

(2022) 04 OHC CK 0053

In the Orissa High Court

Case No : Writ Petition (C) Nos. 3523, 5491, 5494 Of 2022, 28644, 30554 Of 2021

M/s M.G. Mohanty And Another

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 08-04-2022

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1)(e), 3(3), 9, 9(1), 10(3), 14, 15(2), 16(3), 29A, 34, 36, 37, 37(1)(a), 37(2), 50
Commercial Courts Act, 2015 — Section 3(3), 10, 10(2), 10(3), 11, 13(1), 15, 15(2), 21

Citation : (2022) 04 OHC CK 0053

Hon'ble Judges : Dr. S. Muralidhar, CJ; R. K. Pattanaik, J

Bench : Division Bench

Advocate : Gautam Mukherjee, Durga Prasad Nanda, Prabhu Prasanna Behera, Avijit Pal, Durga Prasad Nanda, P.K. Parhi, P.K. Muduli, Gautam Misra, Yogesh Jagia, Tanmay Mishra, S.S. Parida

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ.

1. These five writ petitions raise interesting questions of law concerning the interpretation as well as interplay of the provisions of the Commercial Courts Act, 2015 (CC Act) with the provisions of the Arbitration and Conciliation Act, 1996 (A&C Act). These petitions also question a Notification dated 13th November 2020, issued by the State of Odisha through its Principal Secretary, Law Department in establishing the Court of the Civil Judge (Senior Division) for the purposes of exercising jurisdiction and powers under the CC Act.

2. The question posed for consideration by this Court is whether for the purposes of the dealing with applications under Sections 9, 14, 34 and so on of the A&C Act jurisdiction can be conferred on a judicial officer subordinate to the rank of a District Judge, i.e., the Principal Civil Judge in the district notwithstanding

Section 2 (1) (e) of the A&C Act? An incidental question is whether the power exercised by the State Government under Section 3(3) read with Section 10(3) and 15(2) of the CC Act can override Section 42 of the A&C Act?

Facts in W.P. (C) Nos. 3523, 5491 and 5493 of 2022

3. Three of the five writ petitions are by M/s. M.G. Mohanty, a registered partnership firm (Petitioner No.1) and its managing partner Mr. Rajiv Lochan Mohanty (Petitioner No.2). The background facts in these three petitions are that due to the disputes between the partners of the firm i.e. Petitioner No.2 and proforma Opposite Party Nos.4 to 8, applications under Section 9 were filed before the District & Sessions Judge (D&SJ), Bhubaneswar. These were the Arbitration Petition Nos.56, 57 and 58 of 2020. The learned D&SJ admitted Arbitration Petition No.56 of 2020 by an order dated 12th November, 2020 and on 17th November, 2020 passed an interim order in favour of the Petitioners. He issued notice in the remaining two petitions on 2nd December, 2020.

4. Meanwhile, on 13th November 2020, the impugned notification was issued by the Law Department of the State Government in consultation with the High Court establishing the Court of the Civil Judge (Senior Division) and conferring the powers and jurisdiction of the Commercial Courts under the CC Act on such Court. Following this, on 7th July 2021, the learned D&SJ transferred Arbitration Petitions Nos.56, 57 and 58 of 2020 to the Court of the Senior Civil Judge (Commercial Court), Bhubaneswar.

5. It is further stated that an application was filed before the learned D&SJ, challenging the jurisdiction of the Commercial Court in adjudicating the matter under the A&C Act particularly, since the Presiding Officer of the Commercial Court is subordinate to the rank of a District Judge and that hearing of the application under Section 9 of the A&C Act by the Senior Civil Judge (Commercial Court) would be against the spirit of the A&C Act in terms of the recent definition of the expression, "Principal Civil Court", in the A&C Act. By an order dated 25th October 2021, the learned D&SJ rejected that application inter alia on the ground that the order dated 7th July 2021, passed by the D&SJ transferring the matter to the Senior Civil Judge (Commercial Court) was an order under Section 15 of the A&C Act, and that order had not been challenged before a higher forum.

6. In the present petitions, a challenge has been raised not only to the notification dated 13th November, 2020 but also the order dated 7th July, 2021 passed by the learned D&SJ transferring the cases pending before him to the Court of the Senior Civil Judge (Commercial Court) as well as the above order dated 25th October, 2021. A direction is sought for the establishment of the Commercial Court by conferring the power on the Presiding Officer in the cadre of the District Judge, not subordinate to the rank of the District Judge.

7. In the aforementioned three petitions by M/s. M.G. Mohanty, the interim order passed by this Court was to the effect that proceedings may continue before the Senior Civil Judge (Commercial Court), Bhubaneswar, but no final order would be

passed in the applications pending before that Court.

Facts in W.P. (C) No.28644 of 2021

8. The fourth petition, W.P.(C). No. 28644 of 2021, has been filed by M/s. Budhraj Mining and Construction Limited (BMCL). The background facts as far as in this petition is concerned are that BMCL and National Aluminium Company Limited (NALCO) (Opposite Party No.3) and the General Manager, Captive Power Plant (CPP) (Opposite Party No.4) had a contractual relationship. The disputes between the parties were referred to the arbitration of a former Judge of this Court as sole Arbitrator.

9. On 28th January 2021, the learned Arbitrator passed an Award which was challenged by the Opposite Party Nos. 3 and 4 i.e., NALCO and the CPP in Arbitration Petition No.24 of 2021 under Section 34 of the A&C Act before the D&SJ, Khurda at Bhubaneswar. By an order dated 23rd June 2021, the learned D&SJ transferred the said petition to the Court of the Senior Civil Judge (Commercial Court) at Bhubaneswar which then issued notice to BMCL to appear on 16th September, 2021 and file an objection.

10. BMCL has, in the present petition, challenged the said order dated 23rd June 2021 of the D&SJ and has sought for a declaration that it is only the D&SJ, being the Principal Civil Court having territorial jurisdiction within the meaning of Section 2(1)(e) of the A&C Act who is competent to decide arbitration matters/ disputes filed under Sections 9, 14, 34, 36 and 37 of A&C Act. A further prayer is to declare Section 10 and 15 of the CC Act in so far as related to arbitration applications, as being ultra vires the A&C Act. In W.P.(C) No.28644, this Court on 29th September 2021, directed that Arbitration Petition No.24 of 2021 filed by NALCO and CPP against BMCL pending in the Court of the Senior Civil Judge (Commercial Court) would continue but no final order would be passed. That interim order has continued.

Facts in W.P. (C) No.30554 of 2021

11. In W.P.(C) No.30554 of 2021, the Petitioner is Odisha Hydro Power Corporation Limited (OHPC), whereas the contesting party is M/s. TRAFGAR House Construction (T) Satyam Sankarnarayan Joint Venture (TSSJV). The background facts as far as this petition is concerned are that an agreement was entered into between these parties whereby TSSJV was to complete the work under the agreement. The disputes that arose between the parties were referred to arbitration.

12. Arbitration Petition No.50 of 2020 was filed by OHPC before the D&SJ, Bhubaneswar under Section 14 of the A&C Act for termination of mandate of the Arbitrator. While the petition was pending, on 15th July 2021, the D&SJ transferred Arbitration Petition No.50 of 2020 to the Court of the Senior Civil Judge (Commercial Court), Bhubaneswar. The said order of transfer dated 15th July, 2021 has been challenged by OHPC before this Court in the present

petition. On 19th July 2021, the Senior Civil Judge (Commercial Court) passed a consequential order receiving the case on transfer. The present petition, therefore, challenges the orders dated 15th July 2021 transferring the case record to the Senior Civil Judge (Commercial Court), Bhubaneswar and the corresponding order dated 19th July, 2021 of the Senior Civil Judge (Commercial Court) receiving the case on transfer.

13. This Court has heard the submissions of Mr. Gautam Mukherjee, learned Senior Advocate and Mr. Durga Prasad Nanda, learned Senior Advocate, instructed by Mr. Prabhu Prasanna Behera, learned counsel on behalf of the Petitioners in W.P.(C) No.3523, 5491 and 5494 of 2022. Mr. Avijit Pal, learned counsel appeared for BMCL, the Petitioner in W.P.(C) No.28644 of 2021 and Mr. D.P. Nanda, learned Senior Advocate appeared on behalf of OHPC in W.P.(C) No.30554 of 2021.

14. Mr. Gautam Misra, learned Senior Advocate appeared on behalf of Mr. Padma Lochan Mohanty (Opposite Party No.5), whereas Mr. Yogesh Jagia, learned Senior Advocate appeared on behalf of Mr. Pankaj Lochan Mohanty (Opposite Party No.6) in the three writ petitions of M/s. M.G. Mohanty and its managing partner. In W.P.(C) No.28644 of 2021, Mr. Tanmay Mishra and Mr. S.S. Parida, learned counsel appeared on behalf of NALCO and CPP whereas Mr. P.K. Parhi, learned Assistant Solicitor General, appeared on behalf of the Union of India, Ministry of Law and Justice. In W.P.(C) No.30554 of 2021, Mr. P.K. Muduli, learned Additional Government Advocate appeared on behalf of the State of Odisha.

Submissions of counsel for the Petitioners

15. The submissions of learned counsel for the Petitioners in all these petitions could be summarized as under:

(i) The A&C Act is a special statute as has been held in *Kandla Export Corporation v. OCI Corporation* (2018) 14 SCC 715. In the said Judgment, the CC Act had been declared to be a general statute by relying on the decision in *Fuerst Day Lawson Ltd v. Jindal Exports Ltd.* (2011) 8 SCC 333. Therefore, the A&C Act being a special statute would prevail over the CC Act.

(ii) The definition of 'Court' under Section 2(1)(e) of the A&C Act would prevail over the provisions of the CC Act. Thus, the Principal Civil Court of the District alone has the exclusive jurisdiction to try and decide the matters relating to the disputes in arbitration under Sections 9, 14, 29A, 34, 36, 37(1)(a) and 37(2) of the A&C Act.

(iii) The maxim '*generalia specialibus non-derogant*' was squarely applicable in these matters. In other words, it is submitted that the provisions of the general law i.e., the CC Act had to yield to the provisions of the special Act, i.e., the A&C Act. Reliance was placed on certain passages from Maxwell on Interpretation of Statutes (11th edition) [Chapter-VII Section 3, Page 168].

(iv) The mere fact that the general law i.e., the CC Act contained a non obstante

provision viz., Section 21 stating that the CC Act has overriding effect, did not demolish the force of the rule of construction advanced on behalf of the Petitioners. It is submitted that Section 21 of the CC Act will not override the provisions of the A&C Act.

Submissions of counsel for the Opposite Parties

16. Mr. Yogesh Jagia, learned Senior Advocate appearing on behalf of Kamal Lochan Mohanty [Opposite Party No.4 in W.P.(C) No.3523 of 2022], submitted as under:

(i) There is no apparent conflict between the A&C Act and the CC Act. Since both enactments could be labelled as 'special' laws, inter se among them, the latter enactment being the CC Act, would prevail.

(ii) It is further submitted, on the strength of the decision of the Supreme Court of India in *Innoventive Industries Ltd. v. ICICI Bank and others* (2018) 1 SCC 407 that the 'inconsistency must be clear, direct and irreconcilable and inconsistency should be of such a magnitude that the legislations appear to be in 'direct collision' with each other and it is impossible to obey both of them simultaneously'.

(iii) To resolve the repugnancy, a purposive and harmonious construction was required to be applied. On a collective reading of Section 9 with Section 2(1)(e) of the A&C Act read with Section 10 (3) and 21 of the CC Act, it is clear that the legislature while providing substantive provisions in the A&C Act for speedy disposal also provided procedurally the forum under the CC Act viz., the Commercial Court, to adjudicate all disputes arising under Section 9 and other sections of the A&C Act.

(iv) Reliance is placed on the decision in *New India Assurance Company Limited v. Shanti Misra* (1975) 2 SCC 840, and it is submitted that:

"5.the change in law was merely change of forum, i.e., a change of adjectival or procedural law not a substantive law and 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 change of forum."

(v) It is submitted that both the A&C Act and the CC Act aim at speedy adjudication. Whereas the CC Act covers all commercial disputes, the A&C Act is only concerned with the disputes that involved arbitration. It is submitted that if at all there is any conflict between the two enactments substantively, it would be the A&C Act that prevails. However, since it is the procedural aspect of resolution of commercial disputes, including arbitral disputes, that has been provided under the CC Act, the latter can co-exist harmoniously with the A&C Act. .

(vi) Reliance was placed on the decision of the Bombay High Court in *Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar*, where it was held that it would be the CC Act that prevails over the A&C Act. It is submitted that the main

purpose of the CC Act was for speedy disposal of commercial cases. Pursuant to the amendments of 2018 to the CC Act even the appellate jurisdiction has been conferred in the form of a Commercial Appellate Court at the district level which was not provided for prior to the 2018 amendment. The purpose of specifying the forum under Section 10 of the CC Act was further substantiated from the fact that the CC Act stipulated time-bound completion of pleadings without any discretion for extension which was otherwise permitted in common law.

17. Mr. Gautam Misra, learned Senior Advocate appearing for one other partner namely, Sri Padma Lochan Mohanty, made the following submissions:

(i) In view of Sections 3, 3A, 10(3), 13, 15(2) and 21 of the CC Act, the contention of the Petitioners is that arbitration matters must be exclusively triable by the D&SJ who happens to be the Principal Civil Court original jurisdiction in a district, is not legally tenable.

(ii) As per Section 10 (3) of the CC Act, the State Government in consultation with the High Court can designate a Senior Civil Judge as a Commercial Court. Appeals from the said Court would lie to the Commercial Appellate Court which would be in the rank of the District Judge. Thus even an Additional District Judge can be designated as a Commercial Appellate Court under Section 3A of the CC Act.

(iii) Reference is made to the 16th Lok Sabha Parliamentary Debates dated 1st August, 2018 to urge that the objective of setting of Commercial Courts was the expeditious disposal of the commercial cases. In terms of the scheme of the CC Act, it would not be proper for one Court to hear civil suits and another to hear arbitration matters. It is pointed out that in some other States i.e., the States other than Odisha, an Additional District Judge has been appointed as a Commercial Court. It is, however, the State Government to take call in that regard. The corresponding appeal would lie to the High Court under Section 13 (1-A) of the CC Act, hence, there was no denial of the opportunity of an appeal.

Analysis and reasoning

18. The Court would first like to examine the provisions of the A&C Act. The word 'Court' is used in many provisions of the A&C Act. In the context of the present petitions, it requires to be noticed that Section 9(1) of the A&C Act states that a party can before or during or even at any time after the making of an award and prior to its enforcement apply to a 'Court' for certain interim reliefs mentioned therein. Then we have Section 14(2) which states that if there is a controversy regarding termination of the mandate of an Arbitrator, then a party may unless, otherwise agreed to by the parties, 'apply to the Court to decide on the termination of the mandate'. Section 34 of the Act which gives the remedy of challenge to an arbitral award states that such an application may be made 'to a Court'.

19. Section 37 of the A&C Act talks of 'appealable orders' and reads as under:

“(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:

- (a) refusing to refer the parties to arbitration under section 8;
- (b) granting or refusing to grant any measure under section 9;
- (c) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

20. Section 42 of the Act which makes it clear that wherein respect to an arbitration agreement an application has been made under this part in a certain ‘Court’, then ‘that Court alone shall have jurisdiction of the arbitral proceedings’. This provision has a non-obstante clause. It reads as under:

“Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

21. Since the expression ‘Court’ is used extensively, its definition assumes some importance. Section 2(1)(e) of the A&C Act defines the Court and reads as under:

“Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.”

22. Section 2(1)(e)(i) is relevant for the present cases since the arbitrations in question are domestic arbitrations, i.e. other than ‘international commercial arbitrations’. In that context, the expression ‘Court’ can be only the ‘Principal Civil Court of original jurisdiction in a district’ and, as the provision clarifies, it ‘does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of small causes’. In certain States other than Odisha including the

State of Madhya Pradesh, the 'Principal Civil Court of original jurisdiction in a district' need not be only the District & Sessions Judge (D&SJ) but can be even an ADJ. However, the admitted position is that as far as Odisha is concerned, further purposes of 2(1)(e)(i) of the A&C Act, it is only the D&SJ who is the Principal Civil Court in a district.

23. In the present case, therefore, when the applications under Section 9 or Section 34 of the A&C Act as the case may be were filed in the Court of the D&SJ, Bhubaneswar then strictly going by Section 42 of the A&C Act, it is that Court alone which would have the jurisdiction to entertain the suit notwithstanding any other provision in any other law for the time being force.

24. However, a significant change has been brought about by the enactment of the CC Act in 2015 and which came into effect from 31st December 2015. The Statement of Objects and Reasons (SOR) of the CC Act assumes significance. One stated object was that there was a 'need to provide for an independent mechanism' for the early resolution of 'high value commercial disputes'. Such early resolution, it was expected, 'shall create a positive image to the investor world above the independent and responsive Indian legal system'. The SOR referred to the 188th Report as well as the 253rd Report of the Law Commission of India.

25. The CC Act underwent certain significant changes in 2018 by the Amendment Act 28 of 2018 with effect from 3rd May 2018, while the CC Act as it was enacted in 2015 was meant to deal with high value commercial disputes, the 2018 amendment acknowledged that there was a need for early resolution of commercial disputes 'of even lesser value'. The specific objectives enumerated in the SOR to the 2018 Amendment Bill read as under:

"(i) to reduce the specified value of commercial disputes from the existing one crore rupees to three lakh rupees, and to enable the parties to approach the lowest level of subordinate courts for speedy resolution of commercial disputes;

(ii) to enable the State Governments, with respect to the High Courts having ordinary original civil jurisdiction, to constitute commercial courts at District Judge level and to specify such pecuniary value of commercial disputes which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction of the district courts;

(iii) to enable the State Governments, except the territories over which the High Courts have ordinary original civil jurisdiction, to designate such number of Commercial Appellate Courts at district judge level to exercise the appellate jurisdiction over the commercial courts below the district judge level;

(iv) to enable the State Governments to specify such pecuniary value of a commercial dispute which shall not be less than three lakh rupees or such higher value, for the whole or part of the State; and

(v) to provide for compulsory mediation before institution of a suit, where no

urgent interim relief is contemplated and for this purpose, to introduce the Pre-Institution Mediation and Settlement Mechanism and to enable the Central Government to authorise the authorities constituted under the Legal Services Authorities Act, 1987 for this purpose.”

26. Keeping in view of the above changes, the Court now proceeds to look at the definitions in the CC Act. Section 2 (1) (b) defines a ‘Commercial Court’ to be the Commercial Court constituted under Section 3(1) of the CC Act, which reads 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.”

27. Section 3A of the CC Act which speaks of the constitution of Commercial Appellate Courts reads as under:

“3A. Designation of Commercial Appellate Courts:-

Except the territories over which the High Courts have ordinary original civil jurisdiction, the State Government may, after consultation with the concerned

High Court, by notification, designate such number of Commercial Appellate Courts at District Judge level, as it may deem necessary, for the purposes of exercising the jurisdiction and powers conferred on those Courts under this Act."

28. Commercial Appellate Courts can, therefore, also be established at the District Judge level. Arbitration matters are also commercial disputes as per the definition of 'commercial dispute under' Section 2(1)(c) read with Section 10 of the CC Act which reads as under: "10. Jurisdiction in respect of arbitration matters:-

Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and-

(1) If such arbitration is 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 have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) 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 have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(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."

29. Correspondingly, as regards the pending arbitration cases, the transfer of such cases to the Commercial Courts is provided under Section 15(2) of the CC Act which reads as under:

"15 (2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 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:

Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2)."

30. Section 21 of the CC Act is a provision that has been relied upon by the

Opposite Parties. It reads as under:

“21. Act to have overriding effect:-

Save as otherwise provided, the provisions of this Act shall have effect, 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.”

31. There can be no doubt that in terms of chronology, CC Act is later to the A&C Act. Both are Parliamentary enactments. When the CC Act was enacted, the Parliament was conscious of the A&C Act and its provisions. There is specific reference to the A&C Act in Sections 10 and 15 of the CC Act. Wherever, the subject matter of an arbitration is a ‘commercial dispute of a specified value’ and it fulfils the conditions which specified in Section 10(3), the matter shall be heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Courts have been constituted. Therefore, Section 3(3) of the CC Act assumes importance. The constitution of such Commercial Courts is to be done by the State Government with the concurrence of the Chief Justice of the High Court.

32. As far as Odisha is concerned, it is an admitted position that pursuant to the aforementioned power vested in the State Government under Section 3(3) of the CC Act, the impugned notification dated 13th November 2020 has been published. It reads as under:

“GOVERNMENT OF ODISHA

LAW DEPARTMENT

NOTIFICATION

Bhubaneswar dated, the 13- NOV, 2020

No. IJ-68/2018. 10933/ L, In exercise of the powers conferred by section-3 and sub-section (1) of section 9 read with section 10 of the Odisha Civil Courts Act, 1984 (Odisha Act 18 of 1984) and section 30 of the Commercial Courts Act, 2015 (4 of 2016) and in supersession of the notification of the Government of Odisha in the Law Department No.12640/L, dated 26th October 2017, published in the Extraordinary issue No.1478 of the Odisha Gazette dated the 28th October, 2017, the State Government on the recommendation of and after consultation with the High Court of Orissa do hereby establish the Courts of Civil Judge (Senior Division) at the places as mentioned in column (2) of the Schedule below, and number of such Courts as mentioned in column (4) thereof in addition to the existing number of such Courts in the respective Judgeship having local limits of jurisdiction co-extensive with the local limits of jurisdiction mentioned in column (3) of the said Schedule for the purpose of exercising the jurisdiction and powers on those Courts under the Commercial Courts Act, 2015, with effect from the

date on which the said Courts are made functional.

Schedule

Sl. No.

Place of sitting of Commercial Courts

Extent of local limits of jurisdiction

No. of Courts at the place of sitting

(1)

(2)

(3)

(4)

1

Cuttack Sadar

Judgeship of Cuttack,

Angul, Dhenkanal and Jajpur

1

2

Bhubaneswar

Judgeship of Khurda

1

3

Berhampur

Judgeship of Ganjam,

1

Kandhamal, Boudh and

Gajapati

4

Sambalpur

Judgeship of Sambalpur,

Bargarh, Deogarh and Jharsuguda

1

By order of the Governor

Principal Secretary to Government”

33. This has to be read with the relevant provisions of the Orissa Civil Courts Act (OCC Act), 1984. Section 2 (1) of the OCC Act reads as under:

“Classes of Civil Courts-

(1) There shall be the following classes of Civil Courts under this Act, namely:-

(a) The Court of the District Judge which shall include the Court of the Additional District Judge;

(b) The Court of the Civil Judge (Senior Division) which shall include the Court of the Additional Civil Judge (Senior Division) and;

(c) The Court of Civil Judge (Junior Division) which shall include the Court of Additional Civil Judge (Junior Division).

(2) The Court of the District Judge shall be the principal Court of original civil jurisdiction in the district.

Explanation- For the purposes of this sub-section the expression “District Judge” shall not include an Additional District Judge.”

34. Then we have the memo dated 27th April, 2021 of the High Court of Orissa which notified on 3rd May, 2021 as the date of commencement of the Commercial Court of the Senior Civil Judge, Bhubaneswar. In the said memo, it was directed that case records pertaining to commercial disputes under the CC Act be transferred for smooth functioning to the Commercial Court.

35.1 In order to press home the point that it is the A&C Act that would prevail and therefore the petitions pending in the Court of Senior Civil Judge (Commercial Court) Bhubaneswar should continue to be heard only by the D&SJ and not by the Senior Civil Judge Commercial Court, extensive reliance is placed by counsel for the Petitioners on the decision of the Supreme Court in *Kandla Export Corporation v. OCI Corporation* (supra). A careful perusal of the said decision reveals that the question addressed there was whether ‘an appeal, not maintainable under Section 50 of the A&C Act, is nonetheless maintainable under Section 13(1) of the CC Act?’ The question, in that case arose in an international commercial arbitration and not a domestic arbitration. It was contended in that case, relying on the decision in *Fuerst Day Lawson Limited v. Jindal Export Limited* (supra) that the A&C 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 CC Act.

35.2 The Supreme Court considered the definition of the word ‘specified value’ in the CC Act which at the relevant point of time meant not less than Rs.1crore or higher value ‘as may be notified by the Central Government’. Incidentally, that definition has undergone a change by the 2018 amendment with retrospective

effect from 3rd May, 2018 and the figures '1crore rupees' has been substituted by '3 Lakh rupees'. The discussion in *Kandla Export Corporation v. OCI Corporation* (supra) turned on the interpretation of Section 50 of the A&C Act, which was considered in *Fuerst Day Lawson* (Supra). It was held as under:

"20. Given the judgment of this Court in *Fuerst Day Lawson* (supra), which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in paragraph 89 of *Fuerst Day Lawson* (supra) that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.

21. However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done *ex abundanti cautela*. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasize the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(a) and would, therefore, not be appealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the ratio decidendi of the judgment in *Fuerst Day Lawson* (supra) would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone.

22. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left "to the Court authorized by law to hear appeals from such orders". 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.”

35.3 An argument was advanced based on Section 21 of the CC Act but was repelled by the Court in *Kandla Export Corporation (Supra)* as under:

“26. In this view of the case, it is unnecessary to advert to Shri Giri’s arguments based on Section 21 of the Commercial Courts Act. Section 21 would only apply if Section 13(1) were to apply in the first place, which, as has been found, cannot be held to apply for the reasons given hereinabove. Equally, it is unnecessary to advert to the arguments of the learned counsel for the Appellants based on Section 11 of the Commercial Courts Act.”

35.4 The Supreme Court in *Kandla Export Corporation v. OCI Corporation (supra)* then discussed another aspect as under:

“27. The matter can be looked at from a slightly different angle. Given the objects of both the statutes, it is clear that arbitration itself is meant to be a speedy resolution of disputes between parties. Equally, enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community. In point of fact, 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 objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads. Admittedly, if the amount contained in a foreign award to be enforced in India were less than Rs. one crore, and a Single Judge of a High Court were to enforce such award, no appeal would lie, in keeping with the object of speedy enforcement of foreign awards. However, if, in the same fact circumstance, a foreign award were to be for Rs. one crore or more, if the Appellants are correct, enforcement of such award would be further delayed by providing an appeal under Section 13(1) of the Commercial Courts Act. Any such interpretation would lead to absurdity, and would be directly contrary to the object sought to be achieved by the Commercial Courts Act, viz., speedy resolution of disputes of a commercial nature involving a sum of Rs. 1 crore and over. For this reason also, we feel that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonized by 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.”

35.5 What appears to have weighed with the Supreme Court in deciding *Kandla Export Corporation (Supra)* in the above manner was that Section 50 of the A&C

Act, in relation to international commercial arbitration, did not provide for an appeal whereas accepting the submissions of the Appellants in that case would mean that notwithstanding Section 50 of the A&C Act an appeal was still maintainable. The question was that whether Section 13(1) of the CC Act would apply in the first place? Since the answer to that question was in the negative, the Court held that it is Section 50 of the A&C Act which would prevail and not Section 13(1) of the CC Act.

36. In the present case, however, we are not concerned with an international commercial arbitration. For a domestic arbitration, there is no bar as contained in Section 50 of the A&C Act to the maintaining of an appeal under Section 13(1) of the CC Act. In fact that is not in issue as far as the present case is concerned. Here, what stands transferred to the Commercial Court are petitions under Section 9 or Section 14 or Section 34 of the A&C Act. These are covered under Section 15(2) of the CC Act. The question of applicability of either Section 13(1) of the CC Act or Section 50 of the A&C Act, therefore, does not arise.

37. The principal concern expressed in *Kandla Export Corporation (Supra)* was that the objective of a speedy resolution of disputes would be defeated if a right of appeal under Section 13(1) of the CC Act in an international commercial arbitration was permitted despite the specific bar in Section 50 of the A&C Act. This, it was opined, would defeat the purpose of early resolution of disputes. Such a concern does not arise as far as the present case is concerned. Consequently, the Court is not persuaded that the decision in *Kandla Export Corporation (supra)* helps the case of the Petitioners.

38. Learned counsel for the Petitioners also placed extensive reliance on the Judgment of the Madhya Pradesh High Court in *Yashwardhan Raghuwanshi v. District & Sessions Judge 2021 SCC OnLine MP 457*. There the validity of an order passed by the D&SJ, Bhopal, distributing the Civil and Criminal business among various Additional District Judges (ADJs) and the subordinate Judges working under his supervision. The challenge in particular was to Entry-45 in terms of which disputes/cases filed under the provisions of Sections 9, 14, 34 & 36 of the A&C Act, involving commercial disputes under the provisions of the CC Act of specified value between Rs.3 Lac and Rs.1crore were assigned to the Court of the Civil Judge Class-I, Bhopal.

39. In *Yashwardhan Raghuwanshi v. District & Sessions Judge (supra)*, the Madhya Pradesh High Court relied on the decision of the Supreme Court of India in *State of Maharashtra, through Executive Engineer v. Atlanta Limited (2014) 11 SCC 619* to hold that the Court of superior most jurisdiction in a district is the Court of the District Judge. It concluded that:

“14.....Segregation of an arbitration matters on the basis of a pecuniary limit is not what the law provides for. All the arbitration matters, irrespective of the value of claim, are required to be adjudicated by Principal Civil Court of original jurisdiction. Therefore, it is clear that in respect of commercial disputes involving

an arbitration dispute only the Commercial Court of the status of District Judge or Additional District Judge would be the competent court to entertain the matters under Sections 9, 14, 34 & 36 of the Arbitration Act.”

40. Consequently, the aforementioned order dated 20th October, 2020 was set aside by the M.P. High Court.

41. This Court’s attention has been drawn to an earlier decision of the Madhya Pradesh High Court in Apollo Real Estate LLP v. Dr. Arun Waghmare 2019 SCC OnLine MP 2570 which appears not to have been noted in the Yashwardhan Raghuwanshi decision. There the High Court appears to have come to an opposite conclusion viz., that Section 10(2) read with Section 15(2) of the CC Act would prevail over the provisions of the A&C Act.

42. In any event, this Court is unable to agree with the reasoning of the High Court of Madhya Pradesh in Yashwardhan Raghuwanshi (supra). In particular, the Court would like to refer to the Parliamentary intent in enacting the CC Act in 2015 much after the A&C Act of 2016 and the SOR not only of the Bill introduced in 2015 but also the SOR of the Bill introduced in 2018, amending the said statute. The debates in the Parliament in this regard are instructive. In defending its decision to expand the scope of commercial disputes beyond those which were of high value, three aspects that were mentioned on behalf of the Government defending the Bill in the Parliament, which read as under:

“Now, what really has transpired in December 2017? As has already been mentioned by the hon. Minister, in December, 2017, the Government had established a total of 247 commercial courts across the country. But, the non-exhausted list of 22 disputes, termed as commercial disputes, has also been brought in. To increase the efficiency of the system, there are still many enactments and many things which we need to correct and this is just one part of the correction to improve the ease of doing business. By bringing the jurisdiction to three lakhs, we will actually be bringing judicial accessibility to a wider audience and to a larger number of people. By making it available to a larger number of people, we will be resolving a larger number of disputes. It is in this context that the jurisdiction has been reduced after studying the data in detail.

This particular amendment has been brought in with the specific value which was determined under Section 2 (1) (i), where the minimum pecuniary jurisdiction is mentioned, which was one crore earlier before the Ordinance, now it has been brought to three lakhs. This jurisdiction will initiate more such disputes to have a faster disposal.

As I have mentioned earlier, under the Charter, there are Chartered High Courts and non-Chartered High Courts. So, certain original jurisdictions are vested with certain High Courts and not with every High Court. This was one impediment in establishing commercial divisions. So, there was a bar of some sort. To do away with the bar, this particular enactment has been brought in and this is another

major change which has been brought in through this particular Bill.

The third aspect of the commercial appellate court is that normally at the District Level, either a District Judge or a Judge below the level of District Judge, will be notified as the Commercial Court Judge. Then the appeal need not go to the High Court. The appeal can go to the District Judge. That is also a part of this particular enactment.”

43. The legislature appears to have left it open to the High Court and the State government either to appoint a Civil Judge (Senior Division) or an Additional District Judge as the Commercial Court of first instance to expedite the adjudication of commercial disputes. It is interesting to note that there are several States that have constituted Commercial Courts both at the District Judge level as well as below the District Judge level. In Gujarat, the Courts of the Additional District Judges in Bhuj, Anjar, Gandhidham and Bhachau have been constituted for hearing arbitration matters whereas the Courts of the Principal Senior Civil Judge in these places are for hearing other commercial disputes. In Karnataka, in some districts, it is the Principal D&SJ and in others the AD&SJ. In Bihar, depending on the pecuniary value, it could be the District Judge or the Sub-Judge. In Uttarakhand, it is the Additional District Judge Commercial Court, Dehradun. The intent clearly was to expand the power and to bring in more Courts under the rubric of ‘Commercial Courts’. Considering that the specified value was being lowered, it was but natural to allow Courts below the rank of the District Judge to be designated as such.

44. Section 10(3) of the CC Act specifically deals with arbitrations, ‘other than international commercial arbitrations’. The jurisdiction in respect of such disputes would now be based with the Commercial Courts, although earlier it was with a principal Civil Court, which would ordinarily exercise jurisdiction under Section 2(1)(e) of the A&C Act. The orders passed by the D&SJ on 7th July 2021, transferring the arbitration petitions to the Court of the Senior Civil Judge Commercial Court, was only by way of implementation of these provisions.

45. During the course of hearing, the issue concerning the constitutional validity of Section 10(3) of the CC Act was not seriously canvassed. In any event, the Court considers the argument to be futile for the simple reason that commercial disputes have been identified as a special category for the purposes of the legislation. It is not possible to accept the plea on behalf of the Petitioners that while A&C is a special law, the CC Act is a general law. This cannot be a mere matter of perception of the Petitioners. Here we have two special laws one being the A&C Act which is earlier and the CC Act which is later. Therefore, the principle of ‘*generalia specialibus non-derogant*’, has no application whatsoever, in the present context.

46. There might be an anomaly inasmuch as arbitral disputes of a commercial value of less than Rs.3 Lacs may have to be dealt with directly by the D&SJ in terms of the definition under Section 2(1)(e) of the A&C Act and appeal against

which would lie to the commercial appellate division in the High Court. But none of the petitions before this Court has that fact situation. The question is, therefore, purely academic. Nevertheless, it will be open to the State Government to revise its notification in view of the above anomaly.

47. The Court is not satisfied that there is any arbitrariness in the enactment of Section 10(3) of the CC Act or any of the notifications issued by the State Government under Section 3(3) read with Section 10 of the CC Act.

48. At this stage, it must be pointed out that this Court's attention has been drawn to the Judgment of the Bombay High Court in *Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar* (Supra). The Bombay High Court, on analyzing these very provisions, came to the conclusion that it is the CC Act provisions that would prevail. The Court is in respectful concurrence with the said view. As rightly noted by the Bombay High Court both Sections 42 of the A&C Act and Section 21 of the CC Act appeared to be similar provisions inasmuch as they begin with a non-obstante clause, precluding the applicability of any other law for the time being in force. The following observations of the Bombay High Court in this regard are relevant, which reads as under:

"60. G.P. Singh, in his cerebral commentary, *Principles of Statutory Interpretation* (G.P. Singh, *Interpretation of Statutes*, (reprint, 14 edn., Lexis Nexis, 2018) 403), 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 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."

49. The Bombay High Court then undertook an analysis of the un-amended provisions of the CC Act and noted that there is a two-tier Court at the district level. One is the Commercial Court of original jurisdiction and another at the District Judge level of the Commercial Appellate Court. The approach in *Kandla Exports* (supra) about the CC Act being procedural in nature and therefore having retrospective effect, found support in the decision in *New India Assurance Company Limited v. Shanti Misra* (1975) 2 SCC 840, where a three-Judge Bench held that once there was a change not in the substantive law but in the procedural law, it would operate 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'. The relevant passage of the decision of the Bombay High Court in *Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar*, reads as under:

"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."

50. The Court finds merit in the contention on behalf of the Opposite Parties that the A&C Act must yield to the CC Act and not vice versa given that the objective of both enactments is the speedy disposal of the cases and the CC Act was a later enactment. There is no apparent conflict between the A&C Act and the CC Act for being resolved. The objective of both is the speedy resolution of the disputes. As far as challenge to the vires of Section 10 of the CC Act is concerned, indeed no ground has been made out before this Court to show how Section 10 of the CC Act is ultra vires the legislative powers of the Parliament or how it is 'manifestly arbitrary'. The identification of commercial disputes as distinct from ordinary civil disputes is based on an intelligible differentia and subjecting them to a special expedited procedure can neither be considered to be arbitrary nor ultra vires the A&C Act. That prayer, therefore, has to be rejected.

51. Incidentally, there is no challenge to either Section 15 or 21 of the CC Act. If indeed commercial cases involving arbitral disputes have necessarily to be transferred under Section 10(3) read with Section 15(2) of the CC Act, then as a natural corollary the Commercial Court alone will have to decide those disputes and not of the Court in terms of the A&C Act. In passing the impugned orders transferring the cases, the D&SJ has not committed any illegality nor has the Senior Civil Judge, Commercial Court, Bhubaneswar committed any illegality in

accepting the cases on transfer and proceeding with them in accordance with law.

52. Section 37 of the A&C Act does not confine the appellate power to the High Court. The very wording of Section 37 contemplates a Court other than the High Court hearing appeals against orders under the A&C Act by Courts subordinate to the High Court. Therefore, the CC Act providing for Commercial Appellate Division at the District Judge level is not inconsistent with the Section 37 of the A&C Act.

53. A 60-day appeal period is provided under the CC Act as opposed to 90 days under the CPC. The CC Act also provides for expeditious disposal of appeals within six months of the filing. It also calls for appointment of Judges possessing special knowledge and expertise in commercial law. All these provisions provide rational nexus to the object sought to be achieved by the CC Act, viz., the expeditious resolution of commercial disputes. For the aforementioned reasons, the Court finds nothing manifestly arbitrary in the enactment of Section 10 (3) of the CC Act.

54. The Court finds no merit in any of these petitions. The interim orders are hereby vacated. The petitions are dismissed, but in the circumstances, with no order as to costs.

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