



\$~36

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Decision delivered on: 09.01.2024*+ **RFA(COMM) 7/2024 & CM Nos.1422-24/2024**

M/S ANSA

..... Appellant

Through: Mr Sumit Rajput, Adv.

versus

ZAHID SHAWL

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):****CM No.1423/2024**

1. Allowed, subject to just exceptions.

CM No.1424/2024

2. Allowed, subject to just exceptions.

RFA(COMM) 7/2024 & CM No.1422/2024 [Application filed on behalf of the appellant seeking interim relief]

3. This appeal is directed against the judgment dated 22.12.2023 passed by the learned District Judge (Commercial Court)-02, West/THC Extn. Block, Delhi. The said judgment was rendered on the day the suit, along with the interlocutory application, was listed for the first time.



4. *Via* the impugned judgment, the learned District Judge has rejected the plaint, and in this behalf, had taken recourse to the provisions of Order VII Rule 11(d) of The Code of Civil Procedure, 1908 [in short, “CPC”].

4.1 The plaint has been rejected solely on the ground that the appellant/plaintiff had not taken recourse to pre-institution mediation and settlement, as provided under Section 12A of The Commercial Courts Act, 2015 [in short, “2015 Act”].

5. The suit action, instituted before the learned District Judge, pivoted on the failure of the respondent/defendant to pay the balance outstanding amount for extending professional services.

5.1 The appellant/plaintiff avers that it is in the business of providing interior design and architectural services.

6. It appears that the respondent/defendant engaged the appellant/plaintiff for rendering the services in connection with a house that he wished to construct in Srinagar, Kashmir.

7. It is also seen that a WhatsApp group had also been set up to progress the work assigned to the appellant/plaintiff, which included not only the respondent/defendant but also two of his team members. On the said WhatsApp group, it is alleged that the proprietor of the appellant/plaintiff was subjected to unparliamentary language and was issued threats.

8. Furthermore, a perusal of the plaint reveals that it is asserted that the respondent/defendant was smearing the appellant’s/plaintiff’s reputation in the market, trade circles, and the consumers.

9. The appellant/plaintiff, being apprehensive that the respondent/defendant would continue to smear the proprietor’s reputation, had also moved an application under Order XXXIX Rules 1 and 2 read with



Section 151 of the CPC, whereby, the following reliefs were sought:

“a. pass an *ex-parte- ad interim injunction order* thereby restraining the Defendant from sending/writing any unscrupulous and derogatory comments on social media pages of Plaintiff on Instagram, Facebook, Twitter, Youtube, etc or restrain any other entities/persons, which may malign the goodwill, reputation, frame or image of the Plaintiff.”

10. Therefore, the record made available to us clearly demonstrates that an application for interim relief accompanied the suit action.

10.1 The learned District Judge, while dealing with this aspect of the matter, has observed that the respondent's/defendant's action, whereby, false rumours were allegedly spread, required a separate cause of action that does not fall within the ambit of the 2015 Act.

11. According to the learned District Judge, the appellant/plaintiff ought to have filed a suit for defamation.

11.1 Furthermore, the learned District Judge has also observed that no documents were filed that would, *prima facie*, support the stand taken by the appellant/plaintiff that the defendant/respondent had posted any malafide content on social media.

12. It is in the backdrop of these observations that the learned District Judge got over the prayers made by the plaintiff for *ad interim* reliefs, via the application under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC.

13. Learned counsel for the appellant/plaintiff says that the provisions of Section 12A of the 2015 Act would kick in only if no urgent interim relief is contemplated.



14. It is learned counsel for the appellant's/plaintiff's submission that the learned District Judge erred in failing to appreciate that the tenability of relief may not necessarily decide whether or not the appellant/plaintiff could be called upon to first take recourse to the provisions of Section 12A of the 2015 Act and then approach the court.

15. According to us, there is no dispute that the appellant/plaintiff had, in the instant case, sought interim protection based on an apprehension and past conduct of the respondent/defendant, which involved the issuance of scurrilous statements against the proprietor of the appellant/plaintiff.

16. A perusal of Section 12A of the 2015 Act would show that it mandates that the plaintiff should take recourse to pre-litigation mediation and settlement only where urgent relief has not been contemplated in the suit. The purpose and object of providing this mechanism is to, *inter alia*, deal with the docket explosion that courts are facing.

17. This apart, it appears that the Legislature also intended to create an environment, whereby, disputes could be settled so they could be taken out of the litigation stream altogether.

18. The learned District Judge has, in support of her conclusion, relied on the judgment rendered by the Supreme Court in ***Patil Automation Pvt. Ltd. & Ors. v. Rakheja Engineers Pvt. Ltd.***, 2022 SCC OnLine SC 1028.

19. In our opinion, the ratio of the aforesaid judgment needs to be understood in the context of the facts which obtained in that case. The Supreme Court, in paragraph 100 of the said judgment, clearly observed that the suit actions that came up for examination before it did not contemplate urgent relief.



20. In this case, as indicated hereinabove, urgent relief was contemplated and, therefore, on facts, the judgment is distinguishable. Therefore, in our opinion, the plaint could not have been rejected at the threshold.

21. That said, we are also of the opinion that the court can, in a given case examine an interlocutory application or a prayer made therein to ascertain whether it is a frivolous application lodged only to bypass the provisions of Section 12A of the 2015 Act.

22. In this case, however, we are not persuaded by the observations made by the learned District Judge that the alleged scurrilous statements made by the defendant *via* WhatsApp would constitute a separate cause of action and that the only remedy which the appellant/plaintiff had was to file a suit for defamation.

23. The view that we have taken finds resonance in the following observations made by the Supreme Court in the judgment dated 13.10.2023 passed in SLP(C) Diary No.32275/2023, titled ***Yamini Manohar v. TKD Keerthi*** :

“7. 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.”



8. 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.

9. Recording the aforesaid, the present special leave petition is dismissed."

[Emphasis is ours]

24. We may note that during arguments, counsel for the appellant/plaintiff sought to rely on the judgment of a division bench of this court in **Chandra Kishore Chaurasia v. R A Perfumery Works Private Ltd.**, 2022 SCC OnLine Del 3529 as well. In particular, reliance was placed on paragraphs 33, 34, and 35 of the said judgment.

24.1 While in the context of the instant case, the conclusion reached in Chandra Kishore's case may support the appellant's/plaintiff's stand, certain observations made by the division bench appears to be in dissonance with the observations made by the Supreme Court in the **Yamini Manohar** case. The division bench's observations are suggestive of the view that once an interim application is filed, the court has no role to play in ascertaining



whether or not the application is frivolous, i.e., is preferred only to get around the obligation cast under Section 12A of the 2015 Act, which mandates recourse to pre-institution mediation. The relevant part of the **Chandra Kishore** judgment is set forth hereafter:

“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.”

[Emphasis is ours]

24.2 The argument of the respondent in Chandra Kishore’s case was that an exemption application should have been filed the appellant/plaintiff. The division bench rejected this contention but while doing so, went so far as to say that the commercial court cannot determine whether urgent relief claimed is hit by the bar of Section 12A of the Act.

24.3 Although we agree that neither an exemption application is required to be filed, nor leave is to be obtained, the concerned commercial court can certainly examine and weed out interlocutory applications claiming urgent relief, which are, on the face of it, frivolous. The space for the commercial courts in this area, though narrow, nevertheless exists.

24.4 The Supreme Court in the *Yamini Manohar* case, after taking note of the judgment in *Chandra Kishore*, has observed that the Court can, in given circumstances, sift through the plaint and the documents placed on record and relegate parties to the mediation route if it is not satisfied that there is a need for interim relief.

25. Thus, having regard to the foregoing discussion, we are of the view that the impugned judgment deserves to be set aside.

25.1 It is ordered accordingly.



26. The suit is restored to its original number. The suit action will be listed before the concerned District Judge on 01.02.2024.
27. Consequently, the interlocutory application preferred with the instant appeal is closed. Liberty is, however, granted to the appellant/plaintiff to press for interim relief before the concerned District Judge.
28. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

AMIT BANSAL, J

JANUARY 9, 2024

aj