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**In the High Court at Calcutta
Civil Appellate Jurisdiction
Commercial Division**

**FMAT 3 of 2025
with
IA No. CAN 1 of 2025
CAN 2 of 2025**

sg

**Asa International India Microfinance Ltd.
Vs.
Northern ARC Capital Ltd. & Anr.**

Mr. Surajit Nath Mitra, Sr. Adv
Mr. Swatarup Banerjee
Ms. Saheli Sen
Mr. Rajib Mallick
Ms. Ayantika Saha
... For the Appellant

Mr. Jishnu Chowdhury, Sr. Adv
Ms. Trisha Mukherjee
Mr. Chetan Kabra
... For the Respondent no. 1

Mr. Pramit Bag
Mr. Dip Jyoti Chakraborty
Mr. Anuj Mishra
Mr. Amit Pareek
... For the Intervenor/IDFC
First Bank/Creditor

Soumen Sen, J. (Oral):

1. The plaintiff/respondent no.1 claims to be guarantor in respect of Non-Convertible Debentures in favour of CDC group Plc aggregating to Rs.40 Crores.
2. The plaintiff alleged that due to default of the appellant in payment in terms of the Debenture Trust Deed dated 24th March, 2021 the Debenture Trustee had invoked the deed of guarantee dated 24th March, 2021. The plaintiff as a guarantor paid

the default amounts to the respondent no.2, debenture trustee. Presently a sum of over Rs.18 crores is due and payable by the appellant on the basis of clause 4 of the Payment Undertaking executed by the appellant/defendant no.1. The appellant in spite of repeated demands did not discharge its liabilities and pay all the debts, although, payment obligations in respect of other lenders/creditors are being honoured. This is a clear breach of the obligations under the payment undertaking. On such facts and circumstances suit was filed in the Commercial Division of the department concerned with a prayer for dispensation of the mandatory requirement of Section 12A of the Commercial Courts Act, 2015. The learned judge granted leave and thereafter two orders have been passed.

3. On 6th December, 2024, the plaintiff filed an application under Section 12(A) of the Commercial Courts Act, 2015 supported by affidavit praying for exemption from applying for Pre-institution Mediation in view of the urgent interim reliefs. The plaintiff also filed an application for interim relief under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. On 19th December, 2024, an order was passed by the learned Commercial Judge granting leave under Section 12(A) relying upon the observation of a

coordinate Bench in FMAT 222 of 2024 with CAN 1 of 2024 (Shristi Infrastructure Development Corporation Limited vs. Sarga Hotel Private Limited & Anr.) and thereafter an ex-parte ad-interim order was passed restraining the appellant from making any disbursement or payment including any payment to any third party/alleged creditor/s before the petitioners' monetary overdue is cleared. Subsequently, on 23rd December, 2024, the defendant appeared and contested the said application. On the basis of the oral submission, the interim order was modified to the extent that the parties shall avail the mediation before the appropriate Authority/Forum and till the mediation proceeding comes to an end, the order of ad-interim injunction as it stands after modification, will remain in abeyance since the commencement of the mediation proceeding till its end subject to the condition that the defendants/respondents pay 40% of the outstanding dues of Rs.16 crores and odds to the plaintiff/petitioner within three weeks since the commencement of the mediation proceeding. The matter was directed to be listed on 26th March, 2025 for compliance.

4. Mr. S.N. Mitra, learned senior counsel appearing on behalf of the appellant, has submitted that no application was served upon the

appellant before such leave was obtained and in any event, having regard to the decision of Hon'ble Supreme Court in the case of ***Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.***, reported in **(2022)10 SCC 1**, the Court has a suo motu power to reject the plaint, in the event the Court is satisfied that the urgency pleaded was not genuine and is only a pretext to circumvent the mandatory provision of Section 12A.

5. The learned senior counsel has referred to paragraph 20 of the plaint to show that the plaintiff had received payments. It is further submitted that even after the impugned order was passed a sum of Rs.1.5 Crores have been paid to the plaintiff which clearly disprove the impecunious situation of the appellant.

6. An attempt was made by Mr. Pramit Bag, learned counsel appearing for one of the creditors to submit that the said order ought not to have been passed without hearing the IDFC Frist Bank. However, in absence of any application, we are not inclined to go into that question.

7. Section 12A of the Commercial Courts Act, 2015 states as follows:

“(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.” (emphasis supplied)

The clear intent of this Section is to encourage parties to use litigation as a last resort and to resolve commercial disputes amicably, informally, cheaply and quickly under the process of mediation.

8. Section 12A of the 2015 Act requires the court to ascertain whether the suit contemplates any urgent interim relief arising out of a commercial dispute as defined in the said Act. ‘Contemplate’ would mean to deliberate and consider whether regard being had to the facts and circumstances pleaded, any urgent relief is called for. It would imply that a die is cast and bolt impending and the act is done in expectation of and with a view to it, or that the dispute is already existing and the act is done in support to one side of it. The judge is required to consider and apply its mind to the facts and take a decision keeping in mind that such relief is ex parte. An ‘urgent interim relief’ would mean that the matter cannot wait for the initial period of three months as required under Section 12A (3) of the Commercial Courts, Act, 2015. On a reading of a pleading the court has to be satisfied that if the court does not immediately intervene in spite of plaintiff fulfilling the trinity tests namely, prima facie case, balance of

convenience and irreparable loss and injury and allow the plaintiff to institute the suit only after the expiry of the statutory period, it would be an injustice to the plaintiff and the situation may be irreversible.

9. Recently two decisions rendered by a Division Bench of the Calcutta High Court in ***Gavrill Metal Pvt. Ltd. v. Maira Fabricators Pvt. Ltd., 2023 SCC Online Cal 2443*** and ***Sristi Infrastructure Development Corporation Limited v. Sarga Hotel Private Limited & Ors., MANU/WB/1688/2024*** have dealt with the issue. In the aforesaid matters the question arose whether leave is required where urgent reliefs are contemplated. Justice I.P. Mukerji presently the Chief Justice of Meghalaya has given illustrations in paragraphs 14 and 15 in Gavrill (supra) to understand the distinction between mandatory requirement and a suit contemplating urgent relief:

“14. The section stipulates three months' time from the date of the application of the plaintiff which can be further increased by two months with the consent of parties for completion of the mediation process. Take the example of a suit for recovery of money lent and advanced. The defendant debtor has huge debts in the market. Several claims of creditors against him are pending. When the plaintiff is contemplating filing of the suit against him, he is in the process.

of transferring his immovable property so as to defeat the claim of the plaintiff as well as other creditors. Immediately with the filing of the suit, the plaintiff needs to move an interim application and obtain an order restraining the defendant from transferring the property and for the property to be taken possession of by a receiver to be appointed by the court.

15. Now, if the plaintiff is to undergo mediation compulsorily, the defendant might keep it pending for three months. For three months the plaintiff would be unable to institute the suit and hence, unable to obtain any relief. In the meantime, the defendant could be successful in transferring the property, thus defeating the claim of the plaintiff. Hence, the justification for the exception in Section 12A that in suits contemplating urgent reliefs pre-litigation mediation could not be required.”

In this context the word “contemplate” was explained in paragraph 16 and 17 as under:

“16. The legislature, in my opinion, has used the expression "contemplated" to express the intention that an interim relief may be required at the time of filing of the suit or may be required any time the defendant expresses an intention to do some act to defeat the decree to be passed.

17. So, the test, in my opinion, is not whether an urgent interim relief is immediately required but whether the averments in the plaint point to a situation where even before expiry of three months, the plaintiff may have the need to obtain interim relief.”

10. In this context, the legislative intent of the phrase “an urgent relief” and the

expression “contemplate” are to be understood and applied.

11. Contemplation thus would not mean an instant immediacy but the prejudice and the irreparable loss and injury that the plaintiff is likely to suffer if the plaintiff is made to wait for pre-litigation mediation. The court has to examine whether the facts and circumstances justify a genuine apprehension as opposed to a camouflage of an irreparable injury the plaintiff is likely to suffer.

12. The Apex Court in the case of ***Patil Automation Private Limited & Ors. v. Rakheja Engineers Private Limited, (2022) 10 SCC 1*** reinforced that the requirement of Section 12A for pre-institution mediation is compulsory and not optional. The Court emphasizing on the necessity of obtaining a mediation certificate as proof that mediation was attempted in good faith and had failed, stated that such was a pre-condition for the institution of a commercial suit. It was also noted that the failure to adhere to such requirement of Section 12A would render the suit non-maintainable.

13. Mr. Jishnu Chowdhury has referred to a decision of Bombay High Court in ***Kaulchand H. Jogani vs. Shree Vardhan Investment and Others*** reported in ***2022 SCC OnLine Bom***

4752 : (2023) 1 Bom CR 63 and has submitted that the inquiry envisaged under Section 12(A) should be extremely narrow and any such an inquiry cannot partake the character of determination for interim relief on merits. It cannot be urged that the Court is disinclined to grant interim relief then the justifiability of the institution of the suit without Pre Institution mediation can itself have questioned. This view, in fact, is also reiterated in the two Division Bench Judgments of our Court alluded above.

14. In fact, the Hon'ble Supreme court in ***Yamini Manohar v. T.K.D. Tripathi, 2023 SCC OnLine SC 1382*** in approving the decision in Kaulchand H. Jogani (supra) has indicated the duty of the Court in accepting a plaint with the prayer for urgent relief in paragraph 9 of the Judgment. The relevant observations in this regard are reproduced below:

“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.” (emphasis supplied)

The court should be careful of clever and artful drafting and creating illusion of an urgent relief.

15. In ***Harish Verma v Joginder Pal Singh, 2024 SCC OnLine Del 2770***, the Division Bench of the Delhi High Court relying on the case of Yamini Manohar (supra) has laid down the following tests and standards to be followed in this regard in paragraph 8 as follows:

“8. the Supreme Court established standards against which the plaint and the application for urgent relief have to be tested amongst others, on the following grounds:

i) *The commercial court has to examine the nature, subject matter, cause of action, and the relief sought.*

ii) *The facts and circumstances of the case have to be considered holistically from the viewpoint of the plaintiff.*

iii) *Plaint, documents, and facts should show and indicate the need for urgent relief.”*

Thereafter the Division Bench concluded in paragraph 9:

“9. Therefore, to dismiss a plaint, a commercial court has to undertake a thorough examination of the case while also looking out for deception and falsity. The plaint cannot be dismissed at the threshold for failure to prima facie establish urgency.”

16. Pre suit correspondence and conduct between the parties can be indicative of existence of genuine apprehension in the mind of the plaintiff since any further delay might cause irreparable and irretrievable prejudice to the plaintiff as there might be every likelihood of the assets and properties being dissipated or alienated.

17. However, in view of the fact the satisfaction recorded was ex-parte and it has been emphasized that the plaintiff had waited till 25th October, 2024 within which time some payments were made, the Pre-institution Mediation could not have been avoided is a matter if raised in an application by the applicant/defendant may be considered keeping in view the law laid down in this regard as summarized in the preceding paragraphs. At this stage, we are not inclined to go into the said question as the appellant has decided

to take out an application for revocation and we are unaware of the grounds that may be taken in such application for revocation.

18. The impugned order prima facie shows that preferential treatment was given to the plaintiff as regards repayment of the loan or advances by the plaintiff over other creditors. IDFC First Bank claims to be one of the creditors. That other creditors may be affected by an order cannot dilute the legal right of the plaintiff to secure its claim. In the event of establishing its legal right, notwithstanding at the initial stage, the Court should be circumspect not to pass any drastic order that may cause breach to any existing obligation or procuring a breach of a contract. It is only upon whole facts that are brought on record and to the notice of the Court the order of attachment or injunction as the case may be depending upon the facts of the case.

19. The learned Trial Court has referred to few decisions where in appropriate cases an order of attachment or injunction could be passed. In view of the fact that the appellant has paid a sum of Rs.1.5 crore after the impugned order was passed and is willing to pay further sum and also agreeable to have an amicable settlement of the dispute to which respondent, at this stage, expressed its disinclination, we vary the interim

order to the effect that upon the appellant making payment of Rs.2 crores and filing an affidavit of assets and schedule of payments in respect of other creditors the appellant shall be permitted to utilize the rest of the amounts enjoined by the impugned order. The appellant shall file an affidavit-in-opposition to the injunction application within two weeks from date reply thereto, if any, shall be filed within ten days thereafter. In the event of compliance of this order, it would be open for the appellant to pray for preponing the date of hearing of the injunction application. In the event of any application for revocation of lease under Section 12A is filed, it shall be heard only after the compliance of this order.

20. The appellant shall file fortnightly statement of accounts in the pending proceeding upon prior service to the plaintiff with regard to the utilization of its fund in respect of other creditors.

21. We request the learned Judge Commercial Court to decide the injunction application on merits being uninfluenced by the observation made in this order.

22. During the pendency of the suit and the application, it would be open for the appellant to pay a further sum, as may be admissible, as it has

been submitted on behalf of the appellant that the appellant is ready and willing to liquidate the admitted amount.

23. In view of the above, the appeal being FMAT 3 of 2025 stands disposed of along with CAN 1 of 2025 and CAN 2 of 2025.

24. Urgent Photostat copy of this order, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)