*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 21.08.2024
Judgment delivered on: 02.09.2024

\+ CM(M) 459/2023 & CM APPL. 13679/2023

ADITY A BIRLA FASHION AND RETAIL LIMITED .....Petitioner

versus

MRS SAROJ TANDON ....Respondent

Memo of Appearance

For the Appellant: Mr. Varun Sharma with Mr. Akhil B Kukreja and Ms. Sanchita Chamoli, Advocates
For the Respondents: Ms. Aastha Dhawan with Ms. Shalini Bhardwaj and Mr. Aditya Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. This petition poses an interesting proposition.

2. The respondent herein owned one shop which was leased out to plaintiff/petitioner on 15.03.2013. Plaintiff, eventually, in light of the Covid-19 pandemic, was constrained to decide upon closure of its business operation from such leased shop. It issued notice of termination of lease and demanded refund of its security. Since, the security was not returned by the defendant/respondent, it thought of filing a commercial suit against the lessor (respondent herein) seeking recovery.

3. Before institution of suit, plaintiff, however, filed an application in terms of Section 12-A of the Commercial Courts Act, 2015 before *South District Legal Services Authority, Saket (South East) Courts* (in short SDLSA) on 07.04.2021. Respondent/defendant, despite due service of the notice(s) summons by SDLSA, deliberately and intentionally avoided or failed to enter their appearance before the said authority. Accordingly, such process of mediation was declared as *non-starter*.

4. Resultantly, a suit was filed by plaintiff.

5. After institution of the suit, the defendant filed its written statement on 05.02.2022.

6. However, things did not stop there.

7. Defendant also lodged a counter-claim on 21.02.2022 seeking rentals etc.

8. Importantly, such counter-claim was also involving a commercial dispute and was, therefore, registered as a commercial suit.

9. Such counter claim was merely seeking recovery of money and did not contemplate any urgent relief.

10. However, since before lodging such counter-claim, the defendant had not invoked pre-institution mediation, the plaintiff filed an application under Order 7 Rule 11 CPC seeking rejection of such counter claim.

11. Such application has been dismissed which has compelled the plaintiff to knock the doors of this court by filing instant petition under Article 227 of Constitution of India.

12. According to learned Trial Court though such process was mandatory for a suit, it was not necessary for a counter-claim.

13. The question is whether such recourse is obligatory or should be treated as optional in context of a counter-claim.

14. Before adverting to answer the same, it is important to take note of relevant provisions of Civil Procedure Code (CPC).

15. Order VIII Rule 6A CPC reads as under:

> *"(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of a counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not; Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.*
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> *(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.*
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> *(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.*

(4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

16. Order IV Rule 1 & 2 CPC requires every plaint to be registered by the Court. The said provision reads as under:

"1. Suit to be commenced by plaint –

(1) Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in subrules (1) and (2)

2. Register of suits- The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted."

17. Thus, it is very apparent that a counter-claim is also a suit in its individual and distinct capacity, though it needs to be within the confines of order VIII Rule 6A CPC.

18. Once it is lodged, it has to be treated as a regular suit for all practical and procedural purposes.

19. The question is what if such counter-claim pertains to a commercial dispute?

20. To me, it should hardly be of any consequence.

21. Any such counter-claim pertaining to a commercial dispute has to, mandatorily, follow the rules and procedures prescribed for a commercial suit. Merely because, it is a counter-claim, it cannot be assumed that it is relieved of adhering to any such legal obligation. Like any other commercial suit, it has also to go through all the stipulated rigors scrupulously, as may be prescribed for any general commercial suit.

22. Similarly, once filed, the rules and procedures for filing written statement, time-line for filing the same, manner of filing the same and the mandate of filing requisite affidavit and declaration would also be required to be adhered to, with no exception, by the opposite party concerned.

23. The Commercial Courts Act 2015 and Civil Procedure Code (CPC) do not contain any provision providing for different treatment for any such counter-claim.

24. During the trial and till its eventual disposal, the rules for the game have to remain same and similar for any plaint and yes, for the counter-claim as well.

25. The next question is what if such counter-claim does not contemplate any urgent relief?

26. In other words, whether Section 12-A of Commercial Courts Act is also applicable to any such counter-claim.

27. Can it be said that there is no pre-requisite to abide by the mandatory provision of Section 12-A of the Commercial Courts Act, prior to the filing of the counter-claim.

28. Can it be given a go bye?

29. The answer has to be in empathic 'no'.

30. Section 12-A of Commercial Courts Act reads as under: -

> *"**12-A. 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.*
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> *(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.*
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> *(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):*
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> *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).”

31. Rule 3 of Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 reads as under: -

*“**3. Initiation of mediation process**.—(1) A party to a commercial dispute may make an application to the Authority as per Form 1 specified in Schedule I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee of one thousand rupees payable to the Authority either by way of demand draft or through online;*

(2) The Authority shall, having regard to the territorial and pecuniary jurisdiction and the nature of commercial dispute, issue a notice, as per Form 2 specified in Schedule I through a registered or speed post and electronic means including e-mail and the like to the opposite party to appear and give consent to participate in the mediation process on such date not beyond a period of ten days from the date of issue of the said notice.

(3) Where no response is received from the opposite party either by post or by e-mail, the Authority shall issue a final notice to it in the manner as specified in sub-rule (2).

(4) Where the notice issued under sub-rule (3) remains unacknowledged or where the opposite party refuses to participate in the mediation process, the Authority shall treat the mediation process to be a non-starter and make a report as per Form 3 specified in the Schedule I and endorse the same to the applicant and the opposite party.

(5) Where the opposite party, after receiving the notice under sub-rule (2) or (3) seeks further time for his appearance, the Authority may, if it thinks fit, fix an alternate date not later than ten days from the date of receipt of such request from the opposite party.

(6) Where the opposite party fails to appear on the date fixed under sub-rule (5), the Authority shall treat the mediation process to be a non-starter and make a report in this behalf as per Form 3 specified in Schedule I and endorse the same to the applicant and the opposite party.

(7) Where both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a mediator and fix a date for their appearance before the said mediator.

(8) The Authority shall ensure that the mediation process is completed within a period of three months from the date of receipt of application for pre-institution mediation unless the period is extended for further two months with the consent of the applicant and the opposite party."

32. The definition of "opposite party" mentioned in Rule 2(g) of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, *"means a party against whom relief is sought in a commercial dispute".* Palpably, the scheme of the Rules and the intent of the Legislature was never to oust the requirement of pre-institution mediation and settlement for any party and wherever there is a commercial dispute, the concerned applicant must initiate mediation process against the "opposite party" within the definition in Rule 2(g) in a procedure laid out in Rule 3 of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.

33. The opposite party in such counter-claim, thus, gets an 'indefeasible legal right to participate in mediation' prior to the institution of counter-claim.

34. Hon'ble Supreme Court in *Patil Automation Private Limited v. Rakheja Engineers Private Limited: 2022 SCC OnLine SC 1028* has, in no uncertain words laid down that the process is mandatory and its non-compliance would entail rejection of the plaint. The relevant pars read as under: -

> ***"48.*** *In contrast, Section 12-A cannot be described as a mere procedural law. Exhausting pre-institution mediation by the plaintiff, with all the benefits that may accrue to the parties and, more importantly, the justice delivery system as a whole, would make Section 12-A not a mere procedural provision. The design and scope of the Act, as amended in 2018, by which Section 12-A was inserted, would make it clear that Parliament intended to give it a mandatory flavour. Any other interpretation would not only be in the teeth of the express language used but, more importantly, result in frustration of the object of the Act and the Rules.*
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> **……..**
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> **……..**
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> ***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.

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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…..*

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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.*

114. *In civil appeal arising out of SLP (C) No. 14697 of 2021 taking note of the fact that it is a case where the appellant would have succeeded and the plaint rejected, it is also necessary to order the following. The written statement filed by the appellant shall be treated as the application for leave to defend filed within time within the meaning of Order 37 and the matter considered on the said basis.*

115. *While we disapprove of the reasoning in the impugned orders we decline to otherwise interfere with the orders and the two appeals shall stand disposed of accordingly.*

116. *In civil appeal arising out of SLP (C) No. 5737 of 2022, we set aside the order directing payment of costs of Rs 10,000. The petition for permission to file SLP in SLP (C) Diary No. 29458 of 2021 and the said SLP shall stand disposed of as already indicated in the judgment.***"**

35. Evidently, recourse to section 12-A of Commercial Courts Act is mandatory in nature.

36. Let's take note of contentions made by counter-claimant.

37. It is argued by learned Counsel for counter-claimant that where both the parties have already mediated the matter at the stage of institution of the originally filed suit and such process proved to be

unsuccessful or non-starter, the same parties cannot be compelled to go through the entire process of mediation all over again and then to wait for another report unnecessarily which would be, in all probabilities, the same one, as was in the earlier round. It is argued that such a compulsion would only lead to absurdity and undue harassment for the parties, thereby defeating the intention behind the provision. Thus, in any such situation, the gates of mediation should be deemed to be closed, thereby making provision of pre-institution mediation an optional ritual.

38. The final contention of counter-claimant is that though it may seem a wonderful idea to initiate pre-institution mediation before filing of a counter-claim but, logically and practically, it's a futile exercise besides being against the objective of speedy trial and, therefore, the provision cannot be stretched to be interpreted to be made applicable for counter-claim and the provision is required to be read in its liberal sense.

39. In first blush, though these contentions may seem attractive but on deeper evaluation, these need to be rejected.

40. Admittedly, before filing of any commercial suit, which does not contemplate any urgent relief, the concerned plaintiff has to mandatorily go through the process of pre-institution mediation. During such process, the opposite side may or may not appear.

41. The eventual outcome may be either that of ‘non-starter’ or ‘not settled’. Of course, it can also get settled.

42. In the case in hand, as noted already, during the first process of mediation, the process was sent to counter-claimant twice to participate but it did not choose to appear and, therefore, it was returned as 'non-starter'.

43. Same counter-claimant is now avoiding to exhaust the above obligatory requirement when it comes to his own suit, on the pretext that such remedy has been exhausted. Though, it may be reflective of his total disinclination towards any settlement but the indispensable provision cannot be kept aside on his whims and fancies.

44. Merely because, such option was availed/ attempted to be availed in the initial stage and proved to be unsuccessful or returned non-starter, would not suggest and signify that any counter-claimant can straightaway file a commercial suit, not contemplating any urgent relief.

45. It's not difficult to imagine that in counter-claim, the nature of relief can be dissimilar and the subject matter may also be somewhat different. The approach of the original plaintiff in the main suit cannot be anticipated in a mechanical manner. Merely because the defendant, in the earlier round, did not show any interest in settling the matter would not *ipso fact* mean that either such defendant (counter claimant) is relieved of availing such mandate of law or that it would be an illusory exercise on the assumption that its adversary may also, in all likelihood, adopt similar approach or tactic and may not participate in such process. The state of mind of any such party cannot be decoded mechanically.

46. Be that as it may, the fact that the same parties had already participated or had opportunity to participate in the pre-institution mediation would not render the provision nugatory in context of any such counter-claim, not contemplating any urgent relief.

47. It may also happen that main suit might be contemplating some urgent relief whereas the counter-claim, emanating from such suit, may not. In such a situation, even otherwise, it would become obligatory for the counter-claimant to exhaust such process first and then to file.

48. Quite possibly, in a given situation, a suit may, though, not get settled but a counter-claim, emanating from there, may get settled during mediation process.

49. Thus, nothing can be foreclosed or robotically anticipated.

50. All in all, merely because the parties had earlier opportunity would pale into significance, particularly in view of the fact that the subject matter of counter-claim cannot always be envisioned during the earlier round of pre-institution mediation. The nomenclature of the parties gets reversed and the issues may also be diverse. Of course, when parties participate, they can settle their disputes in a comprehensive manner and can, very well, go even beyond. But, in that case, when there is a comprehensive settlement, there is, virtually, no chance of any counter-claim being filed.

51. Right here, equally important is to take note of the Statement of Objects and Reasons of the Amending Act which brought into existence section 12-A of Commercial Courts Act 2015. Same is extracted as under: -

> "***Statement of Objects and Reasons***. —The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was enacted for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and for matters connected therewith or incidental thereto.
>
> **2.** The global economic environment has since become increasingly competitive and to attract business at international level, India needs to further improve its ranking in the World Bank "Doing Business Report" which, inter alia, considers the dispute resolution environment in the country as one of the parameters for doing business. Further, the tremendous economic development has ushered in enormous commercial activities in the country including foreign direct investments, public private partnership, etc. which has prompted initiating legislative measures for speedy settlement of commercial disputes, widen the scope of the courts to deal with commercial disputes and facilitate ease of doing business. Needless to say that early resolution of commercial disputes of even lesser value creates a positive image amongst the investors about the strong and responsive Indian legal system. It is, therefore, proposed to amend the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.
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> **3.** As Parliament was not in session and immediate action was required to be taken to make necessary amendments in the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, to further improve India's ranking in the "Doing Business Report", the President promulgated the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 on 3-5-2018.

4. It is proposed to introduce the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 to replace the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018, which inter alia, provides for the following namely—

(*i*) to reduce the specified value of commercial disputes from the existing one crore rupees to three lakh rupees, and to enable the parties to approach the lowest level of subordinate courts for speedy resolution of commercial disputes;

(*ii*) to enable the State Governments, with respect to the High Courts having ordinary original civil jurisdiction, to constitute commercial courts at District Judge level and to specify such pecuniary value of commercial disputes which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction of the district courts;

(*iii*) to enable the State Governments, except the territories over which the High Courts have ordinary original civil jurisdiction, to designate such number of Commercial Appellate Courts at district judge level to exercise the appellate jurisdiction over the commercial courts below the district judge level;

(*iv*) to enable the State Governments to specify such pecuniary value of a commercial dispute which shall not be less than three lakh rupees or such higher value, for the whole or part of the State; and

(*v*) to provide for compulsory mediation before institution of a suit, where no urgent interim relief is contemplated and for this purpose, to introduce the pre-institution mediation and settlement mechanism and to enable the Central Government to authorise the authorities constituted under the Legal Services Authorities Act, 1987 for this purpose.

5. The Bill seeks to achieve the above objectives."

(emphasis supplied)

52. The objective behind pre-institution mediation is a benevolent one.

53. It does not frustrate speedy trial at all.

54. On the contrary, it aims and visualizes a situation where there may not be institution of any fresh case, once the matter is settled through such pre-institution mediation.

55. Thus, it cannot be labelled as a futile exercise.

56. Moreover, there is no point in construing a mandatory provision liberally. This would rather contradict and undermine the legislative mandate as such (mis)interpretation would transform its nature from ‘mandatory’ to ‘optional’.

57. In view of above said discussion, it clearly emerges out that process of pre-institution mediation is mandatory for every suit involving a commercial suit and no distinction can be drawn when it comes to a counter-claim involving a commercial dispute and not contemplating any urgent relief. As per the mandate of *Patil Automation Private Ltd.* (supra), any such suit, which has been filed without taking recourse of Section 12-A of Commercial Courts Act, needs to be rejected under Order VII Rule 11 CPC.

58. Therefore, to the above extent, observations given by learned Trial Court cannot be sustained.

59. Undoubtedly, as per the directions contained in *Patil Automation Private Ltd.* (supra), such recourse to rejection has been made

prospective and the effective date in this regard is 20th August, 2022. It has also been observed in the said judgment in Para-113.3 that if any such plaint is filed violating Section 12-A of Commercial Courts Act after the jurisdictional High Court has declared said section to be mandatory and consequently directing rejection of such suit, such plaintiff shall not be entitled to any relief.

60. As far as this High Court is concerned, the petitioner has referred to *Extreme Coating Private Ltd. Vs. Jotun India Private Ltd.: 2022 SCC OnLine Del 2341* which though observes that pre-institution mediation is mandatory but fact remains that therein, the application seeking rejection was rather not allowed as by that time, the mechanism for enabling holding of pre-institution mediation was not in place and the learned coordinate Bench of this court, therefore, observed that the suit could not have been returned subsequently, merely on creation of such mechanism.

61. This court may, however, usefully refer to *Harey Krishna Corporation Versus Servotech Power Systems Ltd. and Another: 2024 SCC OnLine Del 3526*. In the above recent pronouncement, the learned Division bench of this Court while referring to other precedents of this court, reiterated the mandatory nature of section 12A of Commercial Courts Act and also held the cut-off date, in context of rejection of suit, as 20th August, 2022, as stated in *Patil Automation Private Ltd.* (supra).

62. Therefore, it will be in the fitness of things, if the abovesaid prospective date i.e. 20th August, 2022, as declared in *Patil Automation Private Ltd.* (supra), is held as cut-off date for the case in hand as well.

63. Herein, admittedly, counter-claim was lodged on 21.02.2022 and, therefore, evidently, the counter claim stands salvaged and protected and cannot be visited with order of rejection.

64. The petition stands disposed of in above terms.

(MANOJ JAIN)
JUDGE

September 02, 2024/*hj/dr*