

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

I.A. No. GA COM 3 of 2023

In

A.S 6 of 2023

Proactive Ship Management Private Limited.

vs.

The Owners and Parties Interested in the Vessel
Green Ocean.

For the petitioner : Mr. Swatarup Banerjee, Adv.
Mr. Shouveek Ray, Adv.
Mr. Sariful Haque, Adv.
Mr. Niket Ojha, Adv.

For the respondent : Mr. Reetobroto Kr. Mitra, Adv.
Mr. Rudrajit Sarkar, Adv.
Mr. Varun Kothari, Adv.

Last heard on : 22.01.2024

Delivered on : 22.02.2024.

Moushumi Bhattacharya, J.

1. The defendant no. 1 Green Ocean Seaways Private Limited has filed the present application for revocation of leave granted to the plaintiff under section 12-A of The Commercial Act, 2015, dispensing

with pre-institution mediation in relation to the Admiralty Suit being AS 6 of 2023. The defendant no. 1 also prays for rejection of the plaint and for dismissal of the suit in tune with the first prayer.

2. The prayer for dismissal and revocation of leave arises out of an order dated 19.10.2023 which recorded that there was no urgency for moving the affidavit of arrest on an earlier occasion. Learned counsel appearing for the defendant no. 1 argues that the plaintiff's suit for payment of outstanding amounts allegedly due to the plaintiff was on account of services rendered to the erstwhile owner of the vessel. Counsel submits that the suit was instituted on the basis of the leave granted by the Court on 13.10.2023 dispensing with the mandatory compliance of the provision of pre-institution mediation under the 2015 Act. Counsel submits that the plaint and affidavit of arrest are bereft of any pleadings on urgency and that the cause of action arose sometime in June, 2016. Counsel places the second order dated 19.10.2023 recalling the order of arrest of 13.10.2023. Counsel submits that the suit could not have been instituted without the plaintiff exhausting the remedy of pre-institution mediation since the suit did not contemplate any urgent interim relief under the 2015 Act.

3. Learned counsel appearing for the plaintiff submits that the dispensation of leave under section 12-A of the Commercial Courts Act is not a revocable order since the need for urgent relief may arise even during pendency of a commercial suit. Counsel further submits that the particular suit was filed under Clause 32 of the Letters Patent, 1865 which falls within the exclusive jurisdiction of the Calcutta High Court

in exercise of its maritime jurisdiction under The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. Counsel submits that a plaintiff has only to establish a maritime claim/maritime lien for an order of arrest under the provisions of the Admiralty Act of 2017. According to counsel, the present application for dismissal of the suit and for revocation of leave granted under section 12-A of the 2015 Act should hence be rejected.

4. The arguments made on behalf of the parties need to be placed in context, that is in the foreground of the orders passed in the Admiralty Suit.

5. Upon presentation of the plaint in the Admiralty Suit on 13.10.2023 the plaintiff prayed for dispensation of pre-institution mediation under section 12-A of The Commercial Courts Act, 2015, pursuant to which leave was granted on the urgency shown by the plaintiff. The order records that the plaintiff's claim for unpaid fees for services rendered was found to be covered by section 4 of The Admiralty (Jurisdiction and settlement of Maritime Claims) Act, 2017 and that the High Court was conferred with jurisdiction to hear and determine any question on a maritime claim against the vessel. The Court accordingly passed an order of arrest of the vessel which was lying within the territorial waters of India, more specifically at Port Blair, as on that day and was within the admiralty jurisdiction of this Court. The vessel was directed to remain under arrest until the defendants / owners furnished sufficient security for the plaintiff's claim of Rs. 1.50 crores inclusive of interest and costs.

6. The owner of the vessel applied for vacating of the order of arrest which culminated in the second order dated 19.10.2023. This order forms the basis of the present application for revocation of the leave granted for dispensation under section 12-A of the Commercial Courts Act and for dismissal of the Admiralty Suit.

7. The Court proceeded to vacate the order of arrest dated 13.10.2023 on the following reasons :

- i) That there was no privity of contract between the plaintiff and the present owner of the vessel / defendant.
- ii) That arrest of a ship is only permissible where the plaintiff asserts a maritime claim against a person who owned the ship at the time when the maritime claim arose and is hence liable for the claim. The person liable must also be the owner of the ship when the order of arrest is made.
- iii) That the plaintiff's case was not one of maritime lien on the defendant's vessel which may continue regardless of a change of ownership.

And more important,

- iv) There was no urgency for an order of arrest on 13.10.2023.
- v) The present Admiralty Suit – A.S. 6 of 2023 is the plaintiff's third attempt to move an application for arrest. The plaintiff had earlier chosen not to proceed with two other Admiralty Suits on the plea of a change of ownership and on the absence of urgency, respectively.

- vi) There is no pleading in the plaint or in the affidavit of arrest of any compelling intervening facts between July, 2022 – October, 2023 to seek an order of arrest on 13.10.2023.
- vii) The vessel is a passenger vessel plying between the islands in the Andamans and hence there was no scope of the vessel leaving the territorial waters of India.
- viii) The Certificate of Fitness of the vessel expired on 24.7.2023 which meant that the vessel was rendered immobile / partially inoperative on and from that date. This would further mean that there was no immediate risk of the vessel leaving the territorial waters of the jurisdiction of the Calcutta High Court.

8. The issues which hence fall for decision are headlined below. The answers to the issues form part of the discussion.

Can the dispensation granted under section 12-A of The Commercial Courts Act, 2015 be subsequently revoked?

If yes, can the suit be dismissed under Order VII Rule 11 of The Code of Civil Procedure, 1908?

The First Issue

9. Section 12-A(1) of The Commercial Courts Act, 2015 reads as:

“12-A. 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 pre-institution mediation in accordance with such

manner and procedure as may be prescribed by rules made by the Central Government.”

10. Section 12-A makes two things clear:

- a) A suit which does not contemplate urgent interim relief under the provisions of the 2015 Act cannot be instituted, unless
- b) The plaintiff first opts for pre-institution mediation before instituting the suit
- c) The suit can however be instituted if the plaintiff obtains dispensation of the mandate of section 12-A at the time of institution of the suit.

11. In other words, the plaintiff must establish - and the Court satisfied on such showing - that the plaintiff requires urgent interim relief and that the urgency would be frustrated if the plaintiff is relegated to mediation instead of pursuing its urgent interim relief in the suit.

12. The more significant conclusion from a plain reading of section 12-A is that contemplation of urgent interim relief under the provisions of the 2015 Act is a matter which is to be determined at the time of institution of the suit (underlined for emphasis). The contemplation is not one which the plaintiff can reserve for a later stage for the Court to examine. The specific words of section 12-A are

“... does not contemplate any urgent interim relief....shall not be instituted...”

meaning thereby that the plaintiff cannot institute a suit which does not call for any urgent interim relief and keep the suit alive for an opportune time to argue such interim relief.

13. The mandate of section 12-A of pre-institution mediation in the absence of any urgent interim relief becomes even more clear from the words “*a suit, / which does not contemplate any urgent interim relief... shall not be instituted...*”. Hence, the plaintiff does not have the option of any later or subsequent contemplation of urgent interim relief post institution of the suit. To reiterate one last time, a suit which does not contemplate urgent interim relief shall not be instituted without resorting to pre-institution mediation. Period.

Who decides contemplation for urgent interim relief?

14. Since the carriage of proceedings is with the plaintiff, the onus of proving that there is indeed a case for urgent interim relief rests squarely on and must be discharged by the plaintiff.

How can the plaintiff do this?

15. By way of pleadings in the plaint. After all, the plaint forms the substratum of the suit consisting of the line-up of parties, the cause of action and the relief claimed. The case for urgent interim relief must be stated and spelt out in the pleadings in the plaint.

Is the plaintiff the only discharger of the onus?

16. The Court receiving the plaint and considering grant of leave for dispensation of the requirement under section 12-A of the Commercial

Courts Act is also clothed with the power to decide whether the suit contemplates urgent interim relief at the point of institution. In other words, the contemplation under section 12-A is not the sole domain of the plaintiff but a multi-decision domain where the Court also plays its part in deciding whether the suit contemplates urgent interim relief and (consequent to such decision) whether the plaintiff should be granted leave to institute the suit without exhausting the pre -institution mediation option: *Yamini Manohar vs. T.K.D. Keerthi; Special Leave Petition (Civil) 32275/2023*.

17. The onus shifts to the defendant subsequently to establish that the suit did not contemplate urgent interim relief at the time of institution. The Court will then examine the case brought by the defendant in considering whether the dispensation of the mandate under section 12-A was wrongly granted.

18. It is also relevant to state that grant or refusal of relief is not relevant for deciding the issue of urgency. The Court's finding on urgency is however of paramount importance. This is precisely where the second order dated 19.10.2023 comes to the fore.

19. The finding/s of the Court for vacating the order of arrest have been dealt above and are not being repeated. Suffice for it to say that, the case sought to be made out by the plaintiff for urgent interim relief at the time of presentation of the plaint was demolished at several levels. The Court specifically found that there was no urgency pleaded in the plaint or otherwise shown by the plaintiff. Further, even if the urgency-requirement was discounted, the plaintiff's maritime claim

could not have travelled with the vessel since the claim was restricted to the erstwhile owners of the vessel. The second finding was based on the provisions of The Admiralty Act of 2017.

20. The most significant finding, however, was that the plaintiff was unable to show any compelling intervening facts after withdrawing the two earlier Admiralty Suits and instituting the present suit i.e. between July 2022 and October, 2023. The order further records that neither the plaint nor the affidavit of arrest contains any specific pleading as to why the facts suddenly became time-sensitive warranting an *ex parte* order of arrest.

21. The other facts which were brought by the defendant to the Court's notice were damaging to the plaintiff's case for urgent interim relief. The first was of the vessel plying between the islands in the Andamans restricting the vessel's movement between the islands. Even more stark was the fact that the Certificate of Fitness of the vessel had expired on 24.7.2023 and the vessel remained stationary on and from that date.

22. The above facts are relevant in the context of grant of an order of arrest in exercise of the powers is conferred on a High Court in its Admiralty jurisdiction over its territorial waters. Orders of arrest are extraordinary measures where the High Court invokes the powers under the Admiralty Act of 2017 on being satisfied of an emergent risk of the vessel leaving the territorial waters within the jurisdiction of the Court.

23. Section 5 of The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act of 2017 empowers the jurisdictional High Court to order arrest of any vessel for the purpose of providing security against a maritime claim which is the subject of an admiralty proceeding. The Court must have reason to believe that the set of circumstances brought to the Court (section 5 (1)(a-c)) warrant passing of such an order. The High Court is also conferred with the power of ordering arrest of a related (sister/brother) vessel.

24. Further, the Court specifically found on 19.10.2023 that the plaintiff's case for urgent interim relief / order of arrest of the vessel did not hold water and the order of arrest should be vacated on that ground.

Section 12-A of the Commercial Courts Act and Clause 12 of the Letters Patent

25. Clause 12 of the Letters Patent, 1865, authorises a Chartered High Court, in exercise of its ordinary original civil jurisdiction, to receive, try and determine suits of every description if the cause of action has arisen either wholly or in part within the local limit of the ordinary original jurisdiction of the said High Court. The plaintiff is required to obtain leave in respect of the part cause of action.

26. The defendant can subsequently pray for revocation of that leave on the ground that no part of the cause of action had arisen within the territorial jurisdiction of the High Court. The Court, on weighing the

competing cases of the plaintiff and the defendant, is empowered either to revoke the leave or reject the defendant's application for revocation.

27. The power of the High Court to grant dispensation of the requirement under section 12-A of the Commercial Courts Act, 2015 is on a similar footing and conferred by the said Act. The High Court is hence entitled to revoke the dispensation granted under section 12-A. The power to revoke the dispensation granted under section 12-A can be made even *suo motu* without being tethered to an application made by the defendant in that regard.

The Second Issue

Can Order VII Rule 11 of The Code of Civil Procedure, 1908, be pressed into service on a subsequent "no urgency" finding of the Court?

28. Order VII Rule 11 of The Code of Civil Procedure, 1908 provides for rejection of the plaint and dismissal of the suit on several grounds including that the suit is barred by law. Therefore, if the Court comes to a specific and subsequent finding either *suo motu* or on an application made by the defendant that the suit did not contemplate urgent interim relief at the time of institution, the Court is entitled to dismiss the suit on Order VII Rule 11(d) - barred by law - that is the Suit contravened the mandate of section 12-A of The Commercial Courts Act : *Patil Automation Private Limited vs. Rakheja Engineers Private Limited; (2022) 10 SCC 1*.

29. To repeat, institution of a suit which does not contemplate urgent relief without exhausting pre-institution mediation under

section 12-A of the Commercial Courts Act falls under the statutory bar under Order VII Rule 11(d) of the CPC. The statutory bar would hold good even if established at a stage subsequent to the institution of the suit. The Court can hence treat the contravention within the fold of Order VII Rule 11 of the CPC and proceed to dismiss the suit.

Is the Admiralty Act, 2017 amenable to the mandate of section 12-A of the Commercial Courts Act, 2015?

30. The plaintiff's argument that contemplation of urgent interim relief under section 12-A of the Commercial Courts Act would not deflate the sails of an admiralty suit is based on the primacy of a maritime claim for maintaining the suit under section 4(1) of the Admiralty Act of 2017. According to counsel, the admiralty jurisdiction of a High Court is a special jurisdiction by which the Court can grant extraordinary and emergent relief in the form of arrest of a vessel. Counsel urges that admiralty jurisdiction is quite distinct and apart from the vagaries of The Commercial Courts Act, including that of section 12-A, with regard to pre-institution mediation.

31. This argument is however unacceptable for the following reasons.

32. Section 2(1)(c)(iii) of the Commercial Courts Act includes issues relating to admiralty and maritime law as coming within the fold of a "commercial dispute". Further, the first order passed by this Court on 13th October, 2023 records that the plaintiff prayed for dispensation under section 12-A of The Commercial Courts Act at the time of

presentation of plaint. This shows that the plaintiff subjected itself to the discipline of section 12-A of The Commercial Courts Act and sought dispensation under that provision on the ground that the vessel was required to be arrested on that day.

33. On the returnable date, i.e 19th October, 2023, the plaintiff argued that the cause of action in the admiralty suit was independent of any urgent interim relief under section 12-A of the 2015 Act and was founded on the existence of a maritime claim under section 4(1) of the Admiralty Act of 2017. The emphasis on the plaintiff's maritime claim however took the wind out of the plaintiff's sails on the Court's finding that the plaintiff failed to establish a maritime claim against the parties who were not the owners at the time of arrest. The Court also found that the plaintiff's case was not one of maritime lien under section 9(1) or (2) of the 2017 Act where the lien would travel with the vessel notwithstanding a change of ownership.

34. The argument of the plaintiff with regard to the admiralty jurisdiction of the High Court being divorced from The Commercial Courts Act is further belied by a Notification dated 16th September, 2019 of the High Court at Calcutta, Original Side, Admiralty Jurisdiction, which was published in the Kolkata Gazette on 22nd November, 2019. The Calcutta High Court, in exercise of powers conferred by section 16(3) of the Admiralty Act of 2017, as amended by the Admiralty Jurisdiction and Settlement of the Maritime Claims (Removal of Difficulties) Order, 2017 notified "The Calcutta High Court

Admiralty (Jurisdiction and Settlement of Maritime Claims) Rules, 2019”.

35. Rule 3 relates to institution of suits and provides that a suit instituted in the High Court at Calcutta in its Admiralty Jurisdiction shall be instituted by a plaint drawn, verified and affirmed according to the provisions of The Code of Civil Procedure, 1908 and in accordance with the Practice Directions of the Commercial Division of the Court. Thus, Rule 3 of the 2019 Rules settles any perceived conflict between the admiralty jurisdiction and the Commercial Division of the Calcutta High Court.

36. Rule 9 of the High Court at Calcutta Commercial Courts Practice Directions, 2021, which was notified on 23rd November, 2023, relating to improperly filed suits and applications also does not create any chasm between the admiralty jurisdiction and the Commercial Division/Commercial Appellate Division of the High Court at Calcutta.

37. Therefore, the plaintiff’s arguments, both on urgency as well as maritime claim, were dislodged on 19th October, 2023.

38. The conclusions of the Court from the above discussion are hence :

(i) Dispensation granted under section 12-A of The Commercial Courts Act, 2015 to a plaintiff to institute the suit without exhausting the remedy of mediation, can subsequently be revoked by the Court. Revocation of dispensation under section 12-A of the Commercial Courts Act is akin to revocation of leave under Clause 12 of the Letters Patent, 1865.

(ii) Revocation of dispensation can be on an application made by the defendant or by the Court on its own motion on the Court being satisfied that the suit did not contemplate urgent interim relief at the time of institution.

(iii) The plaint in the suit can be rejected under Order VII Rule 11(d) of The Code of Civil Procedure, 1908 if the Court finds that the suit was instituted in contravention of the mandate of section 12-A of the Commercial Courts Act, i.e., that the plaintiff failed to exhaust the remedy of mediation despite not having a case for urgent interim relief.

(iv) Admiralty suits involving maritime law are covered within the definition of a “commercial dispute” under section 2(1)(c)(iii) of the Commercial Courts Act, 2015.

39. The above conclusions are within the statutory parameters of The Code of Civil Procedure, the Commercial Courts Act, 2015 and the Admiralty Act of 2017. The factual matrix in the present application fits within these parameters.

40. The plaintiff’s argument that contemplation of urgent interim relief may revive post-institution of the suit or even at the stage of trial is without statutory basis. The words used in section 12-A makes it clear that the contemplation of urgency begins and ends at the point of institution, i.e. material point of time when the contemplation must fructify into a proved and pleaded case for urgent interim relief. Hence allowing the suit to remain in the records despite an absence of urgency on the contingency that urgency may arise at a later point of time is patently contrary to the mandate of section 12-A.

41. Moreover, the words “*urgent interim relief*” by its very definition means relief which the plaintiff seeks at the interlocutory/interim stage and one that cannot wait for a later adjudication on affidavits or at the time of trial. It hence stands to reason that the plaintiff would be under an obligation to explore mediation as an alternative dispute redressal mechanism before institution of a suit where the plaintiff does not need such urgent interim relief. Leave for dispensation of the mandate of section 12-A would hence be necessary where the plaintiff cannot afford - in terms of time - to exhaust the remedy of mediation and only thereafter institute the suit.

42. Section 12-A was inserted into the Commercial Courts Act in 2018 with retrospective effect from 3.5.2018. The Statement of Objects and Reasons would make it evident that section 12-A was meant to be a compulsory provision.

43. In *Patil Automation* the Supreme Court viewed section 12-A as more than a mere procedural provision and further opined that the right to institute suit would fructify only when the pre-condition of section 12-A is fulfilled. The Supreme Court in fact declared section 12-A of the Commercial Courts Act to be mandatory and held that any suit instituted in violation of the mandate of section 12-A must be visited with rejection of the plaint under Order VII Rule 11 of the CPC.

44. The issue before the Division Bench of this Court in *Gavrill Metal Pvt. Ltd. vs. Maira Fabricators Pvt. Ltd.*; 2023 SCC OnLine Cal 2443 was whether the First Court was right in granting leave to the appellant/plaintiff for dispensation under section 12-A of the

Commercial Courts Act or whether the plaintiff should have been compelled to invoke mediation before filing of the suit. This judgment however does not consider *Patil Automation*. The view expressed by the Supreme Court in *Yamini Manohar vs. T.K.D. Keerthi*; *MANU/SCOR/133281/2023*, would also bind this Court in the construction of section 12-A of the Commercial Courts Act. The same may be said with regard to *Ramesh Co. V. Imperial Tubes Private Limited*; *MANU/WB/0514/2022*. In that case, the Court was not confronted with an application made by a defendant for revocation of the dispensation under section 12-A of the Commercial Courts Act. The issue was whether the Master, under the Original Side Rules of this Court, had the power to grant leave under section 12-A of the Commercial Courts Act. *Odisha Slurry Pipeline Infrastructure Ltd. v. IDBI Bank Ltd.*; *MANU/WB/1889/2022* was on the word “contemplate” as used in section 12-A of the Act but gave emphasis on the pleadings made in the plaint for making out a case of urgency.

45. The defendant’s application is allowed for the above reasons. The leave/dispensation granted by the Court on 13th October, 2023 under section 12-A of the Commercial Act, 2015, in relation to AS 6 of 2023, is revoked. The plaint filed in AS 6 of 2023 is rejected. GA 3 of 2023 is disposed of in terms of the above.

Later

46. Considering the reasons given in the judgment including the plaintiff choosing to withdraw the two previous admiralty suits the prayer for stay is considered and refused.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)