

Mintergraph Systems Pvt.Ltd vs Hitachi Systems Micro Clinic Private ... on 28 October, 2021

Author: Jayant Nath

Bench: Jayant Nath

\$~0S-12

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CS(COMM) 185/2019 & I.As. 4327/2021 & 4379/2021
MINTERGRAPH SYSTEMS PVT.LTD Plaintiff
Through Mr.Ajay Verma, Sr. Adv. with
Mr.Ishaan Verma and Ms.Diviani K.
Verma, Advs.
versus
HITACHI SYSTEMS MICRO CLINIC
PRIVATE LIMITED & ORS. Defendants
Through Mr.Siddhant Buxy and Mr.Debanshu
Khettry, Advs. for D-1 to 3.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH
ORDER

% 28.10.2021
IA Nos.4327/2021 & 4279/2021

1. IA No.4327/2021 is filed by the plaintiff seeking exemption from requirement of pre-litigation mediation and settlement in terms of Section 12A of the Commercial Courts Act, 2015.
2. IA No.4279/2021 is filed by defendants No.1 to 3 for rejection of the plaint under Order VII Rule 11 CPC stating that section 12A of the Commercial Courts Act, 2015 envisages mandatory pre-institution mediation which the plaintiff has failed to do and hence it is prayed that the plaint be rejected.
3. The plaintiff has filed the accompanying suit for a decree of Rs.2,59,12,804/-.
4. When the matter came up for hearing on 09.04.2019, learned Joint Registrar after noting the facts of the case issued summons to the defendants through all modes and also directed that the suit be registered.
5. The defendants No.1 to 3 have filed their written statement where various preliminary objections have been taken including that the remedy of pre-institution mediation as mandatorily provided under section 12A of the Commercial Courts Act, 2015 have not been adhered to.

6. Section 12A of the Commercial Courts Act, 2015 reads as follows:

"12A. 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.

(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.

(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):

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).]"

7. Learned senior counsel for the plaintiff has filed a bundle of judgments in support of his contention. He has relied upon the judgment of the Madras High Court in the case of Shahi Exports Pvt. Ltd. v. Gold Star Line Limited & Ors., MANU/TN/6125/2021; judgment of the Punjab & Haryana High Court in the case of M/s Patil Automation Pvt. Ltd. Office & Ors. v. Rakheja Engineers Private Limited & Anr., CR 1853/2021(O&M) decided on 09.09.2021; and the judgment of the High Court of Calcutta in the case of Dhanbad Fuels Ltd. v. Union of India & Ors., MANU/WB/0108/2021 to contend that the said provisions are not mandatory and appropriate directions can be issued by this court.

8. Learned senior counsel for the plaintiff also states that in most of the matters when an application for exemption under section 12A of the Commercial Courts Act, 2015 is filed this court invariably granted exemptions and hence the application of the plaintiff for exemption being IA No.4327/2021 should be allowed on account of the facts stated therein.

9. Learned counsel for defendants No.1 to 3 has also sought to rely upon voluminous compilation of the judgments which includes the judgment of the Division Bench of the Bombay High Court in the case of Deepak Raheja v. Ganga Taro Vazirani, 2021 SCC OnLine Bom 3124; and judgment of the High Court of Calcutta in the case of Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd. & Anr., AIR 2021 Cal 190.

10. I may first look at the judgment relied upon by the learned counsel for the defendant in the case of Deepak Raheja v. Ganga Taro Vazirani(supra) where the Bombay High Court held as follows:

"37. Thus, we hold that section 12A of the Act of 2015 is mandatory, and a commercial suit of specified value which does not contemplate any urgent interim relief under the Act of 2015, cannot 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. Considering the object and purpose of section 12A of being rooted in the public interest, there is no question of it being waived by a party. The findings in the impugned order to the contrary are set aside."

11. Similarly, the Calcutta High Court in Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd. & Anr.(supra) held as follows:

"49. Section 69 of the Partnership Act 1932 and Section 80 of the Code of Civil Procedure, 1908 prohibits institution of a suit without satisfaction of the parameters laid down therein. Both have been held to be procedural law but mandatory. Similarly, Section 12A of the Act of 2015 has a prohibition on institution of a suit in the same parameters. The prohibition on institution of a suit under Section 12A of the Act of 2015 is of similar nature as that of the prohibition under Section 69 of the Indian Partnership Act, 1932 and Section 80 of the Code of Civil Procedure 1908. In all three cases, the prohibition is absolute when the plaintiff fails to observe the modalities stipulated therein. Section 69 of the Indian Partnership Act, 1932 and Section 80 of the Code of Civil Procedure 1908 does not contemplate substantial compliance. On the same analogy Section 12A of the Act of 2015 should not do so also. Both Section 69 of the Indian Partnership Act, 1932 and Section 80 of the Code of Civil Procedure, 1908 non-suited a plaintiff if the stipulated parameters are complied with by the plaintiff. Section 12A of the Act of 2015 stipulates the same result for the plaintiff on non-compliance. The consequence of non-adherence to Section 12A of the Act of 2015 renders the institution of the suit void in the same nature as that of a breach of Section 69 of the Indian Partnership Act, 1932 and Section 80 of the Code of Civil Procedure, 1908 affects a plaint. The pain of non compliance with Section 12A of the Act of 2015 for the plaintiff is getting non-suited. Being non-suited for non-compliance of statutory provisions is a concept not unknown to law."

12. In contrast, the Madras High Court in Shahi Exports Pvt. Ltd. v. Gold Star Line Limited & Ors.(supra) held as follows:

"23. Though, the word 'shall' in Section 12-A of the Act, sounds Pre-litigation mediation is mandatory on the part of the plaintiff to explore Settlement before filing suit under Commercial Court Act, the Rule framed use the word 'Shall' and makes it an optional. Also even if one party go for pre-litigation mediation the other party may conveniently abstain from participating in the mediation and make it a non-starter. Even otherwise, mediator can proceed only if the both the parties appear and give consent to participate in the mediation process. Thus, it is very clear that on combined reading of the Commercial Courts Act and the Rules framed thereunder, pre-litigation mediation is subject to urgency for any interim relief and the consent of the sparing parties.

24. In such circumstances, the Harmonious Interpretation takes us to the irresistible conclusion that Section 12-A of the Commercial Courts Act, is not a mandatory provision. The right to access justice which is a Constitutional Right cannot be denied or deprived for not resorting to mediation. The Court is not substitute to Alternative Dispute Redressal, it is otherwise. The litigant cannot be denied the doors of justice for directly approaching the Court without exploring the possibility of mediation. There can be no prejudice to the defendant, if the defendant is ready for mediation, even after Institution of the suit. Also there is no impediment either for the party or for the Court to refer the pending matter to be resolved through mediation or any other Alternative Dispute Redressal mechanism. This provision is meant for the parties to work out an amicably settlement without involving in the adversary system of litigation. The intention of this Section is not to prevent access to justice or to aid anyone who refuse to subject himself to the judicial process. The intention is to avoid the procedural rigor and to arrive an amicable win-win settlement. Any other interpretation to Section 12-A of the Act contrary to the intention will amount to miscarriage of Justice. Therefore, this Court holds that there is no ground to entertain this Application seeking rejection of plaint. Hence, Application is dismissed with costs of Rs.10,000/-."

13. Similarly, the Division Bench of Punjab & Haryana High Court in M/s Patil Automation Pvt. Ltd. Office & Ors. v. Rakheja Engineers Private Limited & Anr.(supra) held as follows:

"But if a suit is filed without taking recourse to the procedure under section 12A of the Act that does not mean that the case of the plaintiff is to be rejected outrightly. This could certainly be not the intention of the legislature. An enactment is to be interpreted in a manner that it does not result in delivery of preserve justice. While dismissing the application of the defendants for rejection of the plaint for the reasons for the plaintiff having not resorted to mediation before filing of the suit, the trial court in its wisdom has directed that civil suit be kept in abeyance and both the parties were directed to appear before secretary, District Legal Service Authority, Faridabad on 26.08.2021, for the purpose of mediation as per the provisions of Section 12A of the Commercial Courts Act and the rules framed therein. The Revisionists can certainly not insist that suit of the plaintiffs be dismissed for

violation of section 12 A of the Act. The trial Court while dismissing the application has relied upon judgment of the high court of Bombay delivered in Ganga Taro Vazirani Vs. Deepak Raheja, the date of decision 16.02.2021. Thus no interference with the impugned order by way of exercising a revisional jurisdiction under Article 227 of the Constitution of India and Section 115 CPC is required."

14. Similarly, the Calcutta High Court in Dhanbad Fuels Ltd. v. Union of India & Ors.(supra) held as follows:

"19. Section 12A of the Pre-Institution Mediation, is a mere tool for reduction of pendency of commercial litigation in India. However, the purpose of the said Section 12A and the Rules cannot not be to non-suit a party but only to encourage the party seeking to file a suit to first explore the possibility of settlement of the dispute through mediation. Section 12A provides the parties with an alternative mechanism to resolve their disputes by negotiation in the presence of a mediator. Such mediation has been made time bound and the parties also have the liberty to move the commercial court for adjudication of the dispute, if a mediation results in a non-starter or the talks of settlement fail.

20. Thus the plaint should not be rejected at this stage on the ground of non-compliance with Section 12A of the said Act when the plaintiff can still be directed to comply with the provisions of law by keeping the suit in abeyance."

15. At this stage, learned counsel for defendants No.1 to 3 further points out that the matter is also pending in the Supreme Court.

16. I may only note that on a query to the learned counsel for defendants No.1 to 3 as to whether the parties are ready to go for mediation, learned counsel for defendants No.1 to 3 states unequivocally 'No'. He clarifies that the defendant will be prejudiced while the suit is pending and the mediation process is started. He however states that if the plaintiff was to withdraw the suit or this court were to reject the plaint then the defendant would be willing to join the pre-institution mediation process.

17. I cannot help noticing that this plea of the defendant cannot be said to be consistent with the process of mediation where the parties go with the intent of trying and settling the matter. The intent here is only to use the provisions of the Commercial Court Act to obstruct the plaintiff from pursuing the suit that has been filed. There appears to be no bonafide intent to go to mediation to try to sort out the matter. As rightly pointed out in by the various judgments noted above that it hardly appropriate to reject the plaint at this stage on the ground of non-compliance of the section 12A of the Act as the parties can be directed to mediation by keeping the suit in abeyance. In fact, a perusal of the judgment of the Division Bench of the Bombay High Court in Deepak Raheja v. Ganga Taro Vazirani(supra) also shows that by consent of the parties, the Division Bench referred the matter to mediate and held as follows:

"47. Now, we come to the order to be passed in this appeal. According to the Appellant, the plaint has to be returned to the plaintiff to be filed for compliance. The Respondent contends that facts of the present case be considered where the suit was allowed to be filed by the registry because of confusion in the registry in the initial period when the Amending Act came in force, and the suits came to be registered because of oversight. The Respondents contend that the Appellants took no objection, and this is a first suit in which the mandate of Section 12A was debated. The Respondent submits he is not averse to going for mediation even now. The learned counsel for the Appellant is also agreeable to go for mediation. The learned counsel for the parties after the arguments, fairly states that considering the peculiar facts and circumstances of this, an arrangement equatable to both sides can be arrived at. We have heard the suggestions of the learned counsel. The learned Counsel suggests that the Suit and implementation of the impugned order be kept in abeyance, and the parties will approach the Legal Services Authority for mediation to be conducted within the time frame stipulated under Section 12A as if it is initiated under that provision. We find, in the facts of this case, the suggestion to be fair. If the mediation is successful, the dispute will end. If it is unsuccessful, then the Suit and the impugned order can stand revived, and if the Appellant seeks to challenge the impugned order by an appeal, he can file a fresh appeal. The Appellant agrees he will co-operate with the disposal of the mediation within the time frame, and will not require any specific notice."

18. I may note that a co-ordinate bench of this court in Apex Maritime India Pvt. Ltd. & Ors. Vs. Apex Maritime Co. Inc. being CM (M) 667/2021 also followed the same approach and held as follows:

"9. It was put to the counsels for the parties that similar directions in terms of the directions passed by the Division Bench of the High Court of Bombay vide order dated 1st October, 2021 in Deepak Raheja (supra), may also be passed in the present case by referring the parties to mediation and the suit may be kept in abeyance for the time till the matter is in mediation. The counsels for the parties are agreeable to the aforesaid course of action, so long as the rights and contentions of the parties are kept open.

10. Accordingly, this Court is of the view that directions similar to the directions passed by the Division Bench of the High Court of Bombay in Deepak Raheja (supra) may be passed, that the suit be kept in abeyance and the parties be given an opportunity to approach the competent authority under Section 12A of the Act for attempting mediation. If the mediation is successful, the dispute will end and in the event the mediation is not successful, the suit as well the present petition can be revived. It may be noted that in CM(M) 131/2021 titled Bank of Baroda Vs. Suhail Garments Through Its Proprietor Md. Saleem, filed before this Court, the question of law which arose was as to the effect of the retrospective operation to the provision of the Commercial Courts, Commercial Division and Commercial Appellate Division of

High Court (Amendment) Act, 2018, which was notified on 21st August, 2018 but in terms of Section 1(2) thereof was deemed to have come into force on 3 rd May, 2018, on the suits pending as on 21st August, 2018, especially with respect to the applicability of Section 12A of the Act, 2015 to such suits. Vide order dated 23rd March, 2021, this Court CM(M) 667/2021 Page 5 of 6 set aside the impugned order dismissing the suit and restored the same to its original number. However, this Court stated that the said suit would be kept in abeyance for the said petitioner to explore pre-institution mediation in terms of Section 12A of the Act and on failure of the mediation process, the said suit would stand revived and would be adjudicated upon in accordance with law."

19. Keeping in view the above, the present suit is kept in abeyance. Parties are directed to appear before Secretary, Delhi Legal Services Authority on 16.11.2021 for mediation process. If the parties enter into a settlement agreement, the suit will stand disposed of in terms thereof. If for some reasons, the settlement is not arrived at, the order directing to put the suit in abeyance shall stand reverted.

20. List on 20.12.2021 before court for directions.

JAYANT NATH, J.

OCTOBER 28, 2021/v