

19-09-2024
Item no.2 CD
Subrata
Bhattacharyya
AR(C)

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Commercial Division)

FMAT No.255 of 2024
Techno Singal Tubes Private Limited

-vs-

Joginder Agarwal
with
CAN No.1 of 2024

Mr. Soumabo Ghosh
Mr. Varun Kothari
Mr. Nikunj Berlia
Ms. Mosarat Reyaz
Mr. Sandip Manna ...for the appellant

Mr. Subhabrata Datta
Mr. Debnath Ganguly
Mr. Aranya Saha
Mr. Supriyo Dutta ...for the respondent

We formally admit the appeal. We are in a position to dispose of it today itself, dispensing with all formalities.

With the deepest regret and some feeling of annoyance, we are constrained to observe that in case after case the learned court below is not properly appreciating the ratio of the Supreme Court judgements, in **Patil Automation Pvt. Ltd. & Ors. -vs- Rakheja Engineers Pvt. Ltd.** reported in **2022 (10) SCC 1** together with the decision of a division bench of this court rendered on **23rd August 2024** in **FMAT No.222 of 2024 with CAN No. 1 of 2024 (Shristi Infrastructure Development Corporation Limited -vs- Sarga Hotel Private Limited & Anr.)** (still unreported), cited by learned counsel for both the parties.

A suit was filed in the learned court below accompanied by an application for attachment before

judgement under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908. While dealing with the application, the learned court below observed that no urgent relief was contemplated in the application so as to get dispensation of pre-litigation mediation.

Here, the learned judge went absolutely wrong. The legislature has not vested the judge with the role of a legal advisor. It is enough that the plaintiff perceives that an urgent relief is contemplated and the necessity of such urgent relief is likely to arise within the time-period stipulated for mediation. If that is the reasonable belief, then he is entitled to file the suit without undergoing the pre-litigation mediation. This kind of belief was entertained by the plaintiff while filing the Order XXXVIII Rule 5 CPC application. The learned judge was at liberty to assess the merits of the Order XXXVIII Rule 5 CPC application, but not the merits to assess whether section 12A requirement was to be dispensed with.

The learned judge, by the impugned judgement and order dated 12th June 2024, has not only dismissed the Order XXXVIII Rule 5 CPC application of the appellant-plaintiff but has also rejected the plaint and dismissed the suit under Order VII Rule 11 CPC.

We set aside the said impugned judgement and order dated 12th June 2024 and direct the learned court below to hear out the said application in the presence of all the parties and by a reasoned order within two months of communication of this order. All points are kept open.

We are ordering re-hearing of the Order XXXVIII Rule 5 CPC application, because the entire thrust of the adjudication, it seems, was directed at the section 12A adjudication.

The suit be restored to the file of the court.

The application of the appellant-plaintiff before the learned court below for grant of leave under section 12A to present the suit without undergoing pre-litigation mediation is deemed to be allowed.

The deficit court fees as indicated in the Stamp Reporter's report be immediately paid, if not already paid, by 27th September 2024. Otherwise, the certified copy of this order shall not be made available.

The appeal and the connected application – FMAT No.255 of 2024 with CAN No.1 of 2024 – are disposed of accordingly.

[I.P. Mukerji, J]

[Biswaroop Chowdhury, J]