

**Workshop for High Court Justices on Commercial Division and Commercial Appellate Division [P-1245]**

**3<sup>rd</sup> and 4<sup>th</sup> April, 2021**

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The National Judicial Academy organized a two day *Online* Workshop for High Court Justices on Commercial Division and Commercial Appellate Division on 3<sup>rd</sup> & 04<sup>th</sup> April, 2021. The workshop aimed to facilitate deliberations among participant justices on core thematic areas in commercial disputes at the level of commercial division and commercial appellate division. The workshop began with discussion on architecture of the Commercial Courts Act, 2015. The issues regarding litigation in the area of E-Commerce, Joint Venture Agreements, Construction and Infrastructure Contracts and Intellectual Property Rights were addressed in the workshop. The workshop followed interactive mode of discussion where participant justices shared experiences and best practices.

**Major Highlights and Suggestions from the Workshop**

**Session 1: The Commercial Courts Act, 2015: Architecture of the Act and Challenges in the Area of E-Commerce**

The speakers commenced the session by saying that the Commercial Court Act will help in improving image of the Indian court as an independent and responsive legal system among the investors. Through the Commercial Courts Act the Parliament gave jurisdiction in the sovereign public court system to decide commercial disputes and enshrined the fast track procedures to the commercial disputes only. The speakers said that it is our duty to make it successful despite many constraints.

The speakers then discussed the definition of the “Commercial Dispute”. There are 22 classes of commercial disputes and these 22 classes of disputes have residuary clauses under which further disputes can be classified as commercial disputes. These classes of commercial disputes should be read with other statutes to examine whether there is any bar on the jurisdiction of an ordinary court. The speakers said that one should not give an expansive definition to commercial dispute and must examine whether the dispute fall within the definition of commercial disputes or not. In situation where the dispute does not fall within the commercial dispute then let the parties take recourse to the ordinary courts.

The speakers discussed some illustrations of disputes where there may be conflict of opinion such as whether a property dispute or a corporate dispute is a commercial dispute or not. The speakers then said that only commercial dispute of a specified value can go to the commercial court. After the amendment of the Commercial Court Act in 2018, the specified value of a

commercial disputes has been changed to three lakhs from one crore and because of such changes a large numbers of disputes can now be classified as commercial disputes.

Due to this amendment even the courts below the district judge category are now conferred the status of commercial court and district court can exercise appellate jurisdiction over them. The speakers discussed anomalies in the Act regarding appeal against the order of appellate court at district court level.

The speakers then discussed the procedures relating to the case management system under the Act. The hearings have to be fixed according to a schedule. Arbitration can be resorted to under this system once pleadings are completed. Whole litigation progress according to a timeline in order to give greater control to court on litigation. The speakers than discussed the mandatory pre institution mediation and settlement under the Act for suits which does not contemplate any urgent interim relief. The speakers then focused on the summary judgment under the Act and said that provision of summary judgment can be applied prior to framing of issues.

## **Session 2: Joint Venture Agreements**

The speakers commenced the session by explaining the purpose of the joint venture agreement (JVA) which is an arrangement beyond capital contribution and include the sharing of resources, combination of synergies, use of technology, brand and market distribution. Under the joint venture agreements parties provide capital and get respective shares. A joint venture agreement sets out the respective capital contributions and the shareholding of the parties, the overall governance structure and day to day management of the joint venture company (JVC). It also includes provisions in relation to non-compete between the parties (including the exclusivity provisions or the first right of the JVC to participate in additional opportunities for the agreed business), provisions for exit of one or more of the shareholders, identifying and preparing ancillary agreements which will incorporate arrangements between the JVC with one or more of the parties/ group entities, e.g., in relation to brand, technology, services, distribution, business transfer and miscellaneous provisions such as representations and warranties, applicable law, dispute resolution mechanism, breach consequences and termination rights. The speakers added that a very important distinguishing feature of a JVA is that termination of the joint venture agreement (JVA) or shareholder agreement (SHA) may end the agreement, but cannot, by such termination, affect the shareholding of the shareholders nor impair the statutory rights attached with such shareholding. The JVA's/SHA's contractual rights are replaced by shareholders' rights under the law.

The speakers than focused on issues related to minority protection and said that a JVA/SHA generally provides contractual rights for parties over and above what is available under law, particularly for the minority. As an example, among other protections, minority shareholders need protection from unanticipated dilution in future fund raises from shareholders, such as a rights issue, which only requires an ordinary resolution. That gives the basis for preemptive

rights on fresh issues, as capital is often the lifeblood of the business and most disputes result from a failure or unwillingness to fund by one shareholder or the other. At the same time what has been agreed by the parties to fund should become an obligation. For that reason, an agreed business plan with a capital commitment plan is agreed upon and becomes binding amongst the shareholders and a failure to fund gives rise to a breach and a falling away of the anti-dilution protection.

The speakers then focused on issues related to articles of Association and transfer restrictions on shares held by JV partners and said that share transfer provisions need not be in the articles to be enforceable as long as the company is a party to the agreement and the articles are not contrary to the agreement. The speakers then discussed 50:50 joint venture agreement where leverage of parties is balanced and equally limited. The speakers also discussed put and call option as a method of exiting a joint venture agreement. The reasons for failure of joint ventures was discussed by referring to various judgments of the Supreme Court.

### **Session 3: Interpretation of Construction and Infrastructure Contracts**

The speakers commenced the session by highlighting the importance of construction and infrastructure contracts. The speakers said that the infrastructure projects involve high investment and require efficient working and timely completion because the interest of whole society is at stake. The speakers described various types of infrastructure and construction works. The government brought the policy of liberalization, privatization and globalization keeping in mind the two constraints of investment and efficient working. The PPP model is used in such projects where private sector makes its investment and expects a fair return. The speakers said that the first category of infrastructure contracts are those where infrastructure is developed by State only and another mode is public private partnership contracts. The speakers discussed various kinds of infrastructure contracts including Builds, Operate and Transfer (BOT), Build Own and Operate (BOO), Build, Own, Operate and Transfer (BOOT) and Build, Operate, Lease and Transfer (BOLT).

The speakers said that the main hurdle in the growth of infrastructure sector is that the injunction is granted mechanically by courts when contracts are challenged under writ jurisdiction and they remain stayed for several years. So the concern of the government is that there should be expertise in courts in handling such matters and there should be quick resolution of disputes involving infrastructure and construction contracts. The special court should decide the dispute within one year. There should be no injunction if it causes delay in the completion of project. The speakers referred to the concept of substituted performance where the party get the work executed by someone else if the assigned party is not performing the contract.

The speakers then focused on the scope of court's power in judicial review in issues related to infrastructure and construction contracts, execution of contract and arbitration award. The speakers discussed the application of public trust doctrine in such contracts where government acts as trusty of the people and said that such projects should be fair to people also because government is dealing on behalf of all citizens. There is a fundamental right of citizens to

participate in the process. Earlier the view was that the contract is a matter between private parties and court is not concerned with that. But now government is accountable and there has to be level playing field, fairness and transparency. There should be no malafide and it should be bonafide, non-arbitrary and non-discriminatory and these tests are applied by the courts in litigation involving such infrastructure contracts. The issues involved include pre-contract issue such as allotment of the contract and there may be exercise of power of judicial review by writ courts. The courts can apply the wednesbury principle of arbitrariness and contract has to be according to laws and the Constitution. The courts have to analyse grey areas and find out what is the obvious intention of parties if there is no specific provision. Business efficacy is one important factor in interpretation of such contracts and the conflicting provisions should be reconciled.

The speakers said that there are various adjudication levels before the disputes reaches to court i.e. dispute moves from engineer to dispute adjudication board and then to arbitration. Dispute reaches to court under the Sections 9 and 34 of the Arbitration Act. Courts intervene in matters such as bank guarantee or stopping the authority from deducting damages. These contracts can be better interpreted if the understanding of these contracts and their scope and structure are clear. The speakers explained the concept of extension of time in case of delay by employer, concept of time at large and variation in contract. The speakers emphasized that balance is required on number of diverse commercial interest in such contracts. The speakers said that during execution of such contracts many issues arises such as what is the scope of the work, standards to be achieved, time line, force majeure clause and what happens if the work is not completed on time.

#### **Session 4: Intellectual Property Rights: Infringement & Enforcement**

The speakers commenced the session by explaining the different forms of remedies available against the violation of the intellectual property rights. The speakers said that the infringement action is a statutory right granted by the statutes for registered trademark. Passing off action is a common law remedy which is available under the Trademark Act and the Copyright Act. There is no common law remedy under the Patent Act and Design Act and there is no criminal law remedy under the Patent Act and Design Act.

The speakers then focussed on burden of proof under infringement and passing off actions. The speakers explained why registration of trademark is necessary and discussed various tests which a court applies to ascertain the truthfulness of claims. The concepts of similar trademark and deceptively similar trademark were explained. The speakers explained the distinct strength of registration under the four statutes. The speakers then focused on the issue that in infringement action why dissimilarity is to be given more prominence than similarity. The speakers discussed various judgments to explain the approach of courts towards infringement and providing remedy.

The speakers also highlighted the role played by the intellectual property in everyday life. The speakers then focused on the intellectual property rights protection in the digital age. One of the main issue is the determination of jurisdiction in digital transactions. The jurisdictional issues in internet transactions are dynamic and elastic in nature and cannot be restricted by the traditional

concept of jurisdiction. The speakers explained some tests to determine jurisdictional issues in the intellectual property rights suits and explained various provisions under the statutes dealing with the intellectual property rights. The test of purposeful availment was explained in detail.

The speakers also discussed the issue of jurisdiction in situation where business has no physical presence in India and doing business virtually through website which is accessible everywhere in India. The issue of jurisdiction when there is a involvement of third party website was also discussed.

The remedy of dynamic injunction in matters of violation of intellectual property rights by mirror websites or rogue websites in piracy cases was explained. Such remedy of injunction is not restricted to only one website and apply to all the identical websites. In such cases even when a party is not known the court can grant the injunction and the domain name can be blocked by the Indian courts. The speakers then focused on the liability of intermediary in relation to online transactions. Such issues of liability arises when the product sold on online commercial website is not genuine. Intermediary Guidelines, 2021 was also discussed and speakers said that these guidelines have put obligations on the online commercial and social media websites to ensure that no seller or user violates the intellectual property rights. Global injunction against the companies such as Google and YouTube was discussed in cases related to defamation through online video circulation.

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