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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 1846/2023 & CM APPL. 58661-58662/2023**

Date of decision: 10.11.2023

REINODEGRACIA CONSULTANT PVT LTD Petitioner

Through: **Ms. Savita Malhotra, Advocate**

versus

DIASYS DIAGNOSTICS INDIA PVT LTD
& ANR.

..... Respondent

Through:

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 58662/2023 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application is disposed of.

CM(M) 1846/2023 & CM APPL. 58661/2023

1. This Petition filed under Article 227 of the Constitution of India impugns the order dated 04.08.2023 passed by District Judge (Commercial)-02, South West, Dwarka Courts, New Delhi ('Commercial Court') in CS (COMM) No. 26/2019 titled as **Diasys Diagnostics India Pvt. Ltd. v. Reindodegracia Consulting Pvt. Ltd. & Anr**, whereby the Commercial Court dismissed the application filed by the defendant no.1 under Section



12A of the Commercial Courts Act, 2015 ('Act of 2015') read with Section 151 of the Code of Civil Procedure, 1908 ('CPC') seeking return of plaint for want of pre-institution mediation.

1.1. The Petitioner is the defendant no.1 and Respondent No.1 is the plaintiff before the Commercial Court.

1.2. The suit has been filed by the plaintiff on 13.03.2019 for recovery of a sum of Rs. 1,97,49,334/- along with pendente lite and future interest at 18% per annum. The suit was filed along with an application under Order XXXVIII Rule 5 CPC seeking urgent directions to the defendant no.1 to deposit the suit amount with the Commercial Court on the plea that the plaintiff apprehends siphoning of the assets by the defendants.

1.3. The matter was fixed before the Commercial Court for framing of issues on 20.04.2023 (after 4 years), when the said Court noted that an application filed by the defendant no.1 under Section 12A of the Act of 2015 dated 23.03.2019 seeking return of the plaint for exhausting the mandate of pre-litigation mediation was pending ('said application'). It was thereafter that the Commercial Court listed the matter for arguments on said application and also for reply of the plaintiff on the said application.

1.4. The Commercial Court dismissed the said application of the defendant no.1 vide order dated 04.08.2023.

2. The learned counsel for the Petitioner i.e., defendant no.1 states that Section 12A of the Act of 2015 makes it mandatory for the plaintiff to exhaust the remedy of pre-institution mediation in a suit which does not contemplate any urgent interim relief.

2.1. She states that the suit of Respondent No.1 i.e., plaintiff was filed without exhausting the remedy of pre-institution mediation and the perusal



of the plaint does not contemplate any urgent relief and therefore the application of the defendant no.1 filed under Section 12-A of the Act of 2015, ought to have been allowed by the Commercial Court.

2.2. She states that mere filing of an application under Order XXXVIII Rule 5 CPC by the plaintiff with the suit seeking urgent relief does not fulfil the criteria of Section 12-A of the Act of 2015.

2.3. She states that as per the judgment of the Supreme Court in the case of *Patil Automation Private Limited & Ors. v. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1*, and also considering the fact that this High Court has in numerous cases held that Section 12A of the Act of 2015 is mandatory, the Trial Court was not justified in holding that the Section 12A of the Act of 2015 was mandatory only after 22.08.2022.

2.4. She, further, relies upon the subsequent judgment of the Supreme Court in *Yamini Manohar v. TKD Keerthi, 2023 SCC OnLine SC 1382* and more specifically paragraph 10 therein to contend that since in the facts of the present case, no urgent interim relief has been granted to the plaintiff, it is apparent from the record that the said application under Order XXXVIII Rule 5 CPC was a camouflage adopted by the plaintiff to bypass the statutory mandate of pre-litigation mediation.

2.5. She states in the facts of this case, the Trial Court should have checked this mischief and returned the plaint in exercise of its jurisdiction under Order VII Rule 11, CPC with a direction to the plaintiff to comply with the statutory mandate of pre-litigation mediation as per the Act of 2015.

3. This Court has heard the learned counsel for the Petitioner and perused the record. The following facts are admitted on record:

- i. The Commercial Suit for recovery was instituted on 13.03.2019



- ii. The defendant no.1 was served with summons of the said commercial suit on 18.03.2019.
 - iii. The defendant no.1 filed an application seeking return of the plaint due to the non-compliance of the Section 12-A of the Commercial Courts Act, 2015 on 23.03.2019. Defendant no.1 filed its written statement on 21.05.2019.
 - iv. The application of the defendant no.1 filed for return of plaint remained pending between 2019-2023 (for 4 years) and was not pressed for hearing by the said defendant.
 - v. In the interregnum on 07.11.2022, the parties were referred to Mediation Centre, Dwarka to explore the possibility of an amicable settlement which did not yield any result.
 - vi. Thereafter, on 20.04.2023, when the matter was listed for framing of issues before the Trial Court, it was the learned Trial Court which upon a perusal of record noted the pendency of the said application and called upon the plaintiff to file its reply; and it was in these circumstances that the said application was taken up by the Trial Court for hearing and disposal.
4. The Trial Court in the aforesaid circumstances dismissed the said application filed under Section 12-A of the Act of 2015 and held as under:

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5. Application under order 38 Rule 5 CPC moved alongwith the plaint was part of the suit filed by plaintiff on record contemplating the urgency in this respect Merely because there was no mention in the plaint itself because of application seeking urgent relief having been moved separately, it cannot be said that plaintiff did not ask for the urgent relief in the matter, which is the requirement for seeking exemption from pre-institution mediation proceedings. Court may or



may not accede to the request for urgent interim relief or may or may not consider it as urgency, is the consideration later on. In the instant matter, application under though order 38 Rule 5 CPC had been moved alongwith the plaintiff. After the defendants put in appearance, application u/s 12-A r/w section 151 CPC had been moved on behalf of defendant no.1. Matter remained listed for arguments on behalf of defendant no.1 on the question whether pre-institution mediation proceedings could be resorted to, despite pendency of the application for attachment before judgment". This application was not argued by counsel for defendant no. 1 till 25.05.2019 despite repeated opportunities permitted, as is reflected from the record. Thereafter, counsel for defendants were changed and fresh vakalatnama was filed on record. Thereafter application u/s 12-A was not pressed for and matter reached to the stage of framing of issues when Ld. Predecessor of this court noted with regard to pendency application u/s 12-A CPC and put the application for reply and arguments.

6. In *M/s Patil Automation Private Ltd. & Ors. Vs. Rakheja Engineers Private Limited*, (supra), Hon'ble Apex Court had noted that the provision with regard to pre-litigative mediation i.e. section 12-A of the Act is mandatory and any suit violating the mandate of section 12 A must be visited with rejection of the plaint under order 7 Rule 11 CPC. As further noted, this power can be exercised even suo motto by the court but this declaration was held to be effective from 20.08.2022 so that concerned stakeholders become sufficiently informed.

7. Instant matter, as per record, had been filed in the year 2019. Therefore, besides the fact that the application seeking urgent relief had been filed in the matter, in view of the observation of Hon'ble apex court that the declaration shall be effective from 20.08.2022, present plaint does not deserve return or rejection. It is also pertinent to mention here that during the pendency of the case, matter had been referred to the Mediation Centre, Dwarka to explore the possibility of amicable settlement, which did not yield any result and now the matter is pending before the court for disposal on merits. Considering the abovesaid, application under section 12-A stands dismissed."

(Emphasis supplied)

5. In the present case, admittedly the suit was instituted on 13.03.2019 and an application under Order XXXVIII Rule 5 CPC was filed along with the plaint seeking urgent interim relief. In view of the fact that the suit was filed in the year 2019, the Trial Court rightly observed that the declaration of



law by the Supreme Court in *M/s Patil Automation Private Ltd.* (supra) is effective from 20.08.2022 and the present plaint does not deserve return or rejection.

6. The Supreme Court in *Yamini Manohar* (supra) has held that non-grant of the interim relief at the ad-interim stage and even rejection of the interim relief after the issuance of the notice does not entail dismissal of the commercial suit under Order VII Rule 11 CPC. The relevant portion of the judgment reads as under:

“6. In the present case, it is an accepted fact that an urgent interim relief has been prayed for and the contemplates an urgent interim relief is satisfied. Therefore, the condition that the plaint Impugned judgment/order of the Delhi High Court dated 08.05.2023, which upholds the order of the District Judge (Commercial Court)-01, South District at Saket, New Delhi dated 06.02.2023, rejecting the application under Order VII, Rule 11 of the Code, is correct and in accordance with law.

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9. We are of the opinion that when a plaint is filed under the CC Act. with a prayer for an urgent interim relief, the commercial court should examine the nature and the subject matter of the suit, the cause of action, and the prayer for interim relief. The prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12A of the CC Act. The facts and circumstances of the case have to be considered holistically from the standpoint of the plaintiff. Non-grant of interim relief at the ad-interim stage, when the plaint is taken up for registration/admission and examination, will not justify dismissal of the commercial suit under Order VII, Rule 11 of the Code; at times, interim relief is granted after issuance of notice. Nor can the suit be dismissed under Order VII, Rule 11 of the Code, because the interim relief, post the arguments, is denied examination of the three principles, namely. (i) prima facie case, (ii) on merits and on irreparable harm and injury, and (iii) balance of convenience. The fact that the court issued notice and/or granted interim stay may indicate that the court is inclined to entertain the plaint.

10. Having stated so, it is difficult to agree with the proposition that the plaintiff has the absolute choice and right to paralyze Section 12A of the CC Act by making a prayer for urgent interim relief Camouflage and guise to



*bypass the statutory mandate of pre-litigation mediation should be checked when deception and falsity is apparent or established. **The proposition that the commercial courts do have a role, albeit a limited one, should be accepted, otherwise it would be up to the plaintiff alone to decide whether to resort to the procedure under Section 12A of the CC Act.** An absolute and unfettered right' approach is not justified if the pre-institution mediation under Section 12A of the CC Act is mandatory, as held by this Court in Patil Automation Private Limited (supra). **The words 'contemplate any urgent interim relief in Section 12A(1) of the CC Act, with reference to the suit, should be read as conferring power on the court to be satisfied. They suggest that the suit must "contemplate", which means the plaintiff, documents and facts should show and indicate the need for an urgent interim relief.** This is the precise and limited exercise that the commercial courts will undertake, the contours of which have been explained in the earlier paragraph(s). This will be sufficient to keep in check and ensure that the legislative object/intent behind the enactment of section 12A of the CC Act is not defeated.”*

(Emphasis supplied)

7. In the facts of this case, the Trial Court after perusing the record was of the opinion that the institution of the suit in 2019 along with an application seeking directions under Order XXXVIII Rule 5 CPC contemplates urgent interim relief sufficient for seeking exemption from the mandate of Section 12-A of the Act of 2015. The Trial Court has not accepted the contention of the defendant that the said application was a camouflage to bypass the statutory mandate of pre litigation mediation and therefore rejected the application seeking return of the plaint. The said finding of the Trial Court and its consequent rejection of the application filed by the defendant under Section 12-A of the Act of 2015 is within its jurisdiction and does not suffer from any error.

8. This Court, therefore, does not find any infirmity in the order of the Trial Court which would warrant the interference by this Court in its supervisory jurisdiction.



9. Accordingly, the present petition is dismissed. Pending applications are disposed of.

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 10, 2023/msh/sk

Click here to check corrigendum, if any