

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Biswaroop Chowdhury

APD 3 of 2022
with
CS 130 of 2020
With
IA No. GA 1 of 2022

Gavrill Metal Pvt. Ltd.
Vs.
Maira Fabricators Pvt. Ltd.

For the appellant :- Mr. Suman Dutt,
Mr. Debmalya Ghoshal,
Mr. Jit Ray,
Mr. S. N. Dutt,
Mr. Niladri Khanra, Advs.

For the respondent :- Mr. Debraj Saha,
Mr. Indranil Karfa, Advs.

Judgment on :- 25.08.2023.

I. P. Mukerji, J.:-

Chapter IIIA was introduced into the Commercial Courts Act, 2015 by Section 11 of Act XXVIII of 2008 with effect from 3rd May, 2018. It inserted one solitary section, 12A. It is in the following terms:-

“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 Service Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.”

Sub-section 3 of Section 12A provides that the process of mediation would have to be completed within three months from the date of application

made by the plaintiff under sub-section 1. It may be extended by two months by consent of parties.

If a suit contemplates “an urgent relief”, it may be instituted without undergoing pre-litigation, mediation. The rule of practice which is followed in this court is that if a suit under the said Act is to be instituted without pre-litigation, mediation, leave has to be obtained from the court dispensing with the requirement at the time of institution of the suit. In other words, the court has to certify that the suit “contemplates” urgent reliefs and that is why, such leave is being granted.

On 3rd November, 2020 the learned single judge of this court granted leave to the appellant plaintiff to institute the suit without undergoing pre-litigation, mediation. On 4th July, 2022 another single judge of this court in an application for revocation of such leave and for dismissal of the suit ruled that since for two years after institution of the suit no interim application for an urgent relief had been moved by the appellant plaintiff, the Section 12A leave was liable to be revoked and the suit dismissed. An order was passed accordingly on that date.

At this point of time, let us examine the nature, purport and scope of the suit. Between April, 2015 and November, 2017 the appellant plaintiff had sold and delivered to the respondent defendant more than 126 metres of zinc ingots. The respondent defendant accepted the goods unconditionally. The respondent defendant made payment for part of the supplies amounting to Rs.1,68,99,341/- leaving outstanding a sum of Rs.87,36,945/-. The respondent defendant purportedly made payment of part of the claim by several cheques. All of them were dishonoured with the remark “fund insufficient”. It is a simple claim for recovery of price of goods, sold and delivered together with interest.

The question which has now arisen is whether the learned judge was right in granting the leave or whether the appellant plaintiff should have been

compelled to invoke the mediation process and complete it before filing the suit.

As the section postulates, if in a suit no urgent relief is contemplated, then Section 12A leave is mandatory.

It is the appellant's case that such leave was not required for institution of the present suit because urgent reliefs were contemplated.

The learned judge has ruled that no interim application was moved for two years which provided his lordship a reason to revoke the 12A leave.

Was that the correct test applied by the court?

The legislature does not say that the relief should be urgently sought from the court or the time period within which the relief is to be sought or the nature of the relief to be sought to qualify as an urgent relief. The legislature only mentions that the suit should contemplate urgent interim relief.

Very often a purely literary interpretation of the words of a statute does not bring out the intention of the legislature. The intention has to be understood from a consideration of the entire act. Pre-litigation, mediation was obviously introduced to reduce the number of cases filed and to promote alternative dispute resolution. Such an exercise was made mandatory whether the parties wanted it or did not want it in case of suits where "urgent reliefs were not contemplated."

Why this distinction has been made?

The section stipulates three months' time from the date of the application of the plaintiff which can be further increased by two months with the consent of parties for completion of the mediation process. Take the example of a suit for recovery of money lent and advanced. The defendant debtor has huge debts in the market. Several claims of creditors against him are pending. When the plaintiff is contemplating filing of the suit

against him, he is in the process of transferring his immovable property so as to defeat the claim of the defendant as well as other creditors. Immediately with the filing of the suit, the plaintiff needs to move an interim application and obtain an order restraining the defendant from transferring the property and for the property to be taken possession of by a receiver to be appointed by the court.

Now, if the plaintiff is to undergo mediation compulsorily, the defendant might keep it pending for three months. For three months the plaintiff would be unable to institute the suit and hence, unable to obtain any relief. In the meantime, the defendant could be successful in transferring the property, thus defeating the claim of the plaintiff. Hence, the justification for the exception in Section 12A that in suits contemplating urgent reliefs pre-litigation mediation could not be required.

The legislature, in my opinion, has used the expression “contemplated” to express the intention that an interim relief may be required at the time of filing of the suit or may be required any time the defendant expresses an intention to do some act to defeat the decree to be passed.

So, the test, in my opinion, is not whether an urgent interim relief is immediately required but whether the averments in the plaint point to a situation where even before expiry of three months, the plaintiff may have the need to obtain interim relief.

Two parts of the plaint are material to answer the question whether the suit contemplated urgent relief. The first is paragraph 23 of the plaint which is as follows:-

“23. The defendant is a habitual defaulter and unless the properties of the defendant are attached to recover the decretal dues, which are likely to be passed in favour of the plaintiff, the defendant would sell of and dispose of its property, to render the decree, which is likely to be passed, infructuous. Hence, urgent reliefs are required in the matter and plaintiff prays for dispensation of compliance of Section 12A of the Commercial Courts Act, 2015.”

The second group of paragraphs is paragraphs 14, 14A and 14B which are set out below:-

“14. The defendant has made repeated promises and/or assurances and/or acknowledgements and/or clear and unambiguous admissions in so far as the receipt of the said goods are concerned. The said sum of Rs.87,36,945/- was admitted to be due and payable by the defendant, and in favour of the plaintiff, also by the conduct of the defendant, particularly, the part payments made by the defendant.

14A. The plaintiff has not sold zinc ingots to the defendant on gratuitous basis neither the same is the gratuitous act of the plaintiff.

14B. In order to satisfy the dues of the plaintiff, the defendant has raised several cheques dated 24.10.2017, 25.10.2017, 26.12.2017 and 26.12.2017 being cheque nos. 000008, 000010, 812857 and 812856 drawn on Andhra Bank, Ezra Street, Kolkata, India Exchange Place, Kolkata branch for a sum of Rs.30,00,000/-, Rs. 38,50,617/-, Rs. 38, 50,617/- and Rs.30,00,000/- respectively. Upon the cheques being presented with the plaintiff's banker being Axis Bank, Burrabazar Branch, the same were dishonoured with an endorsement “funds insufficient”. Copies of the cheque along with the cheque return memo are annexed hereto and marked as Annexure “E”.

Could it be said that the suit contemplated urgent reliefs?

On a reading of the plaint, particularly those two paragraphs inserted above, there is no doubt that the case for obtaining interim relief is indeed very weak. There is no description in the above paragraph of any act or deed on the part of the defendant necessitating any urgent relief. Nevertheless, it was possible for the defendant to deal with, dispose of its properties within the period of three months so as to defeat the claim of the plaintiff.

In my view, the expression an urgent relief is contemplated signifies the inbuilt case in the plaint from where it could be inferred that in all likelihood an interim relief may be required in the period of three months.

More importantly, appreciating the case of the plaintiff in the plaint, a learned single judge of this court exercising interlocutory jurisdiction, granted such leave to the appellant plaintiff under Section 12A.

It is to be presumed that the above factors were considered by the learned judge while granting leave. In my view, when such leave has been granted, it was not proper for any other single judge without any change in facts, to revoke it.

This case is certainly not similar to a case for revocation of leave under Clause 12 of the Letters Patent. In those cases, the territorial jurisdiction of the court is involved. At the time of presentation of the plaint, that part of the cause of action has arisen within the jurisdiction of the court, is accepted by the judge and leave under Clause 12 of the letters patent granted. Thereafter, if it is found that no part of the cause of action has arisen within the jurisdiction of the court it revokes the leave. But in cases under Section 12A it involves exercise of discretion by the learned judge on consideration of the pleadings. When discretion has been exercised, a court of first instance should not revoke the leave.

For all those reasons, this appeal is allowed. The impugned judgment and order is set aside. The plaint be treated as on the file of the court with immediate effect. The parties are directed to get the suit ready for hearing.

The connected application GA 1 of 2022 is disposed of.

(I. P. MUKERJI, J.)

BISWAROOP CHOWDHURY, J.

I have perused the judgment delivered by my learned brother and agree to the grounds stated therein for the decision. However I add the following grounds.

As the present suit in which the order under appeal is passed is a commercial suit at the very outset it is necessary to consider the objects and reasons of the Commercial Courts Act, 2015.

Upon perusing statement of objects and reasons of the Commercial Courts Act 2015 it will appear that the proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The High value commercial disputes involve complex facts and question of law. Therefore there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian Legal System.

Pursuant to framing of The Commercial Courts Act 2015, Section 12A was incorporated by way of amendment. Although Section 12A was incorporated so that commercial disputes are resolved amicably by mediation but a suit which contemplates any urgent interim relief was permitted to be instituted with the leave of the Court without exhausting the remedy of pre-institution mediation.

Although there is no straight jacket formula regarding urgent interim relief but the same has to be considered from the nature of the suit. All courts have inherent power to do justice, thus while granting leave under Section 12A of the Commercial Courts Act Courts must consider nature of suit, irreparable loss which the plaintiff may suffer if leave is not granted and the abuse of the process of law, if such leave is refused.

Pre-institution mediation is provided for the purpose of amicable settlement of disputes prior to moving Court of Law. But such procedure should not be used by a defendant to delay the resolution of disputes and to defeat the lawful claim of the plaintiff. Any attempt made by defendant to delay the matter in the mediation process would amount to abuse of the process of law. Thus Courts are empowered to pass necessary orders to prevent abuse of the process of law. Even when pre-institution mediation has commenced

and a plaintiff is aggrieved by the acts of the defendant in not appearing in the mediation proceedings or delaying the matter intentionally to deprive the plaintiff of his lawful claims the plaintiff may withdraw from the mediation proceedings if some exigency for interim reliefs arise in the mean-time, and the Court while considering the prayer for leave under Section 12A of the Commercial Courts Act 2015 is also empowered to consider this aspect of the matter while granting leave. All commercial disputes have some elements of urgency. Thus upon perusal of the plaint if it appears to the Court that the dispute between the parties are pending for a long period without being resolved and the plaintiff prior to filing suit has made endeavours to resolve the dispute and failed and further referring the matter to mediation would delay and defeat justice Court will not be powerless to entertain the suit in such exceptional circumstances and suo moto leave may be granted without any formal application.

Section 12A of the Commercial Courts Act 2016 provides power of the Court to grant leave to institute suit without exhausting the remedy of pre-institution mediation which includes power to refuse leave. Nowhere in the statute provides power and condition by which leave granted under Section 12A of the Commercial Courts Act 2016 can be revoked.

Although there is no specific provision in the Commercial Courts Act 2016 regarding revocation of Leave granted under Section 12A of the statute but the Courts under exceptional circumstances may revoke the leave granted under Section 12A. As there is no exhaustive definition of exceptional circumstances which varies from case to case but where the leave is obtained by fraud the same may be revoked as fraud and justice cannot dwell together as fraud vitiates justice. Again when the grant of leave is bad in law the Court may revoke the grant of leave. Thus unless there are exceptional circumstances Courts should be slow in revoking grant of leave.

In the instant matter Learned Trial Judge revoked the leave granted under Section 12A of the Commercial Courts Act 2016, on the ground that since

two years after institution of the suit no interim application for an urgent relief had been moved by the appellant plaintiff Section 12A leave was liable to be revoked and the suit dismissed. As rightly observed by my learned brother that the legislature does not say that the relief should be urgently sought from the Court or the time period within which the relief is to be sought or the nature of the relief to be sought to qualify as an urgent relief. The legislature only mentions that the suit should contemplate urgent interim relief.

After obtaining leave under Section 12A of the Commercial Courts Act 2016 on the ground of immediate urgent relief if the plaintiff finds that after institution of the suit the defendant stayed his hands from defeating the rights of the plaintiff and there is no immediate apprehension of mischief by the defendant to defeat the lawful claim of the plaintiff or there is chance of settlement the plaintiff may choose not to file application for interim relief and take steps to expedite hearing of the suit. Thus the Learned Trial Judge erred in revoking the leave granted under Section 12A of the Commercial Courts Act 2016.

In the facts and circumstances mentioned above I am of the view that the order passed by the Learned Trial Judge cannot be sustained and the same should be set aside.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAROOP CHOWDHURY, J.)