

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

Date of decision: 16th NOVEMBER, 2022

IN THE MATTER OF:

+ **RFA(COMM) 14/2022**

KAPIL GOEL

..... Appellant

Through: Mr. Abhishek Kumar, Mr. Sumit Kashyap and Ms. Vedika Sharma, Advocates.

versus

RAM DULARE YADAV @ GANDHI BHAI Respondent

Through: Advocate (*Appearance not given*)

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant appeal arises out of Order dated 07.04.2021, passed by the learned District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi, in CS (COMM) 82/2019.
2. CS (COMM) 82/2019 was filed by the Appellant herein/Plaintiff for recovery of Rs.27,33,433/- from the Respondent herein/Defendant. Learned District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi, *vide* Order impugned herein dismissed the Suit by allowing the application filed by the Respondent herein/Defendant under Order VII Rule 11(d) of the CPC on the ground of Section 12A of the Commercial Courts Act, 2015 (*hereinafter referred to as 'the Act'*), which mandates Pre-Institution Mediation.
3. The facts leading up to the filing of this Appeal are as under:

- a) The Appellant herein runs a business of sale and purchase of fabric in the name and style of M/s Kapil Creations. It is stated that the Respondents herein had purchased fabric from the Appellant herein on credit basis and defaulted in the payment of Rs.17,98,319/-.
- b) The Appellant herein, before instituting a Suit, approached the Secretary, Delhi Legal Services Authority (DLSA) for initiation of Pre-Institution Mediation proceedings for recovery of Rs.17,98,319/- with interest @ 24% per annum, by filing an application under Schedule I, Form 1 as specified under Rule 3(1) of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (*hereinafter referred to as 'the Rules'*) which had been framed under the Act.
- c) Material on record discloses that DLSA gave a Non-starter Report for the Mediation.
- d) Since the mediation was a Non-starter, the Appellant herein filed a Suit, being CS (COMM) 82/2019, for recovery of Rs.27,33,433/- before District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi. Summons was ordered to be served on the Respondent/Defendant. A written statement was filed by the Respondent herein/Defendant and the Appellant herein/Plaintiff filed a replication.
- e) Arguments were advanced. According to the learned District Judge, the Suit was filed without complying with Section 12A of the Act. The learned District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi, after perusing the material on record came to the conclusion that the

Plaintiff/Appellant herein had filed an application to the DLSA for initiation of Pre-Institution Mediation proceedings only as a formality in order to file a Civil Suit and had no real intention to proceed with the mediation process. The learned District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi, dismissed the Suit by observing that Section 12A of the Act is mandatory in nature, and since the Plaintiff/Appellant herein has not acted in good faith and refused to participate in the Pre-Institution Mediation process and, therefore, the Plaintiff/Appellant herein is barred by law.

f) It is this Order which is the subject matter of the instant appeal.

4. For a better appreciation of the facts and the law on the subject, it is necessary to extract the relevant provisions of the Commercial Courts Act, 2015 and the Commercial Courts (Pre-Institution mediation and Settlement) Rules, 2018. Section 12A of the Act reads as under:

*“Section 12A.
Pre-Institution Mediation and Settlement.*

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 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 purposes 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).]

5. Section 21A of the Act gives power to the Central Government to frame rules for carrying out the provisions of the Act and according to the said provision, the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 were brought in force by notification dated 03.07.2018. Section 2(c) of the Rules defines “Authority” which reads as under:

“2(c) “Authority” means the Authority notified by the Central Government under sub-section (2) of section 12A of the Act;”

6. Rule 3 of the Rules which are relevant for this case reads as under:

“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.”

7. As per Rule 3, a party to the commercial dispute has to make an application to the Authority as specified in Rule 2(c) as per Form-1 specified in Schedule-I for initiation of mediation proceedings under the Act along with a fee of one thousand rupees payable to the Authority either by way of demand draft or through online mode. The Rules further specify that the Authority shall, having regard to the territorial and pecuniary jurisdiction, and the nature of commercial dispute, issue 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. Rule 3(3) specifies that if no response is received from the opposite party either by post or by e-mail, the Authority shall issue a final notice to the opposite party in the manner as specified in sub-rule (2). Rule 3(4) specifies that if the final notice 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.

8. It is pertinent to mention here that the Apex Court in Patil Automation Private Limited and Others v. Rakheja Engineers Private Limited, **2022 SCC OnLine SC 1028**, has held that Section 12A of the Act is mandatory and the Plaintiff, who approaches the Commercial Court, must necessarily resort to Section 12A of the Act. The Apex Court in the said decision also held that in case Section 12A is not complied with by the Plaintiff then the Suit ought to be dismissed under Order VII Rule 11 of the CPC as being barred by law.

9. Learned Counsel for the Appellant herein/Plaintiff contends that the Plaintiff had approached the DLSA by filing an application as per Form-1 specified in Schedule-I of the Rules, and the DLSA, in terms of Rule 3(2) of the Rules issued notice to the Defendant on 08.07.2019. A Non-starter Report was prepared under Form-3 specified in Schedule-I of Rule 3(4) and 3(6) of the Rules. Learned Counsel for the Appellant/Plaintiff draws the attention of this Court to the said Report. Clause 6 of Form 3 of the Non-starter Report dated 27.07.2019 reads as under:

“6. Non-Starter Report Reason: Both the parties do not want to participate in the process of Pre-Institution Mediation.”

(emphasis supplied)

10. Learned Counsel for the Appellant/Defendant contends that it is not as if the Plaintiff was not serious in pursuing the mediation proceedings. He states that it was the Defendant who was not prepared to participate in the mediation proceedings and, therefore, a Non-Starter Report was filed by the

DLSA. He states that the judgment of the Apex Court in Patil Automation Private Limited (supra) would apply only if the Plaintiff does not want to participate in the Pre-Institution Mediation proceedings. He, therefore, states that the judgment of the learned District Judge, Commercial Courts-II, Karkardooma Courts, Delhi, be set aside as it has erroneously concluded that the Plaintiff had not acted in good faith and had refused to participate in the Pre-Institution Mediation Proceedings.

11. *Per Contra*, learned Counsel for the Respondent herein/Defendant contends that the Plaintiff refused to participate in the Pre-Institution Mediation Proceedings and, therefore, the Order of the Apex Court in Patil Automation Private Limited (supra) would apply to the facts of the instant case and the learned District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi, was correct in dismissing the Suit of the Plaintiff as being barred by law. He states that the Plaintiff has merely gone through the formality of approaching the DLSA and getting notice issued without being serious in pursuing the process of Pre-Institution Mediation proceedings which has been termed as mandatory by the Apex Court in Patil Automation Private Limited (supra).

12. Heard learned Counsel appearing for the parties, and perused the material on record.

13. A perusal of the material on record discloses that the Plaintiff had approached the DLSA and the Authority issued a Notice to the Defendant as specified in Form 1 of Schedule-I of the Rules on 08.07.2019 which was received by the Defendant. Thereafter the DLSA provided a Non-starter Report under Form-3 specified in Schedule-I of Rule 3(4) and 3(6) of the Rules. As per Clause 6 of Form 3 of the Non-starter Report, the reasoning

that was provided was that both the parties do not want to participate in the process of Pre-Institution Mediation.

14. The short question which arises before this Court is whether the factum of the Defendant not willing to participate in the Pre-Institution Mediation would suffice for Section 12A of the Commercial Courts Act, 2015, to be satisfied.

15. A plain reading of Rule 3 of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 demonstrates that when mediation process is initiated, the authority is required to issue notice to the opposite party in order for them to appear and give consent to participate in the mediation process on such days not beyond the period of 10 days from the date of issue of the said notice. If no response is received from the opposite party, then the authority is required to issue a final notice to it. However, if the final notice issued remain unacknowledged or the opposite party refuses to participate in the mediation process, then the authority is required to treat the mediation process to be a Non-starter and make a report on the same. Sub-Section 6 of Rule 3 also places the burden on the opposite party to appear on the date fixed in case it does not want the mediation process to be a Non-starter.

16. A holistic reading of the facts of the case as well as the law demonstrates that the consent of the Plaintiff for the institution of the mediation proceedings is irrelevant if the Defendant refuses to move forward with it. All that is required on the part of the Plaintiff is to initiate Pre-Institution Mediation prior to filing of a commercial suit. Once this is satisfied, if it is the Plaintiff who refuses to move forward with the mediation, then the suit that is instituted thereafter would be barred by law. However, if both the Defendant and the Plaintiff do not wish to pursue the

mediation and a Non-starter Report is generated subsequent to the same, then if the Plaintiff files a suit, the same would not be barred by law.

17. It is pertinent to mention here that the facts of Patil Automation Private Limited (supra) reveals that it was the Plaintiff therein who made the Pre-Institution Mediation proceedings a Non-Starter by not taking part in the Pre-Institution Mediation proceeding. Under those circumstances, the Supreme Court had observed that Section 12A of the Act would be mandatory in nature and the Suit can be dismissed under Order VII Rule 11 of the CPC if the Plaintiff does not fulfil the mandate of Section 12A of the Act. Relevant portion of the Judgment of the Apex Court in Patil Automation Private Limited (supra) reads as under:

“80. We may sum-up our reasoning as follows:

The Act did not originally contain Section 12A. It is by amendment in the year 2018 that Section 12A was inserted. The Statement of Objects and Reasons are explicit that Section 12A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The Legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion. Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right

*to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which amply illustrate this principle, are Section 80 of the CPC and Section 69 of the Indian Partnership Act. The language used in Section 12A, which includes the word 'shall', certainly, go a long way to assist the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation. The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. **The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgment of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties.*** (emphasis supplied)

18. In the present case, both the Plaintiff and the Defendant have refused to participate in the mediation. It is not the case as if the defendant was

interested in proceeding ahead with the mediation and the Plaintiff was not interested. This Court is of the opinion that the Defendant having refused to participate in the Pre-Institution Mediation will suffice for the suit of the Plaintiff to be allowed to proceed without any encumbrance. The learned District Judge Commercial Courts-II has erred in observing that the Plaintiff had not followed the mandate of Section 12A of the Act, and, therefore, this legal infirmity warrants the interference of this Court.

19. Accordingly, the instant appeal is allowed. Pending application(s), if any, are disposed of.

20. The Suit is restored to its original number.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

NOVEMBER 16, 2022

Rahul