

NATIONAL JUDICIAL ACADEMY



CONFERENCE FOR HIGH COURT JUSTICES ON COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION

P-1156

22nd March to 24th March 2019

PROGRAMME REPORT

PROGRAMME COORDINATOR:

Paiker Nasir Faculty, NJA

The NJA organized a three day “Conference for High Court Justices on Commercial Division and Commercial Appellate Division”, from 22nd to 24th March, 2019. With the advent of the Commercial Courts Act, 2015, High Courts have to manage adjudication of a variety of high value commercial disputes and concerns. The issues are new and intricate in nature, and require in depth knowledge and practical understanding in the light of steady rise in industrialization and globalization.

The conference facilitated deliberations among participant justices on contemporary issues and recent developments in commercial disputes. It provided a forum for discussing normative issues pertaining to the genesis, importance, benefits & challenges: commercial courts, interplay between Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996, interpretation of distribution & licensing agreements: disputes & resolution, intellectual property rights : copyright, design, trademark and patent, joint venture agreements, interpretation of construction and infrastructure contracts and adjudication of commercial disputes. Creating expertise at the High Court level is a critical factor for capacity building in order to address backlog and increase competencies to serve as a fair arbiter both in domestic and international aspects.

SESSION 1

Commercial Courts: Genesis, Importance, Benefits & Challenges

Speaker: Mr. Somasekhar Sundaresan

Chair: Justice Kurian Joseph

The session commenced by discussing the genesis of commercial courts. While discussing the procedure involved in making of any legislation it was accentuated that in many foreign countries background studies that includes both judicial and financial impact of a particular legislation on the country are conducted. Whereas in India, no background studies takes place. It was opined that with respect to Commercial Courts due to lack of

such related studies it becomes difficult to align the Act with all the stakeholders involved. Rather there is a need for a new jurisprudential theory to be devised to know the expectations of the people. It was also suggested that there is a requirement to understand whether we have the apt number of expertise required?

It was highlighted that Section 20 of the Commercial Courts Act 2015 [hereinafter, the Act] provides for training of judges who may be appointed to the commercial courts, commercial appellate courts, commercial division or the commercial appellate division in a High Court. Various definitions under Section 2 of the Act were discussed elaborately. The scheme of the Act, constitution of commercial courts at the district level under Section 3, power of the judiciary to create commercial court division under section 4, appellate part under section 14, pre-institution mediation under section 12A(1) and various other significant sections of the Act i.e. - section 7, 10(1) etc. were also deliberated upon.

SESSION 2

A Written Constitution: Construing the Sounds of Constitution's Silences

Speaker: Prof. Timothy Endicott

Chair: Justice Kurian Joseph

Session two was a special session with Prof. Timothy Endicott (Professor of Legal Philosophy) University of Oxford as the key speaker. This special session was intended to benefit from the rich academic experience of Prof. Endicott and to facilitate an interaction between him and participant High Court Justices. The theme of the session was *A Written Constitution: Construing the Sounds of Constitution's Silences* which was chaired by Justice Kurian Joseph. The session initiated with discussion on the Bill of Rights, 1689 and the Habeas Corpus Act, 1679. The relevance of the Doctrine of Basic Structure in the Indian Constitution was elaborated. The procedure for appointment of

judges in India and U.K. was deliberated and it was observed that cultural and political force do affect the acceptance of a judges however, with changing times these cultural and political forces do tend to change themselves. On the point whether there ought to be, or are any guidelines for construing silences; what could be the legitimate sources from which such extra-textual interpretation could be traced, it was suggested that silences must be reached out through the constitutional vision of justice. In the light of Aadhar judgment¹ and the earlier judgment *Justice K. S. Puttaswamy (Retd.) & Another v. Union of India & Ors*², on construing the Right to Privacy as comprehended within the spectrum of entrenched rights under the Indian Constitution (In Part III), though not textually spelt out, it was suggested that judicial review is the remedy for the silences in the constitution. The Supreme Court's NJAC Judgment³, which also interpret silences formed an integral part of the deliberation.

SESSION 3

Intellectual Property Rights : Copyright and Design

Speaker: Mr. Rajiv Agarwal

Chair: Justice Kurian Joseph

The session underlined the seven objectives of the National Intellectual Property Rights Policy, 2016 i.e., IPR awareness: outreach and promotion, generation of IPRs, legal and legislative framework, administration and management, commercialization of IPR, enforcement and adjudication, human capital development. Various intricacies involved in taking enforcement action against online copyright piracy like- territorial limitations, change of URLs, statutory safe harbors, anonymity etc. was discussed and it was pointed out that CIPAM (Cell for IPR Promotion and Management) is working closely with NIXI (National Internet Exchange of India) to combat piracy on .IN domain. It was further highlighted that the John Doe Orders have emerged as an effective judicial remedy for

¹ *Justice K. S. Puttaswamy (Retd.) & Another v. Union of India & Ors* (2018) 1 SCC 809

² (2017) 10 SCC 1

³ *Supreme Court Advocates on Record Association v. Union of India* (2016) 5 SCC 1

protecting copyrighted material online, it is a restraining order against unknown defendants and such order prohibits all known and unknown defendants from communicating, making available, displaying, release, uploading and downloading copyrighted work.

SESSION 4

Intellectual Property Rights : Trademark and Patent

Speakers: Mr. Rajiv Agarwal & Mr. Anand Grover

Chair: Justice Kurian Joseph

The session commenced with a brief on the Indian patent regime and its evolution from 1911 to 2005. Significance of the TRIPS agreement was emphasized. Key issues with respect to Patents i.e. - compulsory license, working of patents, evergreening, patent lineage and data exclusivity were discussed in detail. The significance of the Novartis judgment⁴ was also highlighted. Compulsory License in the light of Nexavar Case⁵ in which the Apex Court upheld the decision of the Intellectual Property Appellate Board and the Bombay High Court, sanctioning the grant of a compulsory license for Bayer's anti cancer drug 'Nexavar' was also discussed.

SESSION 5

Interplay between Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996

Speakers: Mr. Anil Xavier & Mr. Somasekhar Sundaresan

Chair: Justice S.C.Dharmadhikari

The discussion initiated by highlighting the introduction of mandatory pre-institution mediation as per the insertion of Section 12A via 2018 Amendment to the Commercial Courts Act, which entails that where a suit does not contemplate urgent interim relief,

⁴ Novartis Ag v. Union of India, (2013) 6 SCC 1

⁵ Bayer Corporation v. Natco Pharma Ltd. (Natco v. Bayer) *Order (No. 45 of 2013)*

the plaintiff has to undergo pre-institution mediation but this is not applicable for arbitration matters. Certain inconsistencies in the procedures when it relates to arbitration as under the Arbitration Act (as amended in 2015) and the Commercial Courts Act, especially with respect to Section 13(1) and Section 13(1A) were also discussed. Furthermore, the case of *Kandla Export Corporation and Another v OCI Corporation and another*⁶ was discussed in which the Supreme Court held that there was no further right of appeal under section 13(1) of the Commercial Courts Act in the matter of arbitration where such right of appeal is not provided under the Arbitration Act. *In D.M. Corporation Pvt. Ltd. Vs. The State of Maharashtra and Ors*⁷ the court was of the view that, if the subject matter of arbitration is a 'commercial dispute' of a 'specified value', it has to be held that, Commercial Court will alone have the jurisdiction to entertain an application under Sec. 9 of the Arbitration Act. It was opined that with proper interplay between the Arbitration Act and the Commercial Courts Act, the entire arbitration process, right from its commencement, interim applications, challenge of award and enforcement of awards becomes effective and efficient so as to make India a preferred seat of Arbitration.

SESSION 6

Interpretation of Distribution & Licensing Agreements: Disputes & Resolution

Speakers: Mr. Atul Sharma & Mr. Anuj Trivedi

Chair: Justice S.C.Dharmadhikari

The session commenced with discussion on the definition of commercial dispute, distribution agreement followed by deliberations on the difference between distribution agreements and license agreements. The key issues which require careful deliberation at the time of drafting licensing and distribution of agreements were set out. It was emphasized that there is a change in the model of distributorship and how it is shifting from the from traditional distributorship model. The discussion accentuated that the

⁶ (2018 (2) Scale 368)

⁷ (2018(4) MHLJ 457)

recent amendments in the policy foreign direct investment (FDI) in e-commerce have had a major impact on the existing online marketplace in India. The draft of e-Commerce policy issued by the government was elaborated. The concepts of multi-level marketing and direct selling were also discussed. The liabilities and duties of intermediaries formed an integral part of the discourse.

SESSION 7

Joint Venture Agreements

Speaker: Mr. Lalit Kumar

Chair: Justice S.C.Dharmadhikari

The session commenced with brief discussion on the definition of Joint Venture, (hereinafter JV). It was emphasized that JV partners undertake specific obligations for the effective running of the JV, for example: grant of technical assistance and know-how, providing facility of established distribution channels, providing marketing expertise, providing management services, separate agreements may be entered into between the respective parties and the JV for some of the above obligations etc. Thereafter, important terms of a JV that includes- object and scope of JV, role and contribution of JV partners, funding / issuance of capital, financial arrangements, composition of board / governing body, management of JV - appointment of CEO/MD, transferability of shares, termination of the JV, indemnity etc., were discussed. Forms of JV i.e., unincorporated JV which includes partnership firm, association of person and trust / society (not for profit ventures) along with incorporated JV that includes private limited company, public limited company and limited liability partnership (LLP) formed an essential part of the deliberations.

SESSION 8

Interpretation of Construction and Infrastructure Contracts

Speaker: Mr. Atul Sharma

Chair: Justice A.K. Goel

The session commenced with emphasis and significance of the Contract Act in the interpretation of construction and infrastructure contracts. The two kinds of infrastructures namely- public infrastructure and the PPP (Public-Private Partnership) infrastructure were discussed in detail. It was stressed that in case of PPP, the return of investment and the effectiveness are the two factors that are considered. Whereas, in case of public infrastructure, there is an invitation to tender and thereafter, a contract is entered into by the parties concerned. The private law remedy and the public law remedies were also discussed. Thereafter, model concession which is a right granted by the state to a private company or joint venture was explained. The concepts of brownfield and greenfield under model concession was elaborated.

SESSION 9

Adjudication of Commercial Disputes: Open Discussion

Chair: Justice A.K. Goel

The deliberation commenced with emphasis on the fact that willingness of all the stakeholders to accept the Act is the purpose of any statute. This was followed by an exhaustive discussion on Article 226 of the Indian Constitution. Thereafter the public law remedies and the private law remedies under the Contract Act were elaborated upon. Issues with respect to the contracts (directly) between the state governments and foreign parties were considered of utmost importance and the need for some guideline for venturing into such contracts was expressed. The discussion stressed that the idea behind the Commercial Courts Act, 2015 is to establish specialized courts with the purpose to

lessen the burden of the civil courts and expedite the commercial matters. It was opined that where legal institutions are effective there the financial reforms are significantly remarkable. The session concluded with emphasis on pre-institution mediation and stressed that the use of section 89 of the Arbitration and Conciliation Act is slow and it needs to be used quite often.