IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION NO.920 OF 2024
IN
COMMERCIAL SUMMARY SUIT NO.47 OF 2023

1. SHRADDHA SHELTERS PVT. LTD)
A company incorporated under the Companies)
Act, 1956, having its registered office at C-302,)
3rd Floor, Waterford Building, Juhu Galli,)
Above Navnit Motors, Andheri (West),)...APPLICANT/ORIGINAL
Mumbai-400 058) DEFENDANT NO.1

IN THE MATTER BETWEEN :

EKTA HOUSING PRIVATE LIMITED)
Having its address at 401, Hallmark Business)
Plaza, Bandra East, Mumbai-400 052)...PLAINTIFF

VS.

1. SHRADDHA SHELTERS PVT. LTD)
A company incorporated under the Companies)
Act, 1956, having its registered office at C-302,)
3rd Floor, Waterford Building, Juhu Galli,)
Above Navnit Motors, Andheri (West),)
Mumbai-400 058)
)
2. KIRTI KEDIA)
Having its address at Flat No.701, 7th)
Floor, Ciroc Tower, N S Rd. No.6, JVPD)
Scheme, Juhu, Mumbai-400 049)
)
3. RISHI TODI)
Having its address at 51/B, 5th Floor,)
Meher Apartments, Altamount Road,)
Mumbai-400 026.)...DEFENDANTS

WITH
INTERIM APPLICATION (L) NO. 2333 OF 2024
IN
COMMERCIAL SUMMARY SUIT NO.47 OF 2023

1. KIRTI KEDIA	)
Having its address at Flat No.701, 7th	)
Floor, Ciroc Tower, N S Rd. No.6, JVPD	)
Scheme, Juhu, Mumbai-400 049	)
	)
2. RISHI TODI	)
Having its address at 51/B, 5th Floor,	)
Meher Apartments, Altamount Road,	)
Mumbai-400 026.	)...APPLICANTS/
	ORG. DEFENDANTS NO.2 & 3

IN THE MATTER BETWEEN

EKTA HOUSING PRIVATE LIMITED	)
Having its address at 401, Hallmark Business	)
Plaza, Bandra East, Mumbai-400 052	)...PLAINTIFF

VS.

1. SHRADDHA SHELTERS PVT. LTD	)
A company incorporated under the Companies	)
Act, 1956, having its registered office at C-302,	)
3rd Floor, Waterford Building, Juhu Galli,	)
Above Navnit Motors, Andheri (West),	)
Mumbai-400 058	)
2. KIRTI KEDIA	)
Having its address at Flat No.701, 7th	)
Floor, Ciroc Tower, N S Rd. No.6, JVPD	)
Scheme, Juhu, Mumbai-400 049	)
3. RISHI TODI	)
Having its address at 51/B, 5th Floor,	)
Meher Apartments, Altamount Road,	)
Mumbai-400 026.	)...DEFENDANTS

WITH
INTERIM APPLICATION (L) NO. 21357 OF 2023
IN
COMMERCIAL SUMMARY SUIT NO.47 OF 2023

Mr. Gaurav Joshi, Senior Advocate a/w Ms. Pooja Kshirsagar, Mr. Laxman Jain and Ms. Trisha Choudhary, Advocates for the Applicant in IA No.920 of 2024 and Defendant No.1 in COMSS No.47 of 2023.

Mr. Chetan Kapadia, Senior Advocate a/w Mr. Yash Momaya, Mr. Krishkumar A Jain and Mr. Kalpesh A. Bandre i/b Mr. Ritesh K Jain Advocates for Applicant in IAL No.21357 of 2023 and for Defendants No.2 and 3 in COMSS No.47 of 2023.

Mr. Zal Andhyarujina, Senior Advocate a/w Mr. Jenil Shah i/b Mr. Ganesh and Co., Advocates for the Plaintiff in COMSS No.47/2023.

CORAM : ABHAY AHUJA, J.

RESERVED ON : 3rd JULY, 2024

PRONOUNCED ON : 11th NOVEMBER, 2024

ORDER

1. These Interim Applications have been filed by the Defendants in the suit seeking rejection of the Plaint under Order VII Rule (a) and/or (d) read with Section 151 of the Code of Civil Procedure, 1908 ("CPC"), and in the alternative to return the Plaint in exercise of power under Order VII Rule 10 of the CPC on the ground that the present Summary Suit was filed without complying with the mandatory provisions of Section 12-A of the Commercial Courts Act, 2015 (the "said Act").

2. The Plaintiff filed the Summary Suit on 28th July, 2023, in respect of a Development Management Agreement dated 28th December, 2017

executed between the Plaintiff and Defendant No.1 read with a Deed of Guarantee dated 15th February, 2018 executed between the Plaintiff and the Defendants No.1 to 3 on the basis of Guarantee Deed seeking recovery of a total outstanding amount payable under the Guarantee Documents of Rs.35,03,62,620/- (Rupees Thirty Five Crores Three Lakhs Sixty Two Thousand Six Hundred and Twenty Only) computed as per the particulars of claim annexed as Exhibit J along with interest on the said amount at the rate of 12% per annum from the date of filing of the captioned Suit until the date of payment / realisation thereof as stipulated in Clause 1.2 of the said Deed of Guarantee, consisting of a claim amount of (i) Rs.23,46,41,697/- (Rupees Twenty Three Crore Forty Six Lakhs Forty One Thousand Six Hundred and Ninety Seven only) towards the outstanding Development Manager's fees, (ii) Rs.4,19,76,000/- (Rupees Four Crores Nineteen Lakhs Seventy Six Thousand Only) towards the GST on the Development Manager's fees; (iii) Rs.7,00,00,000/- (Rupees Seven Crores Only) towards refund of the Security Deposit; and (iv) Rs.37,44,923/-(Rupees Thirty Seven Lakh Forty Four Thousand Nine Hundred and Twenty Three Only) towards interest payable on the said amount from the date of the Demand Notice i.e. 23rd June, 2023 till 26th July, 2023. Along with the Commercial Summary Suit, the Plaintiff has also filed Interim

Application (L) No.21357 of 2023 *inter alia* seeking reliefs, in the nature of an attachment of assets before judgment.

3. Mr. Gaurav Joshi, learned Senior Counsel appearing for Defendant No.1 and Mr. Chetan Kapadia, learned Senior Counsel appearing for the Defendants No.2 and 3 have submitted that the present Summary Suit does not contemplate any urgent relief which is evident from a bare perusal of the Plaint and Interim Application filed by the Plaintiff. Attention of this Court is drawn to paragraph No.11 of the Plaint and paragraphs No.26 to 29 of the Interim Application filed by the Plaintiff.

4. It is submitted that the Plaintiff has only made bald, vague and baseless averments in the Plaint and Interim Application which are general in nature without setting out any particulars or specific instances to demonstrate any urgency. That the Plaintiff has purported to create an artificial urgency, which is a mere eyewash and an after thought to evade compliance with and to get over Section 12-A of the said Act.

5. Mr. Gaurav Joshi, learned Senior Counsel for the Defendant No.1 has submitted that under Section 12-A of the said Act, it is stipulated that a Commercial Suit which does not contemplate any urgent interim relief shall not be instituted unless the Plaintiff exhausts the remedy of pre-institution mediation. That urgency, if any, has to be made out in the Plaint and the Interim Application filed by the Plaintiff. It is only on the basis of the averments in the Plaint and Interim Application alone that it is to be decided whether the suit contemplates any urgent reliefs.

6. Learned Senior Counsel submits that a perusal of the paragraphs of the Plaint and Interim Application makes it clear that the Interim Application filed by the Plaintiff is a mere eyewash and an attempt to wriggle out of complying with the mandate of Section 12-A of the said Act. That there is evidently no urgency in the present case.

7. It is submitted that the Plaintiff called upon the Defendant No.1 to pay the Development Management Fees for the first time by e-mails dated 23rd July 2020 and 15th August 2020. Thereafter, the Plaintiff did not take any action for three years. Three years after the aforementioned e-mails, the Plaintiff served a demand notice dated 23rd June 2023 upon the Defendants. It is submitted that this clearly

indicates that there is no urgency, much less a grave urgency which would warrant avoidance of the remedy of the pre-institution mediation as contemplated under Section 12-A of the said Act.

8. Mr. Gaurav Joshi, learned Senior Counsel for the Defendant No.1, has drawn the attention of this Court to a decision of the Hon'ble Supreme Court in the case of ***Patil Automation Private Limited Vs. Rakheja Engineers Private Limited***[1], where the Hon'ble Supreme Court after considering the provisions of Section 12-A of the said Act as well as the CPC, has held that Section 12-A of the said Act has to be mandatorily complied with and non-compliance with Section 12-A forms a ground for rejection of the Plaint under Order VII Rule 11 of the CPC, further holding that the power to reject a Plaint under Order VII Rule 11 of the CPC for non-compliance with Section 12-A can be exercised by a Commercial Court *suo motu.*

9. Learned Senior Counsel would submit that the mandatory procedure under Section 12-A has not been followed. That only genuine urgency is excluded. That, since the provision of Section 12-A as noted above is mandatory, even if the said provision is harsh, it has to be followed. Learned Senior Counsel refers to the decision of the

1 (2022) 10 SCC 1

Hon'ble Supreme Court in the case of ***Bihari Chowdhary and Another Vs. State of Bihar and others***[2] submitting that the Hon'ble Supreme Court while interpreting Section 80 of the CPC to be mandatory held that a suit preferred before the expiration of two months next after notice was not maintainable. That, where the language of the statute is clear and unambiguous, Court must give effect to it without admitting any implication or exception. Mr.Joshi would submit that like Section 80 of the CPC, where the Section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of which the suit is proposed to be filed and if it is found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person who issued the notice to institute the suit involving considerable expenditure and delay, the mandatory provision of Section 12-A of pre-institution mediation, is to afford an opportunity to settle the claim to avoid unnecessary litigation involving expenditure and delay.

2 (1984) 2 SCC 627

10. Mr.Joshi would submit that the window for genuine urgency cannot be used as a mechanism to override Section 12-A.

11. Learned Senior Counsel has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Yamini Manohar Vs. T.K.D. Keerthi*** [3], submitting that in the said case the Hon'ble Supreme Court has further elaborated on the meaning of the term "contemplate urgent relief" used in Section 12-A of the said Act and has held that the Commercial Court should examine the nature and 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 said Act. The Court also highlighted that camouflage and guise to bypass the statutory mandate of pre-institution mediation should be checked when deception and falsity is apparent or established.

12. Learned Senior Counsel has also relied upon the decision of this Court in the case of ***Future Corporate Resources Pvt. Ltd Vs. Edelweiss Special Opportunities Fund and Anr***[4], submitting that Section 12-A cannot be bypassed by simply filing an application for interim relief.

3 2023 SCC OnLine SC 1382
4 2022 SCC OnLine Bom 3744

13. The decision in the case of ***Kulchand Jogani Vs. Shree Vardhan Investments***[5]*,* of this Court has also been relied upon by the learned Senior Counsel for the Defendant No.1, submitting that the test is whether the Suit contemplates urgent reliefs and not whether the Plaintiff seeks urgent relief.

14. Mr.Joshi, learned Senior Counsel, would submit that a genuine case has to be made out on the basis of pleadings. The learned Senior Counsel for the Defendant No.1 submits that in an identical case in the case of ***Skipper Limited Vs. Prabha Infra Private Limited***[6]*,* the Hon'ble Calcutta High Court has supplemented the law laid down in the case of *Patil Automation Private Limited Vs. Rakheja Engineers Private Limited (supra)* and *Yamini Manohar Vs. T.K.D. Keerthi (supra),* observing that Plaintiff's contemplation as to urgent relief shall be borne out in the Plaint. Learned Senior Counsel would submit that the Hon'ble Calcutta High Court observed that on a holistic reading of the Plaint, there was no statement made to satisfy the contemplation of any urgent interim relief and that the averments therein as in the present case, were only bald and even devoid of bare minimum particulars. Learned Senior Counsel would submit that it is apparent upon a reading of the Plaint

5 2022 SCC OnLine Bom 4752
6 2023 SCC OnLine Cal 5482

and examining the nature and subject matter of the Suit and the cause of action that the statements made in the Plaint by the Plaintiff were only to wriggle out and get over the provision of Section 12 A of the said Act.

15. Mr. Gaurav Joshi, learned Senior Counsel would submit that the Plaint therefore be rejected.

16. Complementing the submissions made by Mr. Gaurav Joshi, learned Senior Counsel, Mr. Chetan Kapadia, learned Senior Counsel for Respondents/Defendants No.2 and 3, has drawn the attention of this Court to a decision of this Court in the case of ***Red Bricks Pvt. Ltd and Ors. Vs. M/s. Green Square***[7], submitting that this Court after considering the decision of the Hon'ble Supreme Court in the case of *Patil Automation Private Limited Vs. Rakheja Engineers Private Limited (supra),* had in a similar case, rejected the Plaint as being barred by law, submitting that in that case also, as in this case, since the Plaintiff had filed the Suit without complying with the statutory requirement laid down under Section 12-A of the said Act this Court, allowed the Interim Application rejecting the Plaint however granting liberty to the Plaintiff to avail of remedies in law.

7 IA(L) No.36105 of 2023 decided on 24th January, 2024.

17. Mr.Kapadia would submit that after July 2020 and August 2020, there had been not a word. And that the demand notice of 23rd June 2023, three years later, has been denied by the Defendants. Thereafter, the suit has come to be filed on 26th July 2023.

18. Mr.Chetan Kapadia, learned Senior Counsel for the Respondents/Defendants No.2 and 3 also submits that paragraph 11 of the Plaint as well as paragraphs 26 and 27 of the Interim Application merely repeat the language of the provisions of Order XXXVIII Rule 5 of the CPC which is not adequate. It is submitted that the aforesaid paragraphs do not meet the requirements of Order XXXVII Rule 5 of the CPC. That, the said paragraphs are only a ruse to defeat the mandatory legal procedure of pre-institution mediation under Section 12A of the said Act, which ought not to be permitted by this Court.

19. Mr. Chetan Kapadia, learned Senior Counsel has further submitted that no case for urgency has been made out either in the Plaint or in the Interim Application filed by the Plaintiff and that this is a clear case where the Plaintiff has purported to create an artificial urgency without any particulars of the specific urgency and only to evade compliance with Section 12-A of the said Act. That, therefore,

this Court reject the Plaint under Order VII Rule 11 of the CPC for non-compliance with Section 12-A of the said Act submitting that any Suit instituted without complying with the mandatory provisions of Section 12-A of the said Act must be visited with rejection of the Plaint under Order VII Rule 11 of the CPC.

20. On the other hand, Mr. Zal Andhyarujina, learned Senior Counsel for the Plaintiff and for the Respondent in the Interim Applications opposes the aforesaid submissions.

21. Mr.Zal Andhyarujina, learned Senior Counsel for the Plaintiff, would submit that the suit is a summary suit for recovery of Rs.35 crores of development management fees in respect of a development project. That, the interim application filed on the same date as the suit, is in the nature of an attachment before judgment, and that, not only the suit but also the interim application as well as the documents contemplate urgent interim relief. That Section 12-A of the said Act says that the suit must contemplate urgent relief if it is to be filed without undergoing the compulsory mediation. That the entire argument relates to a dispute with regard to what it means to say suit must contemplate urgent relief. Learned Senior Counsel would submit that, as has been settled in the decision in the case of *Yamini Manohar Vs.*

T.K.D. Keerthi (supra), that the question as to whether urgent interim relief is contemplated, has to be analyzed from the point of view of the Plaintiff, on the basis of the contents of the plaint, the prayers therein and the documents filed therewith. That, undoubtedly and admittedly, plaint expressly pleads about urgency in paragraph 11 of the plaint. Learned Senior Counsel submits that in the interim application, which is filed on the very same date, there is an elaborate pleading on urgency. That, the real question is whether pleadings in suit contemplate urgent relief. The Court must consider the question as if it is a question being considered for the grant of urgent relief. Learned Senior Counsel would submit that the Court only has to conduct a limited exercise which makes out a *prima face* case, and that, the party which alleges deception or falsity or fraud, has to demonstrate the same and that cannot be pushed on to the defending party. That, the burden, infact, is on the party, who alleges that there is no urgency to establish the fact. Mr.Andhyarujina would submit that the Defendant no.1 and the Plaintiff entered into a Development Management Agreement, however, the documents on which the suit is based, is a Deed of Guarantee dated 15th December 2018, which is between the Plaintiff and the Defendants no.1, 2 and 3. That, the Defendants no.2 and 3 are the guarantors.

22. Mr.Andhyarujina would further submit that the first allegation that has been made on behalf of the Defendants is that there has been a delay in approaching the Court. Learned Senior Counsel would submit that the facts are to the contrary.

23. It is submitted that on 23rd July 2020, payment was made by the Plaintiff to the Defendant. That, on 15th August 2020, Plaintiff renewed the request for payment to which Defendant no.3 responded saying we are in the process of making payment. That, further demand notice was issued on 23rd June 2023 which was replied on 21st July 2023 which said that the Plaintiffs were not entitled for money and infact Plaintiff was required to make payment, and that, if the Plaintiff persisted for money, the Defendants would sue against them. Mr.Andhyarujina would submit that there is hardly any delay, as both the Plaint and the Interim Application came to be filed on 28th July 2023. Mr.Andhyarujina submits that therefore, the question is, what is the test to determine whether the suit contemplates urgency.

24. Mr.Zal Andhyarujina, learned Senior Counsel would submit that as per the test laid down by the Hon'ble Supreme Court of India only when the Defendants are able to prove apparent deception and falsity in the Plaintiff's case only then can the Hon'ble Court go into the fact

whether there is an urgency or not. That even otherwise, the facts set out by the parities clearly show that there is an urgency in the captioned Suit. That the Defendants have evidently failed to show any deception/falsity whatsoever in the case of the Plaintiff. In fact, the captioned Applications filed by the Defendants do not even contain sufficient pleadings in this regard. Learned Senior Counsel submits that the captioned Applications therefore, ought to be dismissed.

25. Mr.Zal Andhyarujina, learned Senior Counsel would submit that this is a well-founded judicial approach as otherwise in every case there can be a false dispute raised to delay and defeat the summary proceedings, as is sought to be done by the Defendants in the present case. Learned Senior Counsel would submit that, if the Defendants' interpretation is accepted then the same shall have the effect of defeating the purpose and intent of Order XXXVIII of the CPC as well as the Commercial Courts Act.

26. Mr.Zal Andhyarujina, learned Senior Counsel would submit that the captioned Applications filed by the Defendants are nothing but an attempt to delay and obstruct the hearing of the Plaintiff's application for urgent reliefs.

27. Mr.Andhyarujina has placed heavy reliance upon the decision of the Hon'ble Supreme Court in the case of *Yamini Manohar Vs. T.K.D. Keerthi (supra)* to submit that unless and until the Plaintiff is bound to have indulged in deception or falsity by use of clever drafting, only to create an illusion of urgent interim relief, only then the Court can insist upon compliance with the mandatory requirement of pre-institution mediation under Section 12-A of the said Act, by rejecting the plaint. Learned Senior Counsel has submitted that, in the facts of this case, neither there is any evidence demonstrating deception or falsity or clever drafting, only to create an illusion of urgent interim relief, nor is there any such allegation made by the Defendants. It is submitted that the judgment in the case of *Patil Automation Private Limited Vs. Rakheja Engineers Private Limited (supra)* expressly leaves open what it is to say that the suit contemplates urgency and that the question is not decided in that case but which has been answered in the case of *Yamini Manohar Vs. T.K.D. Keerthi (supra)* and refers to paragraphs – 4, 5, 32 of the said decision and submits that the test is whether plaint and documents plead urgent relief and if urgent relief is claimed, then it passes muster which learned Senior Counsel reiterates is a limited exercise. Mr.Andhyarujina has also relied upon the decision of this Court (Coram : Manish Pitale, J.) in the case of ***Chemco Plast - In the***

matter between - Chemco Plastic Industries Pvt. Ltd. vs. Chemco Plast[8] to submit that this Court in the case of a commercial suit praying for relief of permanent and mandatory injunction to restrain the Defendant from infringing the registered trade mark of the Plaintiff and also from passing off its goods as those of the Plaintiff, has relied on this very decision in the case of *Yamini Manohar Vs. T.K.D. Keerthi (supra),* where this Court has held that if the Plaintiff is bound to have indulged in deception or falsity by use of clever drafting, only to create an illusion of urgent interim relief, the Court would insist on compliance of mandatory requirement of Section 12-A of the said Act. Learned Senior Counsel would submit that, as noted above, since there is no such allegation of deception or falsity, the question of insistence upon the compliance of Section 12A would not be justified, in as much as, on the basis of pleadings, there are clearly, averments in the plaint as well as in the interim application and upon a holistic reading of the same as well as the documents, the suit does contemplate urgent interim relief.

28. Mr.Andhyarujina has also relied upon a decision of this Court in the case of *Kulchand Jogani Vs. Shree Vardhan Investments (supra),* and submits that in the said decision, while deciding a commercial

8 Interim Application (L) No.10014 of 2024 with Interim Application (L) No.23077 of 2023 in Commercial IP Suit No.80 of 2024 decided on 10th June 2024

summary suit the Court has considered the meaning of the term *'contemplate urgent interim relief'* in paragraphs 30 to 31 as under :

> *"30. In a given case, the Court may be justified in embarking upon an inquiry as to whether there is an element of justifiability in the claim for urgent interim relief or such a prayer is a mere subterfuge to overcome the bar under Section 12A. At the same time, the scope of such an inquiry would be extremely narrow. Such an inquiry cannot partake the character of determination of the prayer for interim relief on merits. It cannot be urged that if the Court is disinclined to grant interim relief then the justifiability of the institution of the suit, without pre-institution mediation, can itself be questioned. Therefore, the Court may be called upon to steer clear of two extremes.*
>
> *31. In my considered view, the proper course would be to asses whether there are elements which prima facie indicate that the suit may contemplate an urgent interim relief irrespective of the fact as to whether the plaintiff eventually succeeds in getting the interim relief. In a worst case scenario,* where an application for interim relief is presented without there being any justification whatsoever for the same, to simply overcome the bar under Section 12A, the Court may be justified in recording a finding that the suit in effect does not contemplate any urgent interim relief and then the institution of the suit would be in teeth of Section 12A notwithstanding a formal application.*"*

29. Learned Senior Counsel has submitted that on a conspectus of the above cases, the following important principles of law as to the meaning and scope of the words 'contemplate urgent interim reliefs' and the standard of enquiry to be adopted by Courts when determining whether a suit "contemplates urgent interim relief" become apparent:

(a) That the role of the Commercial Court in deciding whether a commercial suit is liable to be rejected for non-compliance of Section 12-A is a limited one.

(b) That the Commercial Court is required to undertake a precise and limited exercise i.e.,

i. The Court must look at whether the plaint, documents and facts indicate the need for an urgent interim relief.

ii. That each individual case should also be appreciated on the basis of the pleadings and reliefs sought by the Plaintiff. The facts and circumstances must be considered holistically from the standpoint of the Plaintiff.

iii. If it is *ex-facie* apparent that the prayer for urgent interim relief is a disguise and/ or mask and/or there is deception and / or falsity and/or camouflage and / or guise to wriggle out of and/ or bypass the statutory mandate of pre-litigation mediation, the suit is liable to be rejected.

iv. The Court must consider the facts and circumstances of the case holistically from the standpoint of the Plaintiff.

v. There should be no ascertainment on the merits of the matter at this stage.

(c) The test for grant of interim reliefs on the three well-known principles of *prima facie* case, irreparable harm and injury and balance of convenience should not be applied while dismissing the suit in such a scenario and that mere denial of interim reliefs would not justify rejection of plaint.

(d) An inquiry into as to whether the Plaintiff has approached the Court after some 'delay' is not a ground to conclude that the suit does not.... 'contemplate urgent interim relief". The question of delay and its effect on entitlement of interim relief involves entering into the merits of the matter, which is not a permissible inquiry under Section 12A.

30. It is, therefore, submitted that upon the correct inquiry in the manner as contemplated above, the captioned Suit contemplates urgent interim relief, the captioned Applications ought to be dismissed.

31. Learned Senior Counsel submits that the cause of action for filing the captioned Suit arose when the Defendant No. 1, for the first time, by its letter dated 21st July 2023 (Exhibit I), refused to pay the amounts due and payable to the Plaintiff and instead alleged that the Plaintiff had failed and neglected to perform its obligations. In view

thereof, the Plaintiff justifiably believed that the Defendants may alienate and/or dispose of and/or whittle away their assets leaving the Plaintiff high and dry and unable to recover its lawful dues. It is on this account that the Plaintiff filed the captioned Suit and the Interim Application therein.

32. It is submitted that the relevant pleadings in the Plaint and the Plaintiff’s Interim Application (L) No.21357 of 2023 which ‘contemplate urgent relief’ are as under :

(i) In the Plaint: Paragraph 11 at Page 31 of the Plaint and Paragraph 19 (b) to (f) at Pages 34 and 35 of the Plaint, the relevant extracts of which are reproduced herein below:

> "11. The Plaintiff has a serious apprehension that in order to frustrate the rights of the Plaintiff, the Defendants will attempt to alienate and/or dispose off their assets in order to delay and/or obstruct and/ or defeat and / or frustrate and / or deprive the Plaintiff of its lawful dues. The Plaintiff is, thus, entitled to reliefs such as disclosure and other protective injunctive reliefs and interim reliefs against the Defendants, for which a separate interim application is being filed. The Plaintiff submits that the Plaintiff is seeking urgent interim reliefs in the present matter and therefore, the requirement of pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 does not apply.
>
> 19. PRAYERS
>
> The Plaintiff therefore prays:
> …….

(b) That pending the hearing and final disposal of the captioned Suit, this Hon'ble Court may be pleased to direct the Defendants to deposit a sum of Rs. 35,03,62,620/- (Rupees Thirty Five Crores Three Lacs Sixty Two Thousand Six Hundred Twenty Only) (as per Particulars of Claim annexed at Exhibit 'J' to the Plaint) with this Hon'ble Court;

(c) That pending the hearing and final disposal of the captioned Suit, in the event of the Defendants failing to comply with prayers (b) as may be directed by this Hon'ble Court, then this Hon'ble Court be pleased to order the attachment before judgment, of the assets of the Defendants including all their movable and immovable assets;

(d) That pending the hearing and final disposal of the captioned Suit, this Hon'ble Court may be pleased to restrain the Defendants from selling, transferring, alienating, encumbering, in any or manner whatsoever, or otherwise dealing with or creating any third party right, title or interest, whether directly or indirectly, in respect of their movable and immovable assets, including the present and future book debts, receivables, bills, claims and loan assets of the Defendants;

(e) That pending the hearing and final disposal of the captioned Suit, this Hon'ble Court may be pleased to direct the Defendants to disclose on an affidavit before this Hon'ble Court their entire assets and properties, both movable and immovable, including present and future book debts, receivables, bills, claims and loan assets of the Defendants;

(f) That pending the hearing and final disposal of the captioned Suit, this Hon'ble Court be pleased to appoint a receiver to take charge and possession of the assets, properties and receivables of the Defendants including present and future book debts, receivables, bills, claims and loan assets…”

(ii) It is further submitted that the relevant pleadings in the Plaintiff's Interim Application (L) No. 21357 of 2023 in paragraphs 26 to 29 at pages 18 to 20 and in paragraph 34 at pages 21 to 22 which contemplate urgent relief are as under :-

> "26. The aforesaid clearly reflects that the Defendants are attempting to bypass the rights of the Applicant and the commitments given to the Applicant. There is serious apprehension that the Defendant shall deal with and dispose off its assets in a manner which will defeat the claim/debt owed by the Defendants to the Applicant and will evade and for defeat the final order/decree that would be passed in favour of the Applicant.
>
> 27. The Applicant therefore requires interim protection from this Hon'ble Court in order to ensure that its *bona-fide* claim against the Defendants does not become infructuous and that the assets of the Defendants do not become insufficient to satisfy the Claim Amount along with interest on the said Amount (calculated at the rate of 12% per annum from the date of filing of the captioned Suit until the date of payment realisation thereof in terms of the Guarantee Documents) owed by the Defendants to the Applicant.
>
> 28. The Applicant states that it has a bona- fide debt/ claim against the Defendants and the same cannot be allowed to be defeated by the Defendants. Further, the Applicant apprehends that the Defendants may in the aforesaid process, whittle away its assets and receivables and would cause grave prejudice, which will be adversarial to the rights of the Applicant under the Guarantee Documents. Due to the aforesaid circumstances, the Applicant eventually will be unable to enforce the decree and recover its dues, when such decree is passed as the Applicant has an extremely good case on merits.
>
> 29. The Applicant has a serious apprehension that in order to frustrate the rights of the Applicant, the Defendants will attempt to alienate and/ or dispose off their assets of in order to delay and/or obstruct and for defeat and/ or frustrate and/or deprive the Applicant of its lawful dues.

34. In view of the facts and circumstances of the case, it is most respectfully prayed that pending the hearing and final disposal of the captioned Suit:

a) this Hon'ble Court be pleased to direct the Defendants to deposit a sum of Rs. 35,03,62,620/- (Rupees Thirty Five Crores Three Lacs Sixty Two Thousand Six Hundred Twenty Only) (as per Particulars of Claim annexed at Exhibit 'J' to the Plaint) with this Hon'ble Court;

b) this Hon'ble Court be pleased to order the attachment before judgment, of the assets of the Defendants including all their movable and immovable assets;

c) this Hon'ble Court may be pleased to restrain the Defendants from selling, transferring, alienating, or encumbering, in any manner whatsoever, or otherwise dealing with or creating any third party right, title or interest, whether directly or indirectly, in respect of their movable and immovable assets, including the present and future book debts, receivables, bills, claims and loan assets of the Defendants;

d) this Hon'ble Court be pleased to appoint a receiver to take charge and possession of the assets, properties and receivables of the Defendants including present and future book debts, receivables, bills, claims and loan assets…..;

33. It is submitted that moreover, after filing of the above suit, the Defendant No.1 has confirmed that the Defendants have sold the remaining flats in the building in April-June-July, 2023. Therefore, the apprehension of the Plaintiff that the Defendants will dispose of the assets came true. As laid down by the Hon'ble Supreme Court and this Court, the Courts must look at whether the plaint, documents and facts

indicate the need for an urgent interim relief. It is submitted that hence, it is apparent that the Plaintiff's apprehensions were well founded and that the Plaintiff was justified in filing the captioned Suit which contemplated urgent interim reliefs.

34. In the aforesaid circumstances, it is submitted that on the basis of the Plaint, documents, facts and circumstances of the case, considered holistically from the standpoint of the Plaintiffs, show and indicate the need for urgent interim relief. Mr.Andhyarujina would submit that the precise and limited exercise that this Court can undertake in accordance with the principles set out above and in accordance with the test laid down in the aforesaid cases ought to be decided in favour of the Plaintiff and the captioned Applications therefore ought to be dismissed and in any event, the Defendants have failed to make out a case in the captioned Applications.

35. Mr.Zal Andhyarujina, learned Senior Counsel would submit that therefore the Defendants' captioned Applications are misplaced and misconceived. The Defendants have failed to make out a case in the

captioned Applications for return/rejection of Plaint under Order VII Rule 10 and / or 11 of the CPC for non-compliance with the provisions of Section 12-A of the said Act, 2015 by the Plaintiff.

36. Mr.Andhyarujina would submit that in the captioned Applications, the Defendants have contended that an artificial urgency has been created by the Plaintiff in the Plaint and the same is nothing but an eyewash to evade the mandate of Section 12-A and that the Plaintiff's application for urgent interim reliefs is a mere subterfuge to overcome the bar under Section 12- A.

37. In response learned Senior Counsel has submitted that as explained hereinabove, while the Plaintiff has pleaded and set out a urgency in its Plaint and Plaintiff's Interim Application (L) No. 21357 of 2024, the Defendants have failed to set out any details and / or particulars whatsoever to explain the so-called "artificial" urgency created by the Plaintiff. The Defendants have also failed to explain why the Plaintiff's Interim Application is a "mere subterfuge". It is therefore submitted that the Defendants' case in the captioned Applications consist of mere ritual incantations which are entirely baseless and unsubstantiated.

38. Mr.Andhyarujina submits that as laid down in the judgments above, there should be *ex-facie* falsity and/or deception in the suit and the onus lies on the Defendants to establish the same which the Defendants have clearly failed to discharge and that on this ground alone, the Defendants' Applications deserve to be dismissed.

39. Mr.Andhyarujina would further submit that in paragraph 8 of the note dated 19th April 2024 tendered on behalf of the Defendants No.1 and 2, the Defendants No.1 and 2 have contended that there is no urgency in the present case because the Plaintiff did not take any action for three years after issuing emails dated 23rd July 2020 and 15th August 2020 and therefore, there is no urgency much less a grave urgency which would warrant circumvention of Section 12-A in the present case. In this regard, learned Senior Counsel has submitted as under:

(a) As laid down in the judgment of *Chemco Plast - In the matter between – Chemco Plastic Industries Pvt. Ltd. vs. Chemco Plast (supra)*, this Hon'ble Court has made it clear that the question of delay is a matter concerning the merits of the grant or refusal of interim reliefs to the plaintiff and that at the stage of deciding whether Section 12-A has been complied with or not, the Court shall not enter into the said enquiry.

(b) Without prejudice to the aforesaid and in any event, when the Plaintiff made its first demand by email dated 23rd July 2020, the Defendants did not dispute their liability.

(c) Thereafter, when the Plaintiff issued email dated 15th August 2020, once again following up for its dues, the Defendant No.3 issued an email dated 15th August 2020, merely sending out a holding response and in fact stated that they were in the process of releasing the Development Management Fees. That, in any event, the Defendant No. 3 did not refuse to pay the Plaintiff and therefore, there was no urgent need to file any recovery proceedings against the Defendants at that stage.

(d) Further, Defendant No. 3's email dated 15th August 2020 must be juxtaposed with Defendant No. 1's letter dated 21st July 2023, in which for the first time Defendant No.1 denied its liability to pay the dues of the Plaintiff, necessitating filing of the Suit.

(e) Mr.Andhyarujina would submit that therefore the captioned Suit having been filed within a period of 1 week after Defendant No.1's letter dated 21st July, 2023, it can hardly be suggested that the Plaintiff delayed in approaching this Court.

40. I have heard the learned Senior Counsel and considered the rival contentions. It is to be recorded that the arguments in these applications were concluded on 3rd July 2024 and liberty was granted to the learned Counsel to file written submissions within a period of two weeks. While written submissions on behalf of the Defendant no.1 were filed on 18th July 2024, the written submissions on behalf of the Respondent / Plaintiff were e-filed on 26th July 2024.

41. Before proceeding further, it would be useful to quote Section 12-A of the said Act as under :

> *"12A. Pre-Institution Mediation and Settlement—(1) A suit, <u>which does not contemplate any urgent interim relief</u> 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.*
>
> *(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."

(emphasis supplied)

42. In *Patil Automation Private Limited vs. Rakheja Engineers Private Limited (supra),* the Hon'ble Supreme Court has clearly observed that Section 12-A of the said Act is mandatory and non-compliance with Section 12-A is a ground for rejection of the plaint under Order 7 Rule 11 of the CPC and that the power to reject a plaint under the said Order and Rule of the CPC for non-compliance with Section 12-A can be exercised by a Court *suo motu*. Paragraphs 65, 71 to 74, 76 to 80, 83 to 85, 87 to 91.4 and 92 to 94.3, 99, 99.1 to 99.4, 100, 113, 113.1

to 113.3 are usefully quoted as under :

> *“**65.** The period of mediation being three months and the possibility of an extension by two months, with the consent of both sides, is the subject-matter of Rule 3. The role of the mediator is carved out in Rule 5 to be one to facilitate the voluntary resolution of the dispute and assist the parties in reaching a settlement. Rule 6 provides for authority with the party to either appear personally or through his duly authorised representative or counsel. The significance of being represented by counsel in pre-litigation mediation, cannot but be underlined. Apart from the fact that the legislature must be treated as aware, that, both, public interest, as also the interest of the parties, lies in an expeditious disposal of, what is described as, commercial litigation, with a sublime goal of fostering the highest economic interests of the nation, allowing the counsel to appear before the mediator is intended to facilitate in arriving at a settlement, which is legally valid and otherwise just.*
>
> ***71.** It does not require much debate to conclude that there is a direct relationship between ease of doing business and an early and expeditious termination of disputes, which may arise in commercial matters. The speed with which the justice delivery system in any country responds to the problem of docket explosion, particularly in the realm of commercial disputes can be regarded as a very safe index of the ease of doing business in that country. The Act, therefore, is, in the said sense, a unique experiment to push the pace of disposal of commercial disputes. It is in this background that the Court must approach the issue of whether Section 12-A has been perceived as being a mandatory provision. We say this for the reason that the decisive element in the search for the answer, in the interpretation of such a statute, must be to ascertain the intention of the legislature. The first principle, of course, must be the golden rule of interpretation, which means, the interpretation in conformity with the plain language, which is used. There cannot even be a shadow of a doubt that the language used in Section 12-A is plainly imperative in nature. However, we will not be led by the mere use of the word “shall”.*

72. Even going by the sublime object of the Act, as we have unravelled, we are fully reinforced in our opinion that the pre-institution mediation is intended to produce results, which has a direct bearing on the fulfillment of the noble goals of the lawgiver. It is apparent that the legislature has manifested a value judgment. We are not called upon to decide the constitutionality of the provision. Parliament is presumed to be aware of the felt necessities of the times. It best knows the manner in which the problems on the ground are redressed. Section 89CPC, does contemplate mediation ordered by a Court. However, it must be noticed that Section 12-A contemplates mediation without any involvement of the Court as it is done prior to the institution of the suit.

73. The potential of Section 89CPC for resolving disputes has remained largely untapped on account of the fact that mediation has become the product of volition of the parties. Courts, no doubt, have begun to respond positively. However, there was a pressing need to decongest the trial courts, in commercial matters in particular, as they bear the brunt of docket explosion.

74. It is noteworthy that Section 12-A provides for a bypass and a fast-track route without for a moment taking the precious time of a court. At this juncture, it must be immediately noticed that the lawgiver has, in Section 12-A, provided for pre-institution mediation only in suits, which do not contemplate any urgent interim relief. Therefore, pre-institution mediation has been mandated only in a class of suits. We say this for the reason that in suits which contemplate urgent interim relief, the lawgiver has carefully vouchsafed immediate access to justice as contemplated ordinarily through the courts. The carving out of a class of suits and selecting them for compulsory mediation, harmonises with the attainment of the object of the law. The load on the Judges is lightened. They can concentrate on matters where urgent interim relief is contemplated and, on other matters, which already crowd their dockets.

76. Under Section 12-A, all that is provided is, a cooling period wherein the parties are to be referred for mediation at the hands of skilled mediators. While on mediation, we may *notice the following views expressed by this Court in the judgment reported in Vikram Bakshi v. Sonia Khosla [Vikram Bakshi v. Sonia Khosla, (2014) 15 SCC 80] : (SCC pp. 85-87, paras 16 & 19)*

"16. According to us it would have been more appropriate for the parties to at least agree to resort to mediation as provided under Section 89 CPC and make an endeavour to find amicable solution of the dispute, agreeable to both the parties. One of the aims of mediation is to find an early resolution of the dispute. The sooner the dispute is resolved the better for all the parties concerned, in particular, and the society, in general. For parties, dispute not only strains the relationship but also destroys it. And, so far as society is concerned it affects its peace. So what is required is resolution of dispute at the earliest possible opportunity and via such a mechanism where the relationship between individual goes on in a healthy manner. Warren Burger, once said:

'The obligation of the legal profession is … to serve as healers of human conflict … we should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about.'

MEDIATION is one such mechanism which has been statutorily brought into place in our justice system. It is one of the methods of alternative dispute resolution and resolves the dispute in a way that is private, fast and economical. It is a process in which a neutral intervenor assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. It embraces the philosophy of democratic decision-making [Alfin, et al., Mediation Theory & Practice (2nd Edn., 2006) Lexis Nexis].

19. This Bench is of firm opinion that mediation is a new dimension of access to justice. As it is one of the best forms, if not the best, of conflict resolution. The concept of justice in mediation is advanced in the oeuvres of Professors Stulberg, Love, Hyman, and Menkel-Meadow (Self-Determination Theorists). Their definition of justice is drawn primarily from *the exercise of party self-determination. They are hopeful about the magic that can occur when people open up honestly and empathetically about their needs and fears in uninhibited private discussion. And, as thinkers, these jurists are optimistic that the magnanimity of the human spirit can conquer structural imbalances and resource constraints.*

19.3. Professor Carrie Menkel-Meadow presents a related point of view in making the case that settlement has a political and ethical economy of its own and writes:

'Justice, it is often claimed, emerges only when lawyers and their clients argue over its meaning, and, in turn, some authoritative figure or body pronounces on its meaning, such as in the canonical cases of the late twentieth century … For many years now, I have suggested that there are other components to the achievement of justice. Most notably, I refer to the process by which we seek justice (party participation and empowerment, consensus rather than compromise or command) and the particular types of outcomes that might help to achieve it (not binary win-lose solutions, but creative, pie-expanding or even shared solutions).' "

(emphasis in original and supplied)

77. *On the one hand, the staunchest criticism against mediation has been that it is opposed to the fundamental principle of access to justice. It is in keeping with the traditional notions of the right of a person to have a dispute adjudicated by an impartial and a trained Judge. On the other hand, as noticed by this Court in Vikram Bakshi [Vikram Bakshi v. Sonia Khosla, (2014) 15 SCC 80] , mediation offers a completely new approach to attaining the goal of justice. A win-win situation resulting from assigning a greater role to the parties themselves, with no doubt, a spirit of accommodation represents a better and what is more in the era of docket explosion, the only meaningful choice.*

78. *The realisation has been growing over a period of time, that formal court rooms, long drawn-out proceedings, procedural wrangles, mounting and crippling costs, delay, which never wanes but only increases with the day that at least, in certain categories of cases, mediation can be the way* *out. It, undoubtedly, requires a complete change in the mindset. The change in approach, undoubtedly, can be achieved only if the litigants become aware of its benefits in comparison with the great disadvantage in waiting in the serpentine queue for the day of reckoning to arrive in a court of law. The role of the Bar is vital in taking mediation forward.*

79. *With increase in population and a skewed Judge-population ratio and a huge spiralling of litigation in the courts, it is logical, just and imperative, to attempt and persevere in out of the box thinking. We can no longer afford to remain in the past. A clean break with the past is urgently needed. What was a mere writing on the wall as early as in the last decades of the previous century has become the harsh reality. It is important that the courts also adapt to the changing times. At least when Parliament has decided to move ahead, it becomes the court's duty not to greet it with undue scepticism. It becomes necessary to fulfil the intention of Parliament by realising the true role of judiciary.*

80. *A perusal of the Act and the Rules reveal the existence of a complete Code. Mediation contemplated under Section 12-A and the Rules, may not succeed in every case. To begin with, the figures may not be reassuring but even if success does not elude the mediator, in a few of the cases, a good part of the object of the legislature, would stand achieved. Such is the condition of the docket explosion perceived particularly in commercial disputes. It is not difficult to appreciate the concern of the people through their elected representatives. Particularly with the lowering of the monetary limit from Rupees one crore to Rupees three lakhs, there would be a stupendous load on the courts to achieve the timeline and dispose of commercial matters by the conventional mode of adjudication, even with the amended provisions of the CPC as applicable under Section 16 of the Act.*

83. *We may proceed on the basis that if the suit is brought without complying with Section 12-A, where no urgent interim relief is sought, may not in one sense, affect the legal right of the defendant. But this argument overlooks the larger picture which is the real object of the law. This object is not to* *be viewed narrowly with reference to the impact on the parties alone. This is apart from also remembering that if the parties were to exhaust mediation under Section 12-A, the opposite side may be, if mediation is successful, saved from the ordeal of a proceeding in court, which, undoubtedly, would entail costs, whereas, the mediation costs, as we have noticed, is minimal, and what is more, a one-time affair, and still further, to be shared equally between the parties. Each time the plaintiff is compelled to go in for mediation under Section 12-A there is a ray of hope that the matter may get settled. The chief advantage and highlight of mediation is that it is a win-win for all sides, if the mediation is successful. Therefore, it cannot, in one sense, be argued that no legal right of the defendant is infracted. Further, on the same logic, Section 80(1) CPC and Section 69 of the Partnership Act would not be mandatory. This is however not the case.*

***84.** One of the arguments of Shri Saket Sikri is that, if a plaint is rejected under Order 7 Rule 11, the plaintiff would be saddled with the deprivation of the court fee paid. He would contend that this aspect may be considered, when the Court decides the question as to whether the provision is mandatory or not. Whenever a plaint is rejected on the ground that the suit is barred under any law, this consequence is inevitable. [We may only, in this context, observe, that under Section 4-A of the Kerala Court Fees and Suits Valuation Act, 1959, the plaintiff needs to pay only one-tenth of the total court fee at the time of institution of the suit. The balance is to be paid not later than fifteen days from the date of framing of issues, inter alia. Section 4-A further provides that if the parties further settle the dispute within the period specified or extended by the court for payment of the balance court fee, the plaintiff shall not be called upon to pay the balance court fee.] If a plaint is rejected for failure to give a notice, as contemplated in Section 80 CPC, the court fee paid, may be lost. Equally, for violation of Section 69 of the Partnership Act, if the plaint is rejected, the plaintiff loses the court fee. While it may appear to be hard on the plaintiff, the effect of the provision contained in Order 7 Rule 11, cannot be diluted. Therefore, we are not impressed by the argument, subject to what we will hold later on.*

85. *One of the aspects which weighed with the learned Single Judge of the Bombay High Court in Ganga Taro [Ganga Taro Vazirani v. Deepak Raheja, 2021 SCC OnLine Bom 195] is that in a case where the suit is instituted under Section 80 CPC without issuing any notice, if the defendant does not take up the plea of violation of Section 80, there can be waiver. Thus, even if Section 12-A in a given case, where the defendant does not set up the case there can be waiver and therefore, Section 12-A is not mandatory. No doubt, the Division Bench of the Bombay High Court while reversing the learned Single Judge proceeded to hold that there cannot be waiver as Section 12-A is based on public interest. The approach of the learned Single Judge does not commend itself to us. The question as to whether Section 12-A is mandatory or not, must be decided with reference to language used, the object of the enactment and a host of other aspects. The fact that if a defendant does not raise the plea about compliance of Section 12-A, it may result in a given case of waiver cannot result in Section 12-A not being mandatory. If it were so, then in a case where there is no notice under Section 80, a plaint can never be rejected. It is legally untenable and defies logic.*

87. *We will refer to Section 80 CPC to assist us in justifying our conclusion. Under Section 80(1) CPC, a suit not covered by Section 80(2), which is filed in defiance of the former provision, that is without serving any notice, is not maintainable. The suit would be barred and liable to be rejected under Order 7 Rule 11. The only exception is what is provided in Section 80(2). It contemplates a suit to obtain an urgent or interim relief. Such a suit may be instituted with the leave of the court without serving any notice as required under Section 80(1). In a case where a plaintiff does not seek urgent interim relief under Section 80(2), the suit would fall within the four walls of Section 80(1). Section 80(1) is mandatory. In regard to such suit, there is no question of substantial compliance. The suit must culminate in rejection of the plaint on invoking power under Order 7 Rule 11.*

88. *We may immediately draw a parallel between Sections 80(1) CPC and 12-A of the Act. In Section 12-A also, the bar of institution of the suit is applicable only in a case in which plaintiff does not contemplate urgent interim relief. The* *situation is akin to what is contemplated in Section 80(1) CPC. In other words, the suit under the Act which does not contemplate urgent interim relief is like a suit covered by Section 80(1) CPC which does not project the need for any urgent or interim relief. In regard to a suit covered under Section 12-A of the Commercial Courts Act, namely, in a suit where interim relief is not contemplated, there can be no substantial compliance by way of post institution reference to mediation. The argument of the plaintiff overlooks the object apart from the language used besides the design and scheme of the law. It will, if accepted, lead to courts also spending their invaluable time on such matters which follow from adjournments, objections and hearings. There is no need to adopt such a course.*

***89.** Take a case where notice is given under Section 80(1). A contention is taken that the notice is not effective as it does not comply with what is required in Section 80(1). In such a case, it may be a different matter that the Court may take a liberal view as to whether there is compliance. In fact, Section 80(3) makes this position clear. Even before Section 80 was substituted by Act 104 of 1976 by which Section 80(3) was inserted, in Raghunath Das v. Union of India [Raghunath Das v. Union of India, AIR 1969 SC 674] while dealing with a case where a notice was given, this Court inter alia held as follows : (AIR pp. 676-77, paras 8-9)*

"8. The object of the notice contemplated by that section is to give to the Governments and public officers concerned an opportunity to reconsider the legal position and to make amends or settle the claim, if so advised, without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80CPC are not intended to be used as boobytraps against ignorant and illiterate persons. In this case we are concerned with a narrow question. Has the person mentioned in the notice as plaintiff brought the present suit or is he someone else? This question has to be

decided by reading the notice as a whole in a reasonable manner.

9. In Dhian Singh Sobha Singh v. Union of India [Dhian Singh Sobha Singh v. Union of India, 1958 SCR 781 : AIR 1958 SC 274] , SCR at pp. 795-96 this Court observed that while the terms of Section 80 CPC must be strictly complied with that does not mean that the terms of the section should be construed in a pedantic manner or in a manner completely divorced from common sense. The relevant passage from that judgment is set out below : (AIR p. 281, para 30)

'30. We are constrained to observe that the approach of the High Court to this question was not well founded. The Privy Council no doubt laid down in Bhagchand Dagadusa Gujrathi v. Secy. of State for India in Council [Bhagchand Dagdusa Gujrathi v. Secy. of State for India in Council, 1927 SCC OnLine PC 48 : (1926-27) 54 IA 338 : AIR 1927 PC 176] that the terms of section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock C.B. in Jones v. Nicholls [Jones v. Nicholls, (1844) 13 M&W 361 : 153 ER 149] , "we must import a little common sense into notices of this kind". Beaumont, C.J. also observed in Chandulal Vadilal v. Govt. of the Province of Bombay [Chandulal Vadilal v. Govt. of the Province of Bombay, 1942 SCC OnLine Bom 46] :

""One must construe Section 80 with some regard to common sense and to the object with which it appears to have been passed."

***90.** The period of mediation is three months. If parties warm up to the prospect of settlement through mediation, on their consent, it can be extended for another two months. Thus, for payment of a one-time fee, in the case, which is successfully mediated by a skilled mediator and with the assistance of counsel, the very dispute gets settled. The pressure on the courts is taken off to the extent that the parties, without reference of the court, are compelled to undergo mediation.*

91. *Section 12-A of the Commercial Courts Act provides for mediation. This is a provision, which was inserted as per the Amending Act (Act 28 of 2018) enacted in the year 2018 and it came into force with effect from 3-5-2018. By the said amendment, in fact, Chapter III-A was inserted and Section 12-A is the sole section in the said chapter. A plain reading of Section 12-A makes the following position clear:*

91.1. *The lawgiver has declared that if a suit under the Act does not "contemplate" any urgent interim relief, then, it cannot be instituted unless the plaintiff seeks pre-litigation mediation. The pre-institution mediation is to be done in the manner, procedure, which is to be prescribed by the Central Government. The pre-litigation mediation is to be completed within a period of three months from the date of the application made by the plaintiff under sub-section (1) [see Section 12-A sub-section (3)].*

91.2. *The period of three months can, however, be extended for a period of two months provided there is consent to the same by the parties [see the first proviso to Section 12-A sub-section (3)]. By the second proviso, the Legislature has taken care to provide that the period, during which the parties remained occupied with the pre-litigation mediation, is not to be reckoned for the purpose of computing the period of limitation under the Limitation Act, 1963.*

91.3. *As to what would happen, if the parties arrive at the settlement, is provided for in Section 12-A sub-section (4). The settlement is to be reduced into writing and signed by the parties to the dispute and the mediator. The effectiveness of a settlement arrived at in the course of the pre-institution mediation contemplated in Section 12-A, has been dealt with in Section 12-A sub-section (5). Parliament has accorded the settlement, 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.*

91.4. *Spread over five sub-sections, this standalone section in Chapter III-A, no doubt, supported by the Rules, in our view, substantially manifests a definite scheme to effectively deal with the perceived urgent problem of acute clogging of the justice delivery system, which had to be de-congested. Section*

12-A cannot be perceived as merely intended to reach quicker justice, and what is more, on terms, which are mutually acceptable to the parties concerned. Even, more importantly, it was to produce a vital and significant effect on the very interest of the nation. We have perused the Statement of Objects and Reasons. To attract foreign capital by enhancing its rather low standard in the ease of doing business, it was and is still necessary to showcase an efficient and quick justice delivery system in commercial matters. In fact, India, which was ranked at 142 out of 189 countries, in the Ease of Doing Business Index, in 2015, climbed up to only 130 in the year 2016. By 2020, India stood at the 63rd position.

The regime under Order 7 Rule 11 CPC

92. *Order 7 Rule 11 declares that the plaint can be rejected on 6 grounds. They include failure to disclose the cause of action, and where the suit appears from the statement in the plaint to be barred. We are concerned in these cases with the latter. Order 7 Rule 12 provides that when a plaint is rejected, an order to that effect with reasons must be recorded. Order 7 Rule 13 provides that rejection of the plaint mentioned in Order 7 Rule 11 does not by itself preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Order 7 deals with various aspects about what is to be pleaded in a plaint, the documents that should accompany and other details. Order 4 Rule 1 provides that a suit is instituted by presentation of the plaint to the court or such officer as the court appoints. By virtue of Order 4 Rule 1(3), a plaint is to be deemed as duly instituted only when it complies with the requirements under Order 6 and Order 7. Order 5 Rule 1 declares that when a suit has been duly instituted, a summon may be issued to the defendant to answer the claim on a date specified therein. There are other details in the order with which we are not to be detained. We have referred to these rules to prepare the stage for considering the question as to whether the power under Order 7 Rule 11 is to be exercised only on an application by the defendant and the stage at which it can be exercised.*

93. *In Patasibai v. Ratanlal [Patasibai v. Ratanlal, (1990) 2 SCC 42] , one of the specific contentions was that there was* *no specific objection for rejecting of the plaint taken earlier. In the facts of the case, the Court observed as under : (SCC pp. 47-48, para 13)*

"13. On the admitted facts appearing from the record itself, the learned counsel for the respondent, was unable to show that all or any of these averments in the plaint disclose a cause of action giving rise to a triable issue. In fact, Shri Salve was unable to dispute the inevitable consequence that the plaint was liable to be rejected under Order 7 Rule 11 CPC on these averments. All that Shri Salve contended was that the court did not in fact reject the plaint under Order 7 Rule 11 CPC and summons having been issued, the trial must proceed. In our opinion, it makes no difference that the trial court failed to perform its duty and proceeded to issue summons without carefully reading the plaint and the High Court also overlooked this fatal defect. Since the plaint suffers from this fatal defect, the mere issuance of summons by the trial court does not require that the trial should proceed even when no triable issue is shown to arise. Permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation. This cannot be done."

(emphasis supplied)

***94.** On a consideration of the scheme of Orders 4, 5 and 7 CPC, we arrive at the following conclusions:*

***94.1.** A suit is commenced by presentation of a plaint. The date of the presentation in terms of Section 3(2) of the Limitation Act, 1963 is the date of presentation for the purpose of the said Act. By virtue of Order 4 Rule 1(3), institution of the plaint, however, is complete only when the plaint is in conformity with the requirement of Order 6 and Order 7.*

***94.2.** When the court decides the question as to issue of summons under Order 5 Rule 1, what the court must consider is whether a suit has been duly instituted.*

***94.3.** Order 7 Rule 11 does not provide that the court is to discharge its duty of rejecting the plaint only on an application. Order 7 Rule 11 is, in fact, silent about any such requirement. Since summon is to be issued in a duly instituted* *suit, in a case where the plaint is barred under Order 7 Rule 11(d), the stage begins at that time when the court can reject the plaint under Order 7 Rule 11. No doubt it would take a clear case where the court is satisfied. The Court has to hear the plaintiff before it invokes its power besides giving reasons under Order 7 Rule 12. In a clear case, where on allegations in the suit, it is found that the suit is barred by any law, as would be the case, where the plaintiff in a suit under the Act does not plead circumstances to take his case out of the requirement of Section 12-A, the plaint should be rejected without issuing summons. Undoubtedly, on issuing summons it will be always open to the defendant to make an application as well under Order 7 Rule 11. In other words, the power under Order 7 Rule 11 is available to the court to be exercised suo motu. (See in this regard, the judgment of this Court in Madiraju Venkata Ramana Raju [Madiraju Venkata Ramana Raju v. Peddireddigari Ramachandra Reddy, (2018) 14 SCC 1] .)*

99. *We may sum-up our reasoning as follows:*

99.1. *The Act did not originally contain Section 12-A. It is by amendment in the year 2018 that Section 12-A was inserted. The Statement of Objects and Reasons are explicit that Section 12-A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear.*

99.2. *It is an undeniable reality that courts in India are reeling under an extraordinary docket explosion. Mediation, as an alternative dispute mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which* *amply illustrate this principle, are Section 80 CPC and Section 69 of the Partnership Act.*

99.3. *The language used in Section 12-A, which includes the word "shall", certainly, goes a long way to assist the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage counsel during mediation. The expenses, as far as the fee payable to the mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained mediator can work wonders.*

99.4. *Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12-A, a mandatory interpretation, would result in defeating the object and intention of Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgment of the lawgiver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the court, must, necessarily, resort to it. Section 12-A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties.*

100. *In the cases before us, the suits do not contemplate urgent interim relief. As to what should happen in suits which do contemplate urgent interim relief or rather the meaning of the word "contemplate" or urgent interim relief, we need not dwell upon it. The other aspect raised about the word "contemplate" is that there can be attempts to bypass the statutory mediation under Section 12-A by contending that the plaintiff is contemplating urgent interim relief, which in reality, it is found to be without any basis. Section 80(2) CPC permits the suit to be filed where urgent interim relief is sought by seeking the leave of the court. The proviso to Section 80(2) contemplates that the court shall, if, after* *hearing the parties, is satisfied that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to the court after compliance. Our attention is drawn to the fact that Section 12-A does not contemplate such a procedure. This is a matter which may engage attention of the lawmaker. Again, we reiterate that these are not issues which arise for our consideration. In the fact of the cases admittedly there is no urgent interim relief contemplated in the plaints in question.*

***113.** Having regard to all these circumstances, we would dispose of the matters in the following manner:*

***113.1.** We declare that Section 12-A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12-A must be visited with rejection of the plaint under Order 7 Rule 11. This power can be exercised even suo motu by the court as explained earlier in the judgment. We, however, make this declaration effective from 20-8-2022 so that stakeholders concerned become sufficiently informed.*

***113.2.** Still further, we however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff.*

***113.3.** Finally, if the plaint is filed violating Section 12-A after the jurisdictional High Court has declared Section 12-A mandatory also, the plaintiff will not be entitled to the relief."*

43. In the case of *Bihari Chowdhary and Another Vs. State of Bihar and others (supra),* the Hon'ble Supreme Court, while interpreting Section 80 of the CPC, which requires that a Suit against the Government or a public officer to which the requirement of a prior notice under Section 80 of the CPC is attracted and cannot be validly

instituted until expiration of the period next two months after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the Section, held that, if filed before the expiry of the said period, the Suit has to be dismissed as not maintainable, in as much as, the said Section is mandatory. It was observed that the public purpose underlying the provision of Section 80 is advancement of justice and securing of public good by avoidance of unnecessary litigation as before a Suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of the Suit proposed to be filed and if it is found to be a just claim, to take immediate action by settling the claim without having to institute the suit. That the language of the section is explicit and mandatory and it admits no implication or exceptions. That, therefore, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the Legislature.

44. The relevant paragraphs 3 and 4 of the said decision are usefully quoted as under :-

“3. We are concerned in this case with Section 80 C.P.C. as it stood prior to its amendment, by Act 104 of 1976 (even under the amended provision, the position remains unaltered insofar as a suit of this nature is concerned). We shall extract the Section as it stood at the material time:

80. No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of—

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other Government, a Secretary to that Government or the Collector of the district;

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and relief which he claims; and plaint shall contain a statement that such notice has been so delivered or left.

The effect of the Section is clearly to impose a bar against the institution of a suit against the Government or a public officer in respect of any act purported to be done by him in his official capacity until the expiration of two months after notice in writing has been delivered to or left at the office of *the Secretary to Government or Collector of the concerned district and in the case of a public officer delivered to him or left at his office, stating the particulars enumerated in the last part of sub-section (1) of the Section. When we examine the scheme of the Section it becomes obvious that the Section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the Section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the Section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months time to Government or a public officer before a suit can be instituted against them. The object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.*

4. When the language used in the Statute is clear and unambiguous, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the Legislature."

45. In *Yamini Manohar vs. T.K.D. Keerthi (supra),* the Hon'ble Supreme Court has further elaborated on the term "contemplate urgent relief" used in Section 12-A of the said Act and has held that the Commercial Court should examine the nature and 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. The Hon'ble Supreme Court also highlighted that camouflage and guise to bypass the statutory mandate of pre-institution mediation should be checked when deception and falsity is apparent or established. Paragraphs 4 to 10 of the said decision are usefully quoted as under :

> ***"4.*** *This Court in "Patil Automation Private Limited v. Rakheja Engineers Private Limited." has held that Section 12A of the CC Act is mandatory. Pre-litigation mediation is necessary, unless the suit contemplates urgent interim relief. At the same time, the judgment observes:*
>
> > *"100. In the cases before us, the suits do not contemplate urgent interim relief. As to what should happen in suits which do contemplate urgent interim relief or rather the meaning of the word 'contemplate' or urgent interim relief, we need not dwell upon it. The other aspect raised about the word 'contemplate' is that there can be attempts to bypass the statutory mediation under Section 12-A by contending that the plaintiff is contemplating urgent interim relief, which in reality, it is found to be without any basis. Section 80(2) CPC permits the suit to be filed where urgent interim relief is sought by seeking the leave of the court. The proviso to Section 80(2) contemplates that the court shall, if, after hearing the*

> *parties, is satisfied that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to the court after compliance. Our attention is drawn to the fact that Section 12-A does not contemplate such a procedure. This is a matter which may engage attention of the lawmaker. Again, we reiterate that these are not issues which arise for our consideration. In the fact of the cases admittedly there is no urgent interim relief contemplated in the plaints in question."*

5. *The aforesaid paragraph refers to Section 80(2) of the Code, which permits the suit, praying urgent interim relief, to be filed by seeking the leave of the court. The proviso to Section 80(2) of the Code states that, if, after hearing the parties, the court is satisfied that no urgent or immediate relief is required to be granted in the suit, the court may return the plaint for presentation to it after compliance with requirements of Section 80(1) of the Code. Section 12A of the CC Act does not contemplate leave of the court, as is clear from the language and words used therein. Nor does the provision necessarily require an application seeking exemption. An application seeking wavier on account of urgent interim relief setting out grounds and reasons may allay a challenge and assist the court, but in the absence of any statutory mandate or rules made by the Central Government, an application per se is not a condition under Section 12A of the CC Act; pleadings on record and oral submissions would be sufficient. The words used in Section 12A of the CC Act are - "A suit which does not contemplate any urgent interim relief", wherein the word "contemplate" connotes to deliberate and consider. Further, the legal position that the plaint can be rejected and not entertained reflects application of mind by the court viz. the requirement of 'urgent interim relief'.*

6. *In the present case, it is an accepted fact that an urgent interim relief has been prayed for and the condition that the plaint "contemplates" an urgent interim relief is satisfied. Therefore, the 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.*

***7.** Our attention is drawn to the judgment of the High Court of Judicature at Bombay in "Kaulchand H. Jogani v. Shree Vardhan Investment", wherein the following observations have been made:*

> *"31. In my considered view, the proper course would be to assess whether there are elements which prima face indicate that the suit may contemplate an urgent interim relief irrespective of the fact as to whether the plaintiff eventually succeeds in getting the interim relief. In a worst case scenario, where an application for interim relief is presented without there being any justification whatsoever for the same, to simply overcome the bar under Section 12A, the Court may be justified in recording a finding that the suit in effect does not contemplate any urgent interim relief and then the institution of the suit would be in teeth of Section 12A notwithstanding a formal application."*

***8.** The High Court of Delhi in "Chandra Kishore Chaurasia v. R.A. Perfumery Works Private Limited" observes:*

> *"30. The contention that it would be necessary for the plaintiff to file an application seeking exemption from the provisions of Section 12A of the Commercial Courts Act, 2015, is unmerited. This Court cannot accept the said contention for several reasons.*
>
> *31. First of all, there is no provision under Section 12A of the Commercial Courts Act, 2015 that requires the plaintiff to make any such application in a suit which involves urgent interim reliefs. As stated above, if the suit involves urgent interim relief, Section 12A of the Commercial Courts Act, 2015 is inapplicable and it is not necessary for the plaintiff to enter into a pre-institution mediation.*
>
> *32. Second, a suit, which does not contemplate urgent interim relief, cannot be instituted without exhaustion of pre-institution mediation, as required under Section 12A(1) of the Commercial Courts Act, 2015. As noted above, the Supreme Court has held that the said provision is mandatory and it is compulsory for a plaintiff to exhaust the remedy of pre-institution mediation, in accordance with the rules before instituting a suit. The Court has no*

discretion to exempt a plaintiff from the applicability of Section 12A(1) of the Commercial Courts Act, 2015. It is not permissible for the court to pass an order contrary to law; therefore, an application seeking exemption from engaging in pre-institution mediation, in a suit that does not involve urgent interim reliefs, would not lie.

33. This Court also finds it difficult to accept that a commercial court is required to determine whether the urgent interim reliefs ought to have been claimed in a suit for determining whether the same is hit by the bar of Section 12A(1) of the Commercial Courts Act, 2015. The question whether a plaintiff desires any urgent relief is to be decided solely by the plaintiff while instituting a suit. The court may or may not accede to such a request for an urgent interim relief. But that it not relevant to determine whether the plaintiff was required to exhaust the remedy of pre-institution mediation. The question whether a suit involves any urgent interim relief is not contingent on whether the court accedes to the plaintiff's request for interim relief.

34. The use of the words "contemplate any urgent interim relief" as used in Section 12(1) of the Commercial Courts Act, 2015 are used to qualify the category of a suit. This is determined solely on the frame of the plaint and the relief sought. The plaintiff is the sole determinant of the pleadings in the suit and the relief sought.

35. This Court is of the view that the question whether a suit involves any urgent interim relief is to be determined solely on the basis of the pleadings and the relief(s) sought by the plaintiff. If a plaintiff seeks any urgent interim relief, the suit cannot be dismissed on the ground that the plaintiff has not exhausted the pre-institution remedy of mediation as contemplated under Section 12A(1) of the Commercial Courts Act, 2015.

***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."*

46. In *Future Corporate Resources Pvt. Ltd. vs. Edelweiss Special Opportunities Fund and Another (supra),* this Court has observed that Section 12-A cannot be bypassed by simply filing an application for interim relief. Paragraphs 41 and 42 of the said decision are usefully quoted as under :

> ***"41.*** *We take up next Mr Seervai's argument regarding Section 12A of the CCA. Mr Seervai's submission is that Section 12A is mandatory. It was introduced by amendment. It reads thus:*
>
> *"**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 pre-institution 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)."

(Emphasis added)

42. *No plaintiff, he submits, can merely by filing an Interim Application for interim relief get out of the mandatory requirement of Section 12A. We do not think Mr Seervai's submission on this is well taken. The CCA was meant to expedite the disposal of commercial disputes. Section 12A was meant to accelerate that disposal by providing a disposal mechanism that did not involve Courts. Section 12A does not permit a plaintiff to bypass its provisions by merely filing an interim application. The words "which does not contemplate" does not mean "in the opinion of the plaintiff". A plaintiff may in a commercial cause may contemplate very many things and may want even more. That is immaterial. In a given Commercial Suit if there is no application for interim relief, or there can be none, then undoubtedly Section 12A must apply. But can Section 12A be bypassed by a plaintiff simply by filing an application for interim relief? The answer is clearly no. Equally, Section 12A is not meant to be weaponised by a defendant to prevent a Court from passing an order where the Court believes an order is justified and necessary. Accepting Mr Seervai's argument might, we believe, lead us to down this perilous path. If a Court believes that on a plaintiff's Interim Application there is a justification for an interim order, then Section 12A cannot be used to say that the Court is powerless to make that interim order. That would in fact be even in the teeth of Section 16 of the CCA and the emphasis on the operation of the provisions of the CPC. It would amount to ousting the court's discretionary and equitable jurisdiction at an interlocutory stage. Nothing in Section 12A remotely tends to this interpretation."*

47. In *Kaulchand Jogani vs. Shree Vardhan Investments (supra),* it has been observed that the test is whether the suit contemplates urgent reliefs and not whether the plaintiff seeks urgent relief. Paragraphs 21, 22, 23, 25, 26, 28, 29, 31, 32 and 33 of the said decision are usefully quoted as under :

> ***"21.*** *On a plain reading the text of Section 12A(1) bars the very institution of the suit without exhausting the remedy of the pre-institution mediation, if the suit does not contemplate any urgent interim relief.*
>
> ***22.*** *This Court in the case of Deepak Raheja (supra) had an occasion to consider whether the aforesaid provision is mandatory or directory in nature. After an analysis, this Court ruled that Section 12A is mandatory and a commercial suit of specified value, which does not contemplate an urgent interim relief under the Act of 2015 cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation.*
>
> ***23.*** *In Patil Automation Ltd. (supra), the Supreme Court held that the provision is mandatory. The observations in paragraph 80 encapsulate the reasons.*
>
> > *"**80.** We may sum-up our reasoning as follows:*
> >
> > *The Act did not originally contain Section 12A. It is by amendment in the year 2018 that Section 12A was inserted. The Statement of Objects and Reasons are explicit that Section 12A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The Legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion.*

Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which amply illustrate this principle, are Section 80 of the CPC and Section 69 of the Indian Partnership Act. The language used in Section 12A, which includes the word 'shall', certainly, go a long way to assist the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation. The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgment of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties.

25. *Since this Court in the case of Dipak Raheja (supra) had ruled the mandatory nature of Section 12A on 1 October, 2021 and the instant suit came to be lodged on 11 July, 2022, the plaintiff can not claim the benefit of prospective declaration i.e. with effect from 20 August, 2022. The question that thus wrenches to the fore is whether the plaintiff succeeds in taking* *the suit out of purview of Section 12A on the count that the suit does contemplate an urgent interim relief?*

26. *As noted above, the plaintiff has filed an interim application seeking reliefs of direction for deposit, furnishing security and restraint against alienation of the property. Interim reliefs which are essentially in the nature of attachment before judgment are purportedly sought under Order XXXVIII Rule 5 of the Code.*

28. *In the case of Patil Automation (supra) the Supreme Court has emphasized the legislative object behind introduction of pre-institution mediation as a mandatory measure. Evidently, the outlet for not resorting to pre-institution mediation is provided by the text of Section 12A itself namely a suit contemplating an urgent interim relief. In my view, if the said outlet is construed too loosely in the sense that mere filing of an application for interim relief, howsoever unjustified and unwarranted it may be, would take the suit out of the purview of Section 12A, it may run counter to the legislative object. The interdict contained in Section 12A can be easily circumvented by filing an application for interim relief without their being any reason or basis therefor. Such an interpretation may not advance the legislative object.*

29. *The Parliament, it seems, has designedly used the expression, "a suit, which does contemplate any urgent interim relief ….". This phrase cannot be interchangeably used with the expression, "where the plaintiff seeks an urgent interim relief…" The test would be whether the suit does contemplate an urgent interim relief.*

31. *In my considered view, the proper course would be to asses whether there are elements which prima facie indicate that the suit may contemplate an urgent interim relief irrespective of the fact as to whether the plaintiff eventually succeeds in getting the interim relief. In a worst case scenario, where an application for interim relief is presented without there being any justification whatsoever for the same, to simply overcome the bar under Section 12A, the Court may be justified in recording a finding that the suit in effect does not contemplate any urgent interim relief and then the institution of the suit would be in teeth of Section 12A notwithstanding a formal application.*

> ***32.*** *On the aforesaid premise reverting to the facts of the case, the thrust of the submission of Mr. Khandeparkar was that there was no element of urgency as the loan was advanced in the year 2012 and, allegedly, recalled in 2016. In the circumstances, no interim relief could have been legitimately pressed for. Averments in the plaint and the interim application that the defendants were alienating the assets with a view to delay and defeat the decree which may eventually be passed, were, according to Mr. Khandeparkar, actuated by the design to sidestep the bar under Section 12A.*
>
> ***33.*** *I am afraid to accede to aforesaid submission. There is contemporaneous material to indicate that before the institution of the suit the plaintiff had raised the concern that the defendants were in the process of alienating the assets. In the demand notice dated 8th September, 2021 the plaintiff asserted, inter alia, that it was learnt from reliable sources that the defendants were taking steps to alienate several of their assets and properties. In response to the said notice, the defendants, in fact, remonstrated by asserting that the said allegation was a figment or imagination and also called upon the plaintiff to desist from fanning such rumors. The aforesaid pre-suit correspondence thus indicates that the plaintiff apprehended that the defendants may alienate the assets and properties and he would be left in the lurch. From this standpoint, in the facts of the case, it cannot be said that the prayer for interim relief was wholly unwarranted or unjustifiable. I am, therefore, no inclined to accede to the challenge to the institution of the suit for want of pre-institution mediation."*

48. In *Skipper Limited vs. Prabha Infra Private Limited (supra),* the Calcutta High Court has observed that Plaintiff's contemplation as to urgent relief shall be borne out in the plaint. The Plaintiff in *Skipper Limited vs. Prabha Infra Private Limited (supra)* was also seeking a relief of attachment before judgment. The Calcutta High Court

observed that on a holistic reading of the plaint, there was no statement made to satisfy the contemplation of any urgent interim relief. The averments therein, as in the present case, were only bald and devoid of even bare minimum particulars. The Calcutta High Court observed that upon reading the plaint and examining the nature and subject matter of the suit and the cause of action, it was apparent that the statements made in the plaint were to wriggle out and get over the provision of Section 12-A. Ultimately, the Calcutta High Court rejected the plaint. Paragraphs 3, 6, 7, 8, 9 and 10 of the said decision are usefully quoted as under :

> ***"3.*** *Law so far as the applicability of provisions of Section 12A of 2015 Act and its dispensation has been more or less settled by the Hon'ble Supreme Court through the ratio laid down in the judgment reported in (2022) 10 SCC 1 (Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.) and Yamini Manohar v. T.K.D Keerthi, 2023 SCC OnLine SC 1382. On a conjoint reading of the two judgments aforesaid the following principles can be culled out to be are the admitted position of law at the present:—*
>
> *i) The provisions of Section 12A of 2015 Act are mandatory.*
>
> *ii) The plaintiff's contemplation as to urgent interim relief shall be borne out from the averments in the plaint.*
>
> *iii) The plaintiff does not have the absolute choice and right to paralyse Section 12A of 2015 Act by making a prayer for urgent interim relief to camouflage and disguise and bypass statutory mandate of pre-litigation mediation.*
>
> *iv) The contemplation of urgent interim relief as pleaded by the plaintiff for dispensing the pre-institution mediation is subject to the satisfaction of the Court.*

v) The Commercial Court should examine the nature and the subject matter of the suit, the cause of action and prayer for interim relief so that such prayer is not a mask or disguise to wriggle out or get-over Section 12A of 2015 Act before allowing dispensation.

vi) On finding that the plaint does not disclose any material to dispense with the formalities of pre-institution mediation or that the falsity as to such claim is apparent or established at the time of admission then the Commercial Court can refuse admission but the same will not be under the provisions of Order 7 Rule 11 of the Civil Procedure Code, 1908 (In short CPC).

vii) Mere refusal of interim order in an application for interim relief will not be a ground to reject the plaint automatically.

viii) There is no mechanism as in Section 80 of CPC for return of the plaint after institution of the suit, if the contemplation of urgent interim relief as pleaded by the plaintiff is held to be unfounded.

ix) A suit can also be dismissed under the provisions of Order 7 Rule 11 of CPC if it is found subsequent to the filing on the prayer of the defendant that there was no contemplation of urgent interim relief.

6. *The plaintiff in the plaint apart from money decree has claimed the relief of "injunction" and "attachment before judgment" on the basis whereof the plaintiff can ask for interim relief as to injunction and attachment before judgment.*

7. *On a holistic reading of the plaint in the instant case, including paragraph 61 thereof, neither any statement appears to have been made to satisfy the contemplation of urgent interim relief nor does any act of the defendant allege therein, shows even any prima facie case to allow the plaintiff to institute the suit without dispensing with the mandatory requirements of Section 12A of 2015 Act. The averments in support of contemplation of urgent interim relief in the plaint are not only bold but devoid of bare minimum particulars. If these pleadings are accepted for dispensing with the formalities under Section 12A of 2015 Act then any plaintiff by making such averment will sail through to* *render the legislative mandate otiose. It should also be borne in mind that the plaint does not call for evidence to be pleaded but the particulars are to be provided on to lay the foundation for evidence.*

8. *The contemplation of urgent interim relief has to be at the time of admission of the plaint with the prayer for dispensation of pre-institution mediation and not at a subsequent stage. This is more so as far an urgent interim relief subsequent to institution of the suit, the plaintiff is entitled to ask for the same under provisions of Order 38, Order 39 Rules 1 and 2 or even under Section 151 of CPC. That is why the Hon'ble Supreme Court has conferred the Commercial Court with a limited jurisdiction to scrutinize the averments in the plaint at the time of admission as the power of enquiry is already provided under Order 38, Order 39 Rules 1 and 2 and Section 151 of CPC while hearing an application for urgent interim relief. This is further evident when the Hon'ble Supreme Court clarifies in Yamini Manohar (supra) that an application for urgent interim relief has nothing to do with dispensation of the formalities under Section 12A of the Commercial Courts Act, 2015.*

9. *On a meaningful reading of the plaint and examining nature and subject matter of the suit, the case of action and the prayer for interim relief, it is apparent that the statements made in the plaint are to wriggle out or get-over the provision of Section 12A of 2015 Act. The plaintiff in this manner by way of clever drafting has attempted to bypass statutory mandate of pre-litigation mediation. This Court, therefore, is not satisfied with the statements made in support of the contemplation of any of the urgent interim relief.*

10. *The leave to dispense with the provisions of Section 12A of 2015 is, therefore, recalled and the plaint is rejected. Consequent upon such rejection, the suit instituted as CS No. 195 of 2022 by filing the plaint also stands dismissed."*

49. In *Red Bricks Pvt. Ltd. and Ors. vs. M/s.Green Square (supra),* cited by Mr.Chetan Kapadia, learned Senior Counsel for the Defendants

no.2 and 3, this Court has, while rejecting the plaint in that case, being barred by law as the suit was filed without complying with the statutory requirement laid down under Section 12-A of the said Act, granted liberty to the Plaintiff to avail of remedies in law. Paragraphs 4, 9, 10, 11 and 12 are usefully quoted as under :

> ***4.*** *I have heard the learned Counsel at length. I am of the view that in view of he decision of the Hon'ble Supreme Court in the case of Patil Automation Private Limited Vs. Rakheja Engineers Private Limited (supra), declaring Section 12-A of the Commercial Courts Act, 2015 as mandatory with effect from 20th August, 2022, the failure on the part of the Plaintiff to exhaust the remedy of pre-institution mediation would compel this Court to reject the Plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908. This Suit has been filed on 01st February, 2023, which is after the declaration by the Hon'ble Supreme Court as well as this Court that Section 12-A is mandatory.*
>
> ***9.*** *As far as the scenario (iv) of paragraph 10 (m) is concerned, the present facts of the case in no way suggest that before filing the suit, one of the parties made proposal to the other party to engage in settlement talks for amicable resolution of disputes but the other party categorically refused.*
>
> ***10.*** *In the case before the Hon'ble Delhi High Court the only objection was that the Delhi High Court Mediation and Conciliation Centre was not authorized for pre-institution mediation under the Commercial Courts Act, 2015. That was not a case where no mediation had taken place. In the facts of the case at hand there has been no mediation prior to the institution of the suit, which is mandatory under Section 12A of the Commercial Courts Act, 2015. In my view, therefore, the facts of the present case do not fit into any of the scenarios referred to in paragraph 10(m) of the Delhi High Court's decision in the case of Amit Walia Vs. Shweta Sharma (supra). The said decision does not assist the case of the Respondent-Plaintiff.*

> ***11.*** *Ergo, in view of the decision of the Hon'ble Supreme Court in the case of Patil Automation Private Limited Vs. Rakheja Engineers Private Limited (supra), the Plaint is rejected as being barred by law.*
>
> ***12.*** *The Interim Application is allowed as above. It is made clear that the Plaintiff is at liberty to avail of remedies in law."*

50. From the aforesaid elucidation it is clear that the procedure to be followed pursuant to Section 12-A of the said Act is a mandatory procedure and it has to be followed even if it is harsh. Only genuine urgency is excluded. Bare and vague allegations will not enable a Plaintiff to get over Section 12-A and it cannot be used as a mechanism to override the said Section. That, a genuine case has to be made out on the basis of pleadings. That, the same has to be ascertained on a holistic reading of the plaint and examining the nature and subject matter of the suit and the cause of action to satisfy the contemplation of any urgent relief. But, where there are only bald averments, devoid of bare minimum particulars and specific details, that would not qualify contemplation of any urgent relief.

51. It is settled law that the test is whether the suit contemplates urgent reliefs and not whether the Plaintiff seeks urgent reliefs, based

on bald averments, devoid of any specific details or particulars of the urgency. The urgency has to be demonstrated to be imminent, disclosing a real and genuine apprehension with detailed facts and particulars, that if the urgent relief is not granted, grave prejudice and irreparable harm would be caused.

52. The suit, as noted above, has been filed as a summary suit, claiming an outstanding towards Development Managers' fees, GST, refund of security deposit and interest thereon of a total of Rs.35,03,62,620/- (Rupees Thirty Five Crores Three Lakhs Sixty Two Thousand Six Hundred Twenty) along with interest. That, the transaction documents are of the year 2017 and 2018. Thereafter, two communications were addressed in the year 2020, seeking recovery of dues towards the Development Managers' fees, and thereafter, three years later, a Notice of Demand dated 22rd June, 2023, was addressed by the Plaintiff to the Defendants. That, thereafter, despite the receipt of the Demand Notice, since the Defendants failed to pay the amounts claimed, this suit has been filed on the basis of the Guarantee Documents.

53. It is settled law that it is only on the basis of the averments in the plaint alone, that it can be decided whether the suit contemplates any urgent reliefs. I have perused the plaint as well as the Interim Application seeking reliefs *inter alia* in the nature of an attachment before judgment and indeed this Court has undertaken a limited exercise. None of the paragraphs in the plaint seeking urgent interim reliefs and purportedly seeking exemption from the requirement of pre-institution mediation under Section 12A of the said Act as well as the paragraphs and prayers cited by Mr.Andhyarujina as extracted above, contemplate urgent reliefs.

54. As can be seen from the afore-quoted paragraphs from the plaint, that there is only an averment that the Plaintiff has a serious apprehension, that in order to frustrate the rights of the Plaintiff, the Defendants will attempt to alienate and/or dispose off their assets in order to delay and/or obstruct and/or defeat and/or frustrate and/or deprive the Plaintiff of its lawful dues and that, a separate application for injunctive and interim reliefs is being filed and that, therefore, Section 12A of the said Act does not apply, submitting that, the Plaintiff has established a *prima facie* case in its favour. That,

the balance of convenience is in favour of the Plaintiff and that, the Plaintiff shall suffer grave prejudice and irreparable harm, if the reliefs, as prayed for, are not granted to the Plaintiff. Except the aforesaid bald averments, there are no specific details or particulars of the apprehension or let alone a serious apprehension that the Plaintiff has, which demonstrates any urgency or any *prima facie* case. The averments are bald ones and bereft of even bare minimum facts or particulars. These cannot be said to be elaborate pleadings on urgency.

55. Even the averments in the Interim Application as relied upon by Mr. Andhyrujina and as extracted above do not contemplate any urgency. A perusal of the Interim Application also indicates that the same is a repetition of the plaint.

56. A perusal of the said paragraphs in the Interim Application only indicate that the Plaintiff had by letter dated 21st July, 2023 called upon the Defendants to discharge their obligations to pay the claim amount and the Defendants have refused to do so. The Plaintiff has, therefore, inferred that the Defendants do not have any valid defence to the Suit. Then, there is reference to the Guarantee Documents, purportedly,

pursuant to which the Defendants No.2 and 3 have unconditionally undertaken to pay to the Applicant the claim amount with interest. It is, thereafter, again averred that, despite the same, the Defendants have failed to make payment of the claim amount and acted in contravention of the terms and conditions of the Guarantee Documents. It has been submitted that, therefore, the conduct purportedly reflects that the Defendants are attempting to bypass the rights of the Applicant and the commitments given to the Applicant. That, it is therefore, seriously apprehended that the Defendants would deal with and dispose off the assets in a manner, which will defeat the claim/debt owned by the Defendants to the Plaintiff/Applicant and will evade and/or defeat the final order/decree that would be passed in favour of the Applicant. That, therefore, the Applicant/Plaintiff requires interim protection to ensure that its purported *bonafide* claim against the Defendants does not become infructuous and that the assets of the Defendants do not become insufficient to satisfy the claim amount. And that, since the Plaintiff has a good case on merits, the Applicant has a serious apprehension that in order to frustrate the rights of the Applicant, the Defendants will attempt to alienate and/or dispose off their assets, in order to delay and/or obstruct and/or defeat and/or frustrate and/or deprive the Applicant of its lawful dues.

57. More or less, the paragraphs on the purported urgency in the Interim Application are a replica of those in the plaint. These are bald and vague averments, without any specific particulars. In my view therefore, neither the Plaint nor the Interim Application contemplate any urgent reliefs.

58. Having examined the nature as well as the subject matter of the suit, the cause of action and the prayer for interim relief and I am clearly of the view that neither the plaint nor the Interim Application contemplate urgent relief. A holistic reading of the plaint clearly indicates that there is no material, which in the Plaint or in the Interim Application or a pleading, satisfies the contemplation of any urgent relief. The averments made are bald, devoid of bare minimum particulars only to wriggle out of Section 12-A of the said Act and to bypass the statutory mandate of pre-institution mediation and done in a mechanical and a casual manner. No urgency has been made out. Only an imaginary and mechanical apprehension has been expressed without any supporting facts.

59. True that the Court has to conduct a limited exercise which makes out a *prima facie* case. However, mere pleading of urgency is not enough : there must be specific facts and details spelling out the urgency or apprehension. There has to be genuine urgency which is excluded, which is not the case here. I agree with Mr.Joshi that the window of genuine urgency cannot be used to over ride Section 12-A. I am also afraid therefore that the submission that the burden is on the party who alleges no urgency cannot be accepted. The burden is on the party claiming the urgency, which does not appear to have been discharged. Indeed this Court has undertaken a limited exercise. However, while the principles summarized by Mr.Andhyarujina, learned Senior Counsel for the Plaintiff cannot be disputed, however, as noted above, it is only after applying the principles that this Court has come to a conclusion that the plaint nor the Interim Application contemplate urgent interim relief.

60. The delay prior to filing of the suit, in my view, is not necessary to be commented upon as there was no delay under the Limitation Act, 1963, in filing the suit. At best the pre-suit delay would only reflect on the conduct of the parties but this is not the stage to comment on the same.

61. However, even if the argument with respect to the delay is held against the Applicants, it cannot be ignored that the pleadings as to the urgency are only bald bereft of any specific details or bare minimum particulars.

62. In the case of *Yamini Manohar vs. T.K.D. Keerthi (supra)*, as noted above, the Hon'ble Supreme Court has elaborated on the term "contemplate the urgent relief" used in Section 12A of the said Act and held that the Commercial Court should examine the nature and subject matter of the suit, the cause of action and the prayer for interim relief and that the prayer for urgent relief should not be a disguise or a mask to wriggle out of Section 12A. It is in this context that the Hon'ble Supreme Court also highlighted that camouflage and guise to bypass the statutory mandate of pre-institution mediation should be checked when deception and falsity is apparent or established. Therefore, in my view, deception and falsity cannot be the only grounds on which a Court can go into a fact whether there is an urgency or not.

63. Even otherwise, the very fact that the submission of urgency in the plaint is bereft of any specific details or particulars suggests that there is falsity in the Plaintiff's case of urgency. From a reading of the Plaint it is apparent that the statements are only to wriggle out of the requirement of Section 12A of the said Act.

64. Further, just because the Defendant no.1 may have confirmed that the Defendants have sold the remaining flats in the building in April, June and July 2023 as contained in the Defendant no.1's rejoinder, it cannot be said that the plaint contemplates urgent relief as it is settled law that only on the basis of averments in the plaint it has to be decided whether the suit contemplates any urgent relief and not from any additional material such as rejoinder or facts not contained in the plaint.

65. Mr. Chetan Kapadia, learned Senior Counsel for the Defendants No.2 and 3, in my view has rightly urged that paragraph 11 of the Plaint and paragraphs 26 and 27 of the Interim Application do not meet the requirements of Order XXXVIII Rule 5 of the CPC, which deal

with attachment before judgment. The said order XXXVIII Rule 5 of the CPC is usefully quoted as under :-

> ***"5. Where defendant may be called upon to furnish security for production of property .—****(1) Where, at any stage of a suit, the Court is satisfied, by affidavit of otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, —*
> *(a) is about to dispose of the whole or any part of his property, or*
>
> *(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,*
> *the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.*
>
> *(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.*
>
> *(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.*
>
> *(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."*

66. It is clear from the above provision that the said rule is intended for the protection of the person whose property is sought to be attached

before judgment. The procedure set out in Rule 5 has not been followed by the Plaintiff. Moreover, the said paragraphs in the plaint and in the Interim Application are completely bereft and devoid of specific details and particulars as to how and as to what property is about to be disposed of or removed by the Defendants.

67. The very fact that the Interim Application has not yet been circulated for interim reliefs itself demonstrates that there is hardly any apprehension, let alone a serious one, as to the intention of the Defendants to obstruct or delay the execution of any decree that may be passed against them. Merely, repeating the language of a provision is not sufficient and the same would not assist the case of the Plaintiff in avoiding the mandatory requirement of pre-institution mediation under Section 12-A of the said Act.

68. I therefore agree with Mr. Joshi, learned Senior Counsel for the Respondent No.1, while relying upon the decision of the Hon'ble Supreme Court in the case of *Bihari Chowdhary and Another Vs. State of Bihar and others (supra),* to submit that just as Section 80 of the CPC has been enacted as a measure of public policy with the object of

ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of which the Suit is proposed to be filed and if it is found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person who issued notice, to institute the Suit involving considerable expenditure and delay, similarly, the mandatory provision of Section 12-A of the said Act of pre-institution mediation is to afford an opportunity to settle the claim to avoid unnecessary litigation involving expenditure and delay and that the window for genuine urgency cannot be used as a mechanism to override Section 12-A of the said Act.

69. The Plaint is therefore rejected under Order VII Rule 11(d) of the CPC, as the Suit appears from the statement in the Plaint to be barred by law as the Commercial Summary Suit has been filed without complying with the mandatory provisions of Section 12-A of the Commercial Courts Act, 2015. The pending Interim Applications accordingly to stand disposed. It goes without saying that the Plaintiff is at liberty to file a fresh Plaint in respect of the same cause of action

after following the necessary procedure as mandated in Section 12-A of the Commercial Courts Act, 2015.

70. It is made clear that this Court has not expressed any opinion on the merits of the suit and any observations on merits may have been made only to decide these applications. In the event liberty as granted is exercised, and a suit is filed after complying with the mandatory requirement of Section 12-A of the said Act, the suit be decided on its own merits, uninfluenced by any such observations.

(ABHAY AHUJA, J.)

KIRAN SANJAY GHUGE

Digitally signed by KIRAN SANJAY GHUGE Date: 2024.11.12 21:41:49 +0530