



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: October 06, 2023*

+ RFA(COMM) 148/2023

(1) MR. AMIT WALIA

..... Appellant

Through: Mr. Anuj Garg, Adv.

versus

MS. SHWETA SHARMA

..... Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

V. KAMESWAR RAO, J. (ORAL)

1. The challenge in this appeal is to an order/judgment dated May 15, 2023 passed by the learned District Judge (Commercial Courts), South-East District, Saket Courts Complex, New Delhi ('learned DJ', for short) in CS (COMM) 395/2022 titled as Mr. Amit Walia v. Ms. Shweta Sharma, whereby the learned DJ while considering an application under Order VIII Rule 10 CPC filed by appellant herein, has rejected the plaint under Order VII Rule 11(d) for non-compliance of Section 12A of the Commercial Courts Act, 2015 ('CCA', for short).

2. The facts as noted from the record are, the appellant had filed the suit for recovery of ₹1,57,50,000/- towards arrears of rent for the period December, 2017 to September 2018 and ₹8,63,704/- towards interest on the arrears of rent upto September 30, 2018 at the rate of 12% per annum.



3. The appellant before filing the suit approached the Delhi High Court Mediation and Conciliation Centre (Samadhan) ('DHCMCC(S)', for short) for Pre-Institution Mediation. The petition was registered as petition No.51/2020. The mediation/conciliation sessions were fixed for February 20, 2020, February 24, 2020 and March 04, 2020. The defendant did not appear despite notices and therefore, the proceedings were declared non-starter. Accordingly, the non-starter report dated March 05, 2020 was filed.

4. The appellant filed the suit through e-filing on April 02, 2022. The respondent/defendant was served by publication in the newspapers. She was proceeded *ex parte* vide order dated February 23, 2023 and her right to file written statement was closed as she did not appear and did not make any request for extension of time to file the written statement beyond the period of thirty days from the date of service.

5. It was in this background that the appellant had filed an application under Order VIII Rule 10 CPC for passing a decree in his favour. It was during the hearing on that application that a query was put by the learned DJ whether the Non-starter report dated March 05, 2020 issued by the DHCMCC(S) is valid, as the Center is not authorised for Pre-Institution Mediation under Section 12-A (2) CCA.

6. The case of the appellant on this issue was that the DHCMCC(S) is attached to the High Court of Delhi and the report of the centre is treated as a valid report. The other argument was that the judgment of the Supreme Court in *Patil Automation Pvt. Ltd. & Ors. Vs. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1*, which is effective from August 20, 2022 shall not be applicable to a suit filed prior to August 20, 2022 on the ground of non-compliance of Section 12-A of the CCA. Therefore, the defect of



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compliance of Section 12-A (2) CCA shall not affect the validity of suit filed. In this regard, reliance was also placed on the judgment of ***Samar & Samar Instructure Development Pvt. Ltd. v. Meekintosh Burn Ltd. & Anr., 2023 SCC OnLine Calcutta 462.***

7. Furthermore, it was submitted by the appellant that the defendant did not appear in Pre-Institution Mediation despite notices. She had also not appeared before learned DJ. It was stated that the defendant has no intention to amicably settle the dispute. The issue of compliance of Section 12-A (2) CCA has to be appreciated in the light of the conduct of the defendant. In that regard, reference was made to the judgment in the case of ***Bolt Technology OU v. Ujoy Technology Pvt. Ltd. & Anr., 2022 SCC OnLine Del 2639.***

8. It was also the case of the appellant that the order sheet dated May 23, 2022 of the learned predecessor of the learned DJ observed that the Non-starter report has been filed which means that the learned predecessor of the learned DJ has accepted the report and now its validity cannot be questioned by the successor Court. The learned DJ has, while rejecting the plaint has in paragraph 9.1 concluded as under:-

“9.1 Section 12 of CCA has been the subject of intense litigation and the law has become settled with the judgment by Hon'ble Supreme Court in Patil Automation (Supra) and the judgments by Hon'ble Delhi High Court which hold that in case urgent relief is contemplated, compliance of Section 12A CCA is not mandatory and there is no need to seek exemption. The legal position regarding Section 12A CCA can be summarized as follows:-

(i) Compliance of Section 12A CCA is mandatory unless urgent relief is contemplated.



(ii) In the suits requiring compliance of Section 12A CCA, the plaint has to be rejected if the suit has been instituted without compliance of Section 12A CCA. The suits filed prior to 20.08.2022 are protected in terms of the judgment by Hon'ble Supreme Court in Patil Automation Case unless the jurisdictional High Court had already declared Section 12A CCA mandatory.

(iii) For the pre-institution mediation the plaintiff has to approach the Authority authorized by the Central Government under Section 12A (2) CCA. The Authority will entertain the application according to territorial, pecuniary jurisdiction and subject matter of the suit.

(iv) The Authority will issue notice to the opposite party. If the opposite party does not appear, non-starter report will be issued in Form-3, Schedule- I of the Rules framed by the Central Government. If the opposite party appears and agrees for mediation, the Authority shall refer the parties to a Ld. Mediator/Institution empaneled by it. Depending upon the success or failure of the mediation, the mediator will issue the appropriate certificate in the Form prescribed under Rules framed by the Central Government.

(v) If the pre-institution mediation is a success, the settlement shall have the effect of an arbitral award in terms of Section 30 of Arbitration & Conciliation Act 1996, as provided under Section 12A (5) CCA.”

9. When the appeal was listed before this Court on July 20, 2023, we had passed the following order:

“The short issue which arises for consideration is whether the learned District Judge could have rejected the suit of the appellant herein only on the ground that plaintiff/appellant herein had initiated pre-litigation mediation before the Delhi High Court Mediation and Conciliation Centre (DHCMCC) and not before an authority contemplated under Section 12A of the Commercial Courts Act, 2015.



The submission of learned counsel for the petitioner is that the defendant had not appeared in the proceedings before the Delhi High Court Mediation and Conciliation Centre. Even if the mediation process had commenced before Legal Services authority she would not have appeared. He further says even before the Trial Court the defendant was ex parte. He submits that the learned District Judge has taken a very technical view in the matter.

As the defendant was ex parte, no notice is required to be issued. The appellant herein shall file written submissions alongwith judgments, if any, he wants to rely upon within two weeks.

List on August 25, 2023.”

10. We have heard the learned counsel for the appellant. The submissions of learned counsel for the appellant are the following:-

a) That the appellant has approached the DHCMCC(S) by way of filing a Pre-Institution Mediation Petition being 51/2020 and that the respondent did not appear before the DHCMCC(S) and mediation was closed by the DHCMCC(S) by a Non-starter report.

b) When the appellant tried to serve the summons on the respondent, the report was the following and the same has been noted in Order dated October 13, 2022 of the learned DJ:-

“Defendant has left the address and despite the repeated visits no information could be gathered about her whereabouts.”

c) That thereafter, the appellant served the respondent through paper publication yet the defendant did not appear in the suit proceedings and was declared *ex parte* by the learned DJ, vide order dated February 23, 2023.



d) He states that the learned DJ adopted a hyper technical approach by stating that the Pre-Litigation Mediation Proceedings conducted through the DHCMCC is not a valid compliance of Section 12-A of the CCA. He also states that rather than adopting the hyper-technical approach, the learned DJ should have decided the case on merits as the predecessor Court had issued summons after satisfying the procedural compliance of Section 12-A of the CCA and after perusing the Non-starter report had issued the summons to the respondent.

e) He states that the whereabouts of respondent/defendant were not known and even in the suit the defendant was *ex parte*, hence, no fruitful purpose was/is likely to be achieved even if the appellant had approached the DLSA for the purposes of Pre-Litigation Mediation. He also states that the hyper-technical approach by the learned DJ defeats the purpose and it is settled position of law whenever there is a conflict between substantial justice and hyper-technicality then the substantial justice should be preferred.

f) Another submission of the learned counsel for the appellant is that, under Section 12-A of the CCA, DHCMCC(S) is an appropriate centre for the purposes of Pre-Institution Mediation. He also states that DHCMCC(S) follows Delhi High Court Mediation and Conciliation Rules, 2004, which lays down the procedure for Mediation and Conciliation which was made by the High Court of Delhi following the principles of nature justice.



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g) He also states that the proposed amendment to Mediation Bill of 2021 recognises the court-annexed mediation centres like the DHCMCC(S) as one of the Centres/Institutions for pre-institution mediation under Section 12-A of the CCA. In support of this submissions, he has annexed Section 3(1) of the proposed Mediation Bill, wherein, he lays importance on “*or mediation centre annexed to a court or tribunal or such other forum shall be deemed to be a mediation service provider recognised by the Council*”. He also states that the Mediation Act, 2023, in Section 40 has brought *court-annexed medication centre* within the definition of Medication Service Provider.

h) In support of his submission, he has relied upon the judgment of this Court in *Glaxo Group Limited v. Udhan Kumar Chordia and Ors., CS (COMM) 182/2022 decided on March 25, 2022 and Mr. Anil Pitti v. Apeejay Overseas Ltd. And Ors., CS (COMM) 489/2022, order dated July 21, 2022*, and states that, this Court has referred the parties to mediation before DHCMCC(S).

i) Another submission of the counsel is that Section 12-A of the CCA is purely procedural in nature which only relates to the manner and procedure in which pre-institution mediation may be resorted to and therefore, the same should be construed liberally and not strictly.

j) He further states that the learned DJ has misread the judgment of the Supreme Court in *Patil Automation Pvt. Ltd. (supra)* wherein the Supreme Court has held that, a plaint can be rejected when the suit has been instituted without complying the mandatory provision under



Section 12-A of the CCA as the said judgment has come subsequent to the filing the Suit.

k) He states that the mode and manner given under Section 12-A of CCA is not the only way in which a mandatory Pre-Institution Mediation can be resorted to. He states that, if the Court adopts a hyper-technical approach then the parties will be made to go through multiple rounds of mediation by approaching the authority under the Pre-Institution Mediation Rules. In support of his submission, he has relied upon the judgment of this Court in ***Bolt Technology OU (supra)***.

l) He also states that in the Mediation Bill 2021, an amendment is proposed to be made to Section 12-A of the CCA which specifically recognises court annexed mediation centres like the DHCMCC as one of the centres/institutions for the pre-institution mediation under Section 12-A of the CCA. The relevant extract of proposed amendment to Section 12-A of the CCA is as below:

“12A. Pre-litigation Mediation and Settlement.

(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of prelitigation mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) For the purposes of pre-litigation mediation, the Central Government may, by notification, authorise-

(i) the Authority, constituted under the Legal Services Authorities Act, 1987 (39 of 1987); or



(ii) a mediation service provider as defined under clause (l) of section 3 of the Mediation Act, 2021.

... ”

m) He states that by approaching the DHCMCC for pre-Institution Mediation appellant has in full, effective and valid compliance of Section 12-A of the CCA, sought settlement of dispute. According to him, there can be various other scenarios, which can be considered as full, effective and valid compliance of Section 12-A of the CCA, which the impugned judgment completely loses sight of:

- i. If before filing of the suit, parties themselves engage in extensive settlement talks, but the settlement talks fail and there is sufficient material put on record to demonstrate pre-institution mediation talks;
- ii. If before filing of the suit, parties engage in settlement talks with assistance of a person known to both the parties who acts as a mediator, but the settlement talks fail;
- iii. If before filing of the suit, parties engage in settlement talks with the assistance of an independent/third-party mediator, but the settlement talks fail;
- iv. If before filing of the suit, one party makes a proposal to other party to engage in settlement talks for amicable resolution of disputes, but the other party categorically refuses.

So he seeks the prayers as made be granted and the Suit be revived for consideration of the Ld. District Judge for a decision on merit.

11. Having heard the learned counsel for the appellant, the short issue which arises for consideration is whether the learned DJ could have



dismissed the suit only on the ground that the appellant has not complied with Section 12-A of the CCA. The Section 12-A of the CCA reads as under:-

“12A. Pre-Institution Mediation and Settlement—(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987, the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]”

12. It is settled law that that in terms of the judgment ***Patil Automation Pvt. Ltd. (supra)***, the compliance of Section 12-A of the CCA is mandatory unless urgent relief is contemplated. A notification has been issued by the



Government of India on July 03, 2018 by which the Central Government has made rules in respect of Commercial Courts (Pre-Institution of Mediation and Settlement) Rules, 2018 as contemplated under sub-section 21A read with sub-section (1) of Section 12-A of the CCA.

13. The sub-section 2 of Section 12-A mandate the Central Government may by notification authorise the authorities constituted under the Legal Services Authorities Act, 1987 for the purposes of Pre-Institution Mediation.

14. In the present case, the appellant has not made his claim in terms of the notification of July 03, 2018 before the District Legal Services Authorities ('DLSA', for short) but had approached the DHCMCC(S) which held the proceedings on three occasions and the defendant/respondent despite service did not appear, resulting in Non- starter report being submitted by the DHCMCC. This report was not accepted by the learned DJ as the report is not that of DLSA.

15. The issue which falls for consideration is whether the learned DJ was right in rejecting the plaint only on the ground that the appellant has approached DHCMCC(S) and not DLSA, by invoking the provisions of Order VII Rule 11(d). It is true that the provisions of the Section 12-A of the CCA specifies Pre-Institution Mediation as mandatory, in the sense that any litigation must be preceded by an attempt on the part of the parties to settle their *inter se* dispute, but the fact that the appellant had invoked the process of mediation before the DHCMCC(S) under the aegis of the Delhi High Court and the defendant/respondent did not appear in the proceedings, resulting in a Non-starter report would surely be construed to mean that an attempt has been made by the appellant to settle his dispute with the defendant/respondent, amicably which failed.



16. Aptly, this process should be under the aegis of the DLSA, merely because the appellant had approached the DHCMCC(S) whose jurisdiction has been invoked by this Court, by sending parties for exploring a settlement in a pending suit cannot be said to be fatal on the maintainability of the suit. In fact, the learned counsel for the appellant had relied upon one of the judgment of this Court in the case of **Glaxo Group Limited (supra)**, wherein in a pending suit the Court had referred the parties to mediation process under the aegis of Delhi High Court, pursuant to an application filed by the plaintiff seeking exemption from instituting pre-litigation mediation.

17. So in that sense, the spirit underlying in Section 12A of the CCA is that the provision is mandatory which has been complied with, to the extent the appellant had approached for Pre-Institution Mediation as envisaged under Section 12A of the CCA, but instead of approaching the DLSA, the appellant had approached the DHCMCC(S). The mandatory nature of the provision has to be seen in the context that, there being no urgency in the matter, he had sought to amicably settle the dispute with the respondent/defendant through Pre-Institution Mediation process before the DHCMCC(S).

18. One of the plea of Mr. Garg is that, as per the Mediation Act, 2023 which has been notified by the Central Government, Section 40 of which reads as under, Court annexed mediation centre has been recognised as a centre for exploring mediation:-

*“40. (1) “mediation service provider” includes—
(a) a body or an organisation that provides for the conduct of mediation under this Act and the rules and regulations made thereunder and is recognised by the Council; or*



(b) an Authority constituted under the Legal Services Authorities Act, 1987; or

(c) a court-annexed mediation centre; or

(d) any other body as may be notified by the Central Government:

Provided that the bodies referred to in clauses (b), (c) and (d) shall be deemed to be mediation service providers recognised by the Council.

(2) The mediation service provider shall be recognised by the Council in the manner as may be specified.”

19. So, the DHCMCC(S) being a *court-annexed mediation centre* though under the Mediation Act, 2023 and not under the CCA Act, we are of the view that there has been a compliance of the spirit underlying Section 12A of the CCA. The issue can be seen from another perspective as the respondent had neither appeared before the DHCMCC(S) nor before the learned District Judge, despite service, the likelihood of effective pre-litigation mediation to be undertaken under the aegis of DLSA is highly unlikely as the respondent / defendant will not appear making it a futile exercise.

20. We must state here that, in ***Patil Automation Pvt. Ltd. (supra)***, the Supreme Court has held pre-institution mediation is mandatory, but has not said that the same need to be undertaken under the aegis of the Legal Services Authority though we must state that, Section 12-A stipulates so.

21. The submission made by the learned counsel for the appellant as noted in paragraph (m) above highlighting the eventualities where the parties can engage themselves in settlement talks prior to the initiating litigation to contend that the same may also suffice the requirement is appealing.



22. In view of the above discussion, in the facts of this case, the appeal is allowed and disposed of. The impugned order / judgment dated May 15, 2023 rejecting the plaint under Order VII Rule 11(d) is set aside. We revive suit / application before the learned DJ Court for the learned DJ to hear the counsel for the appellant and decide the suit, wherein an application under Order VIII Rule 10 has been filed. For this purpose, the matter shall be listed before the learned DJ on November 20, 2023.

V. KAMESWAR RAO, J

ANOOP KUMAR MENDIRATTA, J

OCTOBER 06, 2023/ds