



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.5984/2023

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PETITIONER : Sh. R.K. Mishra
Indian Bank [erstwhile Allahabad Bank],
Aged about Major, Occu. : Service
Presently serving as Zonal Manager of
Indian Bank at Asansol Zone, Asansol, Pashchim
Bardhaman, District West Bengal
[Ori. Deft. No.5]

...VERSUS...

- RESPONDENTS**
1. M/s. Poonam Resorts Ltd.
Having its office at 1st Floor, “B”, Poonam
Chambers Byramji Town, Chhindwada Road
Nagpur through its Directors Nandkumar
Harchandani Aged Major, r/o Byramji Town,
Nagpur -13
[Ori. Plaintiff]
 2. Sh. Rakesh Sethi
Aged Major, Occu. : Retired
Ex-chairman, Allahabad Bank
R/o Villa No.2, 10/22
S.O. No.103-A, B/H Babu Khal Arena,
Besides Kokhapeth Lake Rajendra Nagar,
Mandala, Dist. Rangareddi Telangana 500075.
[Ori. Deft. No.1]
 3. Sh. Sanjay Agrawal
Aged Major, Occu. Services
Posted as Chief Finance Officer Head Office,
Calcutta 2, Netaji Subhash Road BBD Bagh,
Kolkata, West Bengal 700001.
[Ori. Deft. No.2]

4. Sh. Vipul Singla

Aged Major, Occu. : Service Posted
as GM (Credit Monitoring) 2, Netaji
Subhash Road, BBD Bagh, Kolkata,
West Bengal 700001.
[Ori. Deft. No.3]

5. Sh. R.S. Bhatt

Aged Major, Occu. : Service Posted as
Dy. General Manager Palm Road, Reserve Bank
of India Sq. Nr. RBI, Civil Lines, Nagpur.
[Ori. Deft. No.4]

6. Sh. M.V. Rao

Aged Major, Occu : Service
Head Office, Calcutta 2, Netaji Subhash Road
BBD Bagh, Kolkata, West Bengal 700001.
[Ori. Deft. No.6]

7. N. Kumar Housing & Infrastructure Pvt. Ltd.

Registered office at 1st Floor, "B" Poonam
Chambers, Byramji Town Chhindwada Road,
Nagpur – 13.
[Ori. Deft. No.7]

(Respondent nos.2 to 7 are deleted)

Mr. A.T. Purohit, Advocate for petitioner
Mr. D.V. Chauhan, Advocate for respondent no.1

CORAM : AVINASH G. GHAROTE, J.

Date of reserving the judgment : 03/11/2023

Date of pronouncing the judgment : 04/12/2023

J U D G M E N T

1. Heard Mr. A.T. Purohit, learned counsel for the petitioner and Mr. D.V. Chauhan, learned counsel for the respondent No.1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsels for the rival parties.

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2. In view of the pursis Stamp No.3/2023, filed by the petitioner, the respondent nos. 2 to 7, stand deleted, as according to the petitioner, they are not the contesting respondents. The petition is now between the petitioner and the respondent no.1, alone.

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3. The petition questions the order dated 20/01/2023 (pg. 249), by which an application below Exh.45 preferred by the petitioner/defendant No.5 seeking liberty to file written statement on record after completion of 120 days, has been rejected by the learned Commercial Court.

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4. Mr. Purohit, learned counsel for the petitioner/defendant No.5, does not dispute that the defendant No.5 was served and appeared on 06/10/2018 through counsel. When the matter was posted on 19/12/2018, the petitioner/defendant 20

No.5 alongwith defendant Nos.1 to 4 and 6 filed an application below Exh.30 for grant of time to file written statement, which came to be allowed (pg. 60). An application under Section 12-A of the Commercial Courts Act, 2015 (for short the “C.C. Act, 2015” hereinafter) read with Rule 3 of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, for dismissal of the suit was also filed at Exh. 32 (pg.58). Exh. 32, the application for dismissal of the suit claimed to be decided by the order dated 27/07/2022 (pg.63), by which the suit was referred for pre-institution mediation for a period of two months, till which period the proceedings of the suit were kept in abeyance (pg.69). On 27/07/2022 itself, the petitioner/defendant No.5 alongwith the other defendants filed a joint application for grant of permission to file written statement, in view of the order dated 19/12/2018 passed below Exh.30, which according to him granted time to file written statement till the application under Section 12-A of the C.C. Act, 2015 (Exh. 32) is decided (pg.241). In this application, a statement was made that the written statements of the defendants were ready and duly sworn on 19/01/2019 and 21/01/2019 and they could not be filed earlier, as time was already granted to file

written statement till the decision of Exh. 32. It was therefore contended, that the already sworn written statement ought to be permitted to be filed on record.

5. The said application has been rejected by the learned Commercial Court by the order dated 20/01/2023 (pg. 249), holding that the period of 120 days as contemplated by the Order VIII Rule 1 of the Code of Civil Procedure, as applicable to the Commercial Courts was mandatory, and therefore, the Court did not have any jurisdiction to enlarge the time. 10

6. Mr. Purohit, learned counsel for the petitioner submits, that since the Court itself had granted the application at Exh. 30 and thereby extended the time to file the written statement till the application under Section 12-A of the C.C. Act, 2015 was decided, 15 the petitioner relying upon the same, though the written statement was ready on 19/01/2019, did not file it on record under the *bona fide* impression that the time was extended. He invites my attention to the contents of the application at Exh.30 (pg. 60), its prayer clause, and the order passed therein, which according to him 20

supports this submission. He therefore submits, that consequent to the decision of Exh. 32, the application under Section 12-A of the C.C. Act, 2015, the learned Court ought to have granted Exh. 45 (pg. 241) by permitting the petitioner/defendant No.5 to file his written statement on record. He further contends, that the petitioner cannot be put to any prejudice on account of the act of the Court as the petitioner was let to believe on account of grant of the application at Exh. 30 that time to file the written statement was extended by the Court till the decision of Exh. 32.

7. In that view of the matter, it is contended, that such an impression was *bona fide*, and therefore, considering this fact position and the fact that the application below Exh. 32 came to be decided only on 27/07/2022 (pg. 63), the application filed below Exh. 45 on the same day for placing the written statement on record ought to have been allowed. He further invites my attention to the written statement at page 157 to indicate that the same was already sworn in on 19/01/2019 (pg.212), and therefore, indicated the *bona fides* on behalf of the petitioner/defendant No.5. In support of his contention, he places reliance upon ***Prakash Corporates Vs. DEE***

VEE Projects Limited, (2022) 5 SCC 112, to contend that the delay in filing of the written statement in a commercial suit has been condoned by the Court which has been accepted by the Hon'ble Apex Court (para 39 and 40); *Pratishtha Commercial Private Limited Vs. Orissa State Cooperative Milk Producer's Federation Limited, 2023 SCC OnLine Cal 1404* ; *Shaikh Salim Haji Abdul Khayumsab Vs. Kumar and others, 2006 (1) Mh.L.J. 178*, which on the mandate of Order VIII Rule 1 of the Code of Civil Procedure, holds that the last day i.e. the 90th day being a holiday filing of the written statement on the 91st day was permissible.

8. Mr. Chauhan, learned counsel for the respondent No.1, by relying upon *SCG Contracts (India) Private Limited Vs. K.S. Chamankar Infrastructure Private Limited and others, (2019) 12 SCC 210*, contends that the Hon'ble Apex Court has held that the provisions of Order VIII Rule 1 of the Code of Civil Procedure fixing of outer time limit of 120 days for filing of the written statement by the defendant from the date of service in commercial suits to be mandatory and not open to extension of time. He also places reliance upon *Flipkart India Pvt. Ltd. and another Vs. Flipkart India*

Pvt. Ltd. and another, 2020 SCC OnLine Bom 664 (paras 7 and 8), to contend that failure to file the written statement within the time limit results in forfeiture of the right thereto and there is no power in the Court to allow its filing subsequent to the expiration of the time indicated in Order VIII Rule 1 of the Code of Civil Procedure. 5

Reliance is also placed upon *K.R. Anand Vs. Commissioner of Central Goods and Services Tax and another, 2021 SCC OnLine Del 3220* (para 13), to contend, that any liberty granted for following a statutory provision to any party, would not have the effect of extending the time mandated by the statute. He further relies upon 10

Garment Craft Vs. Prakash Chand Goel, (2022) 4 SCC 181 (para 15), regarding the scope of interference by this Court in its jurisdiction under Article 227 of the Constitution. It is also contended, that the judgment in *Prakash Corporates* (supra), was passed in Covid-19 pandemic situation, and therefore, sought to 15

address an unprecedented situation and could not be made applicable to a situation which is otherwise normal (para 23 and 24). Reliance is also placed upon *S.S. Nikade and Company (JV), Yavatmal and another Vs. Vidarbha Irrigation Development Corporation, Nagpur and others, 2021 (1) Mh.L.J. 297.* 20

9. The petition poses an interesting question :

“Whether the period of 30 days and further extended period of 90 days, total 120 days under Order VIII Rule 1 CPC as applicable to Commercial Courts, commences from the date of service of the suit summons or the date of failure of the Pre-Institution Mediation and Settlement. ?”

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10. Order VIII Rule 1 of the Code of Civil Procedure as applicable to Commercial Courts, being material is quoted as under :

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“Order VIII Rule 1 of CPC

1. Written Statement.—*The Defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:*

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

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Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.”

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11. Section 12-A of the Commercial Courts Act, 2015 also needs consideration and is quoted as under :

“Section 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.

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(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.

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(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):

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Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

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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).

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(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.

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(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).”

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It is necessary to note that Chapter III-A, which contains Section 12-A, which provides for Pre-Institution Mediation and Settlement was inserted in the C.C. Act, 2015 by virtue of Section 11 of Act No.28 of 2018 w.e.f. 03/05/2018. The process of mediation has to be completed within a period of 3 months from the date of application made by the plaintiff under sub-section (1). The process of mediation is only to be exhausted in case no urgent relief is claimed in the suit. Under sub-section 2 of Section 12-A of the C.C. Act, 2015 the Central Government may by notification authorize the Authorities constituted under the Legal Services Authorities Act, 1987 for the purposes of pre-institution mediation.

12. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, in my considered opinion, cast an obligation upon the plaintiff in the suit to make an application to the authority as per Form-1 as specified in Schedule-I for initiation of the mediation process under the Act, for at that point of time the defendant is not in the picture at all. Thus, the obligation to ensure that there is a pre-institution mediation is upon the plaintiff.

13. In *Patil Automation Private Limited and others Vs. Rakheja Engineers Private Limited*, (2022) 10 SCC 1, the Hon'ble Apex Court has held that the provisions of Section 12-A of the C.C. Act, 2015 are mandatory in the following words:

“48. In contrast, Section 12-A cannot be described as a mere procedural law. Exhausting pre-institution mediation by the plaintiff, with all the benefits that may accrue to the parties and, more importantly, the justice delivery system as a whole, would make Section 12-A not a mere procedural provision. The design and scope of the Act, as amended in 2018, by which Section 12-A was inserted, would make it clear that Parliament intended to give it a mandatory flavour. Any other interpretation would not only be in the teeth of the express language used but, more importantly, result in frustration of the object of the Act and the Rules.

62. Since, Section 12-A also contemplated the making of Rules to give effect to the scheme of pre-litigation mediation. The Rules were promptly made and published on 3-7-2018. Rule 3 elaborately provides for the manner in which the mediation process is initiated. It contemplates that a party, to a commercial dispute, may make an application to the Authority. This Rule speaks about a party. Section 12-A declares that the plaintiff must exhaust the remedy of pre-litigation mediation. What, apparently is required is that the suit cannot be filed except after the remedy of pre-litigation mediation, contemplated under the Act and the Rules, is attempted and exhausted. What Rule 3(1) provides is the form in which the application is to be made viz. Form I, as specified in Schedule I. The making of the Form can be by online transmission or by post or by hand.

63. The view expressed by the High Court of Madras that the use of the word “may”, detracts from the mandatory

flavour of Section 12-A is clearly untenable. Section 12-A is part of the parent enactment. Rule 3, being a subordinate legislation, must be interpreted harmoniously, in the first place, with the parent enactment. That apart, on a proper understanding of Rule 3, there is really no conflict between Section 12-A and Rule 3. Rule 3 only gives a discretion to the applicant, in regard to the mode of making the application. So understood, we are of the clear view that, if Section 12-A is otherwise mandatory, Rule 3(1) can only be understood as providing three different modes for making the application, contemplated in Section 12-A(1).

64. *As to whether the application must be made, must depend upon, among other things, upon the peremptory nature of the language employed in Section 12-A(1). Rule 3 further contemplates that the Authority, which again, has been clearly defined as the Authority notified by the Central Government under Section 12-A(2), has to issue a notice to the opposite party to appear and to give his consent to participate within the time as provided in Rule 3(2). Should there be no response, a final notice is to be given again in the manner articulated in Rule 3(2). Should there be again no response by the notice remaining unacknowledged or upon there being refusal to participate, the mediation process becomes what is described, a non-starter. The Authority then makes a report in Form III, which is called a non-starter report. The copy of the report is served on the applicant and the respondent. There is a provision for accommodating the request of the opposite party appearing and seeking time, subject to the date being not later than ten days from the date of request of the parties. If, in such a case, there is failure to appear by the opposite party, again a non-starter report in Form III has to be made. If, on the other hand, where both the parties appear, gives consent, the Authority is to assign the matter to a mediator and also to assign a date.*

65. *The period of mediation being three months and the possibility of an extension by two months, with the consent of both sides, is the subject-matter of Rule 3. The role of the mediator is carved out in Rule 5 to be one to facilitate the voluntary resolution of the dispute and assist the parties in reaching a settlement. Rule 6 provides for authority with the party to either appear personally or through his duly authorised representative or counsel. The significance of being represented by counsel in pre-litigation mediation, cannot but be underlined. Apart from the fact that the legislature must be treated as aware, that, both, public interest, as also the interest of the parties, lies in an expeditious disposal of, what is described as, commercial litigation, with a sublime goal of fostering the highest economic interests of the nation, allowing the counsel to appear before the mediator is intended to facilitate in arriving at a settlement, which is legally valid and otherwise just.* 5 10 15
67. *A mediation settlement arrived at under Section 89CPC must be scrutinised by the court and only on its imprimatur being given it is effective [see para 40 of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. [Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 : (2010) 3 SCC (Civ) 235]]. Since a settlement under Section 12-A of the Act is accorded the status of an award under the Arbitration and Conciliation Act, it unerringly points to the object of the legislature to make pre-litigation mediation compulsory. We again underscore the vital role, the lawyers engaged can and must discharge in arriving at a just and valid settlement translating into an effective award and therefore, a decree.* 20 25 30
68. *Rule 7 deals with the procedure to be adopted by the mediator. Rule 9 enshrines the principle of confidentiality of mediation. The mediator, the parties, their authorised representatives or counsel are to maintain confidentiality about the mediation. Rule 9 further declares that the* 35

mediator is not to allow stenographic or audio or video recording of the mediation sittings.

91. Section 12-A of the Commercial Courts Act provides for mediation. This is a provision, which was inserted as per the Amending Act (Act 28 of 2018) enacted in the year 2018 and it came into force with effect from 3-5-2018. By the said amendment, in fact, Chapter III-A was inserted and Section 12-A is the sole section in the said chapter. A plain reading of Section 12-A makes the following position clear:

91.1. The lawgiver has declared that if a suit under the Act does not “contemplate” any urgent interim relief, then, it cannot be instituted unless the plaintiff seeks pre-litigation mediation. The pre-institution mediation is to be done in the manner, procedure, which is to be prescribed by the Central Government. The pre-litigation mediation is to be completed within a period of three months from the date of the application made by the plaintiff under sub-section (1) [see Section 12-A sub-section (3)].

91.2. The period of three months can, however, be extended for a period of two months provided there is consent to the same by the parties [see the first proviso to Section 12-A sub-section (3)]. By the second proviso, the Legislature has taken care to provide that the period, during which the parties remained occupied with the pre-litigation mediation, is not to be reckoned for the purpose of computing the period of limitation under the Limitation Act, 1963.

91.3.-----

91.4.-----

93. *In Patasibai v. Ratanlal [Patasibai v. Ratanlal, (1990) 2 SCC 42] , one of the specific contentions was that there was no specific objection for rejecting of the plaint taken earlier. In the facts of the case, the Court observed as under : (SCC pp. 47-48, para 13)*

“13. On the admitted facts appearing from the record itself, the learned counsel for the respondent, was unable to show that all or any of these averments in the plaint disclose a cause of action giving rise to a triable issue. In fact, Shri Salve was unable to dispute the inevitable consequence that the plaint was liable to be rejected under Order 7 Rule 11CPC on these averments. All that Shri Salve contended was that the court did not in fact reject the plaint under Order 7 Rule 11CPC and summons having been issued, the trial must proceed. In our opinion, it makes no difference that the trial court failed to perform its duty and proceeded to issue summons without carefully reading the plaint and the High Court also overlooked this fatal defect. Since the plaint suffers from this fatal defect, the mere issuance of summons by the trial court does not require that the trial should proceed even when no triable issue is shown to arise. Permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation. This cannot be done.”

(emphasis supplied)

94. On a consideration of the scheme of Orders 4, 5 and 7CPC, we arrive at the following conclusions:

94.1. A suit is commenced by presentation of a plaint. The date of the presentation in terms of Section 3(2) of the Limitation Act, 1963 is the date of presentation for the purpose of the said Act. By virtue of Order 4 Rule 1(3), institution of the plaint, however, is complete only when the plaint is in conformity with the requirement of Order 6 and Order 7.

94.2. When the court decides the question as to issue of summons under Order 5 Rule 1, what the court must consider is whether a suit has been duly instituted.

94.3. Order 7 Rule 11 does not provide that the court is to discharge its duty of rejecting the plaint only on an

application. Order 7 Rule 11 is, in fact, silent about any such requirement. Since summon is to be issued in a duly instituted suit, in a case where the plaint is barred under Order 7 Rule 11(d), the stage begins at that time when the court can reject the plaint under Order 7 Rule 11. No doubt it would take a clear case where the court is satisfied. The Court has to hear the plaintiff before it invokes its power besides giving reasons under Order 7 Rule 12. In a clear case, where on allegations in the suit, it is found that the suit is barred by any law, as would be the case, where the plaintiff in a suit under the Act does not plead circumstances to take his case out of the requirement of Section 12-A, the plaint should be rejected without issuing summons. Undoubtedly, on issuing summons it will be always open to the defendant to make an application as well under Order 7 Rule 11. In other words, the power under Order 7 Rule 11 is available to the court to be exercised suo motu. (See in this regard, the judgment of this Court in *Madiraju Venkata Ramana Raju [Madiraju Venkata Ramana Raju v. Peddireddigari Ramachandra Reddy, (2018) 14 SCC 1]* .)

98. The contention appears to be that it may be a fair view to take that there is no institution of the suit within the meaning of Section 12-A, until the court admits the plaint and registers it in the suit register. In other words, presentation of the plaint may not amount to institution of the suit for the purpose of Order 4 Rule 1CPC and Section 12-A of the Act. If this view is adopted, it is pointed out that before the plaint is registered after presentation and there is non-compliance with Section 12-A, the plaintiffs can, then and there, be told off the gates to first comply with the mandate of Section 12-A. This process would not involve the courts actually spending time on such matters. In the facts, this question does not arise and, it may not be necessary to explore this matter further.

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.

99.4. 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 12-A, a mandatory interpretation, would result in defeating the object and intention of 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 lawgiver 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 12-A 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.

104. On the findings we have entered, the impugned orders must be set aside and the applications under Order 7 Rule 11 allowed. This would mean that the plaints must be rejected. Necessarily, this would involve the loss of the court fee paid by the plaintiffs in these cases. They would have to bring a fresh suit, no doubt after complying with Section 12-A, as permitted under Order 7 Rule 13. Moreover, the declaration of law by this Court would relate back to the date of the Amending Act of 2018.

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.

113.2. Still further, we however direct that in case complaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the complaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff.

113.3. Finally, if the complaint is filed violating Section 12-A after the jurisdictional High Court has declared Section 12-A mandatory also, the plaintiff will not be entitled to the relief.”

14. In **Chandra Kishore Chaurasia Vs. R A Perfumery Works Private Ltd.** 2022 SCC OnLine Del 3529 the learned Division Bench of the Delhi High Court after considering **Patil Automation** (supra) has held as under :

“32. Second, a suit, which does not contemplate urgent interim relief, cannot be instituted without exhaustion of pre-institution mediation, as required under Section 12A(1) of the Commercial Courts Act, 2015. As noted above, the Supreme Court has held that the said provision is mandatory and it is compulsory for a plaintiff to exhaust the remedy of pre-institution mediation, in accordance with the rules before instituting a suit. The Court has no discretion to exempt a plaintiff from the applicability of Section 12A(1) of the Commercial Courts Act, 2015. It is not permissible for the court to pass an order contrary to law; therefore, an application seeking exemption from engaging in pre-institution mediation, in

a suit that does not involve urgent interim reliefs, would not lie.

33. *This Court also finds it difficult to accept that a commercial court is required to determine whether the urgent interim reliefs ought to have been claimed in a suit for determining whether the same is hit by the bar of Section 12A(1) of the Commercial Courts Act, 2015. The question whether a plaintiff desires any urgent relief is to be decided solely by the plaintiff while instituting a suit. The court may or may not accede to such a request for an urgent interim relief. But that it not relevant to determine whether the plaintiff was required to exhaust the remedy of pre-institution mediation. The question whether a suit involves any urgent interim relief is not contingent on whether the court accedes to the plaintiff's request for interim relief.*

34. *The use of the words “contemplate any urgent interim relief” as used in Section 12(1) of the Commercial Courts Act, 2015 are used to qualify the category of a suit. This is determined solely on the frame of the plaint and the relief sought. The plaintiff is the sole determinant of the pleadings in the suit and the relief sought.*

35. *This Court is of the view that the question whether a suit involves any urgent interim relief is to be determined solely on the basis of the pleadings and the relief(s) sought by the plaintiff. If a plaintiff seeks any urgent interim relief, the suit cannot be dismissed on the ground that the plaintiff has not exhausted the pre-institution remedy of mediation as contemplated under Section 12A(1) of the Commercial Courts Act, 2015.”*

The above would therefore make it apparent that the provisions of Section 12-A of the C.C. Act, 2015 for Pre-Institution

Mediation and Settlement are mandatory, in a case where no urgent relief is prayed for, and in case this is not done the plaint is liable to be rejected under Order VII Rule 11 of the CPC. In no case where the suit does not contemplate urgent relief, the provisions of Section 12-A of the C.C. Act, 2015 can be bypassed.

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15. In the instant case, it cannot be disputed that the procedure under Section 12-A of the C.C. Act, 2015 of pre-institution mediation was never adopted. In fact, an application for adopting the procedure under Section 12-A of the C.C. Act, 2015 was filed by the petitioner (Exh. 32) which only came to be decided on 27/07/2022 (pg.63) by directing the suit to be referred for pre-institution mediation for about a period of two months, for which period the proceedings of the suit were kept in abeyance (pg.69). Since pre-institution mediation is a mandatory provision, and even the statutes of limitation have been held to be not applicable for the pre-institution mediation duration it necessarily follows that the liability to file the written statement by the defendant would not commence, till such time the pre-institution mediation is completed after which, depending upon the result of the pre-institution

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mediation, in case it is a failure the suit is then registered and a notice is issued to the defendants for their appearance in the suit. This would be so, for the reason that the appearance of the defendants in the pre-institution mediation cannot be considered as an appearance in the suit which is subsequently registered on failure of the pre-institution mediation. This position is further substantiated from the language of Order VIII Rule 1 of the CPC as applicable to Commercial Courts, which contemplates the period as contemplated of 30 days therein to commence from the date of service of summons, which summons can only be issued and served consequent to the institution/registration of the suit, as a result of failure of the pre-institution mediation. It therefore cannot be disputed that the periods as contemplated in Order VIII Rule 1 of the CPC as well as its provisos, commence only after the date of service of the suit summons.

16. The instant case, however, presents a very peculiar situation, inasmuch as, as indicated above, the suit was instituted without compliance with the requirement of Section 12-A of the C.C. Act, 2015. When this position was noticed an application came to be

filed below Exh.32 (pg.58) for dismissal of the suit on account of non-compliance with Section 12-A of the C.C. Act, 2015 which application was filed on 19/12/2018. On the same day, another application for grant of time to file written statement came to be filed on the same ground that the requirements of Section 12-A of the C.C. Act, 2015 were not complied with and the institution of the suit itself was infirm on that ground and therefore, the Court be pleased to grant time to file written statement till the application under Section 12-A of the C.C. Act, 2015 is decided. This application was granted by the learned Commercial Court on 19/12/2018 which order was never challenged by the respondents. The application below Exh.32 for dismissal of the suit under Section 12-A of the C.C. Act, 2015 filed by the defendants, including the present petitioner came to be allowed by the order dated 27/07/2022 and the parties were referred to mediation on which date itself an application below Exh.45 came to be filed for placing the written statement on record. So also on 27/07/2022 itself a pursis was also placed on record below Exh.45 along with the written statement, sworn on 19/01/2019 whereby the said written statement was placed on record. The said pursis contains a specific averment that the written

statement which was duly sworn in on 19/01/2019 could not be filed earlier as the Court had granted time till decision of Exh.32, the application for dismissal of the suit on account of non-compliance with the mandatory provision under Section 12-A of the C.C. Act, 2015 to file a written statement (pg.70).

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17. It is, thus, apparent that though the written statement of the present petitioner/defendant no.5 was duly sworn in and ready for filing on 19/01/2019 on account of the non-compliance with the requirement of Section 12-A of the C.C. Act, 2015 the same was not filed as time was granted to file the same till the application under Section 12-A of the C.C. Act, 2015 was decided.

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18. No doubt true that ***SGS Contracts*** (supra) holds that the period contemplated under Order VIII Rule 1 of the CPC as applicable to Commercial Courts was mandatory, which position has been reiterated in ***Prakash Corporates*** (supra) and an exception was made out on account of Covid-19, it is equally a settled position of law that a party cannot be prejudiced on account of an act of the Court.

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19. In the instant matter, when the matter was presented to the Registry of the Court, considering that it was a commercial suit and no urgent relief was claimed therein, it was necessary for the Registry to have referred the matter for pre-institution mediation. However, that was not done and the suit was directly registered and sent to the Commercial Court, which also without verifying whether the mandate of Section 12-A of the C.C. Act, 2015 was complied with, issued suit summons to the defendants. It is only when the defendants by their application at Exh.32 dated 19/01/2019 brought it on record that the mandatory provisions of Section 12-A of the C.C. Act, 2015 were not complied with, the learned Commercial Court granted time to file the written statement, till the decision of the application at Exh.32. Application (Exh.32) came to be allowed by the order dated 27/07/2022 by referring the suit for pre-institution mediation. All this would indicate that in the present case there was a failure on part of the Registry, to refer the suit for pre-institution mediation, which position also went unnoticed by the learned Commercial Court before issuing the suit summons, which situation came to be corrected only on 27/07/2022 when Exh.32 came to be allowed and the parties were referred to mediation.

Thus, in the peculiar circumstances existing in the instant case, since the existence of the written statement duly sworn in on 19/01/2019, copy of which is placed on record, cannot be disputed, would indicate that the written statement was ready for filing on 19/01/2019 itself and the period of 120 days as contemplated by Order VIII Rule 1 of the CPC as applicable to Commercial Courts was expiring on 07/02/2019, the petitioner has been prejudiced on account of the act of the Court in not referring the parties to pre-institution mediation before issuance of the suit summons itself. As it is a settled position of law the act of a Court cannot prejudice the parties. In view of the peculiar circumstances existing in the instant matter as indicated above, the written statement of the petitioner/defendant no.5 will have to be permitted to be taken on record.

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20. Though *S.S. Nikade and Company, Flipkart India Pvt. Ltd.* and *K.R. Anand* (supra) have been relied upon by Mr. Chauhan learned counsel for the respondent no.1, all of which hold that the period of 120 days as provided in Order VIII Rule 1 of the CPC applicable to the Commercial Courts was mandatory, and the Court

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had no jurisdiction to extend the period beyond 120 days, the question of non-compliance with the mandatory provision of Section 12-A of the C.C. Act, 2015 did not fall for consideration there. There also cannot be any dispute with the propositions as summarized in ***Garment Craft*** (supra) regarding the exercise of the supervisory jurisdiction of the High Court, however, as indicated above, the act of the Court cannot cause a prejudice to a party, as indicated above (*see : Bhupinder Singh Vs. Unitech Limited 2023 SCC OnLine 321 (para 9)*), in view of which, in my considered opinion, ***Garment Craft*** (supra) does not come to the assistance of Mr. Chauhan, learned counsel for the respondent no.1

21. The impugned order dated 20/01/2023 below Exh.45 does not consider the failure of the Court to ensure compliance with the requirement of the mandatory provision of Section 12-A of the C.C. Act, 2015, considering which, the same cannot be sustained and is hereby quashed and set aside and the application below Exh.45 in the peculiar facts and circumstances as existing in the present matter, is hereby allowed. The learned Commercial Court is directed

to take the written statement of the petitioner/defendant no.5 on record and proceed with the matter.

22. Rule is made absolute in the aforesaid terms. No order as to costs. 5

(AVINASH G. GHAROTE, J.)

Wadkar