

24.02.2022

Ct. 21

D/L 1

C.O. 135 of 2022
(Via Video Conference)

Bluestar Engineering and Electricals Ltd.

-Vs-

H.L.G. Memorial Hospital Pvt. Ltd.

Mr. Subhankar Nag,
Mr. Abhishek Guha,
Mrs. Somali Mukhopadhyay,
Ms. Akansha Chopra

... for the petitioner

Mr. Chitta Ranjan Chakraborty,
Mr. Arun Kumar Gupta,
Mr. Dip Jyoti Chakraborty,

...for the opposite party

The present application under Article 227 of the Constitution of India is at the instance of the defendant being aggrieved by the order passed by the learned Commercial Court, Asansol in Money Suit No. 1 of 2021 whereby the learned Court below was pleased to reject the defendant's application under Order 7 Rule 11 read with Section 151 of CPC. being IA No 10 of 2021 dated 31.05.2021.

The facts necessary for determination of the present revisional application in gist is that the plaintiff/OP is a Private Hospital situated at Asansol, Paschim Bardhaman. That for running the said hospital the plaintiff purchased a MRI scanning machine from the petitioner/defendant Company sometime in the year 2019.

The said MRI machine after completing all necessary procedure put into operation on and from 12.06.2019. That within few days the machine stopped

functioning being defective. That as per guarantee and warrantee the petitioner/defendant is bound to maintain the said machine but the defendant's engineer who came for repair could not make the machine fully functional.

It is the case of the petitioner that due to supply and installation of faulty machine the opposite party/plaintiff hospital could not cater the patients who needed MRI test. The machine was purchased at the value of Rs. 1,25,000,00/-. Therefore the plaintiff requested the defendant to replace or make the said machine functional, but it failed. Finding no alternative it had to serve a legal notice upon the defendant and who did not pay any heed. Then it has filed a Money Suit claiming Rs. 1,25,000,00/-towards the cost of the machine and Rs. 25,000/-towards the damage before the Learned Commercial Court at Asansol.

The defendant after appearance has filed the impugned application under Order 7 Rule 11 of CPC praying for rejection of the plaint on the ground of non-compliance of provision of Section 12 A of Commercial Courts Act, 2015. However, by passing the impugned order the learned Court below has been pleased to reject the application of the defendant.

It is true that plaintiff has filed the Money Suit No. 1 of 2021 without exhausting pre-institution, mediation and settlement process.

Therefore, the only question that requires determination in the present revisional application is whether the pre institution mediation and settlement is mandatory?

Following citations are referred:-

1. Laxmi Polyfab Pvt. Ltd. Vs. Eden Realty Ventures Pvt. Ventures Pvt. Ltd. & Anr. Reported in 2021 SCC Online Cal 1457.

2. M/S. Amit Motorcycles Pvt. Ltd. Vs. M/S. Axis Bank Ltd. In the case of IA No. GA 3 of 2019 in CS 217 of 2018.
3. Deepak Raheja vs. Ganga Taro Vazirani reported in 2021 SCC Onlilne Bom 3124.
4. Ashok Kumar Puri & Anr. Vs. S. Suncon Realtors Pvt. Ltd. & Anr.
5. Terai Overseas Private Limited Vs. Kejriwal Sugar Agencies Private Limited & Ors. Reported in 2020 SCC Online Cal 1591.
6. Sree Jain Swetambar Terapanthi Vid(s) Vs. Phundan Singh & Ors. Reported in (1999) 2 SCC 377.
7. Harpeet Singh Chhabra & Ors. Vs. Suneet Kaur Sahney & Ors. Reported in 2018 SCC OnLine Hyd 527.
8. M/S. Dhanbad Fules Ltd. Vs. Union of India & Ors. Reported in AIR Online 2021.
9. Sudhir Kumar @ S. Baliyan Vs. Vinay Kumar G.B. in the case Civil Appeal No. 5620 of 2021 (Arising out of SLP (C) No. 13082 of 2021)

Section 12A provides *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.*

Therefore, as per provision of Section 12A of the Act, if a plaintiff/ plaintiffs files/file a commercial suit and if he/she/it/ does not seek any urgent relief then the plaintiff/plaintiffs has/have to go for pre-institution mediation and settlement. But if the plaintiff/ plaintiffs seeks/seek urgent relief then there is no need to go or pre litigation mediation and settlement.

Perused the record and from order sheet dated 11.01.2021 it appears the plaintiff hospital has filed an application seeking urgent relief by filling a petition under Order 39 Rule 1 and 2 of CPC and another petition under Section 12A exempting it from undergoing pre litigation mediation and settlement.

The learned Court below although granted the plaintiff to institute the suit without undergoing pre institution mediation and settlement after finding prima facie case in favour of the plaintiff has held the suit being a money suit and existence of arbitration clause in the agreement executed between the parties, the plaintiff can be compensated in terms of money if the suit succeed refused to grant interim order of injunction.

No doubt the suit has been instituted by a hospital where a defective MRI machine has been installed by the defendant company. MRI machine is an integral part of a hospital and without it the hospital may face inconvenience in the treatment and diagnosis of not only indoor patients but also outdoor patients. MRI machine being an advanced machine than CT Scan and X Ray and a hospital which already has a MRI facility will be totally handicap without such machine and may suffer revenue loss. In the plaint the plaintiff has highlighted its agony that due to non-removal of defective machine by the defendant company it is not in position to install another machine.

Considering such facts it appears to this Court if the plaintiff had to go for pre-litigation mediation and settlement then it is likely to suffer for no fault of it as the defendant Company may protract the mediation proceeding. Then it would be very difficult on its part to remove the defective machine and replace the same with new one to carter the patients of the locality of Asansol, its adjacent districts and State. It is seen the

defendant Company instead of replacement of the defective machine or repair of the machine want the case filed against it dismissed merely on the ground of technical error. From such very conduct it can be safely inferred that a Court cannot expect pre litigation settlement from such defendant Company.

That apart the learned Court below by passing the impugned order has kept the option for mediation and settlement open.

Since the case has already been preceded it should be allowed to proceed further in its normal course. That if the party desires to have the matter settled they are at liberty to do so.

This Court does not find merit in the revisional application

Accordingly **C.O. 135 of 2022 is disposed of.**

Connected application, if any, is disposed of.

Interim order, if any, stands discharged.

In view of the order made above Affidavits are not invited. Allegations made shall be deemed to be denied.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(**Kesang Doma Bhutia, J.**)