

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. No. 1678 of 2020

M/S. Dhanbad Fuels Ltd.
vs.
Union of India & Ors.

For the petitioners : Mr. Jayanta Kumar Mitra.
Sr. Advocate,
Mr. Pradip Kumar Tarafder,
Mr. Sambuddha Dutta,
Mr. Sourav Sengupta.

For the Respondents : Mr. R.N. Bag,
Mr. Deepak Kumar Singh,
Ms. Meenakshi Singh,
Ms. Renuka Patrick.

Hearing concluded on : 07.01.2021
Judgment on : 22.02.2021

Shampa Sarkar, J.:-

This revisional application has been filed by the defendant in Money Suit No.28 of 2019, challenging the order dated December 21, 2020 passed by the learned Judge, Commercial Court at Alipore, rejecting an application being I.A. No. 190 of 2020. I.A. No. 190 of 2020 was an application filed by the defendant for rejection of the plaint being barred under Order VII Rule 11 (d) of the Code of Civil Procedure. It was the contention of the petitioner that only when an urgent interim relief was prayed for in a commercial suit, the suit could be instituted without exhausting the remedy of Pre-Institution Mediation. In all other cases, as per Section 12A of the Commercial Courts Act, 2015 (hereinafter referred to as the said Act) initiation of mediation was

compulsory before filing the suit and Pre-Institution Mediation and Settlement Rules, 2018 (hereinafter referred to as the said Rules) would have to be followed. Thus, it was the bounden duty of the plaintiffs/opposite parties to first approach the Authority authorised by the Central Government for settlement of the dispute by way of mediation and on failure of settlement, the plaintiffs would be entitled to file the suit for the reliefs sought for. According to the petitioner, the Central Government in exercise of power conferred by sub-section (2) of Section 21A read with sub-section (1) of Section 12A, of the said Act, framed the said Rules which was published in the official gazette on July 3, 2018. The rules came into force with effect from July 3, 2018. The suit was filed sometime in August, 2019, and as such, the mandatory provision of Section 12A of the said Act was applicable to this case. The plaintiffs not having complied with the said provision, could not be allowed to maintain the suit and the suit should be rejected, being barred by law.

2. Mr. Jayanta Kumar Mitra, learned Sr. Advocate appearing on behalf of the petitioner submitted that the order impugned suffered from illegality and material irregularity. The learned Court below rejected the said application for reasons which were not backed by law. Delay in filing the application for rejection of the plaint and lack of proper infrastructure for conducting pre- litigation mediation, could not be valid grounds for rejection of the defendant's application. He further submitted that the learned Court mis-directed itself by further referring the matter to mediation by appointing one Mr. Jayanta Mukherjee as the mediator. Mr. Mitra submitted that the statute mandated Pre-Institution Mediation of the disputes before filing of a

commercial suit. When a mandatory provision of a statute was not followed, it was the duty of the Court to reject the said plaint. He further submitted that the said Rules had come into force in 2018 that is, before the suit was filed and the plaintiffs ought to have approached the Authority as per the said rules. He submitted that the said Rules did not contemplate creation of further infrastructure or publication of any Standard Operating Procedure (in short SOP) by either the High Court or the State Legal Services Authority and the reason assigned by the learned Judge regarding lack of infrastructure was not tenable in law. That the said Rules already stipulated that a party to a commercial dispute may make an application to the Authority as per Form-1 specified in schedule-I of the Rules either online or by post or by hand, for initiation of a mediation process under the Act along with fee of Rs.1000/- payable to the Authority, either by way of demand draft or through online mode.

3. According to Mr. Mitra, Rules 3 and 7 of the said Rules laid down the procedure for such mediation and the Authority was defined as the Authority notified by the Central Government under sub-section (2) of Section 12A of the said Act. Mr. Mitra submitted that in exercise of power under sub-section (2) of Section 12A of the said Act, the Central Government by a notification dated July 3, 2018, authorised the State Authority or the District Authority constituted under the Legal Services Authorities Act, 1987 for the purpose of Pre-Institution Mediation and Settlement under chapter III A of the said Act. He further referred to a notification dated September 12, 2018 by which after assessment of the ADR centres and staff under SLSAs in every State, the Central Government notified that mediation may

be conducted by the authorities constituted under the Legal Services Authorities Act, 1987, such as the National and District legal service authorities. It was further stated in the said notification that the mediation process was required to be completed within a period of three months, which could be extended by another two months as per the requirements of settlement between the parties. The settlement would have the same effect as an arbitral award under the Arbitration and Conciliation Act, 1996. Therefore, according to Mr. Mitra, the reasons assigned by the learned Court in rejecting the application for rejection of the plaint on the ground of delay and lack of proper infrastructure and absence of a SOP to be prescribed by the High Court at Calcutta, were not appropriate reasons for allowing the suit to continue, even after non-compliance of the mandatory provision of Section 12A of the said Act.

4. Mr. Mitra further submitted that in this case, there was no claim for any urgent interim relief and thus the said suit could not be filed without exhausting the remedy by way of mediation. In the least, a leave should have been prayed for, before the learned court for dispensing with the requirement of the provision of Section 12A of the said Act.

5. Mr. Bag, learned Advocate appearing on behalf of the opposite parties submitted that the suit was filed on August 9, 2019, i.e., within one month from the date of establishment of the commercial court in Alipore. Although, mediations were held through the Legal Services Authorities in different districts and states, but those mediations were not akin to mediations contemplated under the said Act. Those mediations were as per the mediation rules framed by the High Court at Calcutta for

implementation of the provision of Section 89 of the Code of Civil Procedure. At the time of institution of the suit there were no trained mediators in any district for settlement of commercial disputes as contemplated under the said Act. That the SOP was published for Pre-Institution Mediation and Settlement by the office of State Legal Services Authority, West Bengal, in relation to settlement of commercial disputes on December 11, 2020. Although, the said Rules were framed by the Central Government, the State Legal Services Authority, West Bengal had not framed rules and the procedure to be followed. There was thus no clarity in the matter and the litigants were not aware of the requirements of the statute. He submitted that in the aid of justice, the suit could not be rejected. He submitted that even if there were stray incidents of one or two parties approaching the pre-existing ADR system for a settlement of commercial disputes, yet on the whole the state lacked adequate infrastructure and the provision of Section 12A of the said Act could not have been made compulsorily applicable.

6. Heard the parties. It is an admitted position that the Commercial Court at Alipore started functioning from July 5, 2019. It is also an admitted position that the suit was filed on August 5, 2019. Although, there were some mediators in West Bengal but neither the High Court, the State of West Bengal nor the Legal Services Authority, West Bengal came up with the SOP to be followed for Pre-Institution Mediation for Settlement of dispute as contemplated under Section 12A of the said Act. It is an admitted position that the draft SOP was prepared by the State Legal Services Authority, West Bengal around October 14, 2020. The same was sent to the Secretary, Mediation and Conciliation Committee High Court at Calcutta for approval

on the same day. The approval was received by the State Legal Services Authority, West Bengal on December 11, 2020. The SOP was sent to the Government of West Bengal, Judicial Department for publication in the Kolkata Gazettee (extraordinary). Thus the SOP was in place only on December 11, 2020. On January 27, 2020, a panel of trained mediators for conducting pre-litigation mediation in commercial disputes was sent by the Registrar, Original Side Cum-Member Secretary Mediation and Conciliation Committee, High Court to the Member Secretary, State Legal Services Authority, West Bengal. Therefore the infrastructure with regard to setting up of mediations centres manned by trained mediators as contemplated under the said Rules was not in place when the suit was filed, that is, within a month from the creation of commercial division in the Alipore Court.

7. Section 12A of the Commercial Courts Act, 2015 was incorporated in the said Act by an amendment of said Act on August 20, 2018, with retrospective effect from May 3, 2018. The Act was promulgated for speedy disposal of disputes of high value which involved complicated questions of law. There was a need to provide for an independent mechanism for early resolution of commercial disputes in order to create a positive image upon the investors about the existence of an independent and responsive Indian legal system. It was visualised that establishment of Commercial Courts and Commercial Divisions would accelerate economic growth and enhance the international image of the Indian justice delivery system.

8. Thus, the Act was promulgated and Commercial Division, and Commercial Courts were established gradually in different states and

different districts in the country. The objects and reasons for establishment of such courts focussed on early disposal of commercial disputes with a view to improve the ease of doing business, as investors worldwide would be attracted and the business world would have faith in the legal system of the country. The investors would not be afraid to invest in business and projects in India and the fear of being entangled in prolonged litigation would diminish. Taking forward such objects and reasons of the said Act, the 2018 amendment was introduced by incorporating Section 12A, making compulsory, the exhaustion of the remedy by way of settlement by mediation of a commercial dispute prior to filing of a suit. Mediation which is an alternative dispute redressal system having gained popularity worldwide over the years, got statutory recognition also in case of commercial suits. Incorporation of this provision, in my opinion, was an attempt at settlement of disputes in a non-adversarial forum with the help of trained persons, thereby, saving time and money for the ease of doing business. As the process of any dispute resolution through court is embroiled in technicalities, procedural hazards, delay acrimony and also involves payment of huge court fees etc., a compulsory obligation to initiate mediation was incorporated. This was done with a view to reduce the burden of the courts and also on the parties.

9. Section 12A of the Pre-Institution Mediation and Settlement Act reads as follows:

“12-A. 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 pre-institution 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 purpose of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 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)."

10. By incorporating Section 12A, the object of the legislators was to cut short litigation by saving time, energy and money. The possibility of future business prospects with the parties involved in the dispute was also protected. Misunderstanding between partners in business and similar issues were aimed to be resolved through mediation. Section 12A was in the nature of a duty imposed on every party involved in a commercial dispute to first try a settlement through mediation instead of wasting time, energy and money in the courts. This was also done to keep pace with the changing times all over the world by putting more and more emphasis on resolution of disputes through alternative dispute redressal fora. In my view, this was a procedure to be followed by a plaintiff before instituting a commercial suit. Even if it was compulsory on a party but its nature as a procedural law would not change in view of the object sought to be achieved by incorporating the provisions of Section 12A. The said provision cannot be

used as a sword to non-suit a litigant especially in the facts narrated herein before. The suit was filed within a month from establishment of the Commercial Court in Alipore. When the suit was filed, the State of West Bengal had not come up with any notification or procedure for implementation of the 2018 Rules. The infrastructure was not in place and the public were not aware. The object of Section 12A was to expedite resolution of disputes in the ease of doing business and not to scuttle the right of a litigant to approach the court.

11. All rules of procedure are handmaids of justice and not its mistress. The language employed by the draftsman of processual laws may be liberal or stringent but the fact remains that the object of prescribing procedures was to ordinarily advance the cause of justice. A party cannot be denied the opportunity of participating in the justice dispensation system. Procedural enactments are not to be construed in a manner which would leave the court helpless to meet such extraordinary situation in the ends of justice.

12. In the words of Justice Dr. Arijit Pasayat in the matter of **Sambhaji & Ors. vs. Gangabai & Ors.** reported in **2008(17) SCC 117**, processual law is not a tyrant but a servant not an obstruction but an aid to justice. The procedural prescription is the hand maid and not the mistress, the lubricant and not a resistant in the administration of justice. The relevant portions of the said judgment are quoted below:-

“11. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. No person has a

vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.

17. In *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur* [AIR 1965 SC 895] a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory. In *Sangram Singh v. Election Tribunal, Kotah* [AIR 1955 SC 425] considering the provisions of the Code dealing with the trial of suits, it was opined that: (SCR pp. 8-9) 'Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.' " [See: *SK. Salim Haji Abdul Khyumsab v. Kumar* (2006(1) SCC 46)] and *R.N. Jodi & Bros. v. Subhashchandra* [2007(6) SCC 420]"

13. Rule 3(2) of the said Rules reads as follows:

“3. Initiation of mediation process. - (1) A party to a commercial dispute may make an application to the Authority as per Form-1 specified in Schedule-I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee of one thousand rupees payable to the Authority either by way of demand draft or through online;

(2) The Authority shall, having regard to the territorial and pecuniary jurisdiction and the nature of commercial dispute, issue a notice, as per Form-2 specified in Schedule-I through a registered or speed post and electronic means including e-mail and the like to the opposite party to appear and give consent to participate in the mediation process on such date not beyond a period of ten days from the date of issue of the said notice.

(3) Where no response is received from the opposite party either by post or by e-mail, the Authority shall issue a final notice to it in the manner as specified in sub-rule (2).

(4) Where the notice issued under sub-rule (3) remains unacknowledged or where the opposite party refuses to participate in the mediation process, the Authority shall treat the mediation process to be a non-starter and make a report as per Form 3 specified in the Schedule-I and endorse the same to the applicant and the opposite party.

(5) Where the opposite party, after receiving the notice under sub-rule (2) or (3) seeks further time for his appearance, the Authority may, if it thinks fit, fix an alternate date not later than ten days from the date of receipt of such request from the opposite party.

(6) Where the opposite party fails to appear on the date fixed under sub-rule (5), the Authority shall treat the mediation process to be a non-starter and make a report in this behalf as per Form 3 specified in Schedule-I and endorse the same to the applicant and the opposite party.

(7) Where both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a Mediator and fix a date for their appearance before the said Mediator.

(8) The Authority shall ensure that the mediation process is completed within a period of three months from the date of receipt of application for pre-institution mediation unless the period is extended for further two months with the consent of the applicant and the opposite party.”

14. A glance at the said rule would indicate that although it was an obligation on the part of the plaintiff to first initiate a mediation process before filing a suit, there was no obligation on the defendant even to respond to such initiative by the plaintiff. It was only an invitation by the plaintiff to the defendant to settle the dispute prior to filing of the suit. In the absence of any response, the mediation would be treated as a non-starter. The mandate of the law becomes rather diluted when it becomes optional on the part of one party to such process to attend the mediation to be initiated by the plaintiff.

15. In this case, the defendant filed the application under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint as being barred by law, the plaintiff having failed to initiate the process of mediation under Section 12A of the said Act. However, assuming that the plaint is rejected on this ground, Order VII rule 13 would allow the plaintiff to file another suit on the self same cause of action. Thus, in my opinion, rejecting the plaint at this stage, would not be in consonance with the objectives of the said Act and Rules. The plaintiffs may face a non-starter or a non-settlement and would have to come back and file a suit once again. This will cause necessary delay and shall not be cost effective even for the defendant. Thus, considering the ultimate object of the provision of law, this Court is of the opinion that the suit which is at its early stage, be kept in abeyance and the plaintiff be directed to comply with the provisions of Section 12A. This order is further passed keeping in mind the time and the situation when the plaint was filed, that is, within a month after the commercial division at Alipore had been made operative. It is also true that until December, 2020, the SOP and the meditation rules to be followed by the Legal Services Authority Act, 1987 in West Bengal, for conducting commercial mediations had not been notified. The panel of trained mediators for commercial suit was also prepared and published thereafter. Thus the plaintiffs had sufficient reasons not to go for an effective mediation as envisaged under the said Rules in the absence of proper infrastructure. The situation would have been otherwise, had there been proper infrastructure in place.

16. The decision of the Calcutta High Court will not apply as the decision was on the point of leave to file the suit without exhausting the

mediation process. This Court is not dispensing with the requirement of Section 12A but directing the plaintiff to comply with the provision of law by keeping the suit in abeyance.

17. Mediation in India is still in its nascent stage and requires more awareness. Prior to the publication of the panel of trained mediators for settlement of commercial disputes, there was no complete machinery which could be availed. Settlement of commercial disputes require special technical and commercial knowledge.

18. Mandatory training for mediation of commercial disputes is the minimum requirement for any mediator to be appointed in terms of the said Rules. Commercial disputes are very often technical in nature and may involve knowledge in commercial law and business. If such was not the case, a separate panel of such mediators would not have been prepared. The Act and the Rules have been framed with an object of improving the “ease of doing business”.

19. Section 12A of the Pre-Institution Mediation, is a mere tool for reduction of pendency of commercial litigation in India. However, the purpose of the said Section 12A and the Rules cannot not be to non-suit a party but only to encourage the party seeking to file a suit to first explore the possibility of settlement of the dispute through mediation. Section 12A provides the parties with an alternative mechanism to resolve their disputes by negotiation in the presence of a mediator. Such mediation has been made time bound and the parties also have the liberty to move the commercial

court for adjudication of the dispute, if a mediation results in a non-starter or the talks of settlement fail.

20. Thus the plaint should not be rejected at this stage on the ground of non-compliance with Section 12A of the said Act when the plaintiff can still be directed to comply with the provisions of law by keeping the suit in abeyance.

21. The instant case is a suit for recovery of money filed by the Union of India for an amount over Rs.8 Crores. The alleged claim is for recovery of public money. The allegation is illegal claim of concessional rate of freight under Rate Circular No.24/2008, 30/2008 and 36/2009. The suit was filed, summons were issued, the written statement was filed, case management hearing was held. The defendant did not show any inclination towards settlement of the dispute by way of mediation. An application under Order VII Rule 11 (a) of the Code of Civil Procedure was filed by the defendant for rejection of the plaint against the defendant No. 2 to 4. Non-compliance with Section 12A was not raised by the defendant in the said application. Thereafter, once the earlier application was rejected, a subsequent application under Order VII Rule 11(d) for rejection of the plaint on the ground of non-compliance with Section 12A of the said Act was again filed. The application was filed on September 30, 2020, that is, more than a year since the institution of the suit. Thus, the learned court held that the suit should not fail for non-compliance of Section 12A of the said Act. Rejection of the plaint would result in delay in dispensation of justice, instead of the court acting in aid of justice. In my opinion, this was a correct

approach, keeping in mind the objects and reasons for establishing Commercial Courts, that is, quick and easy resolution of disputes either by settlement or in court. Yet, the obligation under the law must be complied with. The learned court below rightly directed the suit to be kept in abeyance. In my opinion, the defendants will not suffer any prejudice. The suit has not progressed beyond filing of the written statement. Thereafter two consecutive applications were filed by the defendant for rejection of the plaint. It is also not the case of the defendant that they are interested in settlement through mediation.

22. The decisions cited by Mr. Mitra are not applicable in the facts of this case. The court can make an order adjusting equities for satisfying the ends of justice as it may deem fit while interpreting a procedural law even if the same is couched with a negative covenant.

23. However, the learned court below erred in naming the mediator himself, instead of directing the plaintiffs to approach the State Legal Services Authority, West Bengal, in terms of the 2018 Rules and the SOP notified by the State of West Bengal in this regard.

24. The order impugned is set aside to the extent of appointment of Mr. Jayanta Mukharjee learned member of the bar as a mediator, and the direction upon the parties to attend the mediation on the date fixed by the learned court below and also further directing the learned mediator to complete the proceeding within January 11, 2021 and submit a report before the learned court.

25. Hence, it is ordered that the suit be kept in abeyance for seven months from date or until receipt of the report of the learned mediator, whichever is earlier. The plaintiffs are directed to approach the District Legal Services Authority, West Bengal in accordance with the Standard Operating Procedure (SOP) dated December 11, 2020, mandatorily, within two weeks from date. In case of default, the learned court below shall be at liberty to pass such orders in the suit for non-compliance of the order of court. The Authority shall act in accordance with the said Rules of 2018 and the SOP. The process is to be completed within the period as prescribed by the Rule 3 (8) of the Rules of 2018. The Mediator shall file the report in such Form and manner as prescribed by the Rules, before the learned court below within the aforesaid period. The remuneration/fees etc. of the learned Mediator will be fixed as per the SOP.

26. Upon receipt of the report from the Mediator, the learned Commercial court will proceed according to law. This revisional application is disposed of and there shall be no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.

(SHAMPA SARKAR, J.)