

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
(COMMERCIAL DIVISION)**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE SHAMPA DUTT (PAUL)**

**A.P.O.T 106 of 2022
CS 29 of 2022
I.A G.A No. 1 of 2022**

**Dilip Kumar Rungta
Vs.
KLG Tradefin Pvt. Ltd.**

AND

**A.P.O.T 107 of 2022
CS 30 of 2022
I.A G.A No. 1 of 2022**

**Anurag Rungta
Vs.
K.P. Credit & Traders Pvt. Ltd.**

AND

**A.P.O.T 108 of 2022
CS 31 of 2022
I.A G.A No. 1 of 2022**

**Dilip Kumar Rungta
Vs.
K.P. Credit & Traders Pvt. Ltd.**

Appearance:

For the Appellants : **Mr. Anirban Ray, Adv.**
Ms. Sanjukta Gupta, Adv.
Ms. Sananda Ganguly, Adv.

Mr. S. Roy, Adv.

For the Respondents : **Mr. Suresh Sahani, Adv.**
Mr. Chhandak Dutta, Adv.
Ms. Karuna Bose, Adv.
Mr. Soumik Ghosh, Adv.

Judgment On : **30.03.2023**

Harish Tandon, J.:

All the aforesaid three matters are taken up together as, the legal points involved therein are identical and similar and the answer to it shall decide the fate of the aforesaid appeals.

The basic facts involved in the aforesaid appeals are more or less similar except the quantum of money involved therein and therefore, the facts narrated in APOT 106 of 2022 are adumbrated in the instant judgment. The facts emerged from the pleading filed before the Single Bench are that the respondent company is engaged in the business of financial intermediation and activities apart from the other trading activities. In or around the month of February, 2015 the appellant approach the respondent as it was a need of funds and after the extensive discussion, the negotiations held between the parties wherein the respondent agreed to advance a sum of Rs. 2,87,00,000/- (Rupees two crores and eighty seven lakhs) to the appellant payable with interest at 12 per cent per annum upon maturity. It was further renegotiated and ultimately the rate of interest was reduced to 7 per cent per annum on and from 1st April, 2020. It is further stated that the interest would be payable on a monthly basis and in the

event of default, the respondent is entitled to recall the loan and the entire balance amount would be payable at one go. The aforesaid amount was debited from the account of the respondent on diverse dates and credited into the back account of the appellant. The pleading further revealed that the part payment to the tune of Rs. 2,05,00,000/- (Rupees two crore and five lakhs) was made between 20th March, 2015 and 23rd September, 2016. The interest was also paid on diverse dates between 17th March, 2016 and 10th March, 2021 after deduction of TDS for the respective financial years which would be evident from the copy of the Form 26AS uploaded on the official website of the Income Tax Department. Since there was a default in payment of interest and the principal amount due after part payment, the respondent called upon the appellant to pay a sum of Rs. 82,00,000/- (Rupees eighty-two lakhs) being the balance amount together with an interest to the tune of Rs. 9,61,450/- (Rupees nine lakhs sixty-one thousand four hundred and fifty) upon issuing a letter dated 23rd December, 2021 payable within 15 days from the date of receipt thereof. The said letter was duly replied by the appellant on 7th January, 2022 admitting the receipt of the said amount but denied the liability taking a sham defence and denying the existence of privity of contract. Thereafter the *lis* was filed for recovery of the said sum of Rs. 91, 61,450/- (Rupees ninety-one lakhs sixty-one thousand four hundred and fifty) together with an interest at the rate of 18 per cent per annum from the date of decree till realization. It is pertinent to note that the said suit was filed without exhausting the remedy of pre-institution mediation contemplated under Section 12A of the Commercial Courts Act, 2015 and one of the reliefs claimed in the plaint relates to the

dispensation of the aforesaid recourses. An application was taken out in the said suit seeking for an order of injunction restraining the appellant from dealing and/or encumbering and/or alienating its assets and also to furnish the security to the tune of Rs. 91, 61,450/- (Rupees ninety-one lakhs sixty-one thousand four hundred and fifty). The said application was contested by the appellant by filing the affidavit in opposition taking a plea that one Anil Kumar Chaudhary being known to the deponent of the said affidavit assured in arranging and facilitating the long term unsecured loan for the business requirement of the appellant and pursuant to the several discussions having held the entire amount was arranged by him and it was agreed that the said amount would be repaid within 15 years from the date of its disbursement and therefore, there is no privity of contract in relation to the said loan between the appellant and the respondent.

On the basis of the pleadings exchanged by the parties the application filed by the respondent was disposed of restraining the appellant from dealing with, disposing of and/or in any manner, encumbering the fixed and other assets of the appellant till the disposal of the suit. The appellant has filed the instant appeals against the similar orders taking common grounds of attack.

The counsel appearing for the appellant vehemently submits that the instant suit was instituted without exhausting the remedy provided under Section 12A of the Commercial Courts Act, 2015 and therefore, the same is liable to be dismissed. It is further submitted that even apart on the facts pleaded in the application, the order of injunction could not have been

passed in the manner as has been done in the instant case. It is submitted that in a suit simplicitor for recovery of money, the injunction should have been the last resort and the only grounds open to the plaintiff is to seek the security before proceeding for the attachment before judgment. It is arduously submitted that there is no ingredient, required to be pleaded for attachment before judgment, in the said application and therefore, even on such score, no order for attachment before judgment could be passed and the only recourse available is to dismiss the said application. The plea is taken that the averments made in the plaint does not fulfill the conditions laid down under the definition of 'Commercial Dispute' and therefore, it is outside the purview of the said Act. To elaborate the aforesaid submission, it is submitted that there is no mercantile document pleaded and proved in the plaint and therefore, the suit before the Commercial Division of the High Court is not maintainable.

Per contra, the learned advocate appearing for the respondents submits that the suit involves an urgent interim relief contemplated under Section 12A of the said Act and the dispensation was sought for, which would be evident from one of the reliefs claimed in the plaint. It is further submitted that an application for injunction and/or furnishing the security was taken out as an urgent interim relief and having granted by the Single Bench, the plea of a bar under Section 12A of the Act is not available. It is further submitted that the transaction between the parties have not been disputed and a sham and frivolous defence has been taken which is far from the reality and contrary to the transactions held between the parties. It is,

thus, submitted that the money was transferred directly in the bank account of the appellant and the part payments including the interests were paid upon deduction of the TDS and such documents are issued in course of a transaction between the financier and the borrower and therefore, satisfies the ingredients of the mercantile document. It is further submitted that the documents executed by the parties in the ordinary course of transaction are regarded as a mercantile document and therefore, the stand of the appellant in this regard is untenable.

At the very outside, we must record that the memorandum of appeal filed in the aforesaid appeals does not contain any ground relating to non-adherence of pre-institution mediation required under Section 12A of the said Act yet such point has been taken by the appellant and being the pure question of law, we permit such point to be taken at the bar as it has a greater impact on the maintainability of the suit. Section 12A of the Act is reproduced as under:

“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, authorize 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 authorized 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 the Section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."

It appears from the language employed in the aforesaid section that before institution of the suit relating to commercial dispute, the plaintiff has to exhaust such remedy. There has been a divergent opinion on the legislative intent sublime incorporation of the aforesaid provision whether the same can be regarded as mandatory or directory. Different High Courts have taken a divergent view and ultimately the matter travelled to the Supreme Court in **Patil Automation Pvt. Ltd. vs. Rakheja Engineers Pvt. Ltd. reported in (2022) 10 SCC 1**. The Apex Court held that the said provision is mandatory in nature provided the suit does not involve urgent interim relief in the following:

“99.3. The language used in Section 12-A, which includes the word “shall”, certainly, goes 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.

* * * * *

113.1. We declare that Section 12-A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12-A must be visited with rejection of the plaint under Order 7 Rule 11. This power can be exercised even

suo motu by the Court as explained earlier in the judgment. We, however, make this declaration effective from 20-8-2022 so that stakeholders concerned become sufficiently informed.”

In view of the enunciation of law by the Supreme Court in the above noted report, there is no ambiguity in our mind that the intention of the legislature by incorporating the aforesaid provisions by way of an amendment is that the party have to exhaust the said remedy before the institution of the suit in the Commercial Division/Commercial Court and to that extent it is mandatory. However, an exception is carved out in a case involving an urgent interim relief manifestly seen from the pleadings as well as the reliefs claimed in the plaint which laid the institution of the suit before the Commercial Division/Commercial Court. The Apex Court has further highlighted that in absence of any consequences having provided under Section 12A of the Act, the only course available to the Court is to reject the plaint subject, however, to the fact that the jurisdictional High Court has declared such provision to be mandatory. The Apex Court further deprecated the practice of keeping the suit in abeyance and directing the plaintiff to exhaust the remedy under Section 12A of the Act which would be manifestly seen from the following observations:

“85. One of the aspects which weighed with the learned Single Judge of the Bombay High Court in Ganga Taro [Ganga Taro Vazirani v. Deepak Raheja, (2021) SCC OnLine Bom 195] is that in a case where the suit is instituted under Section 80 CPC without issuing any notice, if the defendant does not take up the plea of

violation of Section 80, there can be waiver. Thus, even if Section 12-A in a given case, where the defendant does not set up the case there can be waiver and therefore, Section 12-A is not mandatory. No doubt, the Division Bench of the Bombay High Court while reversing the learned Single Judge proceeded to hold that there cannot be waiver as Section 12-A is based on public interest. The approach of the learned Single Judge does not commend itself to us. The question as to whether Section 12-A is mandatory or not, must be decided with reference to language used, the object of the enactment and a host of other aspects. The fact that if a defendant does not raise the plea about compliance of Section 12-A, it may result in a given case of waiver cannot result in Section 12-A not being mandatory. If it were so, then in a case where there is no notice under Section 80, a plaint can never be rejected. It is legally untenable and defies logic.”

Recently, this Bench analyzed the ratio laid down in **Patil Automation (Supra)** and held that the suit instituted without complying the mandatory provisions contained under Section 12A of the Act in absence of any urgent interim reliefs is liable to be dismissed by rejecting the plaint if the jurisdictional High Court, prior to the institution of the instant suit, have already held that the said provision is mandatory in nature in the following:

“Though the Apex Court have indicated that the law stated therein would apply prospectively i.e., w.e.f 20.8.2022 but it can be reasonably inferred that the provision contained under Section 12A of the Act is mandatory in nature and if the jurisdictional High Court have declared it so it will disentitle the plaintiff to any reliefs.

The aforesaid observation may get impetus from the enlightening observation of the Apex Court in the said report in the following: “Finally, if the plaint is filed violating Section 12A after jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief.”

The meaningful reading of the aforesaid observations culled out from the Patil Automation Private Limited (Supra) leads no ambiguity that the moment the jurisdictional High Court have taken a view that the provision contained under Section 12A is mandatory even if the suit filed prior to the judgment rendered in the said report, the same will be regarded as violative of said provision and there is no fetter on the part of the Court to reject the plaint on such count alone.”

The plaint involved in the respective appeals does not contemplate an urgent interim relief which would be evident from the reliefs claimed therein and therefore, mere filing an application of injunction and/or security cannot be regarded as dispensation of the rigor of Section 12A of the Act and therefore, is not maintainable. Since, this Court has held the provision

contained in Section 12A of the act to be mandatory in absence of any urgent interim reliefs the suit which was instituted subsequent thereto is liable to fail and the courses to be adopted on the basis of the decision rendered in ***Patil Automation (Supra)***, there is no other option but to reject the plaint. Since we have held that the suits falls within the mischief of the Section 12A of the Act it would be an idle formality to go into the other points canvassed before us the interim reliefs are granted in-aid of the final relief in a variedly instituted suit and cannot be granted in a suit which is otherwise not maintainable in view of the mandatory provision of the Act therefore, the order impugned is set aside. The plaint is rejected. The plaintiff is directed to exhaust the remedy provided under Section 12A and after the outcome of the same if the cause of action still survive may institute a suit and in such event, if any interim reliefs are sought for the same shall be decided on merit without being influenced by the observation made in the impugned order. The appeals are allowed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Shampa Dutt (Paul), J.)