

IN THE HIGH COURT OF BOMBAY AT GOA**LD-VC-CW-88-2020**

Gaurang Manguesh Suctancar

.... Petitioner

Versus

Sonia Gaurang Suctancar

.... Respondent

Shri S.G. Desai, Senior Advocate with Shri Parag Rao, Advocate for the Petitioner.

Shri S.D. Lotlikar, Senior Advocate with Shri J. Karn, Advocate for the Respondent.

Coram:- DAMA SESHADRI NAIDU, J.**Reserved on : 16th July 2020****Pronounced on : 20th July 2020****ORDER :****Introduction:**

A partner invokes the arbitration provision in the deed of partnership and applies under Section 9 of the Arbitration and Conciliation Act, 1995 ("the Arbitration Act"). He files that application before the Senior Civil Judge's Court, designated as the Commercial Court under the Commercial Courts Act 2015. But the Court refuses to entertain the application; it returns it to be presented to a proper court.

Nomenclature:

Procedural generic labels like *appellant*, *claimant*, *defendant*, *petitioner*, *plaintiff*, and *respondent* "dehumanize your narrative and make it more abstract and hard to follow.^[1]" So says Bryan A. Garner, the guru of good legal writing. But here I have used only those generic labels because the petitioner and the respondent have had a simmering matrimonial discord. It is better their privacy is preserved. Technically, the nomenclature of the learned Judge concerned is the "Ad-hoc Senior Civil Judge, 'A' Court, Panaji". I have simply

¹[] Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (3rd ed., OUP, 2014) 245

used the expression “Senior Civil Judge”. Similarly, I have referred to the “Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance 2018”, in short, as “the 2018 Amendment.”

Issue:

2. For adjudicating an application under Section 9 of the Arbitration Act, which is the forum: Is it the court as defined under Section 2 (1) (e) of the Arbitration Act, read with Section 5 of the Goa Civil Courts Act 1965 or is it the Commercial Court under Section 3 (1) of the Amended Commercial Courts Act 2015?

Facts:

3. The petitioner and the respondent are husband and wife, besides being partners in four Limited Liability Partnership Firms. The husband holds the majority share, but that hardly impinges on the jurisdictional issue before us.

4. The husband and wife have faced matrimonial discord and that has spilt over to and affected their business relationship, too. It has, then, led to litigation. The respondent filed two suits before the Commercial Court (Senior Civil Judge), Panaji. Faced with pre-institution mediation and settlement, she withdrew those two suits. Later, she applied under Section 9 of the Arbitration Act before the District Court, Panaji, treating that court as the Commercial Court. But before that, when the respondent’s suits were pending, the petitioner, in fact, invoked Section 9 of the Arbitration Act and applied before the Senior Civil Judge’s Court, Panaji, treating it as the Commercial Court.

5. Even before the respondent could enter her appearance, the Senior Civil Judge’s Court returned the petitioner’s application. She has held that for adjudication under Section 9 of the Arbitration Act, it is the District Court that should be treated as the appropriate court, in terms of Section 2 (1) (e) of the Arbitration Act and Section 5 of the Goa Civil Courts Act.

6. Aggrieved, the petitioner has filed this Writ Petition under Article

227 of the Constitution of India.

Submissions:

Preliminary Objection:

First Objection:

7. Shri Lotlikar, the learned Senior Counsel for the respondent, has raised two preliminary objections against the petitioner's filing this writ petition. According to him, the petitioner has an efficacious alternative remedy. That is, any order passed by a commercial court is amendable to appeal under Section 13 (1) of the Commercial Courts Act. To support this contention, he has cited *Hameed Kunju v. Nazim*^[2], and *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society*^[3].

The Second Objection:

8. The second objection concerns the parallel proceedings the respondent initiated before the District Court. Treating that court as the Commercial Court, the respondent applied under Section 9 of the Arbitration Act. There, the petitioner objected to the District Court's treating itself as the Commercial Court. As the arguments on that preliminary point have been concluded there, this Court had better await the outcome.

9. I reckon the first objection is substantial, and the second a matter of propriety or prudence—if ever.

The Petitioner's Response:

10. Shri Desai, the learned Senior Counsel for the petitioner, has submitted that the designated Commercial Court has refused to treat itself as a commercial court and has thus declined to exercise jurisdiction under the Commercial Courts Act. So, the petitioner's invoking Section 13 (1) of that Act does not arise.

11. As to the second objection, the learned Senior Counsel has provided me with the chronological details and has contended that the petitioner has

2 [] (2017) 8 SCC 611

3 [] (2019) 9 SCC 538

first approached the Commercial Court. When those proceedings were pending, the respondent went before the District Court and tried to invest that court with jurisdiction. Thus, she wanted to invoke parallel, but subsequent, proceedings before an incompetent court. So those proceedings are *coram non judicie* and, as such, this Court ought not to await the outcome there. Shri Dessai has relied on *BGS SGS Soma JV v. NHPC Ltd*⁴].

Ruling on Preliminary Objections:

Does the Petitioner have an efficacious alternative remedy?

12. In *Hameed Kunju*, the respondent suffered an order of eviction. He appealed against it and had it remanded. The case remanded, he did not appear before the trial court. So, again, he suffered orders of eviction. The petitioner laid execution and recovered possession; the execution petition was closed. The respondent filed no appeal, nor did he apply to the trial court for having the order of eviction set aside. Instead, he went to the High Court under Article 227, challenging (1) the eviction order, (2) the executing court's order of recovering possession, (3) the delivery report, and (4) the closure of execution case. The High Court allowed the application under Article 227 of the Constitution. The Supreme Court interdicted the High Court's judgment.

13. Indeed, in *Hameed Kunju*, besides other aspects, the respondent did have an efficacious alternative remedy but failed to invoke it.

14. In *Virudhunagar Hindu Nadargal*, the Supreme Court has cautioned that the "courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before Civil Courts in terms of the provisions of Code of Civil procedure and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasijudicial authorities and tribunals."

15. Regarding the cases falling under the first category, which may involve suits and other proceedings before civil courts, according to

⁴[] (2019) SCC OnLine SC 1585

Virudhunagar Hindu Nadargal, the availability of an appellate remedy under CPC may have to be construed as a near-total bar. It quotes with approval *Radhey Shyam v. Chhabi Nath*^[5] that “orders of civil court stand on a different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts.”

16. In *BGS SGS Soma*, the petitioner secured an arbitral award; aggrieved, the respondent challenged that award under Section 34 of the Arbitration Act, before the District Court, Faridabad, Haryana. The case was later transferred to a Special Commercial Court at Gurugram. But the petitioner wanted the Section 34 petition returned for representation before an appropriate Court at New Delhi or at Dhemaji, Assam.

17. Eventually, the Special Commercial Court, Gurugram, allowed the petitioner’s application and returned the Section 34 petition. Questioning this, the respondent filed an appeal—that is, he invoked Section 37 of the Arbitration Act, read with Section 13(1) of the Commercial Courts Act, as if the return of application were an award. The High Court of Punjab and Haryana, at Chandigarh, allowed the appeal.

18. On the petitioner’s approach, the Supreme Court has held that “there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals.” It is Section 37 of the Arbitration Act that determines the appellate remedy. Section 37(1), however, clarifies that appeals shall lie only from the orders set out in sub-clauses (a), (b) and (c) and from no others. But “the pigeonhole that the High Court in the impugned judgment has chosen to say that the appeals in the present cases were maintainable is sub-clause (c).” In this context, *BGS SGS Soma* has referred to the High Court’s reasoning—which is analogous to the respondent’s contentions here—and rejected it: “According to the High Court, even where a Section 34 application is ordered to be returned to the appropriate Court, such order would amount to an order “refusing to set aside

⁵[] JT 2009 (6) SC 511

an arbitral award under Section 34”.

19. *BGS SGS Soma* refers to the proviso to Section 13(1A) of the Commercial Courts Act, in which Order XLIII of the CPC—that is, appeals from Orders—is also mentioned. But any reference to Order XLIII is “conspicuous by its absence in Section 37 of the Arbitration Act”, which alone should be invoked by an aggrieved party to file an appeal against orders setting aside or refusing to set aside awards under Section 34.

20. To elaborate, *BGS SGS Soma* has held that the refusal to set aside an arbitral award “must be *under* Section 34, i.e., after the grounds set out in Section 34 have been applied to the arbitral award in question, and after the Court has turned down such grounds.” Admittedly, there was no adjudication under Section 34 of the Arbitration Act. The Special Commercial Court at Gurugram allowed an application filed under Section 151 read with Order VII Rule 10 CPC; it has merely held that it had no jurisdiction to proceed with the Section 34 application. In paragraph 22 of the judgment, *BGS SGS Soma* holds that “the appeals filed in the present case do not fall within Section 37 of the Arbitration Act, 1996 and are not maintainable.”

21. Here too, the petitioner approached the Senior Civil Judge’s Court on the premise it is the designated Commercial Court and that it should entertain his application under Section 9 of the Arbitration Act. But the Senior Civil Judge’s Court has refused to entertain that application—not on merits but on the jurisdictional count. If we apply the reasoning of *BGS SGS Soma*, for the petitioner to invoke the appellate remedy, the Senior Civil Judge’s Court must have considered the Section 9 application on the merits, the outcome notwithstanding.

22. Article 227 of the Constitution confers supervisory powers on the High Court precisely for, among others, this purpose: to ensure that the court below (a) has exercised the jurisdiction vested in it by law without any illegality or material irregularity or (b) has not failed or refused to exercise the jurisdiction vested in it by law. This case attracts point (b).

23. So I conclude that the petitioner has no alternative remedy, efficacious or not, other than invoking this Court's supervisory jurisdiction.

24. As to the second objection, if we notice the chronology, the respondent, first, filed two suits before the Senior Civil Judge's Court, treating it as the Commercial Court. Of course, the respondent tells us she initially went to the District Court but was told that she must go to the Subordinate Court. Second, for the reasons not relevant here, she withdrew those suits later. In the meanwhile, the petitioner filed the Section 9 application before the Senior Civil Judge's Court and argued the matter for interim protection. True, throughout, the matter remained at 'Stamp stage'; it was not given a regular number. When the petitioner was expecting an order on the merits, as his counsel puts it, the Senior Civil Judge's Court refused to entertain the application on the grounds of its lacking the inherent jurisdiction.

25. When the petitioner's Section 9 application was pending before the Senior Civil Judge (the Commercial Court), the respondent filed a similar application before the District Court. It was numbered, and the petitioner was put on notice. According to the respondent, the Civil Court's Registry treated only the District Court as the designated Commercial Court for entertaining the Section 9 applications. At any rate, after entering an appearance, the petitioner objected to the District Court's jurisdiction. In that matter, orders are awaited.

26. So, the respondent wants this Court to await the District Court's ruling on the jurisdictional issue. I am afraid that submission must fail on two grounds. To begin with, it is the petitioner that treated the Senior Civil Judge's Court as the Commercial Court and invited that court's ruling on that issue. Only later did the respondent approach an alternative forum on the premise that forum—the District Court—is the Commercial Court. The later developments ought not to affect the rights of an earlier suitor who invited a ruling on an issue and who wanted a finality to that controversy.

27. Second, the District Court's likely ruling would not obviate another

round of adjudication before this Court. But this Court's ruling will certainly obviate an additional round of adjudication before the District Court. Thus, this Court's ruling on the controversy in a matter anterior in time will cut short the litigation. It is, thus, a preferable course of action, even if we keep aside the hierarchical considerations.

Submissions on Merits:

Petitioner:

28. As this case involves a pure question of law, from the very elaborate submissions on either side, I prick up only those submissions that relate to that question of law: Is it the District Court or the Senior Civil Judge's Court that should be treated as the Commercial Court for its entertaining an application under Section 9 of the Arbitration Act?

29. Shri Desai, the learned Senior Counsel for the petitioner, has submitted that the Commercial Courts Act has "repealed only parts of the Arbitration and Conciliation Act". In fact, Section 21 of the Commercial Courts Act amply establishes its overriding effect and supremacy over the Arbitration Act. According to the learned Senior Counsel, with the 2018-Amendment of the Commercial Courts Act, the District Court has been designated an appellate court—not a primary court.

30. To elaborate, Shri Desai has submitted that under the State Government's Notification, dt.03.11.2016, the District Court was constituted as the Commercial Court. But, later, thanks to the 2018 Amendment, the State of Goa issued a fresh Notification, dt.05.05.2020. Through that notification, it constituted the Civil Judge, Senior Division 'A' Court, in Panaji as the Commercial Court and District Court as the Appellate Court. In this context, Shri Desai has also drawn my attention to Sections 6, 10 (3), and 15 to underline the sweeping adjudicatory powers of the Commercial Court.

31. The learned Senior Counsel has also found fault with the trial Court's relying on Section 5 of the Goa Civil Courts Act 1965. Then, he has also elaborated on the significance of the expression "the Principal Civil Court

of Original Jurisdiction in a District”.

32. Indeed, Shri Desai has also touched on the strained matrimonial relationship between the petitioner and the respondent, the respondent’s alleged minority share, and the difficulty the business has been facing because of this dispute. But I reckon they may not be germane for our purpose. To support his contentions, Shri Desai has relied on *Kandla Export Corporation v. OCI Corporation*^[6], *D. M. Corporation Pvt. Ltd. v. State of Maharashtra*^[7], *Government of India v. Jaiswal Ashoka Infrastructure Pvt. Ltd.*^[8], *State of Haryana v. Bhajan Lal*^[9].

Respondent:

33. Shri Lotlikar, the learned Senior Counsel for the respondent, has made strenuous efforts to counter the petitioner’s contentions. At the outset, he has drawn my attention to the Notification, dt.05.05.2020. According to him, it is a mere notification with no legal significance. It cannot, he stresses, eclipse the clear legislative mandate under the Arbitration Act. Even the State Government’s consulting the Hon’ble Chief Justice or the High Court before its issuing the Notification does not improve the position; nor does that process confer any legitimacy on the Notification. It remains a mere administrative measure with no legal force. Shri Lotlikar has reminded me it is the legislation that confers jurisdiction on the courts, not Government’s administrative instructions. In other words, a notification cannot amend a statute.

34. In the alternative, the learned Senior Counsel has submitted that even if the Notification had the effect of law under Article 13 of the Constitution, as the Notification conflicts with the Arbitration Act, it could not be sustained. For this, he invokes the constitutional doctrine of repugnancy

⁶[] JT 2018 (3) SC 138

⁷[] 2018 (4) Mh. LJ 457

⁸[] 2019 SCC OnLine Bombay 2371

⁹[] (1992) 1 SCC 335

under Article 254.

35. According to Shri Lotlikar, the petitioner has laboured under the mistaken impression that the Commercial Courts Act is a special law and the Arbitration Act a general law. Therefore, the petitioner's insistence that the former should prevail over the latter is equally fallacious. In this regard, he lays much emphasis on *Kandla Export Corporation*, a decision on which the petitioner, too, has relied. The learned Senior Counsel has also justified the trial Court's not considering this Court's judgments in *D. M. Corporation* and *Jaiswal Ashoka Infrastructure*. They have been rendered, as he points out, in ignorance of *Kandla Export Corporation*; so they are *per incuriam*. The learned Senior Counsel has relied on *Government of Andhra Pradesh v. B. Satyanarayana Rao*^[10].

36. After taking me through both the Acts, Shri Lotlikar has stressed that the legislative intent in the Arbitration Act is unmistakable. Even if there were any conflict between these two Acts, only the Arbitration Act should prevail, as made clear in *Kandla Export Corporation*. In this context, the learned Senior Counsel draws my attention to the expression "does not include any civil court of a grade inferior to such principal civil court" in Section 2 (1) (e) of the Arbitration Act.

37. Laying additional emphasis on Section 2 of the Arbitration Act, Shri Lotlikar has submitted that that section begins with a legislative disclaimer "unless the context otherwise requires" and, thus, implies what has been defined must be understood in the context of that Act alone. And "the context" requiring otherwise must be found only in that statute; it cannot be diluted or deviated from based on what has been laid down in another statute.

38. Shri Lotlikar insists that in disputes arising out of the Arbitration Act, the Commercial Courts Act must be kept aside.

39. In the end, the learned Senior Counsel has drawn my attention to the

10[] (2000) 4 SCC 262

petitioner's pleadings in the Writ Petition. According to him, the petitioner has tried to besmirch the learned trial Judge's reputation with unsavoury allegations; it ought to be deprecated. He has also emphatically denied that the respondent has ever indulged in forum shopping.

Discussion:

Pleadings, prolixity, and precision:

40. The facts fit into a paragraph and the issue into a single sentence, but the pleadings run into pages. The petitioner's writ pleadings cover a hundred pages, and the respondent's reply, to match, over fifty pages. Two seasoned senior counsel argued the matter; to that extent, the Court derived admirable assistance. No doubt. But the pleadings, I must say, are painfully prolix. I do not wish to sound harsh by singling out this case; it is, rather, a general malady that afflicts our profession. Multiplied pages do not signify precision or perfection—not even exhaustiveness. Beauty lies in brevity, even in law.

41. Prolixity and complexity go hand in hand, the legal profession being no exception. And it compels the court, like a domino effect, to ramble on in its judgment, lest the court faces the allegation it has given short shrift to a lawyer's labour. "You speak like a lawyer" is a compliment; "you write like a lawyer" is not, I reckon. The drafter's want in writing skill may lead to the court's judging ill. The converse, too, is true. "If the judge reading your brief is impressed merely with how well you write, you have defeated yourself. You want to make him feel that your client has a good case, not merely that he has a good lawyer."¹¹ Let me conclude by invoking Alexander Pope:¹²

"Words are like leaves; and where they most abound
Much fruit of sense beneath is rarely found."

On the Merits:

11[□] Henry Weihofen, *Legal Writing Style* (West Publishing Co., 1975) 5

12[□] Alexander Pope's *An Essay on Criticism*, lines 309-10

42. As I have already noted, the matter relates to the competence of a civil court to be a commercial court. So, much depends on the statutory scheme of the two Acts—the Arbitration Act and the Commercial Courts Act—and their interplay. To unravel this issue, let us first refer to the relevant statutory scheme.

Statutory Scheme:

Arbitration Act:

43. As its preamble reveals, Arbitration and Conciliation Act 1996 (“Arbitration Act”) is a consolidating and amending Act relating to domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards. It also defines the law relating to conciliation and other matters connected or incidental to it. As held in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*^[13], Parts I and II of this Act are mutually exclusive. Part I governs only domestic arbitrations; Part II governs foreign arbitrations. In fact, Part I regulates domestic arbitrations at all four stages of an arbitration: (i) commencement of arbitration, (ii) conduct of arbitration, (iii) challenge to award, and (iv) recognition or enforcement of the award. Here, we are concerned with domestic arbitration. And of that domestic arbitration, we are concerned with Section 9 of the Act.

44. Section 9 of the Arbitration Act provides for interim measures by “Court”. Before or during arbitral proceedings or, once the award is made, at any time before it is enforced, a party can apply to “a Court” for interim protection. That interim protection must, among other things, relate to (a) the preservation, interim custody, or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration; (d) interim injunction or the appointment of a receiver.

13[] (2012) 9 SCC 552

45. Section 2 (1) (e) defines “Court”, in the case of domestic arbitration, to mean “the principal civil court of original jurisdiction in a district.” But it does not include “any civil court of a grade inferior to such principal civil court, or any Court of Small Causes.” Though “Court” includes the High Court in exercising its ordinary original civil jurisdiction, in Goa that requires no mention.

46. The Respondent, here, summons all her energies and insists on two things: For a party to invoke Section 9 of the Act, he must go to the principal civil court of original jurisdiction in the district. And that court in the district should not be inferior to the principal civil court.

47. Underlining the importance of a suitor approaching the correct forum, the respondent draws my attention to Section 5 of the Arbitration Act, which speaks of the extent of judicial intervention permissible under the Act. Beginning with a non-obstante clause, it ordains that, in matters governed by Part I of the Arbitration Act, no judicial authority shall intervene unless so provided in that Part.

What is the Principal Civil Court of Original Jurisdiction?

The Goa Civil Courts Act, 1965:

48. Section 5 of the Goa Civil Court Act defines “Original jurisdiction of District Court”. According to it, the District Court shall be the principal Court of original civil jurisdiction in the district, “within the meaning of the Code of Civil Procedure 1908 or any other law for the time being in force.”

Commercial Courts Act:

49. The establishment of Commercial Courts under this Act depends on whether the High Court in a state has “ordinary original civil jurisdiction”. As the Bombay High Court at Goa has no original jurisdiction, our discussion focuses on the set up of Commercial Courts under a High Court with no original jurisdiction. Indeed, in 2018 this Act underwent an amendment through the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance 2018. We will

refer to the provisions in the light of that amendment.

50. Section 2 (1) (b) defines “Commercial Court” to mean the Commercial Court constituted under sub-section (1) of Section 3. Let us see Section 3, which deals with the constitution of Commercial Courts. As per sub-section (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.” Earlier, there were no Commercial Courts at the district level if the High Court had “ordinary original civil jurisdiction” as, for example, in Bombay. Now, in the districts under the High Courts with original jurisdiction, too, the 2018 Amendment permits the State Government to constitute Commercial Courts at the District Judge level, too. Here, in Goa, the District Courts were the Commercial Courts until the Amendment was enforced, for the High Court at Goa has no original jurisdiction.

51. As we face no problem with the pecuniary jurisdiction, let us not delve into it. For our purpose, the pivotal provision is sub-section (3). The amended provision enables the State Government to “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.*” Of course, it must be with the concurrence of the Chief Justice of the High Court. (italics mine)

52. In fact, in tune with the amended sub-section (3) of Section 3, the 2018 Amendment has inserted Section 3A. Now, the State Government may, after consulting the High Court concerned, by notification, designate such number of “Commercial Appellate Courts” at District Judge level as it may deem necessary. That is, first, Section 3 (3) enables the constitution of Commercial Courts at the level of the District Judge or below that level. Second, thanks to the Amendment, Section 3A constitutes, at the level of the District Judge, Commercial Appellate Courts. Section 6 defines the

jurisdictional contours of the Commercial Court. It shall have “jurisdiction to try all suits and applications relating to a commercial dispute of a specified value arising out of the entire territory of the State over which it has been vested territorial jurisdiction.”

53. Now comes the pivotal provision: Section 10 of the Commercial Courts Act. This provision deals with “jurisdiction in respect of arbitration matters. And the provision reads:

10. Jurisdiction in respect of arbitration matters.—Where the subject-matter of an arbitration is a commercial dispute of a specified value and—

(1) . . .

(2) . . .

(3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) *that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court* exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

(italics supplied)

54. Section 11 speaks of the bar of jurisdiction of Commercial Courts and Commercial Divisions. If a civil court has lacked the inherent jurisdiction to adjudicate a matter, the same limitation applies to Commercial Courts. I fail to understand how this provision affects the issue before me. Indeed, the Commercial Court substitutes the civil court regarding ‘commercial disputes’. That is, the Legislature has constituted a ‘specialised’ forum for the adjudication of commercial disputes; to that extent, the commercial court displaces the civil court. Thus, it not only enjoys the civil court’s powers but also suffers from its limitations.

55. The petitioner contends that the civil court of one grade is the commercial court; the respondent contends that the civil court of another grade is the commercial court. The bottom line is that both are civil courts. If Section 11 disqualifies one court, it automatically disqualifies the other one, too. But that is not the case here. Of the two civil courts, one is the

Commercial Court and the other is the Commercial Appellate Court. By taking recourse to the Commercial Courts Act, the petitioner wants to treat the Senior Civil Judge's Court as the Commercial Court. On the other hand, by taking recourse to the Arbitration Act, the respondent wants to treat the District Court as the Commercial Court, being the principal civil court of original jurisdiction. Now, the question is, which Act determines the forum?

56. That said, until the 2018 Amendment, at the district level, there was only a commercial court and no appellate court. The appellate jurisdiction, then, lay with the High Court. Now, there comes into existence a two-tier adjudicatory structure at the district level: the Commercial Court and the Commercial Appellate Court, based on pecuniary jurisdiction. So, now, we must answer whether for all purposes there is only one Commercial Court at the District level or one Commercial Court for arbitration disputes and another for other commercial disputes.

57. As per the Amended Section 13 of the Act, any person aggrieved by the judgment or order of a "Commercial Court below the level of a District Judge" may appeal to the Commercial Appellate Court [at the District level] within a period of sixty days." On the other hand, as Section 13 (1-A) mandates, any person aggrieved by the judgment or order of a "Commercial Court at the level of District Judge . . . may appeal to the Commercial Appellate Division of that High Court within a period of sixty days."

58. Section 14 of the Commercial Courts Act reiterates the legislative object: speedy disposal. Section 15 provides for the transfer of pending cases. According to sub-section (2), all suits and applications, "including applications under the Arbitration and Conciliation Act, 1996" relating to a commercial dispute of a specified value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court.

59. Finally, we may refer to Section 21 of the Commercial Courts Act. The Central Legislature has given overriding effect to this Act. According to it, “notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act”, this Act shall have an overriding effect.

The Effect of Section 21:

60. G. P. Singh, in his cerebral commentary, *Principles of Statutory Interpretation*^[14], has explained that “the expression 'notwithstanding anything in any other law' occurring in a section of an Act cannot be construed to take away the effect of any provision of the Act in which that section appears. In other words, 'any other law' will refer to any law other than the Act in which that section occurs.” In contrast, the expression 'notwithstanding anything contained in this Act' may be construed to take away the effect of any provision of the Act in which the section occurs but it cannot take away the effect of any other law.

61. Indeed, a special enactment or Rule cannot be held to be overridden by a later general enactment or simply because the latter opens up with a *non obstante* clause. There should be a clear inconsistency between the two before giving an overriding effect to the non obstante clause.

62. The learned author G. P. Singh has also remarked that sometimes one finds two or more enactments operating in the same field and each containing a non obstante clause. Each clause, in fact, declares that its provisions will have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force'. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. Another test applied is that the later enactment normally prevails over the earlier one. It is also relevant to

14[] G. P. Singh, *Interpretation of Statutes*, (reprint, 14 edn., LexisNexis, 2018) 403

consider as to whether either of the two enactments can be described a special one; in that case the special one may prevail over the more general one notwithstanding that the general one is later in time.

63. In fact, the Arbitration Act and the Commercial Courts Act, both central enactments, have employed this ‘non-obstante clause’ at more than one place. Precisely for this reason, *Kandla Export Corporation* has harmoniously resolved this imbroglio: that the Arbitration Act prevails when it concerns the parties’ substantive rights, and the Commercial Courts Act does when it concerns the parties’ procedural rights.

64. Let us tabulate^[15] and see how the 2018 Amendment has affected this adjudicatory arrangement:

Category	Under Unamended Act (2015)	Under Amended Act (2018)
Minimum Value of Commercial Dispute	At least one crore rupees (amount to be notified by the Government concerned).	At least three lakh rupees (amount to be notified by the Government concerned).
Commercial Division in High Courts	Establishes Commercial Divisions in 5 High Courts which have ordinary original civil jurisdiction, i.e., the High Courts of Delhi, Bombay, Calcutta, Madras, and Himachal Pradesh.	No change.
Commercial Courts at District level	State Governments may set up Commercial Courts at the District level, in areas where High	(I) Allows Commercial Courts at the District level to be set up, whether the High Court concerned

¹⁵[] PRS Legislative Research, <<https://www.prsindia.org/billtrack/commercial-courts-commercial-division-and-commercial-appellate-division-high-courts-0>> accessed 18 July 2020

	Courts do not have original jurisdiction.	<p>has original jurisdiction or not.</p> <p>(II)</p> <p>In areas where High Courts have original jurisdiction, State Governments may specify the pecuniary jurisdiction of commercial courts. It should not, however, be not lower than three lakh rupees and more than the pecuniary jurisdiction of District Courts in those areas.</p> <p>(III)</p> <p>State governments may constitute commercial courts below the level of a district judge, in areas where high courts do not have original jurisdiction.</p>
Commercial appellate division in all high courts	Establishes Commercial Appellate Divisions in all the High Courts to hear appeals against orders from: (i) Commercial Divisions of High Courts, and (ii) Commercial Courts at the District level.	No Change
Commercial appellate courts at district level	No Provision	<p>(I)</p> <p>State Governments may set up Commercial Appellate Courts at the District level in areas where High Courts have no original jurisdiction.</p> <p>(II)</p> <p>These District Appellate Courts will hear appeals against orders of Commercial Courts below the District Judge.</p>

65. From the above table, we may note the impact of the 2018 Amendment, especially about the Commercial Court set up at the District level. Earlier, in Goa, the District Court was the designated Commercial Court. Now, the District Court has been designated Commercial Appellate Court, and the Senior Civil Judge's Court as the Commercial Court.

66. For this setting up of two-tier court at the district level, the Government of Goa has brought out a notification, based on Section 3 of the Commercial Courts Act permits it.

67. The Notification, dt.05.05.2020, owes its origin to Sections 3 (1) and 3A of the Commercial Courts Act. It designated the Courts of District Judge-1 at Panaji and District Judge-1 at Mapusa as the Commercial Appellate Courts in North Goa. Similarly, the District Judge-1 and District Judge-2 at Margao as the Commercial Appellate Courts in South Goa. Through the same Notification, the Government of Goa constituted the Senior Civil Judges' 'A' Courts at Panaji, Mapusa, Bicholim, and at Ponda as the Commercial Courts in North Goa. Similarly, four courts have been designated in the South Goa. The impugned order originates from the Senior Civil Judge's 'A' Court at Panaji.

68. Now, with the Notification, dt.05.05.2020, in the State of Goa no District Court is a designated Commercial Court; rather it is a Commercial Appellate Court. Then, where should a suitor have his commercial disputes adjudicated. No doubt, that must be before the newly constituted Senior Civil Judges' Courts in the North and the South Goa. Even the Senior Civil Judge's Court at Panaji acknowledges that fact. In the impugned order, dt.08.07.2020, the Court describes itself as "The Commercial Court at North Goa, Panaji". But that Court holds in the Order that it is not the Principal Civil Court of the Original Jurisdiction. For Section 5 of the Goa Civil Courts Act 1965 still remains unamended, and according to that Act, it is the District Court that should be treated as the Principal Civil Court of Original Jurisdiction.

69. In this context, the Commercial Court at North Goa has correctly observed but wrongly concluded about the two Acts: the Commercial Courts Act and the Arbitration Act. It pays to extract the Court's observation:

"12. [I]t is pertinent to note that though the Commercial Courts Act is the special law so is the Arbitration and Conciliation Act 1996 and hence Commercial Courts Act is a procedural law whereas Arbitration and Conciliation Act can be termed as a substantive law, which has to be preferred to Commercial Courts Act, as present application is also filed under Section 9 of Arbitration and Conciliation Act."

70. To elaborate, I may note that the trial Court has correctly observed about the nature of the respective legislations. But it has erred in holding that the Arbitration Act should prevail if conflict occurs. As to the substantive law, that is correct; as to the procedural law, it is not. We will see how?

The Right to a Particular Remedy and the Right to a Particular Forum:

Kandla Export Corporation:

71. In matters arising out of the Arbitration Act, on a particular issue Section 50 of that Act has provided for no appeal. But Section 13 (1) of the Commercial Courts Act has a generic appellate provision against all orders emanating from the Commercial Courts. Then, can a suitor invoke Section 13 of the Commercial Courts Act and appeal against the order though it is not provided for under Section 50 of the Arbitration Act? That was the issue before the Supreme Court in *Kandla Export Corporation*.

72. Incidentally, here, both the parties have relied on this judgment; in fact, the respondent has drawn my attention to every sentence of this judgment. According to her, *Kandla Export Corporation* has emphatically resolved the conflict between the two legislations—the Arbitration Act and the Commercial Courts Act—and declared the supremacy or the overriding effect of the Arbitration Act. So we should pay close attention to the case holding of *Kandla Export Corporation*.

73. In an international commercial arbitration, the seller suffered an

award. Its many rounds of appeal before the Queen's Bench and the Court of Appeal, London, yielded no result. After the award attained finality, the buyer laid execution before the District Court, Gandhidham-Kutch. But the seller applied to High Court of Gujarat, under Section 15(5) of the Commercial Courts Act, for having the execution petition transferred to the High Court, and succeeded.

74. Eventually, the High Court of Gujarat rejected the seller's objections and allowed the buyer's execution petition. Aggrieved, the seller appealed under the Commercial Courts Act, but the High Court dismissed that appeal. It was on the premise that the Commercial Courts Act did not provide for any additional right of appeal which is not otherwise available to the seller under the Arbitration Act.

75. When the matter reached the Supreme Court, it has, first, referred to the Statement of Objects and Reasons for the Commercial Courts Act. It was to underline the statutory objective: expeditious resolution of commercial disputes. Besides referring to salient statutory features of the Commercial Courts Act, *Kandla Export Corporation* has quoted with approval *Fuerst Day Lawson Limited v. Jindal Exports Limited*^[16]. And it has, in that process, emphasised that the Arbitration Act is a "self-contained Code on all matters pertaining to arbitration, which would exclude the applicability of the general law contained in Section 13 of the Commercial Courts Act."

76. According to *Kandla Export Corporation*, when Parliament enacted the Commercial Courts Act, it was presumed to have known about Section 50 of the Arbitration Act. And Parliament, in fact, kept that provision unaltered. Thus, "it carries the negative import mentioned in paragraph 89 of *Fuerst Day Lawson* that appeals which are not mentioned therein, are not permissible." So, Section 13(1) of the Commercial Courts Act, being "a general provision vis-à-

16[] JT 2011 (7) SC 469

vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.”

77. In its reasoning, *Kandla Export Corporation* noticed what could be termed an incongruity. Proviso to Section 13 (1) of the Commercial Courts act did refer to Section 37 of the Arbitration Act, which is equally a special provision of appeal in a self-contained code, but not Section 50. For this, *Kandla Export Corporation* provides two-fold answer: that Section 37 was mentioned *ex abundanti cautela*; that Section 37 of the Arbitration Act itself suffered an amendment on the same day when the Commercial Courts Act was enforced. Thus, it was to emphasise that the amended Section 37 would have precedence over the general provision in Section 13(1) of the Commercial Courts Act.

78. *Kandla Export Corporation* refers to the language of Section 50 of the Arbitration Act and holds that to enforce foreign awards, Section 50 alone provides an appeal. Of immense importance is its observation that after providing for an appeal, Section 50 left the forum of appeal to the court authorized by law to hear the appeals. It pays to extract what *Kandla Export Corporation* has to say on the choice of forum:

“Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal.”

79. As to Section 21 of the Commercial Courts Act, *Kandla Export Corporation* notes that it would apply only if Section 13(1) were to apply in the first place. In the end, *Kandla Export Corporation* takes recourse to purposive and harmonious constructions of both the statutes. It emphasises that “arbitration itself is meant to be a speedy resolution of disputes between parties.” And the *raison d’être* for the enactment of the Commercial Courts Act is that “commercial disputes involving high amounts of money should be speedily decided.” Given the objective of both the enactments, if we provided

an additional appeal, when Section 50 does away with an appeal for speedy enforcement of foreign awards, we would be, according to *Kandla Export Corporation*, turning the Arbitration Act and the Commercial Courts Act on their heads. Indeed, the decision advocates against any construction of Section 13 of the Commercial Courts Act that would lead to further delay.

80. As emphasised by the respondent, both the statutes are best harmonized “by [our] giving effect to the special statute, i.e. the Arbitration Act vis-à-vis the more general statute, namely the Commercial Courts Act, being left to operate in spheres other than arbitration.”

81. Emphatic as the declaration of law in *Kandla Export Corporation* is, I am afraid the Supreme Court has not, at one fell swoop, swept away or subordinated the Commercial Courts Act to the Arbitration Act on all counts, as the respondent would have us believe.

82. A statute may be substantive or procedural or both. And most statutes are both substantive and procedural in parts. A substantive provision engenders a vested right in a suitor’s favour, but not a procedural right. That is why the former is prospective and the latter, usually, retrospective.

83. As held by the Constitution Bench of the Supreme Court in *Garikapati Veerayya v. N. Subbaiah Choudhary*^[17], the right of appeal is not a mere matter of procedure but a substantive right. To my understanding, *Kandla Export Corporation* has echoed *Garikapati Veerayya* under a different statutory backdrop. But how about the change of forum?

84. As to a suitor’s right to approach a particular forum for remedy, let us examine whether it is substantive or procedural. An accident occurred in 1966. The dependents, under the prevailing law, had two years to apply to a civil court for compensation. But meanwhile, the Government of UP constituted the Claims Tribunal under Section 110 of the Motor Vehicles Act. So the dependents approached the Tribunal. The Insurance Company finally

17[] AIR 1957 SC 540

took the matter to the Supreme Court. In *New India Assurance Co. Ltd. v. Shanti Misra*^[18], a three-Judge Bench has held that “the change in law was merely a change of forum, i.e. a change of adjectival or procedural law and not of substantive law.” According to *Shanti Misra*, it is a well-established proposition that “such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum.”

85. Pertinent is the observation in *Shanti Misra* that a suitor “will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective.”

86. Now, let us consider a case that has originated at the home front (in Goa) and reached the Supreme Court. In *Maria Cristina De Souza Sodder v. Amria Zurana Pereira Pinto*^[19], the first and second respondents, the couple, sued the appellants and other respondents for partition. They sued in March 1960, before the Comarca Court at Margao. But pending the suit, the Parliament enacted the Goa, Daman and Diu (Extension of the Code of Civil Procedure, 1908 and Arbitration Act, 1940) Act 1965. The Code of Civil Procedure was extended to the territories of Goa, Daman and Diu, besides enforcing the Goa, Daman and Diu Civil Courts Act 1965 (“Goa Civil Courts Act”), from 15 June 1966, and “the corresponding provisions of the Portuguese Code” were repealed. Under Section 34(2) of the Goa Civil Courts Act, the suit was transferred to and decreed by “the corresponding Senior Civil Judge”. The trial Judge decreed the suit and the counter-claim in March 1968. Aggrieved, the appellants appealed to the Judicial Commissioner's Court at Goa. It was in June 1968.

87. The respondents raised two preliminary objections: (a) that the

¹⁸[] (1975) 2 SCC 840

¹⁹[] (1979) 1 SCC 92

appeal had not been filed in proper Court and (b) that it was barred by law of limitation. The respondents argued that the appeal must be governed by the Portuguese Civil Procedure Code, which was in force when the suit was instituted. Before the Supreme Court, too, the appellants contended that “since the right of appeal had been conferred by Portuguese Code, the forum where it could be lodged was also governed by the Portuguese Code”. But the Supreme Court repelled this contention. It has, in that context, held:

“[I]t is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the *lis* is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. This position has been made clear by clauses (b) and (c) of the proviso to Section 4 of the Central Act 30 of 1965 which substantially correspond to clauses (c) and (e) of Section 6 of the General Clauses Act, 1897. . . *but the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act.*”

(italics supplied)

88. To support the above proposition, *Maria Cristina De Souza Sodder* refers to a passage in *Salmond's Jurisprudence* (12th Edn.):

“Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but *in what courts* and *within what time* I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfill their functions.”

(italics original)

89. *Maria Cristina De Souza Sodder* sums up the position by holding that if the repealing Act provides new forum for redressal regarding any vested right under the repealed Act, the recourse must be taken to only that forum mentioned in the repealing Act.

90. If we examine the statutory scheme of the Commercial Courts Act, Parliament declares in the Statement of Objects and Reasons that the Act provides for speedy disposal of high value commercial disputes. As the high

value commercial disputes involve complex facts and questions of law, Parliament has felt the need to provide for an independent mechanism for their early resolution. The Commercial Courts Act, in the ultimate analysis, aims to “accelerate economic growth, improve the international image of the Indian Justice delivery system and the faith of the investor world in the legal culture of the nation.”

91. With a steep pecuniary value as the threshold and with other avoidable procedural shortcomings laid bare in its implementation, the Commercial Courts Act underwent an amendment in 2018. In the Statement of Objects and Reasons of Amendment Act 28 of 2018, Parliament has emphasised that early “resolution of commercial disputes of even lesser value creates a positive image amongst the investors about the strong and responsive Indian legal system.” There has always been an element of uncertainty, we must agree, in the interplay between the Arbitration Act and the Commercial Courts Act. That said, I reckon, one combines both the substantive and procedural provisions regarding arbitrable disputes. The other—the Commercial Courts Act—supplements the Code of Civil Procedure as to the commercial disputes of specified value. It is essentially procedural.

92. Evidently, the Commercial Courts Act is a later enactment, but it does not work at cross purpose with the Arbitration Act. In fact, both aim at speedy adjudication. The Commercial Courts Act covers all the commercial disputes, whereas the Arbitration Act covers only those disputes that involve arbitration. As *Kandla Export Corporation* has held, both the enactments call for a harmonious interpretation. If at all there is any conflict, as to the substantive provisions, the Arbitration Act prevails; but it has left the procedural niceties to the Commercial Courts Act.

Section 10 (3) of the Commercial Courts act and the Remote Conditional:

93. Let us revisit Section 10 (3) of the Commercial Courts Act. “If” it is a

domestic arbitration, all applications or appeals arising out of arbitration “that would ordinarily lie before any principal civil court of original jurisdiction” in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court”.

94. Sub-section (3) begins with a conditional “if”. Then, it delineates on how “all applications or appeals” arising out of arbitration should be adjudicated. They “would ordinarily” lie before the “principal civil court of original jurisdiction.” In that sentence, “ordinarily” is an adverbial emphasiser; let us keep it aside. Now the sentence is “they *would* lie before the principal civil court of original jurisdiction.” It is, grammatically speaking, the ‘second conditional’ employing the subjunctive “would”. It refers to an unlikely or improbable future event or arrangement. What could have been an ordinary course of remedial event now stands altered. This uncertainty or altered course under sub-section (3) is because of a statutory development—the advent of the Commercial Courts Act. So, to repeat, what could have been the subject of adjudication before the principal civil court of original jurisdiction, now “shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.”

95. Because, now, the Commercial Courts have been established, “all applications” under the Arbitration Act should lock, stock, and barrel go before the Commercial Courts. So the concept of “the principal civil court of original jurisdiction” no longer applies. Instead, what matters is the “Commercial Court”. That accepted, which is the Commercial Court—the Senior Civil Judge’s Court or the District Court? In Goa, the District Court is no longer the primary Commercial Court; it is, in fact, a Commercial Appellate Court.

96. In this context, I may once again quote G. P. Singh^[20], who says that “the words of a statute are first understood in their natural, ordinary or

20[] G. P. Singh (n 13) 91

popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary.” Here, if sub-section (3) is not read in its ordinary grammatical sense, it will lead to absurdity.

The Decisions:

97. The respondent wants me to treat co-equal Bench decisions in *D. M. Corporation* and *Jaiswal Ashoka Infrastructure* as *per incuriam*. They have been rendered, as she points out, in ignorance of *Kandla Export Corporation*. As the Supreme Court has held in *B. Satyanarayana Rao*, the rule of *per incuriam* can be applied “where a Court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.”

98. In *D. M. Corporation*, a learned Single Judge (Dr. Shalini Phansalkar-Joshi, J.) has, on facts, noted that the dispute concerns an arbitration agreement, the subject-matter of which is above Rs.1 crore; it is a dispute of commercial nature. So even if the relief claimed is mere injunction, because of Section 10(3) of the Commercial Courts Act, the Principal District Judge has correctly transferred the arbitration application to the Commercial Court. The impugned order passed by the District Court being just, legal, and correct; it warranted no interference.

99. In *Jaiswal Ashoka Infrastructure*, another learned Single Judge (A. S. Chandurkar, J) has observed that because of Section 15(2) of the Commercial Courts Act, suits and applications in relation to a commercial dispute pending in any civil court must be transferred to the Commercial Court. That is, the civil court “ceases to have jurisdiction to entertain an application under the provisions of the [Commercial Courts] Act in relation to a commercial dispute of a specified value.” Once the court lacks inherent jurisdiction, express or implied consent, failure to raise jurisdictional object, or even acquiescence

cannot clothe the court with jurisdiction.

100. I have already elaborately discussed *Kandla Export Corporation*, and I see no precedential transgression in *D. M. Corporation* or *Jaiswal Ashoka Infrastructure*.

Conclusion:

- (1) Contrary to the respondent's contentions, the Notification, dt.05.05.2020, issued by the Government of Goa, is in tune with the legislative mandate under Sections 3 and 3A of the Commercial Courts Act, 2015.
- (2) In the State of Goa, the designated District Courts are the Appellate Commercial Courts, and the Senior Civil Judges' Courts are the Commercial Courts.
- (3) Even adjudication of an application under Section 9 of the Arbitration Act must be before the Commercial Court, and that Commercial Court need not be the principal civil court of original jurisdiction.
- (4) There is no conflict between the Arbitration and Conciliation Act 1996 and the Commercial Courts Act 2015. If at all we maintain the distinction, the former Act deals with the substantive rights of the parties to the arbitration, and the latter Act with the procedural essentials, the choice of the forum being a part of it.
- (5) As *Kandla Export Corporation* has held, regarding any commercial arbitral dispute, the Arbitration and Conciliation Act 1996 determines, among other things, the appellate remedies and the Commercial Courts Act 2015 provides for the forum and adjudicatory procedure.

Result:

As a result, I hold that the Ad-hoc Senior Civil Judge, "A" Court, Panaji,

has failed to exercise the jurisdiction vested in it as the Commercial Court. Its returning the petitioner's application to be presented "before proper court" is erroneous and unsustainable, for it is, by itself, the proper court. The impugned Order, dt.08.07.2020, is set aside.

So the Commercial Court at North Goa, Panaji, will have the CMA Stamp No.243/2020 restored to file and adjudicated on merits, after giving the regular number.

No order on costs.

DAMA SESHADRI NAIDU, J.

NH