

This commercial suit was filed by the appellant/plaintiff in the learned court below, without undergoing pre-litigation mediation. The suit was accompanied by an application for interim relief under Order 39 Rule 1 and 2 of the Civil Procedure Code. After institution of the suit the appellant/plaintiff applied before the court asking for dispensation of pre-litigation mediation. As the defendants had filed a caveat in the court they were given notice of the above applications. On notice of the application the

defendants filed an application under Order 7 Rule 11 of the Civil Procedure Code.

By a detailed examination of the plaint the learned judge went into the question whether an interim relief was “contemplated” in the suit. She ruled that no such interim relief could be said to be contemplated.

By a judgment and order dated 24th May, 2024 the plaint was rejected.

The other applications for interim injunction and for rejection of the plaint under Order 7 Rule 11 were “rejected as redundant”. The suit T.S (COM) 95/2024 was “disposed of”.

Hence this appeal.

A statute is enacted or an amendment to a statute is introduced to reach benefits to the people at large. Any undesirable state of affairs is also sought to be removed by introduction of a new law or amendment of the existing law.

At a point of time parliament felt that the courts in the country were unable to decide the cases pending before them within reasonable time. There was shortage of courts compared to the number of cases. There was lack of infrastructure. The procedure prescribed by law was dilatory. The number of cases filed was much more than the number disposed of or dealt with by the court. The situation was properly termed as “docket explosion”. The legislature conceived of means of resolution of disputes between the parties through alternative dispute resolution fora. Parliament enacted the Legal Services Authority Act, 1987, amended the Civil Procedure Code so as to promote settlement through LokAdalats, mediation and so on.

Entertaining the belief that there was always scope of a settlement between the parties and if that happened there would be no need to prosecute litigation or would result in reduction in the number of cases, Section 12A of the Commercial Courts Act, 2015 was inserted by parliament by enacting

Section 11 of Act 28 of 2018 with effect from 3rd May, 2018. It is in the following terms:-

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

(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):

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 (36 of 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 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).”

The intention of the section is plain. If in a suit no urgent relief is “contemplated” an effort should be made towards resolution of the dispute between the parties by mediation, before institution of the suit. Obviously, if mediation failed, the suit could be instituted. If it was successful, there would be nothing to file before the court. Section 12A(1) provides that the above type of suit could not be instituted without pre-litigation mediation.

The first and perhaps the foremost objection taken by the respondents in the appeal is that the impugned judgment and order is not appealable.

It was argued on their behalf that leave under Section 12A was required before institution of the suit. Since in this suit Section 12A leave to institute the suit without having undergone pre-litigation mediation was refused, the

suit was deemed not to have been instituted and was not in the file of the court. Therefore, the suit could not have been dismissed by rejection of plaint.

In the **Patil Automation Pvt. Ltd. &Ors.vs. Rakheja Engineers Pvt. Ltd.** reported in **2022 (10) SCC 1**, the Supreme Court had specifically conceptualised two situations. The first one was on presentation of the plaint consideration by the court whether the suit contemplated urgent interim relief, before its institution. At that stage without reference to the defendant the court had the option of rejecting the plaint under Order 7 Rule 11 of the Civil Procedure Code. The second one was discovery by the defendant after institution of the suit and issuance of summons that 12A leave was required and not taken on filing of the plaint. He had the right to take out an application under Order 7 Rule 11 of the Civil Procedure Code for rejection of the plaint. If the court found that the suit did not contemplate any urgent relief but nevertheless it had been instituted without undergoing pre-litigation mediation it could reject the plaint under this provision.

Section 2(2) of the Civil Procedure Code defines decree. Very plainly it states that decree included “the rejection of a plaint”.

Learned counsel for the respondents went to the extent of arguing that Section 13 of the Commercial Courts Act, 2015 did not permit any appeal from a decree. No doubt, the wording of the section is ambiguous in many places. Yet it would be absurd to think that the said Act dealing with commercial cases debarred appeals from a decree which is the final adjudication in a suit which necessarily includes a commercial suit.

Section 13(1) lays down that an appeal would lie from a judgment or order of a commercial court.

Learned counsel for the respondents argued that reference to decree in the title of Section 13 did not mean that appeal from a judgment or order

included a decree. This argument is plainly wrong. A complete misinterpretation was made of the unreported judgment of a Division Bench of this Court made on 10th October, 2023 in **Super Smelters Ltd. vs. Predominant Engineers and Contractors Pvt. Ltd.** where the Court only observed that reference to “decree” in the head note or title to Section 13 did not preclude appeals from orders provided in the Section itself. Section 2(9) of the Code defines judgment as “the statement given by the judge on the grounds of a decree or order”. The proviso to Sub-section 1 of Section 13(1) specifies the orders from which appeals lie. Only orders which are enumerated under Order 43 of the Civil Procedure Code as amended by the Commercial Courts Act, 2015 and Section 37 of the Arbitration and Conciliation Act, 1996 are appealable. Sub-section 2 expressly asserts that no other order is appealable. It also goes on to add that apart from decrees and orders provided in that section, an appeal would not lie from any other decree.

Now to say that judgment and order signifies order which are in the form of a judgment would immediately oust the proviso to Section 13(IA) and Sub-section 2, because if that interpretation was accepted then an appeal lay from all orders in the form of judgments. Therefore, the logical meaning that can be ascribed to the section after considering the title to the section employment of the words judgment and order disjunctively and the use of the words “no appeal shall lie from any order or decree..... otherwise than in accordance with this Act” is that the reference to judgment in sub-section 1 can only mean judgments which result in a decree.

Since in the instant case the plaint has been rejected under Order 7 Rule 11 of the Code of Civil Procedure which is a decree under Section 2(2) of the Civil Procedure Code, the impugned judgment and decree is appealable in my considered view.

The ratio of the Supreme Court in **Patil Automation Pvt. Ltd. &Ors.vs. Rakheja Engineers Pvt. Ltd.** reported in **2022 (10) SCC 1**, is that section

12A is not merely procedural law but also substantive law and hence mandatory. A suit where an urgent relief is not “contemplated”, filed without undergoing pre-litigation mediation is barred under Order 7 Rule 11(d) of the Civil Procedure Code.

Under Section 12A a “cooling period” is provided for the parties to explore mediation. When a suit is dismissed under Order 7 Rule 11 a fresh suit can be filed but court fee is payable over and over again. When under Section 12A the plaintiff is compelled to go for mediation “there is a ray of hope that the matter may get settled. It is a win-win for all sides. If the mediation is successful.”

In paragraph 92 of the judgment the court proceeded to analyse the point at which it could be said that a suit had been instituted under Order 4 Rule 1(3) of the Code. A plaint is deemed to be duly instituted when it complies with the requirements of Order 6 and 7. Order 5 Rule 1 prescribes that after due institution of the suit a summons may be issued to the defendant. Order 7 Rule 11 does not say that the court is to exercise the power of rejecting a plaint only on an application. Under Order 7 Rule 11 a plaint can be rejected by the court before issuing summons. If summons are issued the defendant could make an application under Order 7 Rule 11. (See Para 94.3).

In paragraph 98 the court says there is no institution of the suit unless the court admits the plaint and registers it in the suit register. Presentation of the plaint may not amount to institution of the suit for the purpose of Order 4 Rule 1 and Section 12A of the said Act. Before registration of the plaint the suit can be thrown out on the ground that Section 12A requirement has not been complied with.

What Patil Automation did not decide?

The facts enumerated below were not before the court and consequently not decided by it.

A case where the defendant has no intention of resolving the dispute by mediation. In fact, he is fiercely opposed to any claim by the plaintiff. When leave is sought to file the plaint without pre-litigation mediation and such leave is granted, he immediately makes an application for revocation of the leave on the ground that the plaintiff ought to have but did not undergo pre-litigation mediation. No urgent relief was contemplated in the suit.

The court has to decide the issue. This takes sometime.

In this period the defendant is assured that the suit remains suspended and no order can be passed against him.

Even if the court decides that urgent relief was contemplated and leave was rightly granted the defendant may challenge such order by revision, although an appeal may not be provided against such an order.

If a defendant while challenging the institution of a suit with 12A leave comes up with a proposal for mediation, it could be said that he is approaching court for revocation of the leave, for quicker and effective resolution of the dispute between him and the plaintiff, without undergoing long and expensive litigation. But without any proposal for mediation objection to the plaintiff obtaining 12A leave or making an application to revoke it should be viewed with suspicion by the court.

Now, let us take a look at some decisions. With regard to the meaning which has to be ascribed to the phrase “if a suit contemplates an urgent relief”, a division bench of this Court in **Gavrill Metal Pvt. Ltd. vs. Maira Fabricators Pvt. Ltd.** reported in **2023 SCC OnLine Cal 2443** remarked:-

“16. 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.

17. 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.”

In **Harish Verma vs. Joginder Pal Singh** reported in **2024 SCC OnLine Del 2770**, the Delhi High Court relying on *Yamini Manohar vs. TKD Keerthi*, 2023 SCC OnLine SC 1382 laid down the following proposition:-

“7. According to us, the learned District Judge could not, at the threshold, conclude that the apprehension expressed by the appellant/plaintiff was baseless. This is made clear by the judgment rendered by the Supreme Court in *Yamini Manohar v. TKD Keerthi*, 2023 SCC OnLine SC 1382. For convenience, the relevant observations made by the judgment are extracted hereafter:

"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 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 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 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."

[Emphasis is ours]

8. Clearly, the Supreme Court establishes standards against which the plaint and the application for urgent relief have to be tested, amongst others, on the following grounds:

- i) The commercial Court has to examine the nature, subject matter, cause of action, and the relief sought.
- ii) The facts and circumstances of the case have to be considered holistically from the viewpoint of the plaintiff.
- iii) Plaint, documents, and facts should show and indicate the need for urgent relief.

9. Therefore, to dismiss a plaint, a commercial Court has to undertake a thorough examination of the case while also looking out for deception and falsity. The plaint cannot be dismissed at the threshold for failure to prima facie establish urgency."

Say the plaint discloses a simple money suit, but it is likely that on notice of it, the defendant might start disposing of some of his assets to defeat the decree that might be passed against him. So, the plaintiff may "contemplate" the urgent relief of an attachment before judgment but need not plead it in the plaint, as the cause of action has not arisen at the time of institution of the suit.

Please note the wording of 12A(1). The legislature does not mention "plaint". It uses the word "suit". It employs the word "contemplation". Hence it avoids such words as "averments or statements in the plaint". In other words, the legislature does not say that from the statements or averments in the plaint urgent reliefs obtainable by the plaintiff should be apparent. I would interpret the Section as suggesting that if at the time of presentation of the plaint before the judge from the averment in the plaint and an affidavit to be filed by the plaintiff it would appear that in the contemplation of the plaintiff a situation for urgent relief might arise in the period when mediation has to be undergone, the court may allow the plaintiff to institute the suit without mediation.

On the basis of the declaration that urgent relief is contemplated, the plaintiff should be allowed to present the plaint. The court should not ordinarily interfere with such assertion unless it is shown to be palpably

erroneous or mala fide. Once, the plaintiff is allowed to file a suit without pre-litigation mediation the discretion of the court should not be allowed to be interfered with at a later stage. Otherwise the proceedings are likely to become very dilatory. Even after filing of the suit the parties can be referred to mediation, if the facts so warrant.

In this case, although the claim is monetary, there is a pleading that since the defendant is incurring heavy losses some urgent interim relief may be sought by the plaintiff. The learned judge should have accepted this averment and allowed the plaintiff to institute the suit without Section 12A pre-litigation mediation requirement. Instead of that the learned judge has tried to probe the nature, ambit and merits of the claim which at that stage was wholly unnecessary.

For all those reasons the impugned judgment and order cannot stand. I hold that the impugned order is appealable. I further hold that the learned judge by the impugned order ought not to have refused the section 12A dispensation sought. We grant such dispensation and direct the learned court below to hear out the suit as expeditiously as possible.

The appeal FMAT 222 of 2024 is allowed. The stay application (CAN 1 of 2024) is disposed of accordingly.

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

(I. P. MUKERJI, J.)

Biswaroop Chowdhury, J.:-

I have perused the Judgment delivered by my learned brother and have agreed to the grounds mentioned therein. However I add the following grounds.

Before considering the material in issue it is necessary to consider the provision contained in Section 12A of the commercial Court's Act 2012.

Section 12A of the commercial Courts Act 2012 provides as follows;

12A.- 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.

Thus upon considering the said section it is clear that nowhere there is requirement to obtain specific leave to institute a commercial suit where mediation process is not exhausted. As we find that in Section 80(2) of the Code of Civil Procedure there is specific provision to obtain leave from the Court in the event a suit to obtain urgent or immediate relief against the Government is sought to be instituted without compliance of service of notice as provided under sub-section 1 of the said section, the provision in section 12A of the Commercial Court Act is different to some extent As per Section 12A of the Commercial Courts Act power and discretion is vested upon the Court to consider as to whether the suit contemplates urgent interim relief from plain reading of the plaint and thereafter proceeding in accordance with law. In the event Court is of the view from reading of the plaint that the suit contemplates urgent interim relief the Court should record its satisfaction and finding over the same which is equivalent to leave conceptualised in the judgment of my brother and issue summons upon the defendant on the other hand if it is of the view that no urgent interim relief is contemplated it shall record its findings and pass necessary orders. Although an order recording institution of a commercial suit and registering the same under Code of Civil Procedure and issuance of summons to the defendant without recording satisfaction about existence of urgent relief is not bad in law but there remains some irregularity in such order As the provision regarding urgent interim relief is not a pure question of law but a mixed question of law and fact the nature of the suit and the relief claimed must be considered to determine as to whether the suit contemplates urgent interim relief. Moreover as the conception of urgent, interim relief varies

from person to person Commercial suits instituted by incurring huge Court fees should not be initially dismissed for not exhausting mediation where Courts do not find existence of urgent relief, but the suit should however be kept pending and parties should be directed to exhaust the process of mediation. Such order should also be passed upon granting opportunity to the plaintiff to show cause. If the plaintiff disobeys such order, the suit may be dismissed under Order 7 Rule 11 of the Code.

Upon considering the relevant provisions of the Code of Civil Procedure it is clear that once a suit is instituted the plaint can be rejected as per the provision provided under the Code of Civil Procedure.

As the Learned Court below rejected the plaint under Order 7 Rule 11 of the Code of Civil Procedure it is a Decree and thus appeal lies from it. As I have agreed with the grounds cited by my learned brother for setting aside the decree passed by the Learned Trial Court I do not wish to make any further observation.

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

(BISWAROOP CHOWDHURY, J.)

Later.

Learned counsel for the respondent defendants prays for stay of operation of this judgement and order which is considered and refused.

(Biswaroop Chowdhury, J.)

(I. P. MUKERJI, J.)