESSION 7: DECIDING CHALLENGES TO ARBITRAL AWARDS: SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT

Justice Suneet Kumar discussed following issues:

1. Under Section 34(2(a)), burden of proof is on the party taking the grounds given there, while under Section 34(2(b)), it is for the courts to invoke those grounds.
2. Certain subject matters are not arbitrable, e.g. rent law, bankruptcy matters. Thus awards regarding such matters should not be enforced.
3. He talked about the concept of public policy extensively. He said the term 'public policy' is incapable of any precise definition and may vary from time to time and from place to place. For this, he referred to the following cases:
 - a. ONGC v Saw Pipes Ltd AIR 2003 SC 2629
 - b. Renusagar Power Plant Ltd v General Electric Co., AIR 1994 SC 860
 - c. ONGC v. Western Geco International Ltd (2014)
4. He said arbitration agreement is distinct and separable from the main agreement.
5. Limitation under Section 34 cannot be extended except where parties approach wrong forum in good faith and Section 5 of the Limitation Act has no application here.

Ms. Narmadha Sampath discussed following issues:

She stated that there are 2 ways of appointing an arbitrator: by mutual consent of parties or under Section 11 by the Chief Justice.

1. Indian Arbitration law of 1996 is based upon the UNCITRAL Model Law on arbitration and is very different from Arbitration Act 1940. Thus courts should be slow in applying precedents decided under the 1940 Act. (*Guru Nanak Foundation v. Rattan Singh & Sons*⁵)
2. Section 34 is an application and not a suit or an appeal.
3. Section 34(4) allows courts to adjourn the matter to allow the arbitrator to cure the defect complained of.
4. For setting aside the award on terms of submission, courts have to go by records.
5. She referred to the case of *State of West Bengal v. Associated Contractors*, wherein it was held that in places like Mumbai where High Court is the principle court of original civil jurisdiction, application under Section 34 is to be made to the High Court. While in other places, it has to be made to the principle court of original civil jurisdiction i.e. the District Court.
6. The scope for setting aside the award under Section 34 is very limited. Thus the Supreme Court has added certain other grounds to Section 34.
7. Courts also have power to modify the award if the award is such that it shocks the conscience of the court.
8. An arbitrator while passing an award has to follow the procedure and should have a judicial approach and apply Wednesbury principle of reasonability.
9. She also referred to Law Commission's Report wherein it was suggested to introduce Section 34(5) where it should be provided that the application under Section 34 is to be decided within 1 year from the date of its filing. Also, the arbitrator himself should decide commercial matters within 9 months.

SESSION 8: APPLICATION FOR INTERIM MEASURES: SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT 1996

Justice K.M. Thaker discussed following issues:

⁵ (1981) 4 SCC 634

1. He referred to following cases on jurisdiction of courts under Section 9 in international commercial arbitration:
 - a. Bhatia International v. Bulk Trading SA⁶
 - b. Venture Global Engineering v. Satyam Computer Services Ltd⁷
 - c. Bharat Aluminum Co v. Kaiser Aluminum Technical Services
2. Under Section 9, it is not open for the courts to decide whether arbitration agreement is valid or not. But they can decide whether the dispute falls within the scope of arbitration agreement or not.
3. Though Section 9 can be invoked even before the commencement of arbitration, there should be proximity between demand under Section 9 and commencement of arbitration. There should be bona fide intention to invoke arbitration clause.
4. An award is not a decree. Therefore there is no need for transfer of award for execution. Party may execute the award wherever property of the other party is situated.
5. Section 9 and 34 do not exclude the provisions of Specific Relief Act.
6. Application under Section 9 does not include under its purview an order for arrest.
7. Application under Section 9 can be filed by an unregistered firm which has entered into an arbitration contract.
8. Application under Section 9 can be filed to preserve confidentiality of documents.
9. Relief under Section 9 can be granted to restrain invoking bank guarantees only in cases of fraud and irreparable injury.
10. Application under Section 9 can be filed by 3rd party i.e. a person not a party to the arbitration contract, given in *Chloro Controls (I) P. Ltd v. Severn Trent Water Purification*.

Ms. Narmadha Sampath discussed following issues:

1. There are two provisions under which interim relief can be granted:
 - a. Section 9 by courts
 - b. Section 17 by the arbitrator when arbitral tribunal is in existence and is functional.
2. Granting relief under Section 9 is the discretion of the court.
3. For granting interim relief under Section 9, jurisdiction of courts and arbitrators is parallel.
4. Courts can also grant an anti-suit injunction under Section 9 after the decision in the case of *Enercon (India) Ltd and Ors v. Enercon GmbH and Anr.*
5. Consumer forum is always open even after the existence of arbitration agreements.
6. Reliefs under Section 9 are given when it is just and convenient. Interim reliefs can be refused when:
 - a. Applicant can be adequately compensated in terms of money
 - b. Irreparable injury and great injustice will be caused.

SESSION 9: DISTRICT JUDICIARY UNDER THE TRADE MARKS ACT

Justice Bhat began his discussion by talking about the basics of trademark law in India, the meaning of trademark and which marks are eligible for trademark protection in India. He emphasized on the following:

1. The purpose of the trademark system is that:

⁶ (2002) 4 SCC 105.

⁷ (2008) 4 SCC 190.

- a) It identifies the actual physical origin of goods and services. The brand itself is the seal of authenticity.
 - b) It guarantees the identity of the origin of goods and services.
 - c) It stimulates further purchase.
 - d) It serves as a badge of loyalty and affiliation.
 - e) It may enable consumer to make a life style or fashion statement.
2. Two types of remedies are available to the owner of a trademark for unauthorized use of his or her mark or its imitation by a third party. These remedies are:
 - a) an action for infringement' in case of a registered trademark; and
 - b) an action for passing off' in the case of an unregistered trademark
 3. While former is a statutory remedy, the latter is a common law remedy. In an action involving infringement or passing off, a court may grant relief of injunction and/or monetary compensation for damages for loss of business and/or confiscation/destruction of infringing labels and tags etc.
 4. Although registration of trademark is prima facie an evidence of validity of a trademark, yet the registration cannot upstage a prior consistent user of trademark, for the rule is 'priority in adoption prevails over priority in registration`.
 5. The penalty for selling or providing services using a false trademark is a minimum of six months and maximum of three years and with fine not less than Rupees fifty thousand but which may extend to Rupees two lakh.
 6. In *N.R. Dongre Vs Whirlpool Corporation*⁸ case the Hon'ble Apex Court observed: "The concept and principle on which passing off action is grounded is that a man is not to sell his own goods under the pretence that they are the goods of the another man".
 7. Trans Border Reputation concept was recognised and discussed by the Apex Indian Court in the landmark case of *N. R. Dongre v. Whirlpool*⁹. The the trademark WHIRLPOOL was held to have acquired trans-border reputation which enjoys protection in India, irrespective of its actual user or registration in India.
 8. The relief which a court may usually grant in a suit for infringement or passing off includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings. The order of interim injunction may be passed ex parte or after notice. The Interim reliefs in the suit may also include order for:
 - a) Appointment of a local commissioner, which is akin to an "*Anton Pillar Order*", for search, seizure and preservation of infringing goods, account books and preparation of inventory, etc.
 - b) Restraining the infringer from disposing of or dealing with the assets in a manner which may adversely affect plaintiff's ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.

SESSION 10: ECONOMIC IMPACT OF DELAY IN DECISION MAKING IN COMMERCIAL AND ECONOMIC DISPUTES

Justice V.M. Kanade discussed following issues:

⁸ 1996 (5) SCC 714

⁹ (1996) 5SCC 714

1. He pointed out that whereas in India, we have only 3 e-courts but in Singapore all courts are e-courts, maximum 2 years are taken for disposing of the matter and arbitration proceedings are completed within 8-10 days.
2. In England, there is a pre-trial conference for speedy trial. Time frame is fixed and proceedings cannot extend beyond that.
3. In China, there is quick disposal of cases and no problem of pendency. Therefore all popular brands have their factories in China.
4. In Japan also, maximum 2 years is taken for disposal of trial, with 99% conviction.
5. However in India, several attempts are taken for speeding up the procedure. But all of them go in vain as lawyers go on strike.
6. Thus all the big and popular international business houses are skeptical in investing in India.

Justice S. Ravindra Bhat discussed following issues:

1. He referred to the history of enacting SARFAESI Act 2002 wherein draconian western law was adopted by Indian legislature.
2. He said due to heavy pendency of cases, large conglomerates and companies may invest in India. But medium and small business houses with great reputation do not come to India as they fear that they may not get their investment back.
3. Arbitration has also failed in India due to delay in deciding the disputes. Thus people are preferring international arbitration with foreign seat.
4. He referred to the case of *White Industries* under which Indian government has been asked to pay heavy compensation under the Bilateral Investment Treaties. Now other companies like Vodafone are also going for BIT.
5. India may attract trade sanctions from several governments for delay in adjudication.
6. Companies charge high price for their products in India as they include high litigation expenses into the cost of products.
7. Due to misuse of transfer pricing provisions, there is large scale tax avoidance.
8. Delayed adjudication of IPR matters may lead to ever-greening of drugs.
