

**ANALYTICAL STUDY OF THE COMMERCIAL COURTS, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS (AMENDMENT) ACT, 2018 FROM THE INDIAN PERSPECTIVE & MEDIATION.**

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**ABSTRACT**

The pendency of cases across courts in India has increased in the last decade. There are several reasons; one such reason is the time consuming procedural part & also the vacancy of judges in the Supreme Court, High Courts, and subordinate courts. As on April 2018, there are over three crore cases pending across the Supreme Court, the High Courts, and the subordinate courts (including district courts). The subordinate courts account for over 86% pendency of cases, followed by 13.8% pendency before the 24 High Courts. The remaining 0.2% of cases are pending with the Supreme Court. Between 2006 and 2018 (up to April), there has been an 8.6% rise in the pendency of cases across all courts. Pendency before Supreme Court increased by 36%, High Courts by 17%, and subordinate courts by 7% Disposal rate between 28% and 55%; increasing number of new cases/year add to pendency

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**INTRODUCTION**

The pendency of cases across courts in India has increased in the last decade. There are several reasons; one such reason is the time consuming procedural part & also the vacancy of judges in the Supreme Court, High Courts, and subordinate courts. As on April 2018, there are over three crore cases pending across the Supreme Court, the High Courts, and the subordinate courts (including district courts). The subordinate courts account for over 86% pendency of cases, followed by 13.8% pendency before the 24 High Courts. The remaining 0.2% of cases are pending with the Supreme Court. Between 2006 and 2018 (up to April), there has been an 8.6% rise in the pendency of cases across all courts. Pendency before Supreme Court increased by 36%, High Courts by 17%, and subordinate courts by 7% Disposal rate between 28% and 55%; increasing number of new cases/year add to pendency

In 2016, compared to 2006, number of cases disposed of increased approximately from 57,000 to 76,000 in Supreme Court; from 14.4 lakh cases to 16 lakh cases in High Courts and from 1.6 crore cases to 1.9 crore cases in subordinate courts. Despite an increase in disposal of cases in most years, the pendency of cases has increased due to the number of new cases outpacing the number of cases disposed of. The disposal rate has stayed between 55% to 59% in the Supreme Court, at 28% in the High Courts, and at 40% in the subordinate courts. More criminal cases are filed in subordinate courts than in High Courts and Supreme Court. For example, 81% of all cases pending in subordinate courts (2016) were criminal cases, compared to 19% civil cases. On the other hand, in High Courts, a higher number of civil cases were filed (60%) compared to criminal cases (40%).<sup>1</sup>

**2. Prior Enactment of the Act**

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, replace The Commercial Courts, Commercial Division and Commercial Appellate Division of High

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<sup>1</sup> Court News, 2006-2016, Supreme Court of India; Prison Statistics In India, 2015, National Crime Record Bureau; Lok Sabha Starred Question 521, April 4, 2018, Lok Sabha; Unstarred Question 4248, March 21, 2018

Courts (Amendment) Act, 2018.<sup>2</sup> Before that Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018<sup>3</sup>.The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018, was introduced in Lok Sabha<sup>4</sup> & the parliament received the assent of the president on the 20<sup>th</sup> August, 2018. The Act enables the creation of commercial divisions in High Courts, and commercial courts at the District level to adjudicate commercial disputes (such as, disputes related to construction contracts and contracts for provision of goods and services).In exercise of the powers conferred by sub-section (2) of section 12A of the Commercial Courts Act, 2015, the Central Government hereby authorises the State Authority and District Authority constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation and settlement under Chapter IIIA of the Commercial Courts Act, 2015.<sup>5</sup>

### **3. Problems encountered by Indian Government-**

The government encompass several problem in attracting foreign companies to India The global economic environment has become increasingly competitive and to attract business at international level, India needs to further improve its ranking in the World Bank 'Doing Business Report' which, inter alia, considers the dispute resolution environment in the country as one of the parameters for doing business. Further, the tremendous economic development has ushered in enormous commercial activities in the country including foreign direct investments, public private partnership, etc., which has prompted initiating legislative measures for speedy settlement of commercial disputes, widen the scope of the courts to deal with commercial disputes and facilitate ease of doing business. Needless to say 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. The legislator aims that,

**3.1** To highlight potential problems with implementation of the Amendment 2018 in relation to pre-institution mediation of commercial disputes with objective of proactively supporting the government initiative and assisting in effective and long term sustainable implementation of the scheme which is mutually beneficial to disputants as well as mediation practitioners.

**3.2** Streamlining of commercial litigation to ensure that India becomes the hub for efficient dispute resolution. This can be achieved by using pre-institution mediation to improve India's ranking in the World Bank. 'Ease of doing business' Ranking Report;

**3.3** Ensuring sustainable development of practice of mediation in India.

### **4. The Objectives to be achieved by the Act**

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment), Act 2018 which inter alia, provides for:-

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<sup>2</sup> Parliament received the assent of the President on 20<sup>th</sup> August 2018

<sup>3</sup> It has Come in to force on the 3<sup>rd</sup> of May 2018.

<sup>4</sup> Mr. Ravi Shankar Prasad, Minister of Law and Justice on July 23, 2018.

<sup>5</sup> MINISTRY OF LAW AND JUSTICE (Department of Legal Affairs) NOTIFICATION New Delhi, 3rd July, 2018 S.O. 3232(E).

- (i) 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) 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) 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) 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) 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.

## 5. The Main features of the Amendment Act

**5.1 Reduction in Pecuniary Limits-** It has been added in section 2 of the Principal Act Commercial Appellate Courts” means the Commercial Appellate Courts designed under Section 3A<sup>6</sup> & further The commercial courts and commercial divisions in high courts can decide disputes, which shall not be less than three lakh rupees or a higher value to be notified by the Central Government. (Reduction in pecuniary limits from one Crore)<sup>7</sup>

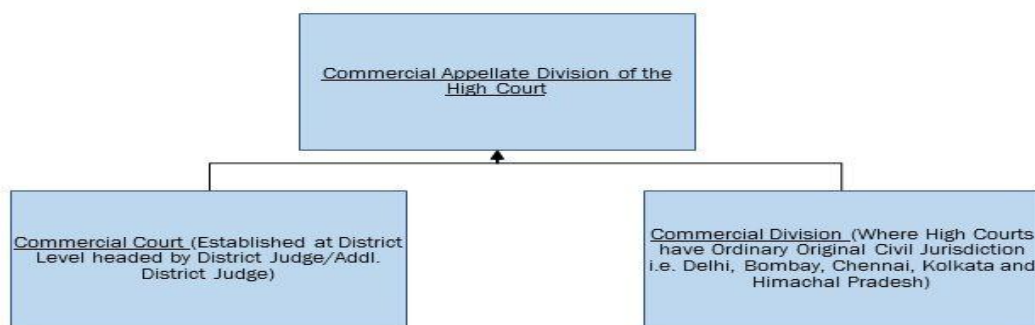
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<sup>6</sup> Section 2(I)(a) of Amendment Act,

<sup>7</sup> Section 2(II)(i) of Amendment Act,

**5.2 Establishment of certain commercial Courts-** The State Government may constitute commercial Courts at District Judge level, after consulting the concerned High Court by notification; It further provides that, with respect to a territory over which the High court have ordinary original civil jurisdiction, the state govt. may by notification, specify such pecuniary value which shall not be less than 3 lakh rupees & not more than the pecuniary jurisdiction exercisable by the District Courts, as it may consider necessary.<sup>8</sup> Then following sub-section is inserted as (IA) Notwithstanding anything contained in this Act, the state government may, after consultation with High court by notification, specify such pecuniary value which shall not be less than 3 lakh rupees or such higher value for whole or part of the state, as it may consider necessary. The amendment Act removes the bar and allows states to constitute commercial Courts where high Court have ordinary original civil jurisdiction.

**Where High Courts have ordinary original jurisdiction<sup>9</sup>**

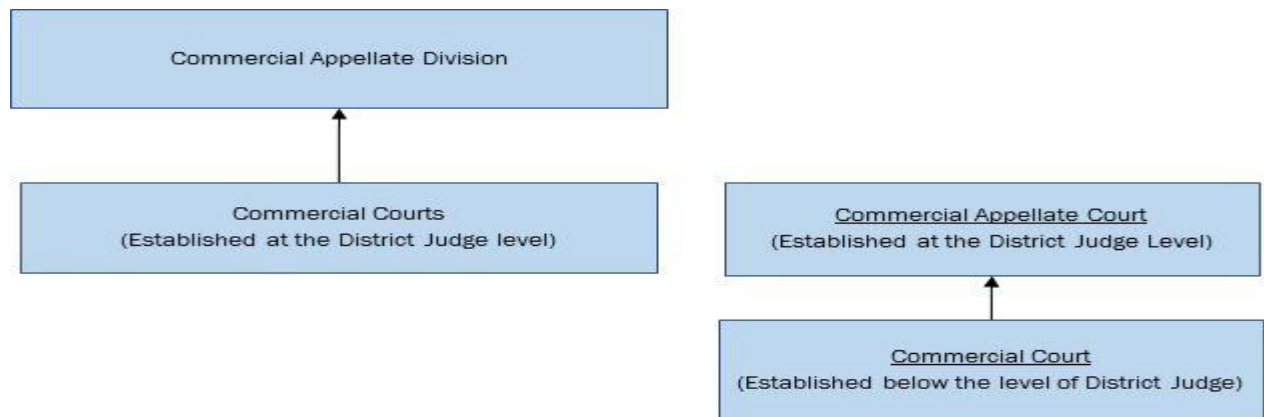


**Where high courts do not have ordinary original jurisdiction<sup>10</sup>**

<sup>8</sup> Proviso to sub-section (I) of section 3 of the Principal Act

<sup>9</sup> <https://barandbench.com/wp-content/uploads/2018/05/Chart-III>.

<sup>10</sup> <https://barandbench.com/wp-content/uploads/2018/05/Chart-III>.



**5.3 Designation of Commercial Appellate Courts-** In areas where High Courts do not have ordinary original civil jurisdiction, the state governments, may notify commercial appellate courts at the district judge level. Appeals against the order of a commercial court (below the level of a district judge) will lie before the Appellate Court.<sup>11</sup>

**5.4 Mediation & Settlement-** A New Chapter IIIA is inserted "Pre-Institution Mediation & Settlement" In this chapter<sup>12</sup> A provision for mandatory mediation has been provided in those cases where no urgent relief is being sought by the parties to the dispute. The mediation may be conducted by authorities constituted under the Legal Services Authorities Act, 1987 (such as the National and District Legal Services Authority) The mediation process is required to be completed within a period of three months (may be extended by another two months). A signed settlement between the parties will have the same effect as an arbitral award under the Arbitration and Conciliation Act, 1996.

**5.5 Section 13 substitute the principal Act-** It is substituted that, Any person aggrieved by the judgment or order of a commercial court below the level of District Judge may appeal to the Commercial Appellate court within period of 60 days from the date of judgment or order & in case of judgment or order of a commercial court at the level of District Judge exercising the original Civil jurisdiction, to the Commercial Division of a High Court may appeal to the Commercial appellate Division of the High Court. It further specify that, the appeal shall lie from such orders passed by a commercial court division or commercial court that provided under Order XLIII of the code of Civil Procedure 1908 & Section 37 of the Arbitration & conciliation Act.1996.

**5.6 Counterclaims not to be transferred-** Under the Act, if a counterclaim was filed in a commercial dispute of at least one crore rupees in a civil court, the civil court could transfer the suit to a commercial court. The Act removes this provision in relation to transfer of suit.

**5.7 APPENDIX-I Statement of Truth<sup>13</sup>** The person will have to file along with application a statement stating that, I ----- the deponent do hereby solemnly affirm and declare as under:

<sup>11</sup> Section 3A of Amendment Act

<sup>12</sup> Section 12A of Amendment Act.

<sup>13</sup> First Schedule, Order VI- Rule 15A and Order XI- Rule 3

1. I am the party in the above suit and competent to swear this affidavit.
2. I am sufficiently conversant with the facts of the case and have also examined all relevant documents and records in relation thereto.
3. I say that the statements made in ----paragraphs are true to my knowledge and statements made in ---- paragraphs are based on information received which I believe to be correct and statements made in --- paragraphs are based on legal advice.
4. I say that there is no false statement or concealment of any material fact, document or record and I have included information that is according to me, relevant for the present suit. 5. I say that all documents in my power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated by me have been disclosed and copies thereof annexed with the plaint, and that I do not have any other documents in my power, possession, control or custody.
6. I say that the above-mentioned pleading comprises of a total of ---- pages, each of which has been duly signed by me.
7. I state that the Annexures hereto are true copies of the documents referred to and relied upon by me.
8. I say that I am aware that for any false statement or concealment, I shall be liable for action taken against me under the law for the time being in force.

The above said contents will have to be verified & have to declare that the statements made above are true to his knowledge.

**5.8** This Act further provides that, It is stated that save as otherwise provided, the provisions of this act shall apply only to cases relating to commercial disputes filed on or after the date of commencement of this Act.<sup>14</sup>

**5.9** The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 is hereby repealed. (2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall deemed to have been done or taken under the corresponding provisions of this Act.<sup>15</sup>

## **6. Impact of the Act on Mediation Movement-**

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment), Act 2018 Potentially significant development, Section 12A of the Amendment 2018 stipulates mandatory pre-institution mediation i.e. the plaintiff is mandatorily required to exhaust the remedy of mediation prior to filing a suit in accordance with the Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018 ("Rules"). Unless the suit contemplates any urgent interim relief under the parent commercial Courts Act, 2015 ("Act"). In this regard, authorities constituted under Legal Services Authorities Act, 1987 i.e. National Legal Services Authority ("NALSA") has been notified to ensure that mediation is undertaken in such matters. It further entails that the settlement arrived at by such mediation shall have the status and effect of an arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") are of the view that the mode of implementation of Section 12A of the Act would not adequately fulfill the objectives of the Amendment 2018 and would in fact, be detrimental to the growth and use of mediation for commercial disputes in India if not rectified.

**6.1.** The definition of Commercial disputes under Section 2(e) of Act & As per the Section 12A. If there is a dispute, parties are required to approach only commercial courts for remedy. Parties cannot approach commercial courts in cases where there is no requirement for urgent interim relief unless they opt for mediation. The wording of the provision is such that private mediation attempt does not have any validity. Only mediation

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<sup>14</sup> Section 19 of Amendment Act

<sup>15</sup> Section 20 of Amendment Act

conducted by Authority has validity although the Act does not expressly bar private mediation practice, the impact of the provisions is that mediation services for commercial disputes shall be only provided by government backed authority. There will be no motivation/incentive for private players to operate in the market owing to government monopoly. This is against the government policy to increase ease of doing business and promoting India as an international ADR service providing jurisdiction.

**6.2.** In all other internationally acclaimed jurisdiction such as Singapore, Hong Kong, Switzerland, United Kingdom and United States of America, there is a level playing field for co-existence of private and government service providers, settlement agreement in case of success and as proof of failed mediation.

**6.3.** As per Section 12A(1) of Commercial Courts Act, 2015, only those cases where there is no requirement of urgent interim relief shall be required to exhaust the remedy of pre-institution mediation before approaching the commercial courts. The legislation does not prescribe a definition or process for determination of what constitutes urgent interim relief. Under Section 12A(2) of the Act, The exception carved for matters requiring urgent interim relief has scope for misuse by parties who do not wish to attempt to resolve disputes through mediation. In almost all matters there is possibility that applications requesting urgent interim relief shall be filed to avoid the requirement of pre-institution mediation. This will make the provision of nullity with regard to enforcement which is not the intention of the legislation. The mechanism of pre-institution mediation shall become redundant as the disputant persons would resort to court.

**6.4.** Under Section 9 of Arbitration and Conciliation Act 1996, the parties at any time before, during or after the arbitration can obtain injunctive relief such as securing the amount in dispute. Detention or preservation of any property of thing which is a subject matter of the dispute in arbitration. Similarly, there is no provision for parties to claim interim relief (urgent or otherwise) parallelly and undertake mediation before the final hearing of the matter commences.

**6.5.** The Authority has been authorized for the purposes of pre-institution mediation. The primary principle of mediation (just like arbitration) is the party's autonomy to choose their mediator. Parties should have freedom to choose their mediator without any limitations or encumbrances. This internationally accepted best practice is breached if only one service provider is allowed as per the Act.

**6.6** Users of mediation services for commercial disputes especially in metro cities have certain expectations from infrastructure and support services required to be provided by a mediation service provider. The legal services authority has been constituted to provide free and competent legal services to weaker sections of the society. To burden the NALSA with commercial disputes would be contrary to NALSA's ethos of providing access to justice to the weaker of the society. This would result in causing duress to the people who are in desperate need of free legal aid as infrastructure of NALSA will be divided between fighting for the subaltern and commercial disputes.

**6.7.** The authorities shall be required to develop these facilities in house which will financially burden the exchequer. This is contrary to the concept of alternative dispute resolution which reduces the burden on government systems by creating private parallel systems requiring no grants from the government. The efficiency of the mechanism of pre-institution mediation would be affected.

**6.8.** There is also need to ensure non-cartelization and decentralization of powers in relation to accredited mediation service providers and accredited training providers to ensure level playing field for all market participants.

**6.9.** Rule 7 of Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (Rules) prescribed a detailed procedure where a party will be repeatedly sent notice to mediate without obligation to attend or consequences of non-attendance. Clear timelines for the commencement and conclusion of mediation sessions to ensure speedy resolutions are required.

**6.10.** Rule 11 of Rules specifies that before the commencement of the mediation the parties to commercial dispute shall pay to the authority a one-time mediation fee to be shared equally as per the quantum of Claims

<b>I</b>	From Rs. 3,00,000 to Rs.10,00,000.	Rs. 15,000/-
<b>II</b>	From Rs. 10,00,000. to Rs. 50.00,000.	Rs. 30,000
<b>III</b>	From Rs. 50,00,000 to Rs. 1,00,00,000	Rs. 40,000/-
<b>IV</b>	From Rs. 1,00.00,000. to Rs.3,00,00,000.	Rs. 50,000/-
<b>V</b>	Above Rs. 3.00,00,000.	Rs. 75,000 <sup>16</sup>

**6.11.** There is no motivation prescribed for parties to attempt mediation in good faith.

**6.12.** Mediation is to be made compulsory for parties to attend the first session of mediation & thereafter the date fixed by the Mediator as per the convenience of party. In case of absence the mediator to impose costs for non-compliance/ nonattendance.

**6.13.** Mediation discussion is confidential & in case of breach, provision for imposing penalties for breach of confidentiality of mediation proceedings needs to be made.

**6.14.** There must be clear timelines for the proceeding otherwise it would hamper the mechanism, thereby defeating the purpose of speedy and timely dispute resolution.

**6.15.** There should be clear direction as to whether the one-time mediation fee includes the mediator fee as well. Schedule-II of the Rules prescribes that the highest fees payable in a mediation even if the value is the claim as specified in Schedule 2 of the Rules. which is meager compared to the complexity of the matter as well as the multiplicity of the meetings required to carry out the mediation process If the one-time mediation fee is inclusive of the mediator fee then it would cap the mediator fee all over the country at a specific amount and the amount prescribed is not commercially feasible. This is against fair market practices where prices are set through market demand and supply. Mediation is professional service just like the other professions like medical, law, accountancy, etc; and should have the freedom to decide their fees on the basis of complicity of the matter & its expertise.

**6.16.** A Committee of reputed mediators, representatives of chamber of commerce, executives & judiciary under the oversight of the legislative authority needs to be formed so that the existing provisions & the pain points of pre-institution mediation can be discussed.

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<sup>16</sup> **SCHEDULE. II** Mediator Fee as per Pre-institution Mediation and Settlement Rules, 2018