

IN THE HIGH COURT OF JUDICATURE AT PATNA
COMMERCIAL APPEAL No.8 of 2024

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M/s Johnson Paints Pvt. Ltd., a Company registered Under the Companies Act, having its Registered Office at Fathua Road, Sabalpur, Patna City Patna through one of its Director, Vikram Khanna, Resident of City Center Apartment, G-4 Block, Hajiganj, Opp, Panjab and Sind Bank, Patna City, Dist. Patna.

... .. Appellant/s

Versus

M/s Johnson Paints Co. having its Office at 11-A, Ashoka Palace, Exhibition Road, Patna through its Partner Nitin Krishna, Male, aged about 42 Years, Son of Late Krishna Prasad Resident of 11- A, Ashok Palace, Exhibition Road, Patna.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. S.D.Sanjay, Sr. Advocate Mr.Mohit Agarwal, Advocate
For the Respondent/s	:	Mr. Y.V.Giri, Sr. Advocate Mr.Ashish Giri, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 09-09-2024

The defendant in Commercial Dispute Case No. 02 of 2023 is before this Court against the order of the learned District Judge, Patna dated 04.01.2024, who is the designated court under the Commercial Courts Act, 2015.

2. Shri Y.V.Giri, learned Senior Counsel appearing for the respondent/plaintiff, raised a preliminary objection that the appeal is not maintainable since the order is not one under Order XLIII of the Code of Civil Procedure, 1908. It is pointed out



that the order only makes over the case to the Additional District Judge (for brevity 'ADJ'), which cannot be faulted and surely not entitled to be challenged in an appeal. Reliance is placed on ***Jaycee Housing Private Limited & Ors. v. Registrar (General) Orissa High Court, Cuttack & Ors., (2023) 1 SCC 549*** and ***Yamini Manohar v. T.K.D. Keerthi, 2023 SCC OnLine SC 1382.***

3. Shri S.D.Sanjay, learned Senior Counsel appearing for the appellant, submits that the order has two limbs, one the waiver of Section 12A of the Commercial Courts Act, 2015 (for brevity 'C.C.Act'), which is not permissible and the other making over of the records of the case to the learned ADJ-XIV. Reliance is placed on ***Patil Automation Private Limited v. Rakheja Engineers Private Limited, (2022) 10 SCC 1***, to contend that the pre-institution mediation and settlement, as provided under Section 12A, could not have been avoided. Insofar as the making over of the records of the case to the ADJ; Annexure-A/17 Notification dated 02.08.2019 is specifically referred to; wherein the courts in all the districts of the State of Bihar have been constituted as Commercial Courts to exercise original jurisdiction in respect of commercial disputes, where the value of suits of disputes exceeds rupees one crore. Reliance



is also placed on a decision of a co-ordinate Bench in MJC No. 1323 of 2018, titled as *M/s Vishal Builtech India Pvt. Ltd. Vs. The Union of India & Ors.* dated 03.08.2018.

4. The learned Senior Counsel appearing for the respondent/plaintiff would point out that the ADJ has not only declined the interim prayer, but also dismissed the application for rejection of suit filed under Order VII Rule 11, as is produced at Annexure-R/4. The appellant having acquiesced to the jurisdiction cannot wriggle out of the same, by filing an appeal from an earlier order.

5. Having gone through the contents of the order, we are of the opinion that it has two limbs, one, with respect to waiver of the proceedings under Section 12A and the other, the direction to make over the case to the ADJ-XIV. We agree with the respondent/plaintiff that both these orders could not have been challenged in an appeal under Section 13 of the C.C.Act. However, both the said aspects, comprised in one single order, can be challenged under Article 226/227 of the Constitution of India. We would not reject the appeal only by reason of the aforesaid contention, since we are entitled to invoke the jurisdiction under Article 226/227; which we *suo motu* exercise, especially considering the fact that the very intention behind the



enactment; i.e. Commercial Courts Act, is for speedy disposal of commercial matters.

6. Insofar as transmission of the case to the ADJ-XIV, we cannot but notice that the State Government is empowered to constitute the Commercial Courts under Section 3 of the C.C.Act. A notification has also been brought out, produced as Annexure-A/17, which constitutes the court of the District Judge in all the districts of State of Bihar as Commercial Courts.

7. *M/s Vishal Builtech India Pvt. Ltd.* (supra) considered the very same issue, but with respect to a notification issued prior to Annexure-A/17. On 03.03.2017, the State Government after consultation with the High Court, constituted the Courts of District Judges of the nine Commissionerates, as Commercial Courts for the respective local limits of the Commissionerate. The petitioner therein having filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for brevity 'Arbitration Act'), before the District Judge, Patna, the same was transferred to the court of ADJ- V, Patna, in a routine manner. A request made by the ADJ pointing out the provisions of the Commercial Courts Act and the notification, evoked a negative response insofar as the finding of the District Judge that since the petitioner had filed an arbitration



miscellaneous case under Section 34(2) of the Arbitration Act, it would not come under the purview of the Commercial Court. The learned Division Bench found the transfer of the case to the ADJ and the further finding that the suit does not come under the purview of the Commercial Court, to be untenable in law.

8. We also notice the reference to Section 15(5) of the C.C.Act, which enables the Commercial Appellate Division of the High Court, on the application of any of the parties to the suit, to withdraw a suit or application from the Court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be. In addition to the jurisdiction under Article 226/227, we also assume jurisdiction under Section 15(5) to ensure that the matter, coming under the C.C.Act is considered by the Commercial Court, as constituted by the State Government.

9. Reference can be made usefully to ***Jaycee Housing Private Limited*** (supra), which challenged the Notification issued by the State of Orissa which constituted the court of Civil Judge (Senior Division) as Commercial Courts for the purpose of exercising the jurisdiction and powers under the C.C.Act. The writ petitioners, who had initiated the proceeding under Section 34 of the Arbitration Act challenged the



Notification on the ground that it would render nugatory the provisions of Section 2(1)(e) of the Arbitration Act. The Hon'ble Supreme Court held so in paragraphs-24 and 25, which are extracted hereunder:

“24. Thus, the Objects and Reasons of the Commercial Courts Act, 2015 is to provide for speedy disposal of the commercial disputes which includes the arbitration proceedings. To achieve the said Objects, the legislature in its wisdom has specifically conferred the jurisdiction in respect of arbitration matters as per Section 10 of the 2015 Act. At this stage, it is required to be noted that the 2015 Act is the Act later in time and therefore when the 2015 Act has been enacted, more particularly Sections 3 & 10, there was already a provision contained in Section 2(1)(e) of the 1996 Act. As per settled position of law, it is to be presumed that while enacting the subsequent law, the legislature is conscious of the provisions of the Act prior in time and therefore the later Act shall prevail.

25. It is also required to be noted that even as per Section 15 of the 2015 Act, all suits and applications including applications under the 1996 Act, relating to a commercial dispute of specified value shall have to be transferred to the Commercial



Court. Even as per Section 21 of the 2015 Act, the 2015 Act, shall have overriding effect. It provides that save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

10. By virtue of Section 21, which gives overriding effect to the C.C.Act and also Sections 10 & 15; it was categorically found that even in a challenge under Section 34 of the Arbitration Act, though ordinarily the jurisdiction lies before the principal Civil Court of original jurisdiction in a district, the matter shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted; as per Section 10(3) of the C.C.Act.

11. Going by the above binding precedents and the provisions of the C.C.Act as also the Notification issued by Annexure-A/17, we cannot but observe that the learned District Judge erred insofar as making over the case to the ADJ-XIV. The case shall stand transferred to the District Judge, Patna who has been constituted as a Commercial Court under Annexure-A/17. The orders passed by the ADJ; being without jurisdiction, are *non est* in law.



12. Now, we come to the issue of waiver of the proceeding under Section 12A. The specific issue has been considered in ***Yamini Manohar*** (supra) by the Hon'ble Supreme Court. The appellant therein was the defendant, who was aggrieved with the dismissal of an application filed under Order VII Rule 11, since pre-litigation mediation and settlement as provided under Section 12A was not resorted to. We specifically extract Paras 9 and 10 from ***Yamini Manohar*** (supra):-

“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 12-A 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 7 Rule 11 of the Code; at times, interim relief is granted after issuance of notice. Nor can the suit be dismissed under Order 7 Rule 11 of the Code, because the interim relief, post the arguments, is denied on merits and on examination of the



three principles, namely : (i) *prima facie* case, (ii) 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 paralyse Section 12-A 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 12-A of the CC Act. An “*absolute and unfettered right*” approach is not justified if the pre-institution mediation under Section 12-A 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 CCAct, 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 plaint, 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.”

13. As has been held in the above extract, in the present case, there is an urgent interim relief prayed for in the suit, which is evident from the order impugned. What has been laid down by the aforesaid decision of the Hon’ble Supreme Court is that, once there is contemplation of an urgent interim relief in the suit, then the court has to enter a satisfaction, *albeit* a limited one; examining the nature and subject matter of the suit, the cause of action and the prayer for interim relief. The learned District Judge has in the impugned order perused the materials available on record and specifically noticed the urgent interim relief sought for by the plaintiff; which, according to the plaintiff, was causing irreparable loss and damage to the plaintiff. The issue was one of passing off, of the trademark of the plaintiff by the defendant. Considering the prayer for interim relief, as also the subject matter of the suit, the learned District Judge has entered a satisfaction, so as to waive the pre-institution mediation and settlement, as provided in Section



12A. We are of the opinion that the satisfaction so entered is perfectly in order.

14. The learned Senior Counsel appearing for the appellant has also relied on judgment of the Hon'ble Supreme Court in ***Patil Automation Private Limited*** (supra); which has been specifically referred to and followed in ***Yamini Manohar*** (supra). In ***Patil Automation Private Limited*** (supra), there was no urgent interim relief sought for in the plaint and hence, the consideration of meaning of the words 'contemplate any urgent interim relief' used in Section 12A, was not attracted. As we noticed, there is a specific prayer for urgent interim relief in the instant case; which makes it distinct from ***Patil Automation Private Limited*** (supra) and makes ***Yamini Manohar*** (supra) squarely applicable.

15. The learned Senior Counsel for the appellant/defendant would also argue that there is no scope for an interim relief since the defendant is a trademark holder and the claim in the plaint is only of passing off. It is also argued that the defendant has been using the mark from the year 2012 and there is no reason to grant an interim order, after such long distance of time.

16. Insofar as the delay in approaching the court is



concerned, we notice that it is a continuing injury, if at all the allegation is correct. The contention in the plaint was that the plaintiff has been using the mark JOHNSON for its paint products and the allegation is the act of passing off by the defendant, of that very mark. The prayer for interim relief hence cannot be faulted and hence, the waiver of pre-institution mediation and settlement also cannot be faulted.

17. Insofar as who is entitled to the user of the mark, it will have to be decided in the suit and we make it clear that we have also not made any observation on the merits of the claim raised, either for interim or final relief.

18. We hence interfere with the impugned order only to the extent of the records having been transmitted to the ADJ, which records will have to be re-transmitted to the District Judge, Patna, who has been constituted under the Commercial Courts Act as a Commercial Court. The orders passed by the ADJ; who has no jurisdiction, will have no effect; being *non est*.

19. We direct the parties to appear before the District Judge, Patna on 18.09.2024. The District Judge, Patna shall consider the interim relief after affording an opportunity of hearing to both parties, which hearing shall be on any date on or before 04.10.2024 and order shall be passed within one month



from the date of hearing.

20. The Commercial Appeal stands disposed of.

21. Interlocutory application, if any, shall stand closed.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

Sujit/-

AFR/NAFR	AFR
CAV DATE	
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