



## **NATIONAL JUDICIAL ACADEMY INDIA**

**P – 1200**

### **REFRESHER COURSE FOR COMMERCIAL COURTS**

**17<sup>th</sup> - 19<sup>th</sup> January, 2020**

**Programme Coordinator**

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**National Judicial Academy**

The National Judicial Academy organized a 3-day programme for Commercial Court Judges. The workshop aimed to provide an in-depth understanding of Commercial Courts Act 2018 (hereinafter 'Act'). The policy framework and operative challenges, Joint Venture Agreements: definition, disputes & resolution, regulatory framework of Insurance & Re-Insurance in India, IPR disputes relating copyright and patent, trademarks and design, Commercial Courts *vis-à-vis* Arbitration, construction and infrastructure contracts and adjudication of disputes under the Act: challenges and solutions. Justice Indira Banerjee, Justice Ved Prakash Sharma, Justice Soumen Sen, Justice Manmohan Singh, Justice Moushumi Bhattacharya, Mr. Lalit Kumar, Mr. R. Chandrasekaran, Mr. M.N. Sarma, Ms. Stuti Dhyani, Justice G.S. Kulkarni, Prof S.P. Srivastava, and Mr. Mohit Saraf were the resource persons of the course.

The theme for session one was on ***Commercial Courts: The Policy Framework and Operative Challenges***. The session commenced with the discussion on challenges in the operation of Commercial Courts. For the purpose of ease of doing business in India it is necessary that business disputes are resolved quickly and efficiently. A judicial system which ensures timely and cost-effective resolution of commercial disputes will have a vibrant and investor-friendly economy. It was stated the Law Commission of India after an extensive study of the operations of the commercial courts of U.K., U.S.A., Singapore and France suggested in its 188<sup>th</sup> and 253<sup>rd</sup> report for creation of Commercial Courts in India, so that cases are disposed of expeditiously, fairly and at a reasonable cost. Such a situation that may lead to economic growth, increased foreign investment and will make India business friendly.

It was emphasised that Commercial Courts Act, 2015 has been enacted by the Parliament to ensure timely and cost effective resolution of commercial disputes of specified value, to foster faith of litigants in the Indian Legal System. The objective of the Act shall be fulfilled only if provisions of the Act are interpreted in a narrow sense that speaks about the speedy redressal.

The definition of 'Commercial Dispute' under Section 2 (1) (c) of the Act provides an exhaustive list of 21 subjects. Section 16 of the Act and Compulsory Pre-institution Mediation as defined under Section 12-A of Chapter 3-A were also discussed. It was emphasized that a suit which does not contemplate

any urgent interim relief shall not be instituted unless the plaintiff exhausts the remedy of Pre-institution Mediation. It was stated that the Act is also applicable to all applications and appeals where the subject matter is a '*Commercial Dispute*' of a '*Specified Value*' under the Arbitration and Conciliation Act, 1996. The cases *Makhan Lal Bangal v. Manas Bhunia and ors.*, AIR 2001 SC 490, *Rameshwari Devi v. Nirmala Devi*, 2011 8 SCC 249 and *Ambalal Sarabhai Enterprises v. K.S. Infraspace LLP.*, 2019 SCC OnLine SC 1311 were discussed.

Session two was ***Joint Venture Agreements: Definition, Disputes and Resolution***. The speaker highlighted the object and scope of joint venture, role and contribution of joint venture partners, funding/issuance of capital, financial arrangements, composition of board/governing body, management of joint venture – appointment of CEO/MD, distribution of profits among joint venture partners, transferability of shares and deadlock resolution. Forms of 'Joint Venture' viz. 'unincorporated' and 'incorporated' was also discussed. It was stated that partnership firm and trust comes under 'unincorporated' joint venture; whereas private limited companies, public limited companies and Limited Liability Partnerships incorporated forms of joint venture. Conduct of joint venture that includes frequency of board and shareholders meetings, quorum for meetings, appointment of directors/observer, board and general meetings, appointment of chairman, appointment of CEO/MD/Legal Head and veto rights were discussed.

It was observed that main disputes in joint ventures are of transferability of shares. It was stated that as per Section 58(2) of the Companies Act, 2013, contracts with respect to transferability of shares will be enforceable irrespective of it being on behalf of public company. Furthermore, topics such as Non-Compete/ Non-Solicitation, Deadlock, Representations and Warranties, Indemnity and Liquidated Damages were discussed in detail.

Session three was on the ***Regulatory Framework of Insurance & Re-Insurance in India***. Legal Aspects of re-insurance contracts and the extant IRDAI regulations governing reinsurance business were discussed. It was stated that reinsurance is a 'contract of Insurance'. There is generally no contractual relationship between the insured and the reinsurers. It was stated that fundamental principles of insurance contracts are applicable to 'contracts of reinsurance' that includes utmost good faith,

Insurable interest, and indemnity. Types of 'reinsurance contracts' including facultative contract and treaty reinsurance were explained.

The resource person explained claim settlements in which reinsurers are under an obligation to indemnify the reinsured for any loss suffered, as long as the loss falls within the terms of the direct policy and within the terms of the reinsurance. It was stated that the reinsurer's liability is often restricted by a 'claim control clause'. It was opined that the dispute between insurer and reinsurer should be settled quickly and preferably without resorting to legal proceedings. The IRDAI extant Regulations such as: to maximize retention within the country, avoid 'fronting', minimum security rating and maximum limit on cession to cross border reinsurer were discussed. The cases of *United India Insurance Co. Ltd. v. Orient Traders (P) Ltd.*, 2016 3 SCC 49 and *General Insurance Society Limited v. Chandmull Jain*, AIR 1966 SC 1644 were also discussed during the discourse.

Session four was ***IPR Disputes relating to copyright and patent***. Principle sources of IP laws such as statutory law, court decisions, and international treaties were discussed. The meaning and concept of the copyright and patent was discussed. It was highlighted that at the first instance, patent can be enforced at district courts and there are no specialised courts to hear patent matters. Various types of infringements like direct infringement, contributory infringement and indirect infringement were discussed.

The case of *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*, AIR 1982 SC 1444 was discussed in which the Supreme Court relied on English case law to hold that the proper way to construe a specification is not to read the claims first and then see what the full description of the invention is, but first to read the description of the invention, to reasonably appreciate the invention. It was emphasised that while reading a patent claim the court must not take into account disclosures of techniques and products that are already used in the industry. It was stated that a patent specification must be given a purposive construction, rather than a pure literal one. Grounds for invalidation of patent and mediation in IPR formed part of the discourse.

Session five was on ***IPR Disputes relating to Trademarks and Designs***. Commenced with a brief introduction on trademarks and designs with an example of a 'Rossogulla' dispute between the State of

West Bengal and Orissa. It was stated that trademark distinguish goods/services of a seller from his competitors and signify existence of a quality which is usually attributed to that seller. The definitions of 'mark' and 'trademark' provided under the Trademark Act, 1999 was discussed. It was stated that number and colour combinations are subject to trademark protection. Anton Piller order, John Doe Order, Mareva Injunction; and the difference between trademark infringement and 'passing off' actions were discussed. It was highlighted that in case of trademark infringement, the court has to determine whether the infringing mark is deceptively similar to the registered trademark. The territorial jurisdiction of courts in case of trademark infringement was deliberated upon. The judgments of *R.G. Anand v. Delux Films*, (1978) 4 SCC 118; *TCS v. State of A.P.* (2005) 1 SCC 308, *Bayer Corporation v. Union of India*, (2014) SCC OnLine Bom 963, *Godfrey Philips India Ltd. v. Girnar Food & Beverages (P) Ltd.*, (2004) 5 SCC 257 were discussed.

Session six was ***Commercial courts vis-à-vis Arbitration***. It was differentially explained that arbitration is a process in which parties agree to submit their dispute to an independent arbitrator or arbitral tribunal, which issues a final and binding arbitral award; whereas in mediation or conciliation the parties ask a third person to assist them in reaching an amicable settlement of their dispute. Objectives of the Commercial Court Act, 2015 was discussed which includes speedy, convenient and efficient dispute resolution and increasing ease of doing business, in line with the competitive global economic environment. The interplay between Commercial Courts Act, 2015 and the Arbitration and Conciliation Act 1996, arbitral disputes of commercial nature of specified valued, International Commercial Arbitrations were discussed. The case of *M/s. Icomm Tele Ltc. v. Punjab State Water Supply & Sewage Board*, 2019 (4) SCC 401 was referred to, wherein it was held by the Supreme Court that arbitration is an important alternative dispute resolution process which is to be encouraged because of the high pendency of cases in courts and the cost of litigation.

It was stated that due to the nature of the Commercial Courts Act in expediting the judicial process and ensuring speedy delivery of justice, The Code of Civil Procedure, 1908 has also been amended for promptness in disposing of suits or applications of civil nature. Judgments of Supreme Court and High Courts referred during the discourse included *Kandla Export Corporation vs. OCI Corporation*, (2018) 14 SCC 715, *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India*

2019 SCC Online SC 677; *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Limited*, 2019 (7) SCC 236; *PAM Developments Pvt. Ltd. v. State of West Bengal*, (2019) 8 SCC 112; *Brahmani River Pellets Limited v. Kamachi Industries Limited*, 2019 SCC Online SC 929; *Mahanagar Telephone Nigam Ltd. v. Canara Bank*, 2019 SCC Online SC 995; *NHAI v. Sayedabad Tea Company Ltd.* 2019 SCC OnLine SC 1102; *Canara Nidhi Limited v. M Shashikala* 2019 (9) SCC 462; *Oriental Insurance Co. Ltd. v. Dicitex Furnishing Ltd.*, 2019 SCC Online SC 1458; *WAPCOS Ltd. v. Salma Dam Joint Venture*, 2019 SCC OnLine SC 1464; *Hindustan Construction Company Limited v. Union of India*, 2019 SCC OnLine SC 1520; *BGS SGS Soma JV v. NHPC Ltd.* 2019 SCC Online SC 1585; *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656; *Ujwala Raje Gaekwar v. Hemaben Achyut Shah* 2017 SCC Online Guj 583; *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, 2015 SCC OnLine Bom 7752, *NTPC Limited v. Jindal ITF Limited*, 2017 SCC OnLine Del 11219; *D.M. Corporation Pvt. Ltd. v. The State of Maharashtra* 2018(4) Mah LJ 457; *Visionindia Ayurved Pvt. Ltd. v. N. K. Sharma, Proprietor*, 2019 SCC OnLine Del 9620; *Kadimi International Pvt. Ltd. v Emaar MGF Land Ltd.* 2019 SCC Online Del 9857, *Hindustan Construction Co. Ltd. v. Ipex Infrastructure Pvt. Ltd.*, 2019 SCC OnLine Del 9981; *Haji Banda Hasan v. Gupta & Gupta Pvt. Ltd.* 2019 SCC OnLine Del 10018; *NCERT v. Skywing Carriers Pvt. Ltd.* 2019 SCC OnLine Del 10094; *Makro v. The New India Assurance Co. Ltd.* 2019 SCC OnLine Del 10321; *Glencore International AG v. Shree Ganesh Metals* 2019 SCC Online Del 11105.

Session seven was *Adjudication of Disputes under the Act: Challenges and Solutions*. It was stated that The Commercial Courts Act, 2015 seeks to radically re-organize the way in which commercial disputes are adjudicated by the courts in India. The 253<sup>rd</sup> Law Commission's Report highlighted that commercial courts were necessary in India for economic growth, improving the international image of the Indian courts and improving legal culture.

The resource person highlighted key hurdles and challenges that stand between the achievements of these objectives contemplated by the Commercial Courts Act with regard to the adjudication of commercial disputes; and also discussed strategies and ways to overcome these hurdles in order to achieve the aims of The Commercial Courts Act. 'Time limits' under Order XIII A of the Code of Civil

Procedure (hereinafter CPC) and Challenges to Order XV A of CPC was discussed during the discourse. It was opined that The Commercial Courts Act could be a ground breaking piece of legislation which has the potential to change the course of litigation in India provided the same is implemented properly.

Session eight was *Construction and Infrastructure Contracts*. It was stated that infrastructure development is vital for growth of the economy and huge infrastructure projects generate employment for a large number of people. Different types of Public Private Partnership (PPP) models like build-operate-transfer (BoT); build-own-operate-transfer (BOOT); build-transfer-operate (BTO); build-own-operate (BOO) and design-build-finance-operate (OBFO) was highlighted. It was opined that the process of allowing private participation by the entities should be fair, reasonable and non-discriminatory and should satisfy the requirements of Article 14 of the Constitution of India.

It was also observed that currently most of the banks in India have a high exposure to non-performing assets and most of the large infrastructure companies are in huge debt, with their projects stalled due to litigation. The speaker also focused upon the 2018 amendment to the Specific Relief Act, 1963 which prohibits granting of injunctions in situation where injunction cause delay or impediment in the progress or completion of specified categories of infrastructure project. During the discussion case of *Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India and Others*, (2006) 10 SCC 1 and *Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (PSPCL) and Ors.*, (2018)11 SCC 508 were discussed in detail.

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