IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

OMP No. 921 of 2024 in
COMS No. 05 of2024
Reserved on: 19.11.2024
Decided on: 27.11.2024

M/s Shilpa Medicare Limited ….Plaintiff.

Versus

M/s. Salus Pharmaceuticals and another …Defendants.

Coram
The Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting?[1] *Yes.*

For the plaintiff/ non-applicant: Mr. Neeraj Gupta, Senior Advocate, with M/s Shradha Karol, Abhishek Jain and Vaibhav Singh Chauhan, Advocates.

For the defendants/ applicants: M/s Rajeshwari H. Garima Joshi and Jyotirmay Bhatt, Advocates.

Ajay Mohan Goel, Judge

OMP No. 921 of 2024

By way of this application filed under VII, Rule 11 read with Section 151 of the Code of Civil Procedure, 1908, the applicants/defendants have prayed for rejection of the plaint, on the ground that as there is no urgency that has been made out by the plaintiff/non-applicant, to do away with the mandatory statutory provisions of Section 12 A of the Commercial Courts Act, 2015, therefore, the suit is liable to be dismissed and the plaintiff/non-applicant be directed to exhaust the mandatory remedy as provided under Section 12 of the Commercial Courts Act, 2015.

1 *Whether reporters of the local papers may be allowed to see the judgment?*

2. Learned counsel for the applicants/defendants has submitted that in terms of Section 12 of the Commercial Courts Act, 2015, pre-institution mediation and settlement is necessary in a commercial suit, which does not contemplate any urgent interim relief and no such suit can be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. Learned counsel further submitted that the plaintiff has admitted in the suit that it was aware since the month of May, 2023 that the defendants were manufacturing and selling the infringing product. The Patent Application was subsequently granted in favour of the plaintiff on 26.09.2023. The suit was filed by the plaintiff in the month of February, 2024 and was listed before the Court on 4th March, 2024. Learned counsel further submitted that since the month of May, 2023, no efforts were made by the plaintiff to approach the defendants. Even after the grant of Patent in the month of September, 2023, the plaintiff did not take any urgent steps to apprise the defendants about its grant of Patent or of its apprehension that the act of the defendants might infringe the Patent of the plaintiff, i.e., IN' 695. Learned counsel further submitted that the plaintiff took six months to approach the Court. Such delay on the part of the plaintiff demonstrates that neither there was any apprehension that the defendants were infringing the Patent of the Plaintiff nor there was any urgency to file the present suit. Instead of following the procedure of pre-institution mediation, the plaintiff has approached this Court to secure an *ex parte* ad interim injunction. Learned counsel further submitted that the plaintiff has acted in a suspicious manner just to prevent its

unauthorized monopoly in the market and thus prevent any third party from entering into the market. Learned counsel further submitted that had plaintiff made any efforts to mediate with the defendants or sent them a legal notice, the defendants would have informed them that the products manufactured and sold by the defendants are outside the purview of the granted Patent. However, no such effort was ever made by the plaintiff. The conduct of the plaintiff in approaching the Court almost after ten months from the date of knowledge and six months after the Patent was granted shows that the plaintiff has failed to demonstrate any urgency as envisaged under Section 12 A of the Commercial Courts Act, 2015. Accordingly, he submitted that as the suit filed by the plaintiff does not contemplate any urgency, it is hit by the provisions of Section 12 A of the Commercial Courts Act, 2015 and, therefore, the plaint be rejected.

3. On the other hand, learned Senior Counsel for the plaintiff/non-applicant submitted that the plaintiff came to know about the product of the defendants in the month of May, 2023. As the Patent of the plaintiff was not yet registered, the plaintiff was not having any ground to file the suit. After the Patent was granted, the plaintiff had to make itself sure that the defendants product was falling within the claims of the suit patent. To establish this fact, the plaintiff undertook internal as well as independent testing of the infringing drug. It was only thereafter when the apprehension of the plaintiff was proved true that the product of the defendants was infringing the Patent of the plaintiff. Learned Senior Counsel further submitted that the

application of the plaintiff for grant of Patent was under consideration in the month of May, 2023. The plaintiff took appropriate steps to actually evaluate the product of the defendants to establish the infringement. The suit was filed on 16th February, 2024 and before this, even an affidavit of the expert was obtained and as the affidavit of the expert became available to the plaintiff on 01.02.2024, immediately thereafter without wasting any further time, the plaintiff filed the suit. Learned Senior Counsel further submitted that as the act of the defendants of selling the infringing product otherwise also is a recurring act, being carried out on day-to-day basis, therefore, there was urgency involved in the suit, as was pleaded in the suit as well as application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure. Learned Senior Counsel further submitted that the intent of the plaintiff was not to evade the provisions of Section 12 A of the Commercial Courts Act, 2015. As per him, as there indeed was an urgency in the suit, therefore, the same was filed alongwith an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure for grant of interim relief. Learned Senior Counsel thus submitted that as the application is without any merit, the same be dismissed.

4. I have heard learned counsel for the parties and have also carefully gone through the averments made in the application as well as the reply, as also the plaint and the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure.

(2024:HHC:12542)

5. The Commercial Courts Act, 2015 was brought into force to provide for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Divisions and Commercial Appellate Divisions in the High Court for adjudicating commercial disputes of specific value and matters connected therewith or incidental therewith. Commercial dispute has been defined in Section 2 (c) of the Act. Chapter III (A) was introduced in the Commercial Courts Act, w.e.f. 03.05.2018, containing Section 12-A of the Act, which provides as under:-

> "*12. Determination of Specified Value.—(1) The Specified Value of the subject-matter of the commercial dispute in a suit, appeal or application shall be determined in the following manner:—*
> *(a) where the relief sought in a suit or application is for recovery of money, the money sought to be recovered in the suit or application inclusive of interest, if any, computed up to the date of filing of the suit or application, as the case may be, shall be taken into account for determining such Specified Value.*"

6. A perusal of sub-section (1) of Section 12-A of the Act demonstrates that a suit which does not contemplate any urgent relief under the Commercial Courts 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.

(2024:HHC:12542)

7. Hon'ble Supreme Court of India in *Patil Automation Private Limited and Others* vs. *Rakheja Engineers Private Limited, (2022) 10 Supreme Court Cases 1*, had an occasion to deal with the provisions of Section 12-A of the Commercial Courts Act, 2015. The question which Hon'ble Supreme Court was called upon to answer was whether the statutory 'Pre-Litigation Mediation' contemplated under Section 12-A of the Act, as amended by the Amended Act of 2018 is mandatory and whether the Courts erred in not allowing applications filed under Order VII, Rule 11 of the Code of Civil Procedure to reject the plaint filed by the respondents in the appeal before it without complying with the procedure under Section 12-A of the Act. Hon'ble Supreme Court held that the Commercial Courts Act is a unique experiment to push the pace of disposal of commercial disputes as there was a direct relationship between ease of doing business and an early and expeditious termination of disputes, which may arise in commercial matters. It held that in this background, the Court must approach the issue of whether Section 12-A has been perceived being a mandatory provision, 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. Hon'ble Court held that the first principal of course must be the golden rule of interpretation, which means, the interpretation in conformity with the plain language, which is used and there cannot even be a shadow of doubt that the language used in Section 12-A is plainly imperative in nature. Thereafter, Hon'ble Supreme Court summed up its reasoning on the issue in Para-99 of

the judgment as under:-

> " *99. We may sum-up our reasoning as follows:*
>
> *99.1. 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.*
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> *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 of the CPC and Section 69 of the Indian Partnership Act.*
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> *99.3 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.

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 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 judgement 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."

8. Hon'ble Supreme Court, thereafter, went on in Para-113.1

of the judgment to hold that Section 12-A of the Act is mandatory and suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure. Hon'ble Supreme Court held that this power can be exercised even suo moto by the Court. However, the declaration was made effective from 20.08.2022.

9. Thereafter, in *Yamini Manohar* vs. *T.K.D. Keerthi, (2024) 5 Supreme Court Cases 815*, Hon'ble Supreme Court again reiterated that the prayer for urgent relief should not be a disguise or mask to wriggle out of and get over Section 12-A of the Commercial Courts Act. The relevant paras of the judgment are quoted hereinbelow:-

> "*10. 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.

11. 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).

12. 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.*"

10. There is no iota of doubt that as per the pronouncement made by Hon'ble Supreme Court of India, Section 12-A of the Commercial Courts Act is mandatory. Hon'ble Supreme Court has made it manifestly clear that the power can be exercised *suo motu* by a Court while dealing with the Commercial Civil Suit and when a plaint is filed under the Commercial Courts 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 and 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 Commercial Courts Act.

11. Now, coming back to the facts of this case, the plaintiff has filed the suit in the Court on 16th February, 2024, *inter alia*, praying for the following reliefs:-

> *"(a) A decree of permanent injunction restraining the defendants, their directors, employees, officers, servants, agents, licenses, franchisees, distributors and all other acting for and on their behalf from using, manufacturing, selling, distributing, advertising, exporting, offering for sale and dealing in any other manner directly*

or indirectly the products that infringe the subject matter of the plaintiff's Suit Patent IN'695.

(b) A decree for rendition of accounts of profits in respect of use, manufacture, sale, export, import or any other infringing activity in relation to products, that infringes the subject matter of the plaintiff's patent IN'695 and a decree for the amount so found and ascertained by this Hon'ble Court may be passed in favour of the plaintiff and against the defendants.

(c) A decree for delivery up of all the stock of infringing products, that infringe the subject matter of the plaintiff's patent IN' 695 as available with the defendants to an authorized representative of the plaintiff.

(d) A decree for damages in favour of the plaintiff and against the defendants as stated hereinabove."

12. The cause of action has been culled out by the plaintiff in Paras 48 to 50 of the plaint, contents whereof are being reproduced hereinunder:-

"48. In light of the abovementioned facts, it is submitted that the cause of action first arose in the month of May 2023 when the plaintiff through its credible sources found out that the defendants are manufacturing , distributing, selling or offering for sale the infringing products.

49. That the apprehension that the defendants are manufacturing, distributing, selling or offering for sale the infringing products, the

plaintiff conducted its due diligence and was able to obtain/purchase the infringing product from the market in September, 2023 and accordingly, conducted test analysis of the infringing products of the defendants and found that the infringing product falls within the scope of the granted claims of IN' 695, which gave rise to further cause of action.

50. That the intended and threatened use, offer for sale, manufacture, export etc. of the infringing product is part of cause of action which is a continuous one and continues to subsist till the defendants are injuncted by this Hon'ble Court from dealing in infringing products. The present suit is being instituted by the plaintiff with a prayer to this Hon'ble Court inter alia to restrain the defendants from infringing the plaintiffs right in the Suit Patent. The cause of action is a continuing one and will continue to subsist until this Hon'ble Court restrains the defendants from carrying on its infringing activities."

13. A perusal of these paras demonstrates that according to the plaintiff, the cause of action firstly arose in the month of May, 2023, when the plaintiff through credible sources found that "**the defendants are manufacturing, distributing, selling or offering for sale the infringing product."** It is further mentioned in these paras that thereafter the plaintiff conducted due diligence and was able to obtain/purchase the infringing product from the market in **September, 2023.** Thereafter, the plaintiff

conducted test analysis of the infringing product and found that the infringing product falls within the scope of granted claims of the Patent of the plaintiff, which further gave rise to cause of action. It is thereafter mentioned in these paras that the intended and threatened use, offer for sale, manufacture, export etc. of the infringing product is part of cause of action, which is continuous one and continues to subsist till the defendants are injuncted by the Court from dealing in infringing products.

14. These are the averments made in the plaint so as to demonstrate the “cause of action”. Now, in terms of these averments, the plaintiff come to know of the factum of defendants manufacturing, selling, distributing or offering for sale the infringing product in the month of May, 2023. It is a matter of record that the Patent was granted in favour of the plaintiff on 26th September, 2023. As from the month of May, 2023 up to the month of September, 2023, why no steps were taken by the plaintiff to conduct an in-house and/or independent testing of the infringing product to determine the infringement, has not been spelled out in the plaint. This Court is aware of the fact that the Patent was granted to the plaintiff on 26th September, 2023, but then, there is no law, rule or regulation which prevented the plaintiff from conducting an in-house and independent testing of the drug in issue so as to determine the infringement of its drug.

15. Despite the fact that the plaintiff came to know about the infringing product in the month of May, 2023, coincidentally, the plaintiff was not able to lay its hand on the infringing product till the month of September,

2023, i.e., the month when Patent was granted to the plaintiff. Learned Senior Counsel for the plaintiff took the Court through the documents filed by the plaintiff and perusal thereof clearly demonstrates that it is in the months of September/October, 2023 that in-house and external tests of the drug in issue were conducted by the plaintiff. External tests were also completed in the month of December, 2023. Now incidentally, the plaintiff did not approach the Court even after conducting in-house analysis or external tests, which were available to the plaintiff in September/October/December, 2023. However, it continued to wait for another two months to approach the Court. Why so? There is no answer in the plaint. Learned Senior Counsel made an endeavour to explain this delay by submitting that in order to make itself very sure, the plaintiff also obtained an affidavit of the Expert and as the same was obtained on 1st of February, 2024, therefore, the plaintiff could not have approached the Court earlier and immediately after receipt of the affidavit, the suit was filed without any further delay. Now incidentally, a perusal of the affidavit of the expert demonstrates that this expert is not an independent expert. He happens to be President-Global R & D (Head R & D) of the plaintiff. This clearly demonstrates that *prima facie* the affidavit of the expert is a self-serving affidavit, which has been obtained by the plaintiff to propagate its cause. The Court is not derogating the contents of the affidavit or making any remarks thereon, but fact of the matter remains that this expert, by no stretch of imagination, is an independent expert and further, simply because this expert swore the affidavit on 1st February, 2024, the same does not improve

the case of the plaintiff with regard to the non-adherence to the provisions of Section 12-A of the Commercial Courts Act.

16. As already observed hereinabove, the provisions of Section 12-A of the Commercial Courts Act are mandatory in nature. A party can be allowed to do away with said provision only if it is able to establish urgency. In the present case, the conduct of the plaintiff clearly demonstrates that despite the factum of the infringing product being in its knowledge since the month of May, 2023 and despite the fact that the Patent was granted to the plaintiff on 26.09.2023, the plaintiff approached the Court in the month of February, 2024. Had there indeed been urgency in the issue, the plaintiff could have had undertaken all the investigations as from the month of May, 2023 onwards and approached the Court immediately upon the grant of the Patent. However, this has not been done, as is evident from the facts mentioned hereinabove.

17. There is no material placed on record by the plaintiff from which this inference can be drawn that there indeed was urgency in the case so as to do away with the provisions of Section 12-A of the Commercial Courts Act.

18. At this stage, it is relevant to refer to the contents of Para-48 of the plaint vis-à-vis the contents of the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure. In Para-48 of the plaint, it is the definite stand of the plaintiff that in the month of May 2023, the plaintiff came to know that defendants **were manufacturing, distributing, selling or**

offering for sale the infringing product, however, when one peruses the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, in Paras 27 and 28 thereof, it is mentioned that little prior to the grant of the suit Patent, the plaintiff **had apprehension from the market sources** that defendant No. 1 was contemplating manufacturing product that might infringe the Patent of the plaintiff. There is a clear contradiction in the stand of the plaintiff in the plaint as compared to the contents of the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure. In the paint, the averments are that the plaintiff came to know that the defendants were manufacturing, distributing, selling or offering for sale the infringing product, whereas in the application, it was mentioned that the plaintiff apprehended that the defendants contemplating manufacturing of the infringing product. This demonstrates that the intent of the plaintiff was but to evade the provisions of Section 12-A of the Commercial Courts Act by concocting a version in the application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, contrary to the averments contained in the plaint. This Court again reiterates that the internal and external testing of the product was completed in the months of October and December, 2023, yet the suit was filed on 16th February, 2024. The affidavit of the expert pertains to one Dr. Ganeshchandra S. Sonavane, who is the President-Global R & D (Head R & D) of the plaintiff.

19. Therefore, from the reasoning given hereinabove, it is apparent and evident that there indeed was no urgency involved in the case

and the plaintiff could not have resorted to the filing of the suit without first adhering to the mandate of Section 12-A of the Commercial Courts Act.

20. In said backdrop, this Court has no hesitation in holding that the present suit does not contemplate any urgent interim relief. Filing of the application under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code is just an act to wriggle out of and get over Section 12-A of the Commercial Courts Act. Therefore, as the Civil Suit could not have been filed by the plaintiff without resorting to the Pre-Institution Mediation and Settlement in terms of Section 12-A of the Commercial Courts Act, 2015, the application is allowed and the plaint is rejected.

(Ajay Mohan Goel)
Judge

November 27, 2024
(bhupender)