

RVWO 6 of 2020
IA GA 1 of 2020 (Old GA 901 of 2020)
IA GA 2 of 2020 (Old GA 902 of 2020)

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division

IMPERIAL TUBES PRIVATE LIMITED

v.

RAMESH CO.

For the Petitioner	: Mr. Joy Saha, Sr. Advocate Mr. Rajarshi Dutta, Advocate Mr. Tridib Bose, Advocate Mr. VVV Sastry, Advocate
For the Respondent	: Mr. Surajit Nath Mitra, Sr. Advocate Mr. Soumabho Ghose, Advocate Mr. Soumalya Ganguli, Advocate
Hearing concluded on	: January 12, 2021
Judgment on	: February 11, 2021

DEBANGSU BASAK, J. :-

1. The defendant has applied for review of the judgement and decree dated January 16, 2020 passed in GA No. 2598 of 2019 CS No. 254 of 2019.
2. Learned Senior Advocate appearing for the defendant has submitted that, the judgement and decree dated January 16, 2020 has to be

reviewed on the grounds as canvassed by the defendant. He has submitted that, the plaintiff served two copies of the print of the suit on the defendant. According to him, the first copy of the print was annexed to the petition under Order 12 Rule 6 of the Code of Civil Procedure, 1908. The second copy of the print was handed over by the advocate of the plaintiff to the advocate of the defendant on January 16, 2020. He has referred to and relied upon the judgement and decree dated January 16, 2020 in support of the contention that, a copy of the print was served upon the defendant in Court on January 16, 2020.

3. Learned Senior Advocate appearing for the plaintiff has drawn the attention of the Court to paragraph 23 of the plaint as appearing in the petition for judgement on admission. He is submitted that, on the basis of the pleading as appearing therein, the learned Master had granted leave under Section 12 A of the Commercial Courts Act, 2015 on November 28, 2019. According to him, the learned Master had permitted amendment of the plaint on January 19, 2020 without a formal application being made in that regard. Paragraph 23 of the plaint had been allowed by the learned Master to be amended. A new sentence had been incorporated in paragraph 23 of the plaint. He has submitted that,

the learned Master had allowed other amendments to be incorporated in the plaint which he had no power to do.

4. Learned Senior Advocate appearing for the defendant has submitted that, the defendant was not aware of leave under Section 12 A of the Act of 2015 being granted by the learned Master. The defendant came to know of the same during the settlement/drawing up and completing of the order dated January 16, 2020 in the month of February 2020.

5. Learned Senior Advocate appearing for the defendant has submitted that, the plaint does not contain any prayer seeking leave under Section 12 A of the Act of 2015 to institute the suit. According to him, in absence of such prayer, no leave could have been granted. He has referred to the commercial Courts (Pre-Institution Mediation and Settlement) rules, 2020 as has been published in the Gazette on July 3, 2018. He is submitted that, the government and the plaint that requirement under Section 12 A of the act of 2015 may be dispensed with as there is no mechanism for pre-institution mediation in place, is incorrect.

6. Learned Senior advocate appearing for the defendant has submitted that, the defendant came to learn for the first time on January 19, 2020

that the learned Master had granted leave under Section 12 A of the Act of 2015 on November 28, 2019. He has submitted that the plaintiff did not apply for leave to amend the plaint. According to him, learned Master has no power under the Original Side Rules to exercise jurisdiction under Order 6 Rule 17 of the Code of Civil Procedure, 1908 or permit amendment of the plaint after the presentation thereof. He has submitted that, the learned Master had allowed amendment of the plaint on the pretext of correcting typographical errors. He has referred to the concise statement, paragraphs 6, 12, 14, 15, 18, 23, and 26 of the plaint. He has referred to the verification portion of the plaint along with the list of documents. He has submitted that the learned Master allowed amendments in such portions of the plaint without a formal application being taken out.

7. Learned Senior Advocate appearing for the defendant has referred to Section 12A of the Act of 2015. He has submitted that, the provisions of Section 12A are mandatory. In support of such contention, he has relied upon a decision of the Madras High Court dated February 12, 2020 rendered in ***Civil Miscellaneous Appeal Nos. 137 and 138 of 2020 (Mr. Brahymanath Subhramaniam v. Mr. S.A. Chandrasekharan)***. According to him, Section 12A of the Act of 2015 prohibits institution of

suit without mandatory mediation where urgent interim relief have not been sought. In support of such contention, he has relied upon the order dated September 3, 2020 passed in **CS No. 78 of 2020 (Terai Overseas Private Limited v. Kejriwal Sugar Agencies Private Limited and others)**.

8. Learned Senior Advocate appearing for the defendant has submitted that, leave under Section 12A of the Act of 2015 cannot be granted subsequently. In support of such contentions, he has relied upon **All India Reporter 1953 Calcutta 639 (Kshitish Kumar Som v. State of Bihar)**, **2008 Volume (3) MHLG 407 (Quadricon Private Limited v. Shri Bajrant Ltd.)** and **2017 SCC Online Bombay 9180 (M/s. Electrosteel Steels Limited v. M/s. Polycab Wires Private Limited)**.

9. Learned Senior Advocate appearing for the defendant has submitted that, granting of leave under Section 12 A of the Act of 2015 is a judicial act. The learned Master could not have exercised powers under Section 12A of the Act of 2015. In support of such contentions, he has relied upon **1907 ILR 34 Cal 617 (Laliteshwar Singh v. Rameshwar)**.

10. With regard to the practice directions dated December 7, 2018 and July 1, 2020, learned Senior Advocate appearing for the defendant has

submitted that, the practice directions dated December 7, 2018 is not related to Section 12A of the Act of 2015. According to him, such practice direction does not confer jurisdiction upon the learned Master to grant leave under Section 12A of the act of 2015. Such note has provided for application of the practice and procedure of regular suits to be followed and applied *mutatis mutandis* to suits filed under the Commercial Jurisdiction. Since, suits filed in the ordinary original civil jurisdiction of the Hon'ble Court do not follow the practice of leave under Clause 12 of the Letters Patent, 1865 or Order 2 Rule 2 or Section 80 of the Code of Civil Procedure, 1908 being granted by the learned Master, he has submitted that, the learned Master could not have granted leave under Section 12A of the Act of 2015. He has submitted that, in any event, the practice direction dated December 7, 2018 cannot be called to be a practice direction as, the same has not been ratified by any Learned Judge. He has drawn the attention of the Court to Section 18 of the Act of 2015 and submitted that, necessary notification or practice directions in terms of Section 18 of the Act of 2015 has not been issued by the Court. In any event, the note dated December 7, 2018 of the learned Master cannot be construed to be one in exercise of powers under Section 18 of the Act of 2015.

11. Referring to the provisions of the Act of 2015, learned Senior advocate appearing for the defendant has submitted that, Chapter II of the Commercial Courts Act, 2015 has dealt with the Constitution and Jurisdiction of Commercial Courts, Commercial Appellate Courts, Commercial Divisions and Commercial Appellate Divisions. According to him, the rule-making power of the High Court to issue practice directions must be notified and must relate to Chapter II of the Act of 2015. According to him therefore, the practice directions will be applicable only to the jurisdictions and constitutions of commercial Courts. He has contended that, Section 12 A is not included in Chapter II of the Act of 2015. Since Section 12A of the Act of 2015 has been kept outside the purview of Section 18 of the Act of 2015, the rule-making power of the High Court to issue practice directions in relation thereto is absent.

12. Referring to the note dated July 1, 2020, learned Senior Advocate appearing for the defendant has submitted that, such note had been issued subsequent to the passing of the decree dated January 16, 2020 and as such is not attracted to the present case.

13. Learned Senior Advocate appearing for the defendant has submitted that, in the facts and circumstances of the instant case, the judgement and degree dated January 16, 2020 should be reviewed.

14. The plaintiff has contested the application for review and the stay petition filed therein. Learned Senior Advocate appearing for the plaintiff has submitted that, the plaintiff was compelled to institute the suit on November 20, 2019 on account of the defendant's failure to pay for the price of goods sold and delivered. He has submitted that, the plaint was presented before the learned Master who admitted the same. The learned Master had granted leave to the plaintiff to institute the suit by dispensing with the requirements under Section 12A of the Act of 2015.

15. Learned Senior advocate appearing for the plaintiff has submitted that, the plaintiff at that material point of time was given to understand that the learned Master was entitled to grant such relief on the basis of the practice directions issued by the Hon'ble Court. He has referred to paragraphs 23 and 27 of the plaint in support of the contention that, the plaintiff had sought dispensation of the requirement of the provisions of Section 12A of the Act of 2015. He has pointed out that, the plaintiff had filed an application for judgement and admission simultaneously with

the filing of the suit. He has submitted that, after exchange of affidavits, the petition for judgement on admission was taken up for hearing on January 16, 2020 when a judgement and decree upon admission was passed. The defendant did not challenge the judgement and decree dated January 16, 2020 even after drawing up and completion of the decree and issuance of the certified copy thereof in March 2020. In June 2020, the plaintiff had put the decree into execution. It is only thereafter that the defendant had preferred an appeal from such decree. According to him, when the Hon'ble Appeal Court after hearing the parties commenced delivering judgement after expressing that it was not inclined to interfere with the judgement and decree under appeal, leave was sought for on behalf of the appellant to withdraw the appeal with liberty to file an application for review. Accordingly, the appeal and the application made therein were dismissed as withdrawn. He has referred to the order of the Appeal Court dated July 1, 2020 in this regard.

16. Learned Senior Advocate appearing for the plaintiff has submitted that, the review stay petition as well as the Memorandum of Review does not disclose any ground for review. He has submitted that, the contention of the defendant that, they were not aware of leave under Section 12A of the Act of 2015 having been granted by the learned

Master, is unacceptable. He has submitted that, the defendant is being represented by a reputed firm of solicitors. The defendant has not named any advocate of the firm of the solicitors who has taken the responsibility of not knowing that leave under Section 12A of the Act of 2015 had been granted in favour of the plaintiff. He has referred to the verification of the stay petition. He has submitted that, the paragraphs have been verified by a director of the defendant as information derived from his advocates. According to him, the defendant has not annexed any document to show that such information was communicated to the defendant in writing. The defendant has not named any advocate from whom the defendant derived such knowledge.

17. Learned Senior Advocate appearing for the plaintiff has submitted that, the contention of the defendant that, they became aware of the leave under Section 12A of the Act of 2015 being granted by the learned Master at the time of settling of the decree, is false and untrue. At the time of settling of the decree, the original plaint is not considered. The certified copy of the judgement is looked into for settling and drawing up of the decree. He has contended that, the defendant has taken different stand in the Memorandum of Review and in the stay petition for review.

18. Learned Senior Advocate appearing for the plaintiff has submitted that, the defendant could have known the facts that the defendant claims to know subsequent to the passing of the decree, had the defendant been diligent in that regard. According to him, the defendant has not made out any ground for review. In support of such contentions, he has relied upon **1995 Volume 1 SCC 170 (Meera Bhanja v. Nirmala Kumari Choudhury)**. According to him, the defendant and its advocates were fully aware of the fact that leave was granted by the learned Master.

19. Relying upon **1979 Volume 3 Supreme Court Cases 578 (N. Jayaram Reddy & Anr. v. Revenue Divisional Officer and Land Acquisition Officer, Kurnool)**, learned Senior Advocate appearing for the plaintiff has submitted that, the defendant having chosen not to address the Court on the point of leave under Section 12A of the Act of 2015 prior to the passing of the decree, is deemed to have abandoned such plea.

20. Learned Senior Advocate appearing for the plaintiff has submitted that, the negligence on the part of the defendant to exercise due diligence cannot be a basis for seeking review of the judgement and

decree. According to him, the plaint was available for inspection to the defendant. The defendant chose not to exercise such right. The defendant not having made out a case of mistake or error on the face of the record, this court should be pleased not to entertain the review.

21. Learned Senior Advocate appearing for the plaintiff has submitted that, on the date of presentation of the plaint, there existed a practice direction which empowered the learned Master to grant leave under Section 12A of the Act of 2015. It is only in February 2021 that plaints seeking leave or seeking dispensation of compliance of Section 12A of the Act of 2015 was directed to be placed before the Hon'ble Judge taking up interlocutory matters.

22. Learned Senior Advocate appearing for the plaintiff has referred to Chapter 6 Rule 12 of the Original Side Rules and submitted that, the learned Master is entitled to transact all such business and exercise all such authority and jurisdiction as under the rules may be transacted or exercised by a judge in chambers except where otherwise prescribed or in respect of proceedings of matters mentioned in the exceptions provided under that rule. Under such exceptions, only leave under Clause 12 of the Letters Patent, 1865 cannot be granted by the learned

Master. The defendant has not been able to indicate any provision which debar the learned Master from granting leave under Section 12A of the Act of 2015.

23. Learned Senior Advocate appearing for the plaintiff has submitted that, in any event, the order of the learned Master granting leave under Section 12A of the Act of 2015 is appealable before the Judge under Chapter 6 Rule 15 of the Original Side Rules. The defendant has not preferred any appeal from the order of the learned Master granting such leave. The defendant is therefore not entitled to urge the same as a ground of review.

24. Learned Senior Advocate appearing for the plaintiff has submitted that, Clause 12 of the Letters Patent, 1865 and Section 80 of the Code of Civil Procedure, 1908 as also Order II Rule 2 of the Code of Civil Procedure, 1908 contemplate prior leave by court. Section 12A of the Act of 2015 however does not contemplate any prior leave. According to him, in the event the defendant had taken the point of Section 12A of the Act of 2015 prior to the passing of the judgement and decree, the plaintiff could have obtained such leave and the Court could have granted the same.

25. Learned Senior Advocate appearing for the plaintiff has relied upon **1988 volume 2 Supreme Court Cases 602 (A.R. Antulay v. R.S. Nayak & Anr.), All India Reporter 1966 Supreme Court 1631 (Jang Singh v. Brijlal and others)** and **2003 Volume 8 Supreme Court Cases 559 (Bharat Damodar Kale & Anr. v. State of A.P.)** in support of the contention that, while obtaining leave under Section 12A of the Act of 2015 from the learned Master, the plaintiff had acted bona fide through its advocate and proceeded on the basis that the learned Master was competent to grant such leave on the basis of the practice directions issued by the Court. Assuming though not admitting, the learned Master had acted in error of jurisdiction, the plaintiff should not be penalised for the same.

26. Referring to Section 80, Order I Rule 8, Order II Rule 2 and Order II Rule 4 of the Code of Civil Procedure 1908, and clause 12 of the Letters Patent, 1865, learned Senior Advocate appearing for the plaintiff has contended that, such provisions contemplate specifically leave being granted by the Court. According to him, Section 12A of the Act of 2015 does not contemplate grant of leave by Court. Since the statute does not contemplate grant of leave by Court, the plaint can be presented before the learned Master and the learned Master can admit the same after

granting leave under Section 12 A of the Act of 2015. According to him, leave under Section 12A of the Act of 2015 is an appendage and is not at all required in the event the suit contemplates urgent reliefs. According to him, the fact that the plaintiff had instituted the suit along with an application seeking urgent relief, the same dispenses with the requirement to comply with the pre-institution mediation as directed under Section 12 A of the Act of 2015.

27. Relying upon ***All India Reporter 1962 Supreme Court 199 (Hiralal Patni v. Kali Nath)*** and ***All India Reporter Supreme Court 823 (Official Trustee, West Bengal and others v. Sachindra Nath Chatterjee and others)*** learned Senior Advocate appearing for the plaintiff has submitted that, the Court had jurisdiction to pass the decree. The alleged irregularity or illegality of the learned Master in granting leave under Section 12 A of the Act of 2015 does not vitiate the jurisdiction of the court granting the decree.

28. Learned Senior Advocate appearing for the plaintiff has submitted that, review of the judgement dated January 16, 2020 is barred by the laws of limitation. He has submitted that, application for certified copy of the judgement dated January 16, 2020 was made in February 3,

2020. Certified copy was taken delivery on February 21, 2020 although it was made ready for delivery on February 20, 2020. According to him, a period of 30 days as prescribed under Article 124 of the Limitation Act, 1963 for review expired on March 6, 2020. The defendant has not explained the delay.

29. Learned senior advocate appearing for the plaintiff has submitted that, the ratio laid down in the authorities cited on behalf of the defendant have no manner of application to the facts and circumstances of the present case. He has submitted that the application for review along with the stay petition should be dismissed.

30. The plaintiff had filed a suit for recovery of price of goods sold and delivered. The plaintiff had filed an application for a judgment and decree on admission for a sum of RS. 5,79,58,608/- and for an order of injunction. Such application being GA No. 2598 of 2019 had been disposed of by the judgement and order dated January 16, 2020. The Court had passed a judgment and decree upon admission for a sum of Rs. 5,79,58,608/- as against the defendant. The issue as to interest had been kept open to be decided at the suit. The learned Advocate for the defendant having waived service of the writ of summons, a copy of the

plaint had been directed to be served upon the learned Advocate on record for the defendant which was done in Court. The defendant had been granted liberty to file written statement within 4 weeks thereafter.

31. The plaintiff had filed the suit in the commercial division. The Commercial Courts Act, 2015 has a mandate under Section 12A thereof requiring pre-institution mediation unless, the plaintiff seeks urgent interim relief.

32. The plaint in the instant suit had been admitted by the learned Master on November 28, 2019. The learned Master had allowed corrections to be incorporated in the plaint on January 9, 2020.

33. The defendant had preferred an appeal from the judgment and decree dated January 16, 2020. The defendant had withdrawn such appeal on July 1, 2020 after obtaining leave of the Hon'ble Appeal Court to file a petition for review against the judgment and order dated January 16, 2020. The defendant has filed the present application for review along with the review stay petition, subsequent to the order dated July 1, 2020 of the Appeal Court.

34. The defendant has contended that, Section 12A of the Act of 2015 is mandatory in nature. Section 12A of the Act of 2015 has been

considered in ***Terai Overseas Private Limited (supra)***. In the facts of that case, the Court had found that, there was no pleading under Section 12A of the Act of 2015. In such an eventuality, the Court had directed the department to treat the suit as being dismissed.

35. In ***Mr. Brahymanath Subhramaniam (supra)*** the Madras High Court has considered an order rejecting an application for injunction and an application for furnishing security. The Court had observed that, the Civil Court had rightly rejected the orders prayed for. Paragraph 7 thereof, has recorded the submissions advanced on behalf of the defendant and should not be read as a ratio of the Court.

36. In the facts of the present case, the learned Master had granted leave under Section 12A of the Act of 2015. Such fact had been recorded on the body of the plaint. The defendant, has been represented by a firm of advocates. The defendant has alleged that, the defendant was not aware of such leave under Section 12A of the Act of 2015 being granted prior to the passing of the judgment and order dated January 16, 2020. This contention of the defendant that, it was not aware of the leave under Section 12A of the Act of 2015 being granted by the learned Master prior to the judgment and decree dated January 16, 2020 being

put up for drawing up and completion, has to be understood in the context of the contention of the defendant that, leave under Section 12A of the Act of 2015 is mandatory.

37. In course of hearing of the application for judgement upon admission and for injunction, the defendant did not raise the issue of the leave under Section 12A of the Act of 2015 being granted by the learned Master.

38. Despite the defendant contending now that leave under Section 12A is mandatory, the defendant did not oppose the application for judgment on admission and injunction on the ground that, no leave under Section 12A of the Act of 2015 had been granted or that, leave by the learned Master is no leave at all in the eye of law. The defendant having been represented by advocates, at this stage, I am not minded to allow the defendant to raise the plea of the learned Master being incompetent to grant leave or that the suit suffers from non grant of leave under Section 12A of the Act of 2015. The defendant not having assailed such order of the learned Master in an appropriate proceedings, I am not minded to allow the defendant to raise such plea through this review petition.

39. The plaintiff has contended that, the defendant did not make out any ground for review in the memorandum of review or in the review stay petition. In the facts and circumstances of the present case, I find substance in such contention of the plaintiff.

40. ***Meera Bhanja (Supra)*** has held that, review proceedings are not by way of an appeal and have to strictly confined to the scope and ambit of Order 47 Rule 1 of the Code of Civil Procedure, 1908. It has observed that, an error apparent on the face of the record must be such an error which must strike one at a mere looking at the record and would not require any long-drawn process of reasoning on points where they may be conceivably be two opinions.

41. ***N. Jayaram Reddy & Another (Supra)*** has in the facts of that case held that, the plea that the persons were seeking to raise had been willfully abandoned by such persons. The Supreme Court had therefore, did not allow such persons to raise a plea that they had willfully abandoned. In the facts of the present case, the defendant has assailed the order of the learned Master granting leave under Section 12A of the Act of 2015. I am not minded to allow the defendant such plea by way of a review.

42. **A. R. Antulay (Supra)** and **Jang Singh (Supra)** have observed that a litigant should not suffer due to the mistakes of a court. **Bharat Damodar Kale & Others (Supra)** has observed that, an act of the court shall prejudice no man. In the facts of the present case, the plaintiff had acted on the basis, that the Learned Master had power to grant leave under Section 12 A of the Act of 2015. The Plaintiff cannot be faulted for such purpose, particularly when the defendant had a right to challenge such order of the Learned Master before the Learned Judge taking Interlocutory matters and the defendant chose not to do so.

43. In **Hiralal Patni (Supra)**, the Supreme Court has considered a matter where, the defendant, raised the question of lack of territorial jurisdiction of the Bombay High Court, with regard to a suit when, the defendant in such suit, invited the court to refer the parties to arbitration. In the facts of that case, the suit was instituted after obtaining leave of the Clause 12 of the Letters Patent, 1865. The Supreme Court had observed the correctness of the procedure or of the order granting leave under Clause 12 of the Letters Patent, 1865 could have been questioned by the defendant. Since the defendant did not raise any objection with regard there to, as will appear from its conduct subsequently, the objection with regard to the lack of territorial

jurisdiction should not be entertained. It has observed that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of the court to decide a case. The competence of the court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a Court can be waived and this principle has been given statutory recognition or enactment in Section 21 of the Code of Civil Procedure, 1908.

44. ***Official Trustee West Bengal (Supra)*** has considered the issue of jurisdiction. It has held that, if the court had no jurisdiction to pass the order then such order is null and void. If the court had jurisdiction to pronounce on the plea but the court made an incorrect order or even an illegal order, the same cannot affect its validity. In the facts of the present case, it cannot be that this Hon'ble Court lacked jurisdiction to try the suit. The alleged irregularity in institution of the suit is a point which the defendant could have raised by challenging the order of the learned Master in granting leave under Section 12A of the Act of 2015 which such procedure the defendant did not adopt. The defendant

cannot be allowed to raise such point in the review circuitously, not having done so directly.

45. In the facts and circumstances of the present case therefore, the defendant not having substantiated any ground of review of the judgment and decree dated January 16, 2020, RVW 6 of 2020 is dismissed. Since the review petition itself is dismissed, no question of granting stay of the judgment and decree under review arises. IA GA 2 of 2020 is dismissed accordingly. IA GA 1 of 2020 is an application for early hearing of the review as well as the stay petition. Such application is also disposed of.

[DEBANGSU BASAK, J.]