

Appeals under the Commercial Courts Act. A tale of an undelivered promise. Mr. Ajay J Nandalike Advocate Bangalore

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The Commercial Courts Act, 2015 ('the Act') was promulgated with an intention to provide for speedy disposal of high value commercial disputes involving complex facts and questions of law and to create a positive image to investors about the independence and responsiveness of the Indian legal system . The Act provided for constitution of Commercial Courts and designation of Commercial Appellate Courts or Commercial Division of High Court to deal with appeals arising from Commercial Courts.

Detailed amendments were made to the Civil Procedure Code, 1908 ('CPC') insofar as it applies to a commercial dispute including provisions limiting the period for filing of written statement, provisions for disclosure and discovery of documents, Case Management hearing to resolve all pending issues such as framing of issues, providing for list of dates for completion of various stages of the Trial etc, filing of written arguments etc. The procedure for filing of evidence

affidavits, restricting the scope of cross-examination, day to day trial are meant to expedite the disposal of commercial disputes. Any judgment or decree passed in a Commercial Dispute is made appealable under Section 13.

This article explores the provisions of the Commercial Courts Act, 2015 to examine whether the intention of the Act to provide for speedy disposal is achieved insofar as it applies to Commercial Appeals.

In order to ensure a speedy disposal of appeals, the Legislature provided for the following:

a) Designating specific courts as Commercial Appellate Courts or creating Commercial Division of High Court so that judges having experience in commercial disputes would adjudicate the appeals.

b) reduce the period of appeal from 90 days as provided in the Limitation Act to 60 days in terms of Section 13(3) of the Act.

c) Section 14 which provided that the Appellate Court shall endeavour dispose the appeal within a period of 60 days from the date of filing.

Commercial Appeals under Section 13 of the Act would be governed by the procedure provided under Section 96 read with Order XLI CPC. Interestingly, the endeavour under Section 14 to dispose the appeal within 60 days is reflected in Order 41 Rule 11-A of CPC. A suggestion was made to include a proviso that the Court must give reasons if it is unable to dispose the appeal within 60 days akin to TDSAT which was not heeded. Given the huge pendency of matters, designating a specific court to hear commercial appeals is an excellent idea but the overburdening of courts with regular matters has ensured that the Commercial Appellate Courts or Commercial Divisions of High Court also deal with other roster matters. The appeals are listed along with those matters thus ensuring that the statutory intent is reduced to dust.

Additionally, appeals involve a series of other miscellaneous matters such as interim applications for stay of execution of decree, furnishing of security if

necessary, applications for additional evidence, filing of paper books (which is governed by the procedure of the respective High Courts). There is a possibility that issuance of court notice to the other side would take a few weeks and the matter is listed thereafter. If sufficient process fee is not paid, then notice is not sent and the matter has to be listed again for issuance of notice.

In fact, many High Courts provide for 30 to 60 days' time to comply with office objections which is applicable to every filing including a Commercial Appeal. The non-compliance with office objections is first listed before Registrar / Court Master and later on before Court and opportunities are granted to comply with the objections. In fact, Order XLI Rule 19 CPC itself provides for readmission of appeal if it is dismissed for any default.

When Courts have failed to achieve the mandate provided for in Order 41 Rule 11-A for disposal of appeals within 60 days, compliance of Section 14 of the Act is unlikely. Therefore, the Act has failed to deliver on the promise of an expedited disposal of the commercial dispute. Even if the Commercial Court passes a judgment in terms of the Act, there are no special procedures contemplated for disposal of appeals under the Act.

This article recommends certain measures which can be considered by High Courts to be issued as Practice Directions under Section 18 of the Act or by framing appropriate Rules under the High Court Act or Letters Patent Rules.

First measure would be for compulsory issuance of notice to the other side before filing of the appeal. This would be akin to the amendment made to the Arbitration and Conciliation Act, 1996 under which Section 34 (5) was inserted which requires that an application under Section 34 for setting aside the arbitral award be filed 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. This would save considerable time in issuance of notices to the other side.

Second measure would be to ensure that the Commercial Appellate Court becomes a paperless court. This means that all the Trial Court records must be scanned and cross-referenced. The High Court can frame guidelines for hyperlinking (online equivalent of Post-It) and indexing of the records such that it is as easily accessible as a piece of paper. The instructing counsel / arguing counsel should be able to point at a relevant portion and it gets highlighted for all persons in Court. Software of this nature exists and is in use in the United States and United Kingdom. One would have noticed situations wherein paper books are not numbered properly resulting in wastage of time in identifying the appropriate page delaying the hearing and hampering the flow of arguments. Imagine if one can hyperlink or provide an e-index such that one can refer to one document in a separate window while reading from another document.

Third measure would be to have a two-tier case management hearing. In the first case management hearing, direct the Appellant to file written arguments and Respondent to file reply written arguments within stipulated periods. The written arguments must hyperlink the relevant exhibit / pleading for ease of reference. Both parties must also thereafter file their draft points for determination based on the written arguments. They must also make a list of all preliminary / interlocutory matters which they want the Court to adjudicate on such as stay of execution of decree, furnishing security, additional evidence and other miscellaneous matters. Parties must be directed to have a conference to discuss amongst themselves to arrive at consensus on these matters. This can be hearing before the Registrar / Court Master wherein a standard template order can be furnished providing a date for hearing.

The Court will have all the information in two lists: (i) containing all interlocutory matters on which parties want a decision as they have been unable to arrive at an understanding; (ii) Points for determination as per both parties. On the date fixed for the second case management hearing, the Court will decide on the

following: (i) All interlocutory matters including stay of execution of decree, furnishing security, additional evidence and other miscellaneous matters; (ii) Arrive at the points for controversy and develop the points for determination in consultation with counsel so as to avoid adjudication on unnecessary aspects. This will be an order of the Court which will be incorporated into the final judgment that the Court will pass.

Fourth measure would be to specify a day in a week wherein an afternoon is spared for hearing of commercial appeals having an advance list on the basis of the case management hearing dates. Even for preparation of this list, consent letters from both counsel indicating their list of favourable dates may be taken at the case management hearing stage.

As written arguments are already filed, the Court will be familiar with the issues involved and the oral arguments can be cut short or a time be fixed for completing oral submissions. This is followed even by the US Supreme Court and host of other Courts across the world and is not considered as impinging the access to justice.

Ultimately, the intention of the parties and the Courts collectively will result in an expedited disposal of the Commercial Appeal no matter whatever law or practice direction is issued. The measures suggested in this article are used throughout the world in some form or another. While incorporating some of the best trial practices for adjudication of a commercial suit, the legislature has failed to show the same effort while framing provisions for Commercial Appeals resulting in an undelivered promise of speedy disposal. One can only hope that the High Courts take the matters into their own hands to fulfil the legislative mandate.

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