IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2023

CORAM:

THE HON'BLE Mrs.JUSTICE **V.BHAVANI SUBBAROYAN**

Civil Revision Petition No.3519 of 2023 &
C.M.P.No.22014 of 2023

Sivasubramaniam ...Petitioner

Vs.

1. Shri Dhanalakshmi Spinntex Pvt., Ltd.,
having registered office at
S.F.No.226/3, Avinashi Road,
N.H.47, karumathampatti,
Coimbatore – 641 659
rep. By its Managing Director,
Thiru.C.Natarajan

2. Shri Dhanalakshmi Green Energy India
Pvt., Ltd.,
Having registered office at
S.F.No.226/3, Avinashi Road,
N.H.47, karumathampatti,
Coimbatore – 641 659
rep. By its Managing Director,
Thiru.C.Natarajan

3. Shri Dhanalakshmi Exim
A partnership Firm having
registered office at
S.F.No.226/3, Avinashi Road,
N.H.47, Karumathampatti,
Coimbatore – 641 659
rep. By its Managing Director,
Thiru.C.Natarajan

4. C.Natarajan

5. N.Leelavathy
6. S.Sujitha Siddharth
7. N.Navanya
8. Tamilnadu Mercantile Bank Ltd.,
 Coimbatore Main Branch
 No.1432, Ground floor,
 Akshya Orbit 11, Trichy Road,
 Coimbatore – 641 018
9. Sivachandran
 Assistant Manager,
 Tamilnadu Mercantile Bank Ltd.,
 Coimbatore Main Branch,
 No.1432, ground floor,
 Akshya Orbit 11, Trichy road,
 Coimbatore – 641 018

10. Vinoth @ Vivek kumar
11. Kannan
12. Kalaivani
13. Puspharani ...Respondents

Civil Revision Petition filed under Article 227 Constitution of India to set aside the docket order of the Commercial Court (District Judge Cadre), Coimbatore made in C.O.S.No.88 of 2023 dated 18.07.2023.

For Petitioner : Mr.M.R.Thangavel

For Respondents : Mr.AR.L.Sundaresan, Senior Counsel for Mr.R.Bharath Kumar for R1

O R D E R

The present petition has been filed to set aside the docket order of the Commercial Court (District Judge Cadre), Coimbatore made in C.O.S.No.88 of 2023 dated 18.07.2023.

2. The brief facts of the case are as follows:-

Originally, the respondents 1 to 7 had filed a suit before the Commercial Court, Coimbatore to direct the petitioner and respondents 8 to 13 to jointly and severely pay a sum of Rs.6,43,67,112/- to the 1st respondent together with interest and to direct the 8th respondent / 1st defendant to pay a sum of Rs 1,00,00,000 towards damages. Pending suit, the petitioner / 2nd defendant filed a memo stating that fraud, misappropriation and cheating as alleged by the respondents 1 to 7 / Plaintiffs does not come under the definition of Commercial Dispute as defined under Section 2(c) of the Commercial Courts Act, 2015 [hereinafter referred to as 'Act']. The above suit based on such allegations of fraud and misappropriation are not maintainable before the Commercial Court and prayed to reject the plaint as not maintainable. The trial court by its docket order dated 18.07.2023 had rejected the memo filed by the petitioner and retained the suit in commercial court. Aggrieved by the same, the petitioner has come up with this present Revision.

3. The learned counsel for the petitioner would state that the cause of action projected by the respondents 1 to 7 / plaintiffs do not satisfy any of the enumerations under Section 2(c) of the Commercial Courts Act, 2015 so as to bring the lis within the ambit of 'Commercial Dispute'. Further, the Commercial Court failed to consider that a claim arises out of a

fraud or misrepresentation could not in any event be termed as a contractual claim or a dispute arising out of ordinary transactions so as to bring the dispute within the definition of 'Commercial dispute', as defined under Section 2(c) of the Commercial Courts Act.

4. The learned counsel for the petitioner also submits that there is a claim against the 1st defendant / 8th respondent, the petitioner is not a necessary or proper party to the suit nor this petitioner does not have a contractual liability towards the plaintiffs. Further, the plaintiffs had not even averred in the plaint that they had made attempts for a pre-institution mediation before instituting the suit and as such, the suit is bad and not maintainable. Further, the learned counsel for the petitioner in support of his contention has relied on the Judgments of the High Court of Delhi reported in **2021 SCC Online Del 3946 [Black Diamond Trackparts Pvt., Ltd., and Others Vs. Black Diamond Motors Pvt., Ltd.,] and reported in 2022 0 Supreme (Del) 1754: [Ihhr Hospitality (Andhra) Pvt., Ltd., Vs. Seema Swami & Others]**

5. Per contra, Mr.AR.L.Sundaresan, learned senior counsel appearing for Mr.R.Bharathkumar, learned counsel appearing for 1st respondent had reiterated the allegations made in the plaint document and submitted that the trial Court had rightly rejected the contentions of the petitioner and the same does not need any interference.

6. Heard both sides and perused the documents placed on record.

7. The points now arise for consideration before this Court is, (a) Whether the suit is in commercial nature under Section 2(1)(c) of the Act.? and (b) Whether the plaint is liable to be rejected for evading the pre-institution mediation under Section 12A of the Act?

8. In order to answer the 1st point, it is necessary to extract the relevant Section 2(1)(c) of the Act, which is as follows:-

"2(1)

....

(c). "Commercial dispute" means a dispute arising out of—

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;"

................"

9. In the present case on hand, the court below held that the Plaintiff-Company was a customer of 8th respondent / 1st defendant-bank and the 10th and 11th respondents / 4th and 5th defendants, who are the ex- employees of the plaintiff company had colluded with the employees of the defendant bank and sphioned off money in their own personal accounts. In IHHR Hospitality (Andhra) Pvt. Ltd. vs. Seema Swami and Ors. (04.11.2022 -DELHC) : MANU/DE/4301/2022, the Delhi High Court,

while dealing with a similar set of facts had held as follows :-

> *"28. It was argued on behalf of the plaintiff that there is involvement of two defendant banks with whom the plaintiff had commercial dealings and any amounts permitted to be withdrawn by the Banks against the written instructions/Resolutions of the plaintiff Company, would bring the transactions in the ambit of Commercial suit.*
>
> *29. This argument holds no water in view of above discussion. The acts of defendant Banks in permitting withdrawals were not in the nature of commercial transaction, but in the nature of fraudulent withdrawal on the basis of forged cheques and falsification of accounts.*
>
> *30. It is quite evident from the entire details given in the plaint that the suit is for the recovery of the amounts which were allegedly embezzled by an ex-employee Manoj Kumar Swamy and the embezzled money according to the plaintiff, had reached the accounts of defendants in the present suit. It is absolutely evident that the nature of transaction and the recovery is sought on the averments of embezzled amounts which cannot be termed as a "business transaction" or having arisen "in the course of business". The suit does not qualify as a commercial suit as defined under Section 2(i)(c) of the Act"*

The learned counsel for the petitioner had relied on the above judgment before the trial court as well as this Court and the trial court while dismissing the contention of the petitioner, held that in the said case the plaintiff- employee swindled money from the plaintiff account by committing forgery and by creating documents. Thus, the Delhi High Court held that it is not commercial in nature. But, in the present case on hand, it is alleged that the employees and ex-employees of the 1st defendant bank committed misappropriation in the plaintiff-company bank accounts, therefore, the court below proceeded to state that if bank had filed this suit against its employees, it is not commercial in nature and since, the customer has filed a suit against bank and employees and ex-employees for joint and several liability for the misappropriation committed by the employees of the bank in their accounts and further held that the suit is perfectly maintainable before the commercial court.

10. On the perusal of the plaint documents, it is seen that the plaintiffs had alleged that the 1st defendant bank had rescheduled the term loan accounts of the plaintiffs without any intimation to them and also pre-closed their deposits without consent of the plaintiffs. Therefore, it is clear that the employees of the 8th respondent / 1st Defendant bank had illegally handled the account of the plaintiffs, for which, the 1st defendant bank would be vicariously liable and hence the said transaction is a commercial dispute under 2(1)(c) of the Act, therefore, the 1st point is answered against the petitioner.

11. As far as the 2nd point is concerned, it is necessary to extract Section 12-A of Commercial Courts Act 2015, which reads as follows:

"(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, for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 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 (l): 19 of 1987 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.

(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 26 or 1996 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."

12. A bare reading of the above provision would make it clear that the mandate under Section 12-A of Act, with regard to the pre-institution mediation is applicable only to the suits, which do not contemplate any urgent interim orders, on the other hand, the suits, which contemplate urgent interim relief, pre-institutions mediation is not necessary. The **Hon'ble Apex Court [Patil Automation Private Limited and Ors. vs. Rakheja Engineers Private Limited (17.08.2022 – SC)] reported in MANU/SC/1004/2022**, had held that Section 12-A of Act is mandatory and failure to explore pre-institution mediation as per Section 12-A of Act should necessarily result in rejection of the plaint, and the relevant paragraph is reproduced hereunder:-

> *"83. The statute which has generated the controversy is the Amending Act of year 2018. We have noticed that there is undoubtedly a certain amount of cleavage of opinion among the High Courts. The other feature which is to be noticed is that, this is a case where the law in question, the Amending Act containing certain Section 12A is a toddler. The law necessarily would have teething problems at the nascent stage. The specified value has been lowered drastically from Rs. 1 crore to Rs. 3 lakhs. The imperative need to comply with the mandate of Section 12A which we have unravelled if it has not been shared by the parties on the advice they received or on the view prevailing in the High Courts would necessarily mean that unless we hold that the law, we declare is prospective such suits must perish. The court fee paid would have to be written*

off. In a fresh suit which would be otherwise barred by limitation, shelter can be taken only Under Section 14 of the Limitation Act. The availability of the power Under Section 14 itself may have to be decided by the court.

84. Having regard to all these circumstances, we would dispose of the matters in the following manner. We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A of Act must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even suo moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 so that concerned stakeholders become sufficiently informed. Still further, we however direct that in case plaints 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 plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the Plaintiff. Finally, if the plaint is filed violating Section 12A after the jurisdictional High Court has declared Section 12A mandatory also, the Plaintiff will not be entitled to the relief."

13. Besides the above, this Court, **[Mr.K Varathan v Mr. Prakash Babu Nakundhi Reddy] reported in 2022 LiveLaw (Mad) 475** has set out certain tests/parameters (illustrative, not exhaustive) to be looked into to see if a relief was an urgent interim relief, which is as follows:-

"16. This Commercial Division having explained the expression 'contemplation of urgent interim relief' deems it appropriate to make an adumbration of parameters / tests and they are as follows:

(a) whether the prayer for interim relief is a product of profound thinking carefully about the possibility of the happening;

(b) whether the matter demands prompt action and that promptitude is of such nature that exhausting the remedy of pre institution mediation without any intervention in the mean time can lead to a irreversible situation, i.e., a situation where one cannot put the clock back;

(c)where the urgency is of plaintiff's own doing, if that be so the plaintiff cannot take advantage of its own doing;

(d)high standard is required to establish the requirement of this prompt action (urgency);

(e)plaintiff should be on fair ground in urging urgency and an interim measure;

(f) actual or apprehended wrong or injury should be so imminent that the plaintiff should be able to satisfy the court that plaintiff should not be made to stand and suffer the same."

14. Taking note of the above said facts and circumstances of the present case and the Judgments referred above, it is clear that the suit does not fall under the criteria, where Section 12-A Mediation cannot be dispensed with and since in the present case, there is no urgent relief, as mandated under Section 12-A of Act, the mediation is necessary,

therefore, the 2nd point is answered in favour of the petitioner. Though 1st point, viz., whether the suit is in commercial nature under Section 2(1)(c) of the Act, is answered against the petitioner, since mediation is required, as per Section 12-A of the Act, the 2nd point, viz., whether the plaint is liable to be rejected for evading the pre-institution mediation under Section 12A of the Act?, is hereby answered in favour of the petitioner.

15. In view of the above, the present Civil Revision Petition is allowed and the Docket Order of the Commercial Court (District Judge Cadre) Coimbatore in C.O.S.No.88 of 2023 dated 18.07.2023 is set aside and the parties are directed to explore the possibility of settlement through mediation, as mandated under Section 12A of the Act and thereafter, if there is no amicable settlement, parties are directed to file a suit. No costs. Consequently, connected miscellaneous petition is closed.

17.11.2023

Index:Yes/No;
Internet:Yes/No
Speaking / Nonspeaking order
ssd

To

The Commercial Court
(District Judge Cadre),
Coimbatore

V.BHAVANI SUBBAROYAN J.

ssd

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