

SUGGESTIONS AND COMMENTS ON

THE COMMERCIAL DIVISION OF HIGH COURTS BILL, 2009

Presented to the Select Committee of the Rajya Sabha

headed by
the Hon'ble P.J. Kurien,
Member, Rajya Sabha

By

Mr Satish J. Shah
Advocate, High Court, Bombay
&

Mr Gautam S. Patel
Advocate, High Court, Bombay

on behalf of the

Bombay Bar Association

Room # 57, 3rd Floor
High Court, Bombay

Mumbai
31 May 2010

I. Introduction

Set up in 1862, the Bombay Bar Association (“BBA”) is the oldest Bar Association in the country. It represents lawyers practicing on the Original Side of the High Court. Since its inception, the BBA has given the Indian judiciary a disproportionate number of legal luminaries, including judges of the Supreme Court, Chief Justices of the Supreme Court and the Bombay High Court, High Court judges, Attorneys-General, Solicitors-General and Advocates-General. The present Chief Justice of India, the present Attorney-General for India and the present Advocate-General of Maharashtra are all members of this Association. Indeed, our membership roll reads like a cavalcade of legal history in India and includes many of the architects of modern India and, in particular, the father of our Constitution, Dr. B.R. Ambedkar.

The BBA is committed to assisting the administration of justice. Apart from the role of individual members who serve at the Bar, the Association itself has always worked closely with the judiciary on its administrative side in attempting to evolve more effective procedures and systems. Many of our members work as Commissioners for recording evidence; others serve as Arbitrators and Mediators and many are appointed *amicus curiae* in difficult PILs.

II. The Commercial Division of High Courts Bill, 2009

In Maharashtra, most high-value commercial litigation is filed on the Original Side of the Bombay High Court. This is because Mumbai is the commercial capital not only of the State but of the country. Many leading banks, financial institutions and large industrial organizations have their head offices and most high value transactions are entered into in Mumbai. The Commercial Division of High Courts Bill, 2009 (“the Bill”) is therefore of direct and immediate importance to this Association.

Subject only to the various suggestions made in this note and at the hearing before the Select Committee of the Rajya Sabha headed by the Hon'ble P.J. Kurien, Member, Rajya Sabha ("the Kurien Committee"), this Association states its full-fledged support for the bill.

At the hearing held by the Kurien Committee in Mumbai on Monday, 24 May 2010, the BBA was represented by Shri Satish J. Shah and Shri Gautam S. Patel, both members of the Standing Committee of the BBA. This note is prepared on behalf of the BBA by Shri Shah and Shri Patel.

Before setting out specific suggestions and comments, one important question that was raised during the hearing must be more fully addressed, viz., whether, in the view of this Association, the Bill, if enacted, would assist in expediting the disposal of regular, non-commercial cases, or whether it would be viewed as a hindrance to such disposal.

It is the view of this Association, that far from impeding the disposal of the High Court caseload, this Bill would significantly expedite disposals. The reason is that high-value commercial cases are invariably the ones with the greatest complexity. They tend to take up a disproportionate amount of court hours when they are handled as 'regular' cases. With a special fast-track court, dedicated infrastructure, and special provisions governing procedure, especially at trials, these high-value cases will be quickly cleared through the system, thus freeing up court time to attend to regular cases.

Further, and independent of the Bill, this Association is preparing a working plan under which, with the cooperation of the Bombay Incorporated Law Society (of Solicitors in Mumbai) ("BILS") and the judicial branch of the High Court, the *oldest pending cases*, the money value of many of which has now become insignificant, will also be prioritized for speedy disposal.

With the Bill and this proposal working together, the Association is confident that it will be possible to cut down arrears on the Original Side within a realistic time-frame.

III. Suggestions by the Chamber of Commerce & Industry

The BBA refers to the submissions already filed before the Kurien Committee by the Bombay Chamber of Commerce and Industry (“the BCCI”). The BBA fully supports each of these suggestions. Some of the members of the BBA and BILS serve on the Legal Committee of the BCCI; and in this matter, the Association and the BCCI share a common purpose and interest.

The BBA therefore adopts the suggestions of the BCCI *in toto* and these may be treated as forming part of this note.

The following points should, therefore, read as supplementing the suggestions of the BCCI and not in derogation thereof.

IV. Suggestions by the Bombay Bar Association

Sr No	Bill Section Reference	Suggestion	Rationale
1.	S.2. ("Definition")	<p>The BBA is of the view that, as suggested by the BCCI, the definition should be restricted to disputes arising out of economic activity. The determining criteria should not be the value, but the activity that generates that value.</p> <p>Specifically, the BBA suggests that all disputes covered by the Family Courts Act, matrimonial disputes, disputes arising out of the law of inheritance and succession, partition suits of joint family property and HUFs should be <i>excluded</i> from the definition.</p> <p>For this purpose, a suitable Explanation may be added to S.2, along these lines:</p> <p>"(1) A dispute shall not be deemed to be a commercial dispute solely because it is in respect of or otherwise relates to any property the value whereof exceeds the amount specified in S.7;</p> <p>(2) Notwithstanding anything contained in this Act, regardless of the value of the claim or dispute, the following shall not be deemed to be commercial disputes, viz.,</p> <p>(a) disputes arising out of situations covered by the Family Courts Act,</p> <p>(b) matrimonial disputes</p> <p>(c) disputes relating to the laws of inheritance and succession;</p>	<p>The purpose of the Bill is to expedite the disposal of those cases which satisfy two criteria: (1) they must arise out of some economic or commercial activity; and (2) they must be above a certain claim value. <i>Both criteria must be met</i>. It is not sufficient to meet only one and not the other.</p> <p>This Bill's purpose is primarily to assist the country's economic development <i>inter alia</i> by ensuring that high-value commercial disputes, of which there are likely to be an increasing number, are not snarled up in a cumbersome system, and nor do they clog up the disposal of other cases. It is important, therefore, to <i>remove</i> from the definition any possibility of inclusion of such cases as are merely of a high value <i>but do not stem primarily from an underlying commercial or economic activity</i>.</p> <p>Personal disputes should, therefore, be excluded. Otherwise, the purpose and intent of the Bill as reflected in the introductory chapter of the Law Commission's 188th Report will be lost.</p>

Sr No	Bill Section Reference	Suggestion	Rationale
		(d) suits or actions for partition of joint family property, HUFs and impartible estates;	
		(e) any dispute not arising from a business, trade, mercantile, service or like activity which is primarily of economic, mercantile or commercial nature.	
2.	S.2, Explanation I	Delete the word “also” in the second line.	The word “also” implies that a commercial dispute cannot be <i>only</i> for recovery of immovable property, etc., but must be coupled with some other cause of action. It is submitted that this is likely to lead to confusion, as there are several commercial disputes that are directly and <i>only</i> connected to recovery of property.
3.	S.2, Explanation II	Add at the end, “or intended to be used in trade or put to commercial use”	This should be adopted <i>only if the suggestion by the BCCI is not accepted for any reason.</i>
4.	S.5(8)	Add at the end, “but which shall ordinarily not be less than Rupees Fifty Thousand PROVIDED that not more than one such extension shall be granted to each party. The Court may, however, in exceptional cases, and for reasons to be recorded in writing, reduce the amount of costs or grant one further extension.	This may seem like a drastic provision but it is the experience of the members of this Association that the practice of repeated adjournments without a significant imposition of costs is wholly inimical to speedy disposal. The present Bill is for a select class of cases—high value, commercial cases—and such cases are sought to be accorded preferential “first-class” treatment: special reserved infrastructure, a separate procedural code, etc. Such cases cannot, therefore, be permitted to delay the process, delay being the first issue that the Bill seeks to address. A litigant cannot claim the privilege of this special act and yet also claim endless time extensions at next to no cost.

Sr No	Bill Section Reference	Suggestion	Rationale
-------	------------------------	------------	-----------

The proposal from the BBA provides a minimum of costs to be imposed and, to that extent, limits judicial discretion. This is borne out of the experience that, typically, even in a city like Mumbai, only nominal costs are awarded.

Apropos this suggestion, a question was put to the BBA representatives at the hearing as to why an indigent litigant compelled into the Commercial Division, say for example a landlord, should be foisted with heavy costs. To this there are three possible answers:

(1) In some of these key jurisdictions, notably Mumbai, landlord-tenant disputes, regardless of value would automatically stand excluded from the purview of the proposed Act, since these are governed by special rent control statutes that confer special jurisdiction on the Small Causes Court; and S.6 of the Bill excludes such suits from its ambit. Thus, most landlord-tenant disputes are unlikely to be brought before the Commercial Division.

(2) Where a landlord-tenant dispute does fall within the jurisdiction of the commercial division it is clearly in the interests of both parties to ensure timely completion of procedures. The proposed Commercial Division would be better suited to quick disposal of such disputes.

(3) Lastly, the proposal allows for a measure of discretion in extending time, but requires reasons to be given for

Sr No	Bill Section Reference	Suggestion	Rationale
			imposing reduced costs or extending time, and makes such order appealable.
			It is submitted that just as there need to be powerful incentives, there must also be equally strong <i>disincentives</i> to the dishonest litigant, if abuse of the Bill is to be prevented.
5.	S.8(3)(b)	Change "preliminary jurisdiction" to "pecuniary jurisdiction"	This appears to be a typographical error.
6.	S.9(2)(c)	After the words "Code of Civil Procedure, 1908" add the words "or in any rules framed by the High Court in this regard"	Chartered High Courts, such as the Bombay High Court, have their rules for service.
7.	S.9(2)(e) and (f)	Delete (f)	This is a replication of (e), with a minor change. A possible typographical error.
8.	S.9(2)(e)	Add at the end: "and shall serve a copy thereof in the manner provided herein on all parties, and the Plaintiff shall be entitled to file a Reply to the Counter-Claim within one month from the date of service thereof and a copy whereof, along with copies of all documents referred to therein shall also be served on all parties in the manner provided herein."	A Counter-Claim operates as an independent cross-suit and can be tried even if the Plaintiff is dismissed. The CPC allows the Plaintiff (the Defendant to the Counter-Claim) to file a reply (effectively the Plaintiff's Written Statement to the Defendant's Counter-Claim). This has been overlooked in the Bill.
9.	S.9(2)(g)	Delete	This is already covered by the proposed S.9(2)(e) above.
10.	S.9(2)(h)	Delete the clause	Every further witness Affidavit should be filed only after the cross-examination of the previous witness is complete; and the Defendant should be required to file his witness Affidavits only after the Plaintiff closes his case.

Sr No	Bill Section Reference	Suggestion	Rationale
11.	S.9(2)(f)	<p>Add the following as S.9(2)(f):</p> <p>“(h). Service.—Service of all filings in the Commercial Division shall be effected by the party filing on all other parties in the manner provided herein no later than fifteen clear days from the date of such filing in the registry of the Commercial Division.”</p>	<p>It may happen that after the completion of cross-examination of the Plaintiff’s first witness, the Plaintiff does not wish to lead further evidence. If, as presently envisaged, he has <i>already</i> put in the Affidavit evidence of his other witnesses then he is forced to put those witnesses in the box and offer them from cross-examination. This is because the Affidavit is <i>evidence</i> and once on file cannot be ‘withdrawn’ (testimony cannot be <i>simpliciter</i> withdrawn). Equally, once filed, if the witness is <i>not</i> offered from cross-examination then the other side might well argue that an adverse inference be drawn for failure to produce the witness.</p> <p>The same applies to the Defendant. If his cross-examination of the Plaintiff’s witness is sufficient, he may not wish to lead any evidence at all. But if he is compelled to file his witness Affidavits in advance then he has no choice but to put his witness up for cross-examination; or face the argument and consequences of an adverse inference being drawn against him.</p> <p>A special provision is required to be made for service to provide a compressed timeline. Also, the suggestion makes it the duty of each party to serve all other parties. Thus if there are three Defendants, all separately represented, then each Defendant must not only serve the Plaintiff but also all other Defendants. Carriage of proceedings is thus with the party who files.</p>

Sr No	Bill Section Reference	Suggestion	Rationale
12.	S.9(2)(a)(iii) to (vii)	<p>Renumber after sub-section (f), thus:</p> <p>(g). <u>Pre-trial procedure.</u></p> <p>(i). “No later than three weeks after the date of filing of the Written Statement, or if there be more than one Defendant, the Written Statement filed last in point of time, the dispute shall be listed before the Commercial Division for framing of issues. The Plaintiff shall file a draft of the brief issues arising from the Plaintiff and Written Statement and each Defendant shall file brief draft issues arising from such Defendant’s Counter-Claim, if any, and Plaintiff’s reply thereto. The Commercial Division shall, after considering the issues so filed, immediately proceed to settle the issues.</p> <p>(ii). The Commercial Division shall also forthwith issue necessary directions for completion of discovery and inspection, allowing sufficient time not exceeding six weeks, for administering interrogatories, issuance of notice to admit documents and notice to admit facts.</p> <p>(iii). The Commercial Division shall also either set a date before a Single Judge for recording of evidence or shall appoint a Commissioner for that purpose, fixing the date for commencement of evidence at a time not later than two weeks after the period fixed in sub-section (ii) above.</p>	<p>The procedure for settling issues, discovery, inspection, and witness affidavits needs to be carefully timelined.</p> <p>These are matters that cannot be done at the time of filing of the Plaintiff, but only arise after the Written Statement is filed. For instance, issues are drawn not on the averments on the Plaintiff alone, but require an assertion to be made by one party and denied by the other. Similarly, no Affidavit of Evidence may be required if the Defendant admits the claim; and interrogatories, discovery and inspection also only arise after filing of the Written Statement.</p>

Sr No	Bill Section Reference	Suggestion	Rationale
		(iii). Any party shall be entitled to make an application for discovery and production of documents, setting out specifically with reference to each document, the relevance thereof in correlation to the issues settled, at any time no later than two weeks before the date fixed for recording of evidence.	
13.	S.9(2)(i) and (j)	Delete these clauses	There is no provision in the CPC for a "rejoinder" to a Written Statement, and none should be permitted in the Commercial Division.
14.	S.9(2)(k)	Re-number as S.9(2)(j)	Consequential on foregoing changes.
15.	S.9(2)(k)	The words "supplementary statements" should be deleted and substituted by "supplementary pleadings".	The use of the word "statements" appears to be inadvertent.
		Add the following as S.9(2)(k)	
		(k). <u>Evidence.</u> (i) The Plaintiff shall file an Affidavit in lieu of examination-in-chief of his first witness along with a list of all witnesses intended to be called not later than two weeks before the date fixed for commencement of recording of evidence.	
		(ii). Before commencement of the cross-examination, the Plaintiff may put additional questions in examination-in-chief to his witness.	
		(iii). Within two days of the completion of the cross-examination and re-examination, if permitted, of the Plaintiff's first witness, the Plaintiff shall file the Affidavit	

Sr No	Bill Section Reference	Suggestion	Rationale
		<p>in lieu of examination-in-chief of his next witness;</p>	
		<p>(iv) The foregoing procedure applicable to first witness shall apply to the second and every subsequent witness.</p>	
		<p>(v). On completion of the evidence of his last witness, the Plaintiff shall close his case and may, if he so desires, reserve the liberty to examine witnesses in rebuttal if necessary.</p>	
		<p>(vi) The Defendant, or, if there be more than one Defendant, the first Defendant, shall file and serve the Affidavit in lieu of cross-examination of his first witness along with his list of witnesses not later than one week after the completion of the evidence of the Plaintiff's last witness, and thereafter the same procedure as applicable to the Plaintiff and his witnesses shall apply to the Defendant, or, if there be more than one Defendant, to each of the Defendants in turn, and to the evidence of all rebuttal witnesses till completion of all evidence.</p>	
		<p>(vii). Affidavits of evidence in lieu of examination-in-chief for both the Written Statement and the Counter-Claim shall be filed simultaneously.</p>	
		<p>(viii). Every Affidavit of evidence shall contain, and contain only, such matters as are to the knowledge of the witness or in respect whereof the witness can give direct evidence.</p>	

Sr No	Bill Section Reference	Suggestion	Rationale
16.	s.9(3)	<p>Add at the end.</p> <p>“Such Commissioner shall be entitled to rule on issues of admissibility and relevancy of any document or any testimony and also to permit or disallow any questions in re-examination. The Commissioner shall also be entitled to order to be redacted from any evidence Affidavit any statement that the Commissioner considers not admissible or relevant, including averments in the nature of legal submissions, arguments and prayers.”</p>	<p>The power to so rule is a judicial function and can only be delegated by statute, not by administrative order. It is submitted that, to free up the time of the court, and since the Commissioners to be appointed are of the rank of Senior Civil Judge or lawyers of at least 20 years' standing, the delegation of this power is both necessary and desirable. In the present system, Commissioners have no such power. The result is a voluminous record where an objection is raised, recorded and never decided; further questions are put as <i>if the question had been allowed</i>, and the entire record is then sent to the High Court. Such a procedure would, if permitted, defeat the purpose of the Bill completely and is likely to clog up the time of the court. This limited power should be delegated to the Commissioner.</p> <p>In England, a practice exists of appointing 'Recorders' (part-time circuit judges) for less complex cases. These recorders do have the power to decide cases; it is not proposed to vest such powers in the Commissioner, except to the limited extent of permitting them to rule on admissibility and relevancy. This will also require the High Court to set up a panel of reputable and skilled Commissioners.</p>
17.	S.9(6)	<p>Add the following:</p> <p>“(6). <u>Costs</u>.</p> <p>(i). The losing party shall normally be directed to pay the expenses incurred and actually paid by the other side, including actual counsel and</p>	<p>At present, <i>there is nothing to dissuade the dishonest litigant at all</i>. Costs must follow the event. This is the single most powerful disincentive to frivolous litigation. If this is a mandatory provision, frivolous suits will not be filed and frivolous defences not taken. This provision alone will force</p>

Sr No	Bill Section Reference	Suggestion	Rationale
		<p>attorney fees and witness costs, if any. If a dispute is partly decreed or a party succeeds only in part, the Commercial Division may, in its discretion, reduce the costs proportionately or leave the parties to bear their own costs. However, in an appropriate case the Court shall have the power to award costs less than the actual costs, or to direct both parties to bear their own costs and shall give reasons for such direction in its judgment.</p>	<p>parties to a settlement conference outside court, or to some form of ADR, even before a suit is filed. A dishonest litigant is less likely to pursue his case if he knows that the imposition of actual costs, which are likely to be very high, is inevitable. This, after all, is the very intent and purpose of the Bill—not merely to find another forum, but to find a more effective means of <i>resolution</i> of a certain class of cases.</p>
		<p>(ii). At the conclusion of the hearings, each party shall file a statement of such costs actually incurred by each party. The statement of costs shall be certified by the Advocate on record for that party and a copy served on all opposite parties. The statement shall specifically provide that the amount of costs mentioned therein has been incurred and actually paid by the party on whose behalf the statement of costs is filed.</p>	<p>The concern that an innocent party may well have to pay huge costs, though his case is <i>bona fide</i> yet decided against him is, well founded: to avoid grave injustice, the Court is given the power in such an event to impose lesser costs, or even no costs, but must give reasons for its decision.</p>
		<p>(iii). Subject only to clause (i) above, the decree or order of the Commercial Division shall contain an order for payment of actual costs against the party against whom the final decree or order is passed.</p>	<p>Further, the suggestion applies to costs actually paid.</p>
		<p>(iv). No appeal shall lie from a decree on the issue of award of costs by the Commercial Division.</p>	

Sr No	Bill Section Reference	Suggestion	Rationale
18.	S.10(2)	Delete	This is not understood. If the evidence is being recorded by the Commissioner, and the matter decided by a Division Bench, then there is no scope for making any such application, which will only further delay matters, since even a Commissioner can record an objection, although at present he is not empowered to decide it. Also, it is unclear what a Single Judge is supposed to do when he 'records' an objection, but the decision thereon is required to be taken only by the Division Bench.
19.	S.13(1)	Add the following as sub-section (3): “(3). All interim applications shall be made to a Single Judge of the Commercial Division and appeals therefrom shall lie to the Division Bench of the Commercial Division.”	If the suggestion of the BCCI is not accepted for any reason then, at the very least, interim applications should be dealt with first by a Single Judge and then by a Division Bench of the High Court in an intra-Court appeal. Otherwise, the Supreme Court will be flooded with appeals from interim applications in Commercial Cases, even on matters of discovery, production and inspection. This is needlessly costly and will undoubtedly slow down the process.

Mumbai
31 May 2010