INTRODUCTION TO

COMMERCIAL COURTS ACT, 2015 – ARBITRATION –

Justice M. Sundar

Judge, Madras High Court

PART I-DETERMINATION OF JURISDICTION UNDER ACT 4 OF 2016

- Jurisdiction of Commercial Court under Section 6 of Act 4 of 2016.
- Jurisdiction of Commercial Division under Section 7 of Act 4 of 2016.
- Interpretation of the phraseology in sections 6 and 7 will make it clear that "Commercial Dispute" and "Specified Value" should be read conjunctively
- Both conditions under section 2(1)(c) "Commercial Dispute" and section 2(1)(i) "Specified Value" have to be fulfilled

COMMERCIAL DISPUTE OF SPECIFIED VALUE

- **Commercial Dispute- Section 2(1)(c)- 22 Sub clauses.**
  - The Supreme Court in ***M/s Kandla Port v. OCI (2018) 4 LW 204*** held that each of the 22 sub clauses constitute a single neat pigeon hole.
  - *Madras High Court* applied the ratio in ***(2006) 9 SCC 591*** to interpret the term "arising out off". The Single judge held that the term has a wide meaning and should be interpreted accordingly.
- **Specified Value – Section 2(1)(i)**
  - From 23.10.2015 to 3.5.2018 the 'Specified Value' was 1 crore
  - From 3.5.2018 onwards the specified value has been brought down to 3 Lakhs, due to the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance, 2018 which fructified into a Act; Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Act, 2018 [Act 28 of 2018]
  - Act 28 of 2018 was passed by both the house of parliament and received the Presidential assent on 20.8.2018 and notified on 21.8.2018, however it was given retrospective effect from 3.5.2018

{The order recording jurisdiction is not appealable- section 12(3)}

High Court	Cause title/Citation	Whether Section 12-A is directory or mandatory	What is the fate of a suit instituted in breach of Section 12-A
Allahabad	Awasthi Motors v Managing Director, AIR 2021 Allahabad 143	Mandatory	No finding
Bombay	Deepak Raheja v Ganga Taro Vazirani (2021 SCC Online 3124)	Mandatory	Suit directed to be kept in abeyance till pre-litigation mediation is completed
Calcutta	**A.**Terai Overseas Private Limited v Kejriwal Sugar Agencies Private Limited , 2020 SCC Online 1591 **B.** Amit Motorcycles v Axis Bank Limited GA 3 of 2019 in C.S 217 of 2018 (dated 15.12.2020) **C.** Dhanbad Fuels Ltd v Union of Inda (2021 SCC Online Cal 429)	Mandatory Mandatory Mandatory	Suit dismissed Suit dismissed Suit to be kept in abeyance
Delhi	Mintergraph Systems Private Limited v Hitachi Systems Private Limited, Order dated 28.10.2021 passed in CS (Comm) 185 of 2019	Mandatory	Suit to be kept in abeyance till pre-litigation mediation is is completed

High Court	Cause title/Citation	Whether Section 12-A is directory or mandatory	What is the fate of a suit instituted in breach of Section 12-A
Madras	Shahi Exports v Gold Star Line Limited	Optional	--
Madhya Pradesh	Curewin Pharmaceuticals v Curewin Pharma Private Limited (MA 1269 of 2021)	Directory	**---**
Punjab and Haryana	Patil Automations Private Limited v Rakheja Engineers Private Limited	Directory	Suit to be kept in abeyance

HON'BLE SUPREME COURT IS SEIZED OF THE MATTER

- Whether Section 12A of The Commercial Courts Act, 2015 is mandatory or directory is now seized of by Hon'ble Supreme Court vide SLP (Civil) No.14697 of 2021 in an appeal against an order made by Punjab and Haryana High Court in the case of *Patil Automation Private Limited v. Rakheja Engineers*.

PART II- ACT 4 OF 2016:CHANGES ONLY IN PROCEDURAL LAW

- Substantive law is untouched
- Amendments to CPC for faster adjudication and disposal of cases
- Aim of the Act
    1) Fast track resolution of Commercial Disputes of the Specified Value
    2) Accelerate economic growth
    3) Improve the international image of Indian justice delivery system
    4) Improve the faith of investor world in the legal culture of the nation.

AMENDMENTS TO CPC

- Section 16 of Commercial Courts Act 2015 enabled the amendments to CPC
- Commercial Court and Commercial Division to follow amended CPC, which will prevail above all.
- Totally 3 sections and 10 Orders amended in CPC.

AMENDED SECTIONS IN CPC

Section	Before Amendment	After Amendment	Impact
Proviso to 26(2) inserted	-Nil-	Affidavit to be in form and manner as in Order VI Rule 15A	Specific averments in the pleadings
Section 35 substituted	Complete discretion of the court to impose costs on any of the parties to the Suit	For commercial disputes, while determining costs, court can look at various factors . (Eg-conduct of parties). The court can also impose costs on the successful party for rising frivolous claims	To deter frivolous claim in a civil suit.
Section 35-A(2) Omitted	Order of costs should not be more than Rs. 3000 or should not exceed the pecuniary value.	Omitted	The limit of Rs. 3000 is removed.

ORDER V- ISSUE AND SERVICE OF SUMMONS

Order	Substituted or omitted	Before	After	Impact
Second Proviso to Order V Rule 1(1)	Substituted	Written Statement should be filed within 90 days from date of service of summons.	Written Statement to be filled within 30 days from service of summons, thereafter 90 days extra, but with leave of court. Court can impose costs	Strict time limit to file written statement, in case of default, defendant forfeits the right to file written statement. For the delay, the court can impose costs.

ORDER VI- PLEADINGS

Order	Substituted, omitted or inserted	Before	After	Impact
Order VI Rule 3A	Inserted	-Nil-	For commercial dispute the pleading should be as per HC rules or practice directions, whichever is prescribed.	Specific format to be followed while filing pleadings.
Order VI Rule 15A	Inserted	-Nil-	Verification of pleadings and to be supported by Statement of Truth	If pleadings are not verified, court can strike out those pleadings.

*Statement of Truth attached to the Commercial Courts Commercial Division, Commercial Appellate Division of High Courts (Amendments) Act, 2018

ORDER VII- PLAINT

Order	Substituted, omitted or inserted	Before	After	Impact
Order VII Rule 2A	Inserted	-Nil-	To disclose details when interest is sought by plaintiff in the suit	Specific details and to avoid vague averments.

ORDER VIII- WRITTEN STATEMENT

Order	Substituted, omitted or inserted	Before	After	Impact
Proviso to Order VIII Rule 1	Substituted (same as Second Proviso to Order V Rule 1(1))	Written Statement should be filed on such other day but within 90 days from date of service of summons. (same as Second Proviso to Order V Rule 1(1))	Written Statement to be filled within 30 days from service of summons, thereafter 90 days extra, but with leave of court. Court can impose costs	Strict time limit to file written statement, in case of default, defendant forfeits the right to file written statement. For the delay, the court can impose costs.
Order VIII Rule 3A	Inserted	-Nil-	Denial by the defendant to be specific and alternative events should be stated.	Court can narrow down the dispute and issues.
Proviso to Rule 5(1)	Inserted	-Nil-	If allegations not denied in manner, then it shall be take to be admitted	Deter vague denials
Second Proviso to Rule 10	Inserted	-Nil-	No extension for filing written statement	Specific deadline to complete pleadings

ORDER XI- FULLY SUBSTITUTED DISCOVERY, DISCLOSURE AND INSPECTION OF DOCUMENTS AND ETC

Order	Substituted, omitted or inserted	Before	After	Impact
Order XI	Substituted	No time limit given to complete the procedure	Time specified to complete the pleadings and thereafter Case Management Hearing to Start.	Time bound manner of completing the pleadings, so as to avoid any delay
Order XI Rule 4 (Important Rule)	Substituted	-Nil-	Statement of Admission and Denial of Documents	Complete and comprehensive pleadings

ORDER XIII A- INSERTED SUMMARY JUDGMENT

Order	Substituted, omitted or inserted	Before	After	Impact
Order XIII -A	Inserted	-Nil-	Adjudication of commercial dispute without oral evidence and the court can pass a conditional order	Decide the claim or part thereof without oral hearing

ORDER XVA- INSERTED CASE MANAGEMENT HEARING

Order	Substituted, omitted or inserted	Before	After	Impact
Order XV -A	Inserted	-Nil-	CMH to be held within 4 weeks from admission and denial of Documents. To have a time bound trial (Arguments to be closed within 6 months from 1st CMH	Time bound manner and court monitored trial, so that case can be completed at the earliest

*Order XV- Disposal of the Suit at the First Hearing is OMITTED

ORDER XVIII- CERTAIN RULES HAVE BEEN AMENDED/INSERTED HEARING OF SUITS AND EXAMINATION OF WITNESSES

Order	Substituted, omitted or inserted	Before	After	Impact
Order XVIII Rule 2(3A), (3B), (3C), (3D), (3E), (3F)	Substituted	Written Arguments to be filed before the conclusion of oral hearing	Written arguments to be filed within 4 weeks prior to the date of hearing	Written arguments will narrow down the issues in the oral arguments.
Order XVIII Rule 4(1A), (1B), (1C)	Inserted	-Nil-	Affidavits of witnesses to be filed and additional affidavits only after sufficient cause	Speedy and well managed trial.

ORDER XIX- INSERTED NEW RULES AFFIDAVITS

Order	Substituted, omitted or inserted	Before	After	Impact
Order XIX Rule 4, 5, and 6	Inserted	-Nil-	Court can regulate, redact and reject the evidence	Power of the Court to regulate the evidence

ORDER XX- SUBSTITUTED JUDGMENT AND DECREE

Order	Substituted, omitted or inserted	Before	After	Impact
Order XX Rule 1(1)	Substituted	Court to pronounce judgment at once or when practicable	Within 90 days of conclusion of arguments, the court shall pronounce the judgment	Burden shifted to court to pronounce judgment within time.

PART III - SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996

NEGOTIATING HISTORY

- Parliament enacted The Arbitration and Conciliation Act, 1996 (dated 16.08.1996) which came into force on and with effect from 22.08.1996 replacing an earlier 1940 Act.
- The 1996 Act which is now in vogue is modelled on the lines of the UNCITRAL Model Law
- An important facet of sublime philosophy underlying this 1996 Act is minimum judicial intervention.

SECTION 34: APPLICATION TO SET ASIDE ARBITRAL AWARD

- What is it?
  - Allows for an application to be filed in the court to set aside the arbitral award.
  - Only for Arbitration under Part I
- When? (limitation)
  - The Party has 3 months, from the date of receipt of the award, to file the set aside petition.
  - A further extension of 30 days is allowed, but not more.
- Formal requirements
  - In order to file an application certain conditions need to be fulfilled – limitation, prior notice to the other side needs to be issued (inserted vide Act 3 of 2016 w.r.e.f 23.10.2015)
  - Contours of section 34 are very limited which is in tune with minimum judicial intervention philosophy.

2015 AMENDMENTS

- The Arbitration And Conciliation (Amendment) Act, 2015, Act 3 of 2016 –(w.r.e.f. 23-10-2015).
- Amendments to section 34
  - Explanations were brought in
    1. "Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.
    2. Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.";
  - Insertion of – "sub section (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
    1. Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.";
  - Insertion of - sub section (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
  - Insertion of sub section (6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

2019 AMENDMENTS

- The Arbitration and Conciliation (Amendment) Act, 2019 No. 33 OF 2019

(11 out of 16 sections of the amending Act were notified and the same came into force on and w.e.f. 30.08.2019)

- Step to make India an arbitration-friendly country.
  - In Section 34 of the principal Act, in sub-section (2), in clause (a), for the words "furnishes proof that", the words "establishes on the basis of the record of the arbitral tribunal that" shall be substituted.

SIMPLEX INFRASTRUCTURE LTD. V. UNION OF INDIA
(2019) 2 SCC 455

- 3 months 30 days limitation / cap for a Section 34 application is non negotiable.

- No delay beyond this period is condonable.

FIZA DEVELOPERS AND INTER-TRADE PRIVATE LIMITED VS. AMCI (INDIA) PRIVATE LIMITED (2009) 17 SCC 796

AND

EMKAY GLOBAL FINANCIAL SERVICES LTD. V. GIRDHAR SONDHI (2018) 9 SCC 49

- Section 34 is a special remedy under a special enactment, expeditious disposal is of utmost importance
- Proceedings under section 34 is a summary procedure.

PUBLIC POLICY

- ***07.10.1993*** **- *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644**
- **17.04.2003 - *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705**
- **04.09.2014 - *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263**
- **25.11.2014 - *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49**

- **15.12.2016 - *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228**
- **08.05.2019 - *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131**

STATE OF BIHAR VS. BIHAR RAJYA BHUMI VIKAS BANK SAMITI (2018) 9 SCC 472

- Sub section (5) of section 34 is directory and not mandatory

- In paragraph 26, there is an observation about One year time line in sub section (6) of section 34.

ARBITRABILITY OF DISPUTES

(1) *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532

(2) *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788

(3) *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386

(4) *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706

(5) Lifestyle Equities CV PrinsBernhardplein, 1097JB, The Netherlands v. QDSeatoman Designs Pvt. Ltd. and others, 2017-5-L.W. 500 = (2017) 8 MLJ 385.

(6) Vidya Drolia and Others *v.* Durga Trading Corporation, 2019 SCC OnLine SC 358

(7) Vidya Drolia and others v. Durga Trading Corporation, final order dated 14.12.2020.

(8) Suresh Shah v. Hipad Technology India Private Limited, 2020 SCC OnLine SC 1038.

NON ARBITRABLE

(*i*) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(*ii*) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

(*iii*) guardianship matters;

(*iv*) insolvency and winding-up matters;

(*v*) testamentary matters (grant of probate, letters of administration and succession certificate); and

(*vi*) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

JURISDICTION

(1) Indus Mobile Distribution Private Limited vs. Datawind Innovations Private Limited and Ors., (2017) 7 SCC 678 = MANU/SC/0456/2017

(2) Brahmani River Pellets Limited *v.* Kamachi Industries Limited, 2019 SCC OnLine SC 929 = MANU /SC /0968 /2019

(3) BGS SGS SOMA JV vs. NHPC Ltd., 2019 SCC OnLine SC 1585 = MANU/SC/1715/2019

SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD. VS. NATIONAL HIGHWAYS AUTHORITY OF INDIA LTD.

- Facts
  - The dispute arose out of a contract between the parties for construction of a four-lane bypass on a National Highway in the State of Madhya Pradesh. The agreed method of compensation for inflated prices was the Wholesale Price Index ("WPI") following 1993 – 1994 as the base year.
  - National Highways Authority of India ("NHAI") subsequently issued a circular revising the WPI to follow 2004 – 2005 as the base year for calculating the inflated cost, which was disputed by Ssangyong.
  - The parties referred this dispute to a three member arbitral tribunal. The majority award upheld the revision of WPI as being within the terms of the contract. Challenged before Delhi High Court and then the Supreme Court.
- Issue
  - The definition of public policy after the 2015 amendment - The Appellant's appeal relied on two sub-sections of S.34 of the A&C Act- s.34(2)(a)(iii) and s.34(2)(b)(ii).
  - The prospective nature of the 2015 amendment
  - Recognition of minority decisions

SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD. VS. NATIONAL HIGHWAYS AUTHORITY OF INDIA LTD. 2 JUDGE BENCH

- Holding
  - The Supreme Court acknowledged the substantial changes and narrowing of the scope of appeals from arbitral awards that had resulted from the 2015 amendments. The Supreme Court held that the amendments to s.34 would apply to appeals made after the date of the 2015 amendments even though the arbitral proceedings had commenced prior to the date of such amendments.
  - Second ground of appeal under s.34(2)(b)(ii), the Supreme Court noted that the parameters of challenge under this section is that "*substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court*". By applying the unilateral NHAI Circular and by substituting a workable formula under the agreement between the parties with another formula, the Supreme Court held that the majority award had effectively created a new contract between the parties. Thus, the majority award was *de hors the agreement between the parties*.
  - The Court went on to say that "*This being the case, a fundamental principle of justice has been breached, namely, that* ***a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court***."
  - The Supreme Court added a note of caution that the ground under Section 34(2)(b)(ii) is available only in very exceptional circumstances, and that, "*Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which... is contrary to the ethos of Section 34 of the 1996 Act.*
  - The Supreme Court thus allowed the appeal and set aside the majority arbitral award (and the High Court orders that had upheld the majority award). It also noted that when an appeal against an arbitral award is allowed, the scheme of s.34 requires that the disputes decided by such award would need to be referred afresh to another arbitration. At the same time, it acknowledged that any new proceedings would run counter to a key objective of the Act, i.e., speedy resolution of disputes. In the specific facts before it, however, there was also a minority arbitral award which was based upon the formula mentioned in the agreement between the parties. The Supreme Court exercised its inherent powers under Article 142 of the Constitution of India to uphold the minority arbitral award, and directed that the award, together with interest, be executed between the parties.
  - With respect to the section 87 the Supreme Court held that , if enacted it will be a back-burner to important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters.

CONCLUSION

Salutary principles and sublime philosophy underlying Section 34 are inter-alia constituted by:

(a) Delicate / fine balance between sanctity of finality of awards and sacrosanct need for judicial review

(b) Limited contours / perimeter made up of eight slots, and

(c) Expeditious disposal.