

NATIONAL JUDICIAL ACADEMY



P-1262

WORKSHOP FOR HIGH COURT JUSTICES FOR COMMERCIAL DIVISION & COMMERCIAL APPELLATE DIVISION ON COMMERCIAL DISPUTES

(Virtual through Google Meet)

Organized by

National Judicial Academy, India

(09th & 10th October, 2021)

PROGRAMME REPORT

PREPARED BY

Mr. Rahul I. Sonawane

Ms. Nitika Jain

Faculty, NJA Bhopal.

Objectives of the seminar:

The National Judicial Academy (NJA) organized a two-day online ‘Workshop on Commercial Disputes for Commercial Division & Commercial Appellate Division of the High Courts’ on 9th & 10th October 2021 in virtual mode. The participants included justices dealing with or likely to deal with commercial disputes under The Commercial Courts Act 2015 (‘the Act’). On the premise that businesses nationally and internationally thrive in a stable legal environment and in times of rapid commercial change, the workshop included deliberations on contemporary avenues and challenges faced while adjudicating commercial disputes. The workshop provided a forum for discussion on best practices for effective resolution of commercial disputes. It also included deliberations on recent developments in the law and addressing the complexification of commercial disputes.

(DAY – 1)

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

Speakers: Justice Senthilkumar Ramamoorthy & Justice Rajeev Ranjan Prasad

Chair: Justice Siddharth Mridul

It was highlighted that the Act is in its nascent stage and is developing gradually. It was emphasized that the objective of the Act is to ensure just and efficient disposal of commercial disputes in an expeditious manner. The session included discussion on the importance of early and expeditious disposal of commercial disputes in the wake of globalization and its impact on the country’s economy. The issue of not having dedicated commercial court judges, and delay in resolution of commercial disputes was highlighted as major concerns. The reduction of the monetary limit of a commercial dispute from Rs. 1 Crore set during inception to the present limit of Rs 3 lakhs and with its pros and cons were deliberated upon. Further, the feasibility of having cluster courts or separate courts to ensure easy access to justice in commercial disputes was discussed during the session. The definition of commercial disputes was discussed stressing

that due to an exhaustive definition it occasionally becomes difficult for courts interpret what is a commercial dispute, what can be brought into appeal, and whether IPR matters are covered. The provisions relating to appeal under the Act and various entry barriers such as specified value and large number of interlocutory applications were discussed at length.

It was emphasized that managing the pace in commercial litigation is completely in the hands of the judiciary, and better court management techniques should be applied to expedite the disposal of such cases. The issues arising out of e-commerce viz. territorial jurisdictions, the role of intermediaries, the liability of principal actors, nature of documentation, electronic records, and its admissibility & appreciation, etc. were some other areas that were touched upon during the session.

The case of *Ambala Sarabhai Enterprises Ltd. v. KS Infraspace LLP*, [(2020) 15 SCC 585] was referred to, wherein the Supreme Court held that dispute which actually answers the definition of ‘Commercial Dispute’ under Sec. 2 (1) (c) of the Act are only entitled to be accepted as commercial disputes in commercial courts. On the issue of formation of contracts, the case *Tamil Nadu Organic Pvt. Ltd. v. State Bank of India*, [2014 SCC Online Mad 423] was mentioned. Some other cases discussed included *World Wrestling Entertainment, Inc. v. M/S Reshma Collection*, [FAO(OS) No. 506 of 2013] and *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy & Anr.* [2008 (38) PTC 288 (Del)]. Lastly, reference was also made to the issue of limitation under the Commercial Courts Act, 2015.

Session 2

Distribution Licensing Agreements: Disputes & Resolution

Speakers: Mr. Anand Desai & Mr. Tejas Karia

Chair: Justice Siddharth Mridul

The importance and elements of distribution and licensing agreements were discussed in light of judicial precedents. It was highlighted that distribution channels are fundamental to a business nowadays since they are the connectors between manufacturers and consumers. The importance of storage, transport, packaging, knowledge of products, etc. along with licensing

agreements in the distribution channel was stressed upon. Various elements of licensing agreements viz. financial aspects, the scope of license, guarantees of minimum sale, etc. were discussed in detail. The clauses and structure, issues of IPR and ownership in licensing agreements with various degrees of exclusivity were deliberated upon. Various remedies in case of breach of license including different types of injunction and means of compensation, etc. were also discussed.

Some important judicial pronouncements underlined during the session included: *Gujarat Bottling Co. Ltd v. Coca Cola Co.*, (1995) 5 SCC 545; *Ozone Spa Pvt Ltd. v. Pure Fitness & Ors.* (2015 SCC Online Del 10768); *Aircel Cellular Ltd v. Union of India* (2016 SCC Online Mad 8463); etc. Further, the session involved a presentation on the modalities of distribution and divided them into three general kinds viz. (1) Supply only (e.g. food and pharma products, steel, cement, petrol etc.); (2) Supply and service (e.g. electronics and automobiles) and; (3) service only (e.g. hotels, flights, internet websites etc.). Various kinds of licenses such as technology transfer licenses, manufacturing agreements, and franchise agreements were explained. The difference in the supply chain of e-commerce was elaborated upon. Issues relating to the role of intermediaries and legal disputes cropping out of it were also discussed during the session.

(Day 2)

Session 3

Interpretation of Construction and Infrastructure Contracts

Speakers: Mr. Mohit Saraf and Mr. Somasekhar Sundaresan

Chair: Justice Prateek Jalan

The speakers threw light upon *the relevance* of the topic in the present-day commercial world wherein industry is one of the key drivers of economic growth. From the perspective of the legal world and the justice system, it was highlighted that such litigations involve a large number of parties, huge amounts, and varied types of contracts. It was pointed that judges have to determine how these different forms of contracts work. The concept of *force majeure*

with a reference to the English and American courts was discussed. With regard to Public-Private Partnership (PPP), it was stated that India has the 2nd largest PPP sphere which is likely to grow more. It was pointed out that the impact of the pandemic on economy and infrastructure contracts is an area to contemplate and find ways of mitigating these issues. It was stated that commercial contracts and disputes have strong commercial ramifications and therefore understanding project finance and project contractual framework is an important aspect. It was highlighted that India has done well in ease of doing business however, enforcement of contracts is very poor. It was underscored that a developing nation takes 4.25 years on average to resolve a commercial dispute whereas, a developed nation resolves the same dispute in 1/3rd of the time. Risk allocation between different stakeholders and enforcement of contracts was also discussed during the session. It was emphasized that restraining orders and delays in payment add to the challenges in the enforcement of contracts. A reference was made to the 2018 Amendments in the Specific Relief Act 1963 with regard to infrastructure projects and the judgment in *Reliance Airport Developers Pvt. Ltd. vs. Airport Authority of India & Ors*, (2006) 10 SCC 1 was mentioned. Contractual Delays on account of Land acquisition and its cost implications were also discussed upon. It was underlined that time is of the essence in an infrastructure contract and key legal issues in infrastructure disputes & PPP contracts include (a) Frustration of contracts; (b) Force Majeure; (c) Change orders, and; (d) Change in law.

Further, the speaker highlighted that most of the issues that emerge in infrastructure contracts emerge from the facet of policy confusion and the States complicity when there is confusion over economic policy or regulatory policy. High Courts have next to no role in these disputes in the post-contract phase. Many of these infra contracts fall in the domain of regulatory oversight and legislation has sidetracked the conventional judiciary by creating tribunals to look at disputes relating to this sphere that have tended to oust the jurisdiction of High Courts. Most of the jurisprudence publicly available in resolving disputes in this sphere falls in the writ jurisdiction under Article 226 of the Constitution which includes issues pertaining to the pre-contract stage. All projects are different and unique e.g. electricity projects, construction and therefore, a judge must be able to identify the uniqueness and issues pertaining to each individual project and contract. The interplay between tariff fixation and nuances of a contract

also formed part of the deliberations. It was highlighted that High Courts further face matters relating to the interplay between competition law consideration and construction contract consideration. It was emphasized that in some sectors of infrastructure projects there may be tariff regulators while in other sectors there may be license regulators. It emerged during the discourse that in near future the nature of disputes that will come up to courts will include:

- Disputes over handover, and
- Disputes overvaluation

The principle of “reasonableness” in the Indian Contract Act, 1872 under Sec. 27 and Sec. 73 was also discussed. It was stressed that methods of doing business may change but for a judge who has to interpret the contract, understanding the law is important.

Lastly, it was stated that with the growth of the PPP model, disputes will also increase regarding infrastructure projects. Therefore, it was suggested that in the High Court, roasters must be managed in a way that it includes judges’ having experience and interest in the subject of commercial matters.

Following judgments pertinent to the subject were referred during the discussions: *Hind Construction Contractors vs. State of Maharashtra* (1979) 2 SCC 70; *Kailash Nath Associates vs. DDA* (2015) 4SCC 136; *State of Gujarat vs. Kothari Associates* (2016) 14 SCC 761; *DDA vs. Kenneth Builders & Developers Ltd.*, (2016) 13 SCC 561; *Nabha Power Ltd. vs. PSPCL & Ors.*, (2018) 11 SCC 508; *Energy Watchdog vs. CERC*, (2017) 14 SCC 80; *Lata Construction vs. Dr. Rameshchandra*, AIR 2000 SC 380.

Session 4

Integrated System of Dispute Resolution: Commercial Courts, Arbitration & Mediation

Speakers: Justice Prathiba M. Singh, and Justice M. Sundar

The session included deliberations on three key aspects – Intellectual Property Rights: Infringement & Enforcement; Commercial (Third Party) Funding Litigation; and the new

Litigation Landscape: Procedural Innovations. The speakers highlighted different types of Intellectual Property Rights (IPR) and what falls under each such as trademark, trade secrets, geographical indications, copyright, patents, designs, plant varieties, etc. It was pointed out that in IP matters various entities are involved leading to the complexification of a case and enforcement of IP involves various aspects like law-making, judiciary, and others. Each IPR was discussed at length wherein the concept of trademark and the contribution of the judiciary was stressed upon. Regarding patents, the concept of 'novelty' was discussed.

It was emphasized that the biggest issue the Indian judiciary is facing currently is to regulate intermediaries. On the aspect of intermediaries liability the case of *Swami Ramdev & Anr. vs. Facebook, Inc. & Ors.* [CS (OS) 27/2019 DHC], was referred to wherein the court held that if the content is uploaded from India then a global injunction can be issued from India. Innovative remedies – Geo-Blocking, John Doe Orders or Ashok Kumar orders; Domain name protection were some of the other areas that formed part of the discussion. It was highlighted that Indian courts are facing a large number of matters pertaining to jurisdictional issues because of territorial limitations. The concept of dynamic injunction, active and passive intermediary, and arbitrability were also discussed at length. The case of *Christian Louboutin v. Nakul Bajaj*, [(2018) 76 PTC 508 DHC] was referred to. It was suggested as a way forward that each High court must have a specialized commercial and IP division for speedy and effective adjudication of commercial matters. It was pointed out that by an order dated July 2021 IP division is created in the Delhi High Court along with a notification of rules for the IP Division.

The session further focused discussion on third party funding wherein countries which have recognized third party funding like Singapore were pointed out. Emphasizing the scope of Rule 3 of Order XIII A of the CPC on Summary judgements the speaker pointed out how to integrate dispute resolution system. Further, Mareva Injunction (under O. 38 R 5 of CPC), Anton Pillar Injunction were some other remedies that were highlighted during the course of the discussion. Section 89 of the CPC was discussed with regard to an integrated dispute resolution mechanism and it was underscored that mediation is well integrated into the Commercial division. Reverse tribunalisation with regard to IPAB division was also

elucidated upon during the session. It was suggested that there is a need to create a panel of experts including law graduates trained from IITs and having knowledge of computer and electronics, economists, scientists, chartered accountants, technological experts attached with the commercial division for effective adjudication of such matters.

Following judgements were referred to during the session: *S. Syed Mohideen vs. P. Sulochana Bai* (2016-SC); *Sunil Mittal & Anr vs. Darzi on Call* (2016-DHC); *Prius Auto Industries Ltd. & Ors vs. Toyota Jidosha Kabushiki* (2016-DHC); *Whatman International Ltd. vs. P. Mehta & Ors* (2019- DHC on Punitive Damages); *Rookes vs. Barnard* (1964) 1 ALL E.R. 367. Two important decisions on Copyright were highlighted including *The Chancellor, Masters & Scholars of the University of Oxford & Ors. vs. Rameshwari Photocopy Services & Anr* (DHC-2016); *Music Broadcast Ltd. vs. TIPS Industries Ltd. and Ors.* (IPAB), *Banyan Tree Holding (P) Ltd vs. A. Murali Krishna Reddy & Anr* [CS (OS) 894/2008]; *World Wrestling Entertainment Inc. vs. M/s Reshma Collection & Ors.* [FAO (OS) 506/2013]; *UTV Software Communication Ltd. & Ors. vs. 1337X. TO & Ors.* [CS (COMM) 724/2017]; *Eros International Media Ltd. Telex Links India Pvt. Ltd.,* (2016) 6 Bom CR 321.
