

NATIONAL JUDICIAL ACADEMY, INDIA



NATIONAL WORKSHOP FOR HIGH COURT JUSTICES ON COMMERCIAL LAWS

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PROGRAMME REPORT

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Session 1: Commercial Courts Act: Genesis, Benefits and Challenges

The session dwelt upon the genesis of Commercial Courts Act (CCA) and its historical development, referring to the first dedicated and special Commercial Court Act, which was passed in the year 1895. The contribution of Sir James Charles Mathew with regard to Commercial Court Act was underscored. In relation to Indian context, attention was drawn to the 188th and 253rd Law Commission Reports that flagged the issue as to how specialized courts in other countries were disposing commercial cases in a speedy manner. It was stated that foreign courts have assumed extraordinary jurisdiction over commercial cases on the basis that the Indian judiciary was unable to provide effective relief. It was highlighted that creation of commercial courts was proposed as a necessary legislative reform to enable speedy redressal to commercial disputes. A reference was also made to the Commercial Division of High Courts Bill, 2009.

During the course of discussion it was highlighted that Commercial Courts Act, 2015 came into effect from 23.10.2015 (without Section 12A) but Section 12A was inserted by way of an amendment on 03.05.2018 after operating Commercial Courts Act for a little over two and half years. It was stated that the Central Government authorize the State Authority and District Authority constituted under the Legal Services Authorities Act, 1987 for the purposes of pre-institution mediation and settlement. The amended provisions wherein the minimum value of dispute (pecuniary jurisdiction) reduced to 3 lakh and mandatory pre-institution mediation were some areas that formed part of the discussion.

It was emphasized that time line is one of the cornerstone of Commercial Courts Act and by not adhering it would dissolve its purpose entirely. It was highlighted that after the 2018 amendments, District Courts are also exercising appellate jurisdiction under the Commercial Court Act. It was underlined that invariably in the district judiciary, there is some kind of hesitation while dealing with commercial matters considering the complexity and high value attached with such matters. A reference was made to pre-institution mediation and arbitration. It was accentuated that if a commercial suit does not contemplate any urgent interim relief, it shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. It is significant to note that the settlement arrived at under section 12A of Commercial Court Act, shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996

A reference was made to the case of *Patil Automation Private Limited and Others vs. Rakheja Engineers Private Limited*, 2022 SCC OnLine SC 1028 where it was held that Section 12A of CCA is mandatory, a plaint can be rejected suo moto by a Court for non-compliance with Section 12A and while rejecting the plaint, there shall be no refund of Court fee. Subsequently the case of *Retail Royalty Company & Another vs. Nirbhay Marg New Broadcast Private Limited C.S (Comm).No.601 of 2022* was referred wherein the application for dispensing with Section 12A was entertained. Further the session threw light upon the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 which also provides for time bound mediation.

Session 2: Interpretation of Construction and Infrastructure Contracts

The amendments brought in under various statute such as Specific Relief Act, Commercial Courts Act, and Arbitration & Conciliation Act, were highlighted and deliberated upon. It was emphasized that the schedule of Specific Relief Act post 2018 amendment is non-explanatory in nature and only provides for categories of infrastructure projects such as transport, energy, water and sanitation, communication, social and commercial. During the course of discussion it was accentuated that construction, building, and engineering work form part of the inner circle surrounded by ancillary pillars of economic and social importance. Also including elements of contract with different terms and clauses, and schedules to the Specific Relief Act.

The session threw light upon various types of infrastructure projects and their mode of execution by parties including government through engaging contractors. The concessional model i.e. *public private partnership* including operation and maintenance contract, composite and split contracts, design and build contracts formed part of the discussion. A comparative analysis of section 20 of the Specific Relief Act before and after amendment was deliberated upon. It was opined that in relation to infrastructure projects, no injunction should be granted if it would cause delay in completion of the project. It was highlighted that due to following reasons the expert committee recommended amendments to the Specific Relief Act including;

- Reducing discretion granted to courts in granting injunctive reliefs
- Provision for rights of third parties
- Projects of public nature to be insulated from interruption of judicial process

The speaker further emphasized upon the objects of the amendment i.e. deterring breach of contractual obligations, economic growth and developmental requirements, and greater certainty in enforcement of contracts. A reference was made to the case of *Silppi Construction v. Union of India* (2022) 16 SCC 489 wherein it was held that courts should not interfere in matters of tenders unless substantial public interest involved. Subsequently, a reference was also made to the case of *NG Projects v. Vinod Kr. Jain* (2022) 6 SCC 127 where it was held that infrastructure projects should not be stayed in exercise of jurisdiction under Article 226. It was stated that attempts by unsuccessful tenderers to persuade courts to interfere should be resisted as held in *Uflex Limited v. Government of Tamil Naidu* (2022) 1 SCC 165

It was emphasized that engineering, procurement, and construction contracts (EPC) are awarded on three different basis i.e. fixed price contract, bill of quantities (BOQ), and cost plus model. The discussion also focused on various technicalities involved in EPC. The sublet of contracts under public private partnership and liabilities arising out from the failure of contractual obligations were some areas further deliberated upon in the session.

A reference was made to various judgments with regard to infrastructure contracts viz. *Sanjay Kumar Shukla v. BPCL* (2014) 3 SCC 493; *Hari Ram Nagar v. Delhi Development Authority* 2019 SCC OnLine Del 9747; *NHAI v. Panipat Jalandhar NH1 Tollway* 2021 SCC OnLine Del 5066; *Golden Edge Engineering Pvt. Ltd. v. BHEL* 2020 SCC OnLine Cal 996 were deliberated upon

Session 3: Intellectual Property Rights: Infringement & Enforcement

The session commenced by highlighted that, amendment in CPC, Commercial Courts Act, 2015, Delhi High Court (Original Side) Rules 2018, Patent Rules, 2022, and setting up of the Intellectual Property Division (IPD) in 2021 & Rules in 2022 resulted in dramatic time reduction for intellectual property (IP) litigation in India. It was emphasized that specific provisions were also enacted such as strict timelines for written statement, summary judgment, fixing time slots in case management and limited right of appeal to facilitate speedy disposal of cases considering the importance of IP matters and cost involved. It was mentioned that earlier seventy percentage of IP litigation was centered in the Delhi High Court, but the expansion of IP matters in India touched the jurisdiction of various other High Courts also. It was underlined that the grant of interim injunctions is still the most sought after remedy. The session dwelt upon the issue of jurisdiction under Section 20 of CPC, 1908. In this connection a reference was made to the case of *Tata Sons*

Private Limited v. Hakunamatata Tata Founders 2022 SCC OnLine Del 2968 where the court held that targeting of customers need not be aggressive, looming presence of website is enough. Subsequently, reference was also made to the following cases; *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy*, 2009 SCC OnLine Del 3780, *Millennium & Cophorne International Limited v. Aryans Plaza Services Private Limited & Ors.*, 2018 SCC OnLine Del 8260. It was highlighted that for the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, and in order to satisfy the forum that it has jurisdiction to entertain the suit, the plaintiff would have to show that the defendant “purposefully availed” itself of the jurisdiction of the forum court. The session threw light upon the available criminal remedies in IP matters under Trademark, Copyright and Geographical Indication, Act. Lastly, it was stated that huge changes in Court infrastructure, technological advancement and, IP Office(s) have pushed India from the 81st rank in 2015 to the 40th rank in 2022 in the Global Innovation Index.

Session 4: Arbitration and Conciliation Act: Towards a Model Dispute Resolution

It was highlighted the Arbitration and Conciliation Act, 1996 was enacted to adopt the UNCITRAL model law to consolidate and amend the law relating to domestic arbitration and international commercial arbitration. Key changes brought into the act by 2019 amendment were highlighted i.e. appointment of arbitrators by arbitral institutions; time limits for completion of pleadings and passing of award; challenge applications to be decided based on arbitral record; confidentiality obligation; protection of arbitrators for actions taken in good faith; and establishment of the Arbitration Council of India. It was underlined that the amended Section 29A makes the revised timelines mandatory only for arbitration where all parties are Indians. A reference was made to *ArcelorMittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*, 2021 SCC OnLine SC 718 where the court held that the purpose of Section 9(3), it is the commencement of the entertainment that is relevant. Accordingly, once an arbitral tribunal is constituted and is in seisin of the dispute between the parties, the court cannot take up a fresh application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. It was emphasized that the scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical, but extremely limited and restricted as held in *Vidya Drolia and Others v. Durga Trading Corporation*,

2020 SCC OnLine SC 1018. Subsequently, a reference was made to various cases such as; *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited*, 2019 SCC OnLine SC 1518; *IOCL v. NCC Ltd* 2022 SCC OnLine SC 896; *Emaar India v. Tarun Aggarwal Projects LLP* 2022 SCC OnLInd SC 1328; *Sanjiv Prakash v. Seema Kukreja And Ors.*, (2021) 9 SCC 732; *Dilip v. Errol Moraes*, 2022 SCC OnLine Bom 129; and *Kandla Export Corporation v. M/s OCI Corporation*, (2018) 14 SCC 715. The session further dwelt upon the confidentiality clause in arbitration. It was underlined that Section 43K of the Arbitration Act is in conflict with Section 42A as it enables Arbitration Council of India to maintain an electronic depository of arbitral awards. Lastly, it was highlighted that Supreme Court has observed in various judgments that the object of Section 34(6) of the Arbitration Act is to ensure that an application for setting aside the award is disposed of expeditiously as discussed in *State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti*, 2018 SCC OnLine 966. With regard to time period for written proceedings, a reference was made to the case of *Srei Infrastructure Finance Ltd. v. Tuff Drilling (P) Ltd.*, (2018) 11 SCC 470 wherein it was held that when the legislature has used the phrase “*the mandate of the Arbitral Tribunal shall terminate*” in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be recommenced. The scheme of Section 25 of the Arbitration Act clearly indicates that on sufficient cause being shown, the statement of claims (SOC) can be permitted to be filed even after the time fixed by Section 23(1) has expired.

Various landmark judgments included during the discussion were as follows, *BCCI v. Kochi Cricket (P) Ltd.*, (2018) 6 SCC 287; *Hindustan Construction Company Limited & Anr. v. Union of India & Ors.*, 2019 SCC OnLine SC 1520; *Sorin Group Italia S.R.L. v. Neeraj Garg*, 2022 SCC OnLine Del 3544; *Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328; *MMTC Limited v. Vedanta Limited*, (2019) 4 SCC 163; *UHL Power Co. Ltd. v. State of H.P.*, (2022) 4 SCC 116; *Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.*, (2021) SCC OnLine SC 80; *Suryadev Alloys and Power Ltd. v. Shri Govindraja Textiles*, 2020 SCC OnLine Mad 7858; *DDA v. Tara Chand Sumit Construction Co.*, 2020 SCC OnLine Del 2501; and *Nilesh Ramanbhai Patel and Ors. v. Bhanubhai Ramanbhai Patel and Ors.*, MANU/GJ/1549/2018

Session 5: Recognition & Enforcement of Arbitral Awards

The session highlighted that whatever is justiciable should not be taken out from the realm of the court. It was underlined that judicial conscious should strike at the root of injustice. It was accentuated that Section 34 and 48 is the heart of the ground on which the court can set aside the domestic award and refuse to enforce an international award. It was underscored that once an award is passed it should not be delayed at the stage of recognition and enforcement. During the course of discussion, a reference was made to Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Convention on the Execution of Foreign Arbitral Awards, and UNCITRAL model on international commercial arbitration. The grounds for setting aside the arbitral award were highlighted such as; incapacity, jurisdiction, composition, denial of natural justice, and public policy. It was emphasized that Section 34 and 48 provides very limited scope of judicial intervention. A reference was made to the case of *Vijay Karia v. Prysman Cavi E Sistemi SRL* 2020 SCC OnLine SC 177 where the Apex court has adopted a balanced approach while dealing with the scope of judicial interference at the time of enforcement of foreign award and exercising its jurisdiction under Article 136 of the Constitution. The session further dwelt upon the intricacies of “public policy” with the help of series of judgment. A reference was made to the case of *Renusagar Power Co. Ltd v. General Electric Co.* 1994 Supp (1) SCC 644 wherein it was held that public policy under 1961 Act is different from the public policy under 1940 Act. It was highlighted that in *Renusagar* case the court touched upon the distinction between international public policy and domestic public policy. Subsequently, a reference was made to the case of *ONGC Ltd. v. Saw Pipes Ltd* (2003) 5 SCC 705 where it was held that, there is no necessity of giving a narrower meaning to the term 'public policy of India. On the contrary, a wider meaning is required to be given so that, a patently illegal award passed by the Arbitral Tribunal could be set aside. Thereafter, various cases were cited to provide the contour and emergence of public policy doctrine in India including *Phulchand Exports Limited v OOO Patriot* (2011) 10 SCC 300, *Shri Lal Mahal Ltd. v. Progetto Grano Spa* 2013 (4) CTC 636.

With regard to foreign judgments from non-reciprocating countries a reference was made to the case of *Badat and Co. vs. East India Trading Co.*, AIR 1964 SC 538, wherein the court held that the convention does not apply to award of a non-convention country, the awards are still enforceable in India on the same grounds and in the same circumstances on which they are

enforceable in England under the Common Law that is on grounds of justice, equity and good conscience

Lastly, it was underlined that the trajectory of Section 34 adopted by court must not ignore the objective of the Arbitration Act. The clear distinction of power under Article 226 and Section 34 has to be drawn while deciding cases on allowing or setting aside any arbitral award.