

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 1735 of 2025

Nataraj Das

Vs.

RKD Niraj JV & Ors.

And

C.O. 1857 of 2025

Niraj Cements Structurals Limited

Vs.

Nataraj Das & Ors.

For the petitioner in C.O. 1735 of 2025 and the Opposite Party no. 1 in C.O. 1857 of 2025	: Mr. Rahul Karmakar Ms. Gargi Goswami Mr. Sounak Mukherjee
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Advocates

For the opposite party no. 3 in C.O. 1735 of 2025 and the petitioner in C.O. 1857 of 2025	: Mr. Suman Kumar Dutt, Sr. Advocate Mr. Arnab Dutt Ms. Monica Jaiswal Ms. Laboni Dey
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Advocates

Reserved on : 22.05.2025

Judgement on : 11.07.2025

Hiranmay Bhattacharyya, J.:-

1. The plaintiff in Money Suit (Com) No. 161 of 2024 has filed an application under Article 227 of the Constitution of India being CO 1735 of 2025 challenging the order being no. 10 dated May 7, 2025 passed by the learned Judge, Commercial Court at Alipore. C.O. No. 1857 is at the instance of the 3rd defendant in the said suit and is directed against the self same order.

2. Both the civil revision applications were heard analogously as the applications arise out of common order and are decided by this order.
3. By the order impugned, the learned Judge of the Commercial Court disposed of the I.A. No. 02 of 2004 by directing the defendant to furnish a certain sum of money to the Learned Receiver and the Receiver was requested to keep the said sum by opening a fixed deposit in a nationalised Bank. The plaintiff was directed to pay an amount to the Learned Receiver as initial remuneration and the Receiver was given liberty to raise bill upon the plaintiff and the plaintiff shall have to pay such bill.
4. For the sake of convenience the parties shall be referred to hereinafter according to their status in CO No. 1735 of 2025.
5. Petitioner filed a suit for recovery of money under the provisions of Order XXXVII of the Code of Civil Procedure before the Learned Judge, Commercial Court at Alipore, District 24 Parganas (South) which is registered as M.S. (Com) 161 of 2024. Petitioner filed an application being IA 02 of 2024 praying for passing the judgment in accordance with Order XXXVII Rule 3(6) of the Code of Civil Procedure alleging that the opposite parties defaulted in entering appearance within 10 days of service of summons upon them.
6. The case as made out by the petitioner in the plaint in a nutshell is as follows:

The plaintiff runs and operates a sole proprietorship firm under the name and style "Modern Construction". The plaintiff is engaged in the business of constructions of building, demolition, real estate activities, specialized constructions activities and other allied businesses. The defendant no. 1 is a registered partnership firm consisting of the defendant no. 2 & 3 as its partners. The defendant no. 1 is a platform created by the defendants no. 2 & 3 so as to participate in the tender process floated by the Kolkata Metro Project in an around the city of Kolkata. The Defendant No. 1 had obtained the project work for Noapara and Dumdum Cantonment Metro. In order to pursue with the said tender process, several small tenders have been floated by the defendants from time to time as per the requirements of the principal tender. One of such tender for vibration free diamond cutting and dismantling of walls, top and bottom slabs of RCC culvert at Noapara Car shed Metro Project was floated by the defendants. The plaintiff being the lowest bidder was awarded with a tender dated January 29, 2019 and accordingly various work orders were issued to the plaintiff by the defendant no. 1. The plaintiff completed the entire work in terms of the work orders to the utmost satisfaction of the defendants.

The payment pertaining to the said work orders were on a running account basis. The total invoice amount raised by the plaintiff is for Rs. 88,97,286.03/-. Out of which a credit note was issued for Rs. 9,972/- and an amount of Rs. 56,50,000/-has been received by the plaintiff from time to time from the defendants and an amount of RS. 32,37,314.03/- is due and payable by the defendants. The defendant had admitted and confirmed on December 16, 2021 that an amount of Rs. 32,37,314/- is due and payable by the defendants to the plaintiff as on November 30, 2021. The defendants are also liable to pay an interest being calculated @18% in a compoundable rate amounting to Rs. 29,28,225/-. Thus, a total amount of Rs. 61,65,540/- is payable by the defendants jointly or severally to the plaintiff. The plaintiff has filed the instant summary suit claiming the amount of Rs. 61,65,540/- alongwith interest.

7. Mr. Karmakar, learned advocate appearing for the petitioner contended that the summons of the suit along with the plaint and the application for attachment was duly served upon the opposite parties but they did not enter appearance within 10 days from service of summons. He further submitted that the opposite parties even after appearance did not give any formal notice upon the learned advocate for the petitioner as per provision of Order XXXVII Rule 3(3) of the Code of Civil Procedure. Mr. Karmakar further contended that since the opposite parties defaulted in complying with the provisions of Order XXXVII, their right to apply for leave to defend has been rightly forfeited. Mr. Karmakar submitted that the dispute between the parties is a commercial dispute and in view of the provisions of the Commercial Courts Act, 2015 the Court has a duty to see that there is no unnecessary delay in deciding the suit involving a commercial dispute. Mr. Karmakar contended that the learned Judge ought not to have directed the opposite parties to deposit the admitted amount to the Learned Receiver when the petitioner is entitled to the admitted amount.
8. Mr. Karmakar placed reliance upon an order dated November 15, 2022 passed in **G.A. 5/2022** in **CS 23/2021** in the case of **Micky Metals Limited vs. Sudip Tewary** in support of his contention that the defendant should be directed to pay the admitted amount to the plaintiff.
9. Mr. Dutt, learned Senior Advocate appearing for the opposite parties seriously disputed the submissions of Mr. Karmakar. He contended that the 3rd defendant was not made a party to the Pre-Institution Mediation as per the mandate of Section 12A of the Commercial Courts Act, 2015. He contended that it is now well settled that Section 12A of the Act is mandatory and any suit instituted in violation of the mandate of Section 12A must be visited with rejection of plaint under Order 7 Rule 11. In

support of such contention he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Patil Automation Private Limited and Ors. Vs Rakheja Engineers Private Limited** reported at **(2022) 10 SCC 1**. He submitted that the learned Judge ought not to have allowed the suit to proceed without first requiring the plaintiff to comply with the mandate of Section 12A. Mr. Dutt further contended that the summons as contemplated under Order XXXVII Rule 2(2) of the Code was not issued and, therefore, the opposite parties herein could not have been faulted for not appearing within the time limit prescribed for appearance under Order XXXVII. Mr. Dutt submitted that though the opposite party no. 3 entered appearance on the date fixed in the summons, no summons for judgment as prescribed under Order XXXVII Rule 3(4) was served upon him.

10. Heard the learned advocates for the parties and perused the materials placed.
11. The dispute in these civil revision application relates to the appearance of the defendant and whether the defendants have a right to apply for leave to defend the instant suit.
12. The instant suit for recovery of money has been filed under the provisions of Order XXXVII of the Code of Civil Procedure. The provisions of Order XXXVII Rule 3 of the Code of Civil Procedure would be relevant for the purpose of deciding the issues that have cropped up in these civil revision applications for which the same is extracted hereinafter:

“Order XXXVII

“3. Procedure for the appearance of defendant.

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notice on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice

delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

PROVIDED that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

PROVIDED FURTHER that, where a part of the amount claimed by the the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the court or judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the court or judge or to carry out such other directions as may have been given by the court or judge, the plaintiff shall be entitled to judgment forthwith.

(7) The court or judge may, for sufficient cause shown by the defendant, execute the delay of the defendant in entering an appearance or in applying for leave to defend the suit."

13. From the aforesaid provision it is evident that in a suit instituted by presenting a plaint under the provisions of Order XXXVII, the summons of the suit shall be in Form No. 4 in Appendix B.
14. Copies of the summons issued to the opposite parties have been annexed to the civil revision applications. It appears therefrom that those summons were issued under the provisions of Order 5 Rules 1, 5 of the Code of Civil Procedure on October 3, 2024. The opposite parties were summoned to appear on 09.12.2024 to answer the claim and the date was appointed for the final disposal of the suit.
15. After going through the summons issued to the opposite parties, this Court finds that the same were not issued under the provisions of Order XXXVII Rule 2 in Form No. 4 in Appendix B.
16. In the summons issued in Form 4 in Appendix B, it is specifically stated that the person summoned has to enter appearance within 10 days from the service of such summons and in default whereof the plaintiff will be entitled after the expiration of the said period of 10 days to obtain a decree. The said summons also specifically states that leave to defend may be obtained if the person summoned satisfies the Court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that the person summoned should be allowed to defend.
17. The contention of the petitioner is that the opposite parties has forfeited their right to apply for leave to defend as they did not enter appearance within 10 days from the service of summons. On the other hand, it is the contention of the opposite parties that were mislead by the summons issued against them which are meant for ordinary suits and not a summary suit.
18. The summons issued to the opposite parties fixed the date for final disposal of the suit and the summons did not require that the opposite parties shall have to enter appearance within 10 days from service of summons.
19. Record reveals that the defendant/opposite party no. 3 herein entered appearance on December 9, 2024 i.e., the date fixed in the summons for appearance.
20. For such reason, this Court is not inclined to accept the contention of the learned advocate for the petitioner that the defendant no. 3 had forfeited his right to apply for leave to defend having entered appearance on the date fixed for appearance as stated in the summons.
21. It is the case of the opposite party no. 1 that after termination of the principal tender by the Metro Railway, the business of the opposite party no.

1 was shut down and the office premises was closed for several months and the summons was served to the common building caretaker who is not the employee of the opposite party no. 1 and due to inadvertence the care taker did not inform the opposite party no. 1.

22. The opposite party no. 2 contended that from the documents attached to the plaint it is evident that the office address of the opposite party no. 2 has been changed and the petitioner in spite of being aware of the present office address did not serve any notice or summons at the said address.
23. The Hon'ble Supreme Court in the case of **IDBI Trusteeship Services Limited vs. Hubtown Limited** reported at **(2017) 1 SCC 568** has laid down the broad principles to obviate the exercise of judicial discretion in an arbitrary manner. The Hon'ble Supreme Court in paragraph 17 laid down certain principles which are extracted hereinafter-

“17. Accordingly, the principles stated in para 8 of Mechelec case will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case, as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to

deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. *If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.*

17.6. *If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.”*

24. In **IDBI** (supra), the Hon’ble Supreme Court held that even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant’s good faith, or the genuineness of the triable issues, the trial judge may impose condition both as to time or mode of trial as well as payment into Court or furnishing security.
25. The learned Trial Judge after hearing the parties arrived at a finding that the defendants have raised a triable issue and from the facts and circumstances of the case there is doubt pertaining to the genuineness of issue and for such reason thought it fit to impose certain condition. The learned Trial Judge further noted that the opposite parties had confirmed and admitted that a sum of Rs. 32,37,314/- was due and payable to the petitioner by the opposite parties. In the backdrop of such factual finding the learned Trial Judge directed the opposite parties to furnish a total sum of Rs. 32,37,314/- .
26. To the mind of this court, exercise of discretion by the learned Trial Judge in imposing a condition cannot be said to be arbitrary in the facts of the case on hand.
27. However, this Court is of the considered view that the learned Trial Judge ought to have directed the defendant to deposit the amount in Court instead of appointing a Learned Receiver for such purpose and fixing a remuneration for a Receiver to be paid by the petitioner.
28. This Court is, therefore, inclined to interfere with the portion of the impugned order whereby the defendant was directed to deposit the amount to the learned Receiver.

29. The learned Trial Judge held that the leave to defend the suit shall not be granted unless the amount as directed is deposited by the defendants.
30. Mr. Karmakar would contend that the opposite parties have not sought for leave to defend.
31. It is not the case of the petitioner that the summons for judgment in Form 4A in Appendix B has been served upon them. It is only upon service of summons for judgement, that the time to apply for leave to defend such suit on such summons shall start to run.
32. This Court holds that the learned Judge of the Commercial Court was right in directing that the leave to defend the suit shall not be granted unless the admitted amount is deposited by the defendants/ opposite parties herein.
33. Mr. Dutt would contend that the plaintiff/petitioner has not complied with the provisions of Section 12A of the Commercial Courts Act, 2015 and the suit could not have been proceeded without requiring the petitioner to comply with such provision.
34. The Hon'ble Supreme Court in **Patil Automation** (supra) declared that Section 12A of the Act is mandatory and held that any suit instituted violating the mandate of Section 12A must be visited with rejection of plaint under Order 7 Rule 11 of the Code. It was further observed that such power can be exercised even suo motu by the Court. It was further clarified that such declaration shall be effective from 20.08.2022.
35. In the plaint it has been specifically stated that the plaintiff had lodged a pre-institution mediation before the District Legal Service Authority, South 24 Parganas and the mediation centre issued a "Non starter report" indicating the unwillingness of the defendants to participate in the mediation process.
36. Mr. Dutt would contend that the 3rd defendant was not a party in such mediation. It appears from the statement made in the plaint that the defendant No. 1 is a registered partnership firm consisting of the defendant nos. 2 and 3 as its partners and the defendants nos. 1 is a platform created by defendant nos. 2 and 3 so as to participate in the tender process floated by Kolkata Metro project.
37. It does not appear to this Court that the opposite parties raised the issue with regard to non-compliance of Section 12A of the Commercial Courts Act, 2015 before the learned Trial Judge. For such reason, this Court refrains from expressing any view on such issue. The opposite parties are left free to agitate such issue before the learned trial Judge in accordance with law.

38. In ***Mickey Metals Limited*** (supra), the Court in exercise of powers under Section 151 of the Code directed the defendant to deposit an amount with the Registrar, Original Side in order to enable the defendant to contest this Suit. The said decision does not support the stand of the petitioner that the amount should be directed to be paid to the petitioner.
39. For all the reasons as aforesaid the impugned order is modified only to the extent that the defendants/opposite party shall deposit a total sum of Rs. 32, 37, 314/- before the Court of the learned Judge, Commercial Court at Alipore and the amount deposited by the defendants shall be invested in fixed deposits in a nationalised Bank till further orders to be passed by the learned Judge, Commercial Court. The portion of the impugned order directing deposit of the amount with the learned Receiver and payment of remuneration to the learned Receiver is set aside.
40. CO 1735 of 2025 and CO 1857 of 2025 stand disposed of with the aforesaid observations and directions. There shall be no order as to costs.
41. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)