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**CRITICAL APPRECIATION OF SECTION 12A (1) OF COMMERCIAL
COURTS ACT BY WAY OF LEGAL FICTION**

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“Laws are effective when individuals abide by them or, alternatively, when they do not, but have to face legal sanctions for their non-compliance.”

-Judith Hahn

ABSTRACT

The whole purpose of enforcing The Commercial Courts Act, 2015 was to improve the ease of doing business and the economy of the country. An Act to provide for the constitution of Commercial Courts, [Commercial Appellate Courts,] Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto.

Keywords: Constitution, Commercial Courts, Division, Dispute, High Court

MEANING

Section 2(c) of The Commercial Courts Act, 2015 defines “commercial disputes” as under:

“Commercial dispute” means a dispute arising out of—

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to

mercantile documents, including enforcement and interpretation of such documents;

(ii) export or import of merchandise or services;

(iii) issues relating to admiralty and maritime law;

(iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(v) carriage of goods;

(vi) construction and infrastructure contracts, including tenders;

(vii) agreements relating to immovable property used exclusively in trade or commerce;

(viii) franchising agreements;

(ix) distribution and licensing agreements;

(x) management and consultancy agreements;

(xi) joint venture agreements;

(xii) shareholders agreements;

(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

(xiv) mercantile agency and mercantile usage;

(xv) partnership agreements;

(xvi) technology development agreements;

(xvii) intellectual property rights relating to registered and unregistered trademarks,

copyright, patent, design, domain names, geographical indications and semiconductor integrated

circuits;

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- (xviii) agreements for sale of goods or provision of services;
- (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;
- (xx) insurance and re-insurance;
- (xxi) contracts of agency relating to any of the above; and
- (xxii) such other commercial disputes as may be notified by the Central Government.

Explanation. —A commercial dispute shall not cease to be a commercial dispute merely because—

- (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;
- (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

Initially, the whole motive to enforce this legislation was to facilitate speedy disposal of high-stake commercial disputes. Nevertheless, Section 3 of the Commercial Courts Act, 2015 lays down the pecuniary jurisdiction of commercial courts is as under:

“3. Constitution of Commercial Courts. — (1) The State Government, may after consultation with the concerned High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those Courts under this Act:

[Provided that with respect to the High Courts having ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, constitute Commercial Courts at the District Judge level:

Provided further that with respect to a territory over which the High Courts have ordinary original civil jurisdiction, the State Government may, by notification, specify such pecuniary value which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction exercisable by the District Courts, as it may consider necessary.]

[(1A) Notwithstanding anything contained in this Act, the State Government may, after consultation with the concerned High Court, by notification, specify such pecuniary value which shall not be less than three lakh rupees or such higher value, for whole or part of the State, as it may consider necessary.]

(2) The State Government shall, after consultation with the concerned High Court specify, by notification, the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time to time, increase, reduce or alter such limits.

(3) The [State Government may], with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a [Commercial Court either at the level of District Judge or a court below the level of a District Judge].

The Code of Civil Procedure has also been amended to apply to the Commercial Courts. Section 16 of the Commercial Courts Act, 2015 lay down that:

16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes. — (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their

application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.

(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.

The concept of pre-litigation mediation is another step for facilitating speedy disposal of commercial disputes. Section 12A of the Commercial Courts Act, 2015 deals with the procedure of pre-litigation mediation and reads as under:

“Section 12A: Pre-Institution Mediation and Settlement. 12A. (1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.”

In practice, an application under Section 12-A of the Commercial Courts Act, 2015 is filed before the in charge, Mediation Centre of the District which has territorial jurisdiction over the subject –matter of the case and Notice of Mediation proceedings is issued to the Opposite Party. Thereafter, fate of the mediation proceedings depends entirely on the attitude of the Opposite party.

LEGAL FICTION-I

A, a businessman has to recover a sum of Rs. XYZ/- from another businessman B for a commercial transaction; and files an application under Section 12-A of the Commercial Courts Act, 2015 before the in charge, Mediation Centre concerned. Three times Notice is issued to B by the in charge, Mediation Centre. B receives all the three Notices and chooses not to respond to it or appear before the Mediation Centre on the next date of hearing. What option does A have?

A has no other option but to obtain a Non-starter report from the Mediation Centre and file a Commercial Suit before the Principal Judge, Commercial Courts. A file a Commercial Suit for Recovery of the dues against B. Court issues summons to B. B receives the summons; but this time, he appears before the court; because he is aware that in case of his non-appearance before the court, Court may proceed ex-parte and eventually pass a decree against B.

OBSERVATION

No businessman wants to take resort to litigation in the first instance. It is only when he gives up on the opposite party and loses all hope to recover the dues that he engages a lawyer to set the legal ball rolling. Before enforcement of the Commercial Courts Act, 2015, like any other civil suit, A would have filed a civil suit for Recovery in the court of Principal Judge of the courts having pecuniary and territorial jurisdiction; Summons of the case would have been served upon B and it is very unlikely of him to not appear before the court of law to defend the civil suit for recovery; or chose to have the court proceed ex-parte against him.

The process of issuance and serving of the Mediation Notices upon the opposite party takes one month to three months' time depending on the mode of execution of service of notices and

the rigidity of the in charge, Mediation centre with respect to the satisfaction of the proof of service of the notices of the Mediation Centre. The process of issuance and service of court summons also takes similar time. There is no accountability for the time lost in the futile exercise of service of notice of Mediation upon B before filing of the commercial suit in the court of law. B chose not to join the mediation proceedings because he knew that no adverse action can be taken against him for non-appearance. Section 12-A of the Commercial Courts Act, 2015 is a toothless piece of legislation; which in the above-mentioned scenario might prove to be a waste of time, energy and money of the Claimant/Plaintiff and the court machinery.

LEGAL FICTION-II

A, a businessman has to recover a sum of Rs. XYZ/- from another businessman B for a commercial transaction; but his claim is hopelessly time barred. Now, A having no option to take the legal recourse by way of filing a civil suit; pays a prescribed nominal fee and files an application under Section 12-A of the Commercial Courts Act, 2015 before the in charge, Mediation Centre concerned. In a routine and mechanical manner, three times Notice is issued to B by the in charge, Mediation Centre. B receives the Notice. What option does B have?

OBSERVATION

B will participate in the Mediation proceedings and will incur time, money and energy in explaining to the Mediator, how A's claim is time-barred; to which the Mediator may or may not agree depending on his legal expertise. The Mediator might persuade B to pay something to A just to bury the hatchet. If B pays some amount to A, then A would recover an amount which legally he could never recover from B.

Even if B does not join the mediation proceedings, A might obtain a non-starter report from the Mediation Centre and file a commercial suit for recovery deriving a lame cause of action from the date of non-starter report.

CONCLUSION

The law is still evolving. Problems in applying the law were inevitable. Nevertheless, the courts are pro-actively taking note of such difficulties such as the decision of Hon'ble Delhi High court in the case of *Kapil Goel v. Ram Dulare Yadav @Gandhi Bhai* (2022/DHC/004923). Mere enactment will not serve the purpose; rather the procedure of implementation should also serve the object of the Commercial Courts Act. There has to be check and balance mechanism at the stage of filing of the Application under Section 12-A of the Commercial Courts Act, 2015; so that no one can misuse the Legal Machinery for his vested interests. On the other hand, a non-starter report should also culminate into a presumption against the opposite party during the trial; in case of non-appearance of the opposite party despite proof of service of the Notice of the Mediation Centre.

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