M/S Patil Automation Private Limited vs Rakheja Engineers Private Limited on 17 August, 2022

Author: K. M. Joseph

Bench: Hrishikesh Roy, K.M. Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2022
(Arising out of SLP (C)No. 14697 of 2021)

M/S. PATIL AUTOMATION
PRIVATE LIMITED AND ORS. … APPELLANT(S)

VERSUS

RAKHEJA ENGINEERS PRIVATE
LIMITED … RESPONDENT(s)

WITH
CIVIL APPEAL NO. OF 2022
(Arising out of SLP (C)No. 5737 of 2022)

ALONG WITH
SPECIAL LEAVE PETITION (C) Diary No.29458 of 2021

JUDGMENT

K. M. JOSEPH, J.

1. Leave granted.

2. The seminal question which arises for consideration is whether the statutory pre-litigation mediation contemplated under Reason:

> Section 12A of the Commercial Courts Act, 2015 (hereinafter referred to as 'Act') as amended by the Amendment Act of 2018 is mandatory and whether the Courts below

have erred in not allowing the applications filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'), to reject the plaints filed by the respondents in these appeals without complying with the procedure under Section 12A of the Act.

3. In Civil Appeal arising from SLP (C) No. 14697 of 2021, the respondent filed a commercial suit under Order XXXVII of the CPC before the Additional District Judge, District Court, Faridabad, praying for recovery of Rs. 1,00,40,291/- along with 12 per cent interest on a certain sum which detail need not detain us. The suit was laid on 12.10.2020.

4. The appellant is the defendant in the said suit. It filed an application on 05.02.2021 under Order VII Rules 10 and 11 read with Sections 9 and 20 of the CPC, inter alia contending that the suit was filed without adhering to Section 12A of the Act. The respondent filed its reply on 23.03.2021. It contested the matter contending that the suit was not barred for non-compliance of Section 12A of the Act.

5. A written statement came to be filed on 23.03.2021. On 16.08.2021, the trial Court rejected the contention of the appellant inter alia holding as follows:

> "20. From the bare perusal of Section 12A, it is crystal clear that the procedure provided is mandatory in nature and if by applying the said principles, the suit of the plaintiff is rejected, then it would have a catastrophe effect. The court is of the view that the legislature has no such intention to frame such stringent provision the said rules. The aim and object of Section 12A is to ensure that before a commercial dispute is filed before the court, the alternative means of dissolution are adopted so that the genuine cases come before the Court. Further, it also appears to the court that the said procedure has been introduced to de-congest the regular courts. It is pertinent that the Hon'ble Bombay High Court in case Ganga Tara Vazirani (supra), held that the procedure provided under Section 12A of the Commercial Courts Act is not a penal enactment for punishment and there is no embargo in filing the suit without exhausting the remedy of mediation specially when an attempt is clear to show that the intention of the applicant has already been made and failed. The fact is clear that before filing the suit, the respondent/plaintiff has sent e-mail and legal notice and despite that the applicant/defendant failed to make the payment of the dues. Moreover, it is well settled that the procedure and law are for advancement of justice and not to thwart on technical grounds. Thus, in the larger interest of justice, the court deems it appropriate that the civil suit can be kept in abeyance and both the parties are directed to appear before the Secretary, District Legal Services 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 thereunder. With these directions, the application is disposed of." (Emphasis supplied)

> 6. The appellant filed a Civil Revision Petition. The High Court of Punjab and Haryana, however, confirmed the finding in paragraph 20 and further held that the

> Courts are meant to deliver substantial justice. The rules of procedure are handmaid of justice and are meant to advance the ends of justice and they are not to be bogged down by the technicalities of procedure so as to lose sight of its main duty which is to dispense justice. It was further found that the purpose of referring the dispute to mediation centre is to explore settlement. If the suit is filed without taking recourse to the procedure, it is further found, it should not entail rejection of the plaint. This could not have been the intention of the legislature. It is further observed that an enactment is to be interpreted in a manner that it does not result in delivery of 'perverse justice'. It was noted that the trial Court had directed that the civil suit be kept in abeyance and the parties were to appear before the Secretary of the District Legal Services Authority for the purpose of mediation. Reliance was placed on the judgment of the High Court of Bombay in Ganga Taro Vazirani v. Deepak Raheja1.
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> 7. In the other appeal arising out of SLP (C) No. 5737 of 2022, the impugned Order has been passed by the High Court of Madras, rejecting a similar application filed by the appellant-defendant in a commercial suit instituted without having resorted to pre-litigation mediation under Section 12A of the Act.
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> 8. There is yet another special leave petition which was filed, viz., SLP Diary No. 29458 of 2021. This is filed with an application for permission to file special leave petition. In this special leave petition, the order which is impugned is the same order which is impugned in SLP (C)No. 5737 of 2022.
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> 9. The Special Leave Petition is supported with an application for permission to file SLP. The applicant is not a party in the suit in question. However, it is his 1 2021 SCC OnLine Bom 195 case that a suit is pending in which similar question arises. Though, we have not issued notice in the said matter, we allowed Shri Sharath Chandran, learned Counsel for the petitioner, to address the Court on what appeared to us to be purely a legal issue, viz., the effect of non-

compliance with Section 12A of the Act. In other words, we have permitted intervention, though in the application for permission to file SLP, which application shall stand, accordingly, disposed of. So also the SLP. SUBMISSION OF THE APPELLANTS

10. Shri Sanjeev Anand, learned Senior Counsel, appearing for the appellant in civil appeal arising out of SLP (C)No. 5737 of 2022, would submit that the Court, in the impugned Order, held, inter alia, as follows.

"23. The Central Government by notification dated 03.07.2018, has framed rule and the rule 3(1) and 3(7) of the Commercial Courts Act, 2015 (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;

.... (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.

24. Though the word 'shall' in Section 12A of the Act, sounds Prelitigation mediation is mandatory on the part of the plaintiff to explore Settlement before filing suit under Commercial Court Act, the Rule framed used 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.

25. 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/-."

11. He would submit that the High Court has clearly erred in the view it has taken. He would submit that the Act came into force in the year 2015. It is by the amendment in the year 2018 that Section 12A came to be incorporated.

12. He took us through the Statement of Objects and Reasons. He would commend for the Court's acceptance the view that the legislation was put in place with a definite object of enhancing the ease of doing business in India and de-clogging of Commercial Courts which were assigned with an important task of quickly disposing of commercial matters and that must be uppermost in the mind of the Court.

13. He would submit that if the application under Order VII Rule 11 is allowed and the plaint is rejected for non- compliance with Section 12A, in view of Order VII Rule 13 of the CPC, there is no prejudice caused as on the same cause of action, the plaintiff can bring a fresh suit after complying with the mandate of Section 12A of the Act.

14. He would point out that most pertinently the law giver has used the word 'shall' in Section 12A. The word 'shall' in the context of the object of the legislation must be construed as mandatory. He would complain that the High Court has not properly appreciated the meaning of the words used in the subordinate legislation, viz., Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (hereinafter referred to as the "Rules") with regard to the use of the word 'may' in Rule 3. He would submit that it only refers to the discretion with the plaintiff in regard to the particular mode to be chosen as contemplated therein. Bearing in mind the use of mandatory words conveying an imperative sense in the parent legislation, the High Court erred in finding that the provision in the parent enactment must be treated as only directory. He would submit that the sublime object of the legislation is clearly to de-clog the court particularly having regard to the reduction of the monetary value from Rs.1 crore to Rs.3 lakhs. In other words, by virtue of the amendment, the Legislature was conscious of the fact that there would be a phenomenal increase in the cases which would be treated as commercial cases. Bearing in mind also, the larger object of promoting India as a desired destination for economic activity which in large measure would depend upon the ease of doing business, the purpose is clear as daylight. The High Court has clearly erred in the matter.

15. Shri Ayush Negi, learned Counsel for the appellant in other appeal, would also address arguments on similar lines. In his case, he would submit that the trial Court has proceeded on the footing that the commercial suit as such cannot be thrown out for non-compliance of Section 12A and the trial Court has erroneously considered post institution mediation as tantamounting to compliance with pre litigation mediation contemplated under Section 12A.

16. He would submit that the plain language and the object of the legislation has been overlooked by the Court in the impugned order as is clear by the observations in the impugned order.

17. Both the counsels for the appellants would draw a parallel between the language used in Section 80 CPC and the case law generated by the said provision to contend that Section 12A is mandatory. Equally, support is sought to be drawn from judgments rendered under Section 69 of the Indian Partnership Act, 1932.

18. Shri Sharath Chandran, learned counsel who appears in SLP (C) Diary No. 29458 of 2021 would point out that the procedure contemplated under Section 12A is mandatory.

19. It is the further submission of Shri Sharath Chandran that decision of the learned Single Judge of the Bombay High Court in Ganga Taro(supra) has been reversed by the Division Bench in Deepak Raheja v. Ganga Taro Vazirani2. He has brought to the notice of this Court the different views expressed by the other High courts. It is his contention that on a reference to the Statement of Objects and Reasons, the speech made by the Law Minister and the plain language used coupled with the intention of the Lawgiver makes it clear that Section 12A is mandatory. He, however, drew a

distinction between the presentation of the plaint and the institution of the suit. He also submits that this Court has taken notice of pre-litigation mediation in matrimonial disputes and disputes under Motor Vehicles Act. He would further contend that the Court can suo motu reject the plaint without any application. He relies on the judgment of this Court in Madiraju Venkata Ramana Raju v. Peddireddigari Ramachandra Reddy and Others3. He however, contends that the embargo against institution of the suit may not necessarily affect inherent jurisdiction of the Court. He has further submitted in regard to the interpretation to be placed in cases where urgent interim relief is contemplated and the appropriate 2 (2021) SCC OnLine Bom 3124 3 (2018) 14 SCC 1 procedure provided therein. He would in this regard place reliance upon the judgment in Regina vs. Sekhon4 to contend that if a plea under Section 12A is not pointed out at an earlier point of time, non-compliance cannot result in the proceeding becoming a nullity. He would submit that nullifying proceedings on account of non-compliance at a belated stage would in effect be throwing the baby out with the bathwater. He would also point out that the High Court was in error in not finding that mediation is one of the best forms of conflict resolution. Further, error in understanding of Rule 3 of the Rules is pointed out.

20. Per contra, Shri Saket Sikri, learned counsel who appears in civil appeal arising from SLP (C)No. 14697 of 2021, would contend that Section 12A is actually to be understood as directory. He submits that in order that the word 'shall' in a statutory provision be considered as mandatory, one of the cardinal tests employed by the Courts is to ask the question whether the provision contemplated penal consequences for disobedience of the provision. He would point out that no penal consequence is spelt out in 4 (2003) 1 WLR 1655 Section 12A for instituting a suit without complying with Section 12A.

21. Next, he would point out that instituting a suit without complying with the provisions of Section 12A does not affect any legal right of the defendant. It is only a procedure intended to bring about a settlement between the parties.

He further contends that the course adopted by the Court in his case has addressed the concerns of the defendant as well. This is for the reason that the Court has kept proceedings in the suit in abeyance and referred the parties for mediation. In this context, he highlights the fact that the appellant which swears by mediation has made it a non-starter by not taking part in the mediation procedure.

22. He would submit that having regard to the purport of Section 12A, the interest of justice would be subserved if the procedure which is adopted by the Court in his case is accepted. In other words, if the Court after the institution of the suit immediately refers the parties to the mediation, the appellants may not be justified in insisting on pre institution mediation. In this regard, he would emphasise that pre litigation mediation contemplated in Section 12A does not pertain to inherent jurisdiction of a Court. While mediation is to be encouraged, the Court may not lose sight of the fact that a half-way house between the two extremes has been attempted by the Court in the case, which suffices, having regard to the fact also that no penal consequences are provided and no right of the defendant is imperilled.

23. He next draws our attention to the aspect of court fees. He would submit that the plaintiff is bound to pay the whole court fee under the law in question. When the plaint gets rejected under Order VII Rule 11, the plaintiff suffers a loss of the entire court fee. This is one of the consequences which this Court should not lose sight of, it is contended.

Here again, the procedure which has been adopted in the case is commended for our acceptance as substantial compliance with Section 12A which at the same time, will not reach such disastrous consequences for the litigants.

He also touches upon the possible consequence of a plea of limitation overwhelming a fresh suit of the plaintiff after rejection of the first suit.

ANALYSIS

24. Section 12A of the Act 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.
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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:
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> 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).
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> (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.
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> (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)."

25. The Act was enacted in the year 2015. At the time, the monetary limit for a suit liable to be tried by the Commercial Court was fixed at Rs.1 crore.

26. In the course of three years, noticing certain features, Parliament has decided to amend the Act. Therefore, in the year 2018, the Act came to be amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (Act 28 of 2018) (hereinafter referred to as the "Amending Act").

27. It is apposite that we notice the statement of objects of the Amending Act:

> "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.
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> 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.
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> Further, the tremendous economic development has ushered in enormous commercial activities in the country including foreign direct investments,
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> 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 3rd May, 2018.
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> 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:—
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> (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."

28. It is, accordingly, by the Amending Act that Section 12A came to be inserted. We may notice the Rules which came to be published in the Gazette and thereby came into force on 03.07.2018. Rule 3 reads as follows:

> "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." We shall advert to the effect of this Rule and also advert to the other rules later on.

DOWN THE MEMORY LANE

29. A Bench of five learned Judges in the Judgment reported in State of U.P. and others v. Babu Ram Upadhya5, considered the question as to whether paragraph-486 of the Police Regulations framed under Section 7 of the Police Act, was mandatory or not. In substance, the said paragraph purported to taboo the magisterial inquiry under the Code of Criminal Procedure, 1973, when the offence alleged against the Police Officer was only one under Section 7 of the Police Act. In the opinion written for the majority, Justice K. Subba Rao proceeded to sum-up the relevant Rules relating to interpretation, when the Statute uses the word 'shall':

> "29. The relevant rules of interpretation may be briefly stated thus: When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the 5 AIR 1961 SC 751 real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the

non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

30. In Bhikraj Jaipuria v. Union of India6, a Bench of five learned Judges dealt with the question arising out of Section 175(3) of the Government of India Act, 1935. The Court, inter alia, had to deal with the question, whether enactment should be considered directory or obligatory:

> "17. The question still remains whether the purchase orders executed by the Divisional Superintendent but which were not expressed to be made by the Governor-General and were not executed on behalf of the Governor-General, were binding on the Government of India. Section 175(3) plainly requires that contracts on behalf of the Government of India shall be executed in the form prescribed thereby; the section however does not set out the consequences of non-
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> 6 AIR 1962 SC 113 compliance. Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity :
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> if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed in Maxwell on Interpretation of Statutes, 10th Edn., p. 376:
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> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded." Lord Campbell in Liverpool Borough Bank v. Turner [(1861) 30 LJ Ch 379] observed:
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> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

31. In Lachmi Narain and others v. Union of India and others7, this Court, inter alia, held as follows:

> "66. Section 6(2), as it stood immediately before the impugned

notification, requires the State Government to give by notification in the Official Gazette "not less than 3 months' notice" of its intention to add to or omit from or otherwise amend the Second Schedule. The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language 7 AIR 1976 SC 714 in a negative form is per se indicative of the intent that the provision is to be mandatory. (Crawford, The Construction of Statutes, pp. 523-24). Here the language of sub-section (2) of Section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months." A distinction was, thus, perceived between the words 'must' and 'shall'.

32. Learned Counsel for the appellants sought to draw support from the Judgments rendered under Section 80 of the Code of Civil Procedure, 1908 (for short, 'the CPC'). After the amendment effected by Act 104 of 1976, Section 80 reads as follows:

> "(1) Save as otherwise provided in sub- section (2), no suits shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of
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> (a) in the case of a suit against the Central Government, except where it relates to a railway a Secretary to that Government;
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> (b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;
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> bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorized by that Government in this behalf;
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> (c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district;
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> and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has

been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (I); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be , a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (I), if in such notice

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-

section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated."

33. In fact, Sub-sections (2) and (3) of Section 80 came to be inserted by virtue of the amendment. In Section 80(1), in view of the insertion of Sub-Section (2), the opening words "save as otherwise provided in sub-Section (2)" came to be inserted. There were other changes which were brought about in Section 80 as it stood, as can be discerned from Section 80(1) as substituted. The judgment of the Privy Council, in the decision reported in Bhagchand Dagadusa Gujrathi and Ors. v. Secretary of State for India8, set at rest the controversy about the mandatory nature of the requirement of a previous notice to be given to comply with Section 80. We need only notice what this Court held in the Judgment in State of Madras v. C.P. Agencies and others9:

"1. ... The very language of Section 80 makes it clear,-- and it has been so held by the Judicial Committee in Bhagchand Dagdusa v. Secy. of State, 54 Ind App 338:(AIR 1927 PC

176) which decision has been adopted by the same tribunal in many later cases--that Section 80 is express, explicit and mandatory and admits of no implications or

exceptions. ..."

34. In Bihari Chowdhary & Anr. v. State of Bihar & Ors.10, while on the effect of Section 80 of the CPC, this Court laid down as follows:

8 AIR 1927 PC 176 9 AIR 1960 SC 1309 10 (1984) 2 SCC 627 "3. .....

The effect of the section is clearly to impose a bar against the institution of a suit against the Government or a public officer in respect of any act purported to be done by him in his official capacity until the expiration of two months after notice in writing has been delivered to or left at the office of the Secretary to Government or Collector of the concerned district and in the case of a public officer delivered to him or left at his office, stating the particulars enumerated in the last part of sub-section (1) of the section. When we examine the scheme of the section it becomes obvious that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation."

35. We may also notice, what this Court had said in Bihari Chowdhary(supra) about the course of action to be taken, if a Suit is filed without serving a notice:

> "6. It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80 CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."

36. We must finally also, for reasons, which will be clear, refer to the view expressed by this Court in the following paragraph:

> "7. On behalf of the appellants, strong reliance was placed on the decision of a learned Single Judge of the High Court of Kerala in Nani Amma Nannini Amma v. State of Kerala [AIR 1963 Ker 114 : 1962 Ker LJ 1267]. Therein the learned Judge has expressed the view that Section 80 is not a provision of public policy and there is nothing in the section expressly affecting the jurisdiction of the Court to try a suit instituted before the expiry of the period prescribed therein. The reasons stated by the learned Judge in justification of his taking the said view despite the clear pronouncement of the Judicial Committee of the Privy Council in Bhagchand case [AIR 1927 PC 176 : 54 IA 338, 357] do not appeal to us as correct or sound. In the light of the conclusion expressed by us in the foregoing paragraphs about the true scope and effect of Section 80 CPC, the aforecited decision of the learned Single Judge of the Kerala High Court cannot be accepted as laying down good law." (Emphasis supplied)

37. In this context, we may refer to the Judgment of this Court in Gangappa Gurupadappa Gugwad, Gulbarga v. Rachawwa, Widow of Lochanappa Gugwad and others11:

> "10. No doubt it would be open to a court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 of the Code of Civil Procedure claiming relief was served in terms of the said section, it would be the duty of the court to reject the plaint recording an order to that effect with reasons for the order. ..." (Emphasis supplied) 11 (1970) 3 SCC 716

38. Section 69 of the Indian Partnership Act, 1932, in sub- Section (1) and (2), read as follows:

> "69. Effect of non-registration.— (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

39. In the decision reported in Seth Loonkaran Sethia and others v. Ivan E. John and others12, this Court held:

> "21. A bare glance at the section is enough to show that it is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an

> erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of Section 69 of the Partnership Act. ...” 12 AIR 1977 SC 336

40. In Sharif-ud-Din v. Abdul Gani Lone13, relied upon by Shri Saket Sikri, the matter arose under the Jammu and Kashmir Representation of Peoples Act, 1957, the question arose whether the provision providing that copies of the election petition are to be attested by the petitioner as true copies under his own signature, was mandatory. We may notice the following paragraph:

> “9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word “shall” while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision 13 (1980) 1 SCC 403 causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.”

41. In Kailash v. Nanhku and others14, relied upon by Shri Saket Sikri, this Court was dealing with an election matter and one of the questions was whether the time limit of ninety days, as prescribed by the proviso to Order VIII Rule I of the CPC, is mandatory or not. The said provision dealt with the power of the Court to extend time for filing 14 (2005) 4 SCC 480 the written statement. The proviso fixes a period of ninety days from the date of service of summons as the maximum period for filing the written statement. This Court took the view that the provision is to be construed as directory and not mandatory.

42. In this context, we may notice paragraphs- 28 and 30 of Kailash (supra):

> "28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6) "The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. ... Justice is the goal of jurisprudence — processual, as much as substantive." xxx xxx xxx
>
> 30. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-

extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

43. As far as the views expressed in Kailash (supra), that is a case which dealt with a purely procedural provision and the Court found that the power of the Court to allow filing of a written statement beyond the time, is not taken away. The absence of penal consequences was invoked. The most important aspect is that the proviso is in the domain of the procedural law. In contrast, Section 12A 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 12A not a mere procedural provision. The design and scope of the Act, as amended in 2018, by which Section 12A 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. In this connection, in the Judgement reported in Sharif-ud-Din (supra), it has been held that, if the object of the law is defeated by non-compliance with the provision, then, it would be regarded as mandatory. The right to institute the Suit in a plaintiff who does not contemplate urgent interim relief in a commercial matter under the Act, is clearly conditioned by

the fulfilment of certain conditions as provided in Section 12A. This cannot be likened to allowing a party to file his written statement. Bearing in mind the object also, the conclusion is inevitable that the right of suit itself will fructify only when the conditions in Section 12A are fulfilled. Treating the provision as procedural, also, the result cannot be different. Any other view would remove the basis for treating Section 80(1) of the CPC as mandatory.

44. In Salem Advocate Bar Association, T.N. v. Union of India15, this Court, while dealing with the question, whether Section 89 of the CPC was mandatory or not, held as follows:

> "55. As can be seen from Section 89, its first part uses the word "shall" when it stipulates that the "court shall formulate terms of settlement". The use of the word "may" in later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no 15 (2005) 6 SCC 344 conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarised in the terms of settlement formulated or reformulated in terms of Section 89."

45. Lastly, we may notice that in Prem Lala Nahata v. Chandi Prasad Sikaria16, Justice P.K. Balasubramanyan, speaking on behalf of Justice S.B. Sinha, also held as follows:

> "16. Order 7 Rule 11(d) speaks of the suit being "barred by any law". According to Black's Law Dictionary, bar means, a plea arresting a law suit or legal claim. It means as a verb, to prevent by legal objection. According to Ramanatha Aiyar's Law Lexicon, "bar" is that which obstructs entry or egress; to exclude from consideration. It is therefore necessary to see whether a suit bad for misjoinder of parties or of causes of action is excluded from consideration or is barred entry for adjudication. As pointed out already, on the scheme of the Code, there is no such prohibition or a prevention at the entry of a suit defective for misjoinder of parties or of causes of action. The court is still competent to try and decide the suit, though the court may also be competent to tell the plaintiffs either to elect to proceed at the instance of one of the plaintiffs or to proceed with one of the causes of action. On the scheme of the Code of Civil Procedure, it cannot therefore be held that a suit barred for misjoinder of parties or of causes of action is barred by a law, here the Code. This may be contrasted with the failure to comply with Section 80 of the 16 (2007) 2 SCC 551 Code. In a case not covered by sub-section (2) of Section 80, it is provided in sub-

section (1) of Section 80 that "no suit shall be instituted". This is therefore a bar to the institution of the suit and that is why courts have taken the view that in a case where notice under Section 80 of the Code is mandatory, if the averments in the plaint indicate the absence of a notice, the plaint is liable to be rejected. For, in that case, the entertaining of the suit would be barred by Section 80 of the Code. The same would be the position when a suit hit by Section 86 of the Code is filed without pleading the obtaining of consent of the Central Government if the suit is not for rent from a tenant....." (Emphasis supplied) VIEWS OF HIGH COURTS: DISCORDANT NOTES?

46. In Ganga Taro Vazirani v. Deepak Raheja17, the learned Single Judge of the High Court of Bombay, took the view that Section 12A is a procedural provision. The learned Single Judge found further that when urgent relief is applied for, the procedure under Section 12A need not be undergone. It was further observed that it was not, as if, the Court lacks inherent jurisdiction to entertain a Suit without complying with Section 12A. Still further, he refers to Section 80 of the CPC. He refers to AL. AR. 17 2021 SCC Online Bombay 195 Vellayan Chettiar (Decd.) & Others v. Government of the Province of Madras Through the Collector of Ramnad at Madura & Another18, for the proposition that Notice thereunder is given for the protection of the Authority concerned and he can lawfully waive his right to the Notice. Reliance was also placed on the Judgement in State of A.P. and others v. Pioneer Builders, A.P.19, wherein this Court declined to interfere with the finding that having participated in the proceeding without raising objection about the maintainability of the Suit, there would be waiver. Learned Single Judge also took the view that even under Section 12A of the Act, in a given set of facts, the defendant could be held to have waived his right to set up Section 12A. It is further found that, if there is substantial compliance, the plaintiff cannot be non-suited, i.e., if an attempt has been made for settling the dispute, which has failed and, therefore, the plaintiff is constrained to approach the Court. It is this Judgment, which has been relied upon in both the impugned Judgments.

18 AIR 1947 PC 197 19 (2006) 12 SCC 119

47. However, as pointed out by Shri Sharath Chandran, a Division Bench of the High Court of Bombay, in an appeal, has found that the Single Judge, has erred in his view that Section 12A is not mandatory. The Division Bench proclaimed that Section 12A of the Act is mandatory. It was further observed that considering the object and purpose of Section 12A, being rooted in public interest, there is no question of it being waived. When it came to the Order to be passed in the appeal, we notice that the plaintiff contended that the suit was allowed to be filed by the Registry because of a confusion in the Registry in the initial period, when the Amending Act came into force. There was oversight. The Division Bench stayed the Suit and the impugned Order for three months and referred the parties for mediation. A learned Single Judge of the High Court of Calcutta, in the decision reported in Dhanbad Fuels Ltd. v. Union of India and Others20, took the view that mediation in India is still at a nascent stage and requires more awareness. There was a need for mandatory training of commercial disputes. It was further found that the party cannot be denied the right to participate in the justice dispensation system. It was 20 2021 SCC Online Calcutta 429 further noticed that there was no obligation on the part of the defendant to respond to the initiative of the plaintiff. Rejecting the plaint under Order VII Rule 11(d) in view of Order VII Rule 13, which enables a fresh Suit to be filed upon rejection under Order VII Rule 11, would show that the power

under Order VII Rule 11 should not be invoked as it would not be in accordance with the objectives of the Act and the Rules.

48. Another learned Single Judge of the High Court of Calcutta, in a judgment reported in Dredging and Desiltation Company Pvt. Ltd. v. Mackintosh Burn and Northern Consortium and Others21, took the view that there is a distinction between filing of a Suit and institution of a Suit under the CPC. It was further found that the bar under Section 12A is absolute w.e.f. 12.12.2020, being the date immediately subsequent to the date after the standard operating procedure for undertaking pre-litigation procedure under Section 12A was made. This is after finding that the standard operating procedure had been made and Rules were published on 11.12.2020. The very same learned 21 2021 SCC Online Calcutta 1458 Single Judge (Debangsu Basak, J.) in the judgment reported in Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd. and Another22, elaborately considered the question as to whether Section 12A is mandatory. He went on to hold that Section 12A was mandatory. The Division Bench of the High Court of Madhya Pradesh, in Curewin Pharmaceuticals Pvt. Ltd. v. Curewin Hylico Pharma Pvt. Ltd23, followed the judgment of the learned Single Judge of High Court of Bombay, which we have noticed in Ganga Taro (supra), and after finding that a Suit, which does not contemplate an urgent interim relief, cannot be instituted unless pre- litigation mediation is exhausted. A learned Single Judge of the Allahabad High Court in the decision reported in Awasthi Motors v. Managing Director M/s. Energy Electricals Vehicle and Another24, found that there is a clear purpose provided for pre-institution mediation. He referred to the Statement of Objects and Reasons. He concluded that the provision is mandatory.

22 AIR 2021 Calcutta 190 23 AIR 2021 MP 154 24 AIR 2021 Allahabad 143 A SURVEY OF THE ACT AND THE RULES

49. Section 2(c) defines ‘commercial dispute’ as encompassing various specified transactions, which are 21 in number. There is a residuary provision, which brings up the rear and is contained in Section 2(c)(xxii). The said provision empowers the Central Government to notify other commercial disputes as a commercial dispute. The explanation amplifies/clarifies the scope of commercial dispute. Section 2(i) defines the words ‘specified value’ as follows:

> “2(i) “Specified Value”, in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with section 12 which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government.” [The amount was 1 crore when the Act was enacted in 2015 and it was reduced by the Amendment in 2018.]

50. Under Chapter II, the Law-giver has contemplated, Commercial Courts at the District Level, a Commercial Appellate Court at the District Judge Level, a Commercial Division in the High Court for all High Courts having Ordinary Original Civil Jurisdiction (See Section 4) and a Commercial Appellate Division in the High Court. Section 8 bars revision application or petition against an interlocutory order. Section 12 deals with the determination of the Specified Value. Section 14 contemplates that the Commercial Appellate Court and the Commercial Appellate Division shall endeavour to dispose of appeals before them, within six months from the date of filing of such

appeals. Under Section 15(2), all suits and applications, including under the Arbitration and Conciliation Act, relating to a commercial dispute of a specified value, pending in any Civil Court, is to be transferred to the Commercial Court, where such Court has been constituted. Under Section 16, the provisions of the CPC, in respect of its application to any suit in respect of a commercial dispute of a specified value, is to stand amended as provided in the Schedule. Section 19 provides that the State shall provide the necessary infrastructure to facilitate working of the Commercial Court or Commercial Division of a High Court. A Schedule relatable to Section 16, which provides for the amended version of the CPC, inter alia, provides for a substituted version of Section 35 of the CPC dealing with costs. It provides that the Court has the discretion in the matter of quantum of costs. Section 35 of the CPC in the Schedule, inter alia, contemplates that in making an Order for payment of costs, the Court shall have regard to the conduct of the parties and whether any reasonable offer to settle, is made by a party and unreasonably refused by the other party. Sections 35(3) and 35(4) read as follows:

> "35(3) In making an order for the payment of costs, the Court shall have regard to the following circumstances, including—
>
> (a) the conduct of the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the case;
>
> (d) whether any reasonable offer to settle is made by a party and unreasonably refused by the other party; and
>
> (e) whether the party had made a frivolous claim and instituted a vexatious proceeding wasting the time of the Court." "35(4) The orders which the Court may make under this provision include an order that a party must pay-
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date." [Emphasis supplied]

51. Since, Section 12A also contemplated the making of Rules to give effect to the scheme of pre-litigation mediation. The Rules were promptly made and published on 03.07.2018. Rule 3 elaborately provides for the manner in which the mediation process is initiated. It contemplates that a party, to a commercial dispute, may make an application to the Authority. This Rule speaks about a party. Section 12A declares that the plaintiff must exhaust the remedy of pre-litigation mediation. What, apparently is required is that the Suit cannot be filed except after the remedy of pre-litigation mediation, contemplated under the Act and the Rules, is attempted and exhausted. What Rule 3(1) provides is the form in which the application is to be made, viz., Form-I, as specified in Schedule-I. The making of the Form can be by online transmission or by post or by hand. The view expressed by the High Court of Madras that the use of the word 'may', detracts from the mandatory flavour of Section 12A is clearly untenable. Section 12A is part of the parent enactment. Rule 3, being a subordinate legislation, must be interpreted harmoniously, in the first place, with the parent enactment. That apart, on a proper understanding of Rule 3, there is really no conflict between Section 12A and Rule 3. Rule 3 only gives a discretion to the applicant, in regard to the mode of making the application. So understood, we are of the clear view that, if Section 12A is otherwise mandatory, Rule 3(1) can only be understood as providing three different modes for making the application, contemplated in Section 12A(1). As to whether the application must be made, must depend upon, among other things, upon the peremptory nature of the language employed in section 12A(1). Rule 3 further contemplates that the Authority, which again, has been clearly defined as the Authority notified by the Central Government under Section 12A(2), has to issue a notice to the opposite party to appear and to give his consent to participate within the time as provided in Rule 3(2). Should there be no response, a final notice is to be given again in the manner articulated in Rule 3(2). Should there be again no response by the notice remaining unacknowledged or upon there being refusal to participate, the mediation process becomes what is described, a non-starter. The Authority then makes a report in Form-III, which is called a Non-Starter Report. The copy of the Report is served on the applicant and the respondent. There is a provision for accommodating the request of the opposite party appearing and seeking time, subject to the date being not later than ten days from the date of request of the parties. If, in such a case, there is failure to appear by the opposite party, again a non-starter report in Form-III has to be made. If, on the other hand, where both parties appear, gives consent, the Authority is to assign the matter to a Mediator and also to assign a date. The period of mediation being three months and the possibility of an extension by two months, with the consent of both sides, is the subject matter of Rule 3. The role of the Mediator is carved out in Rule 5 to be one to facilitate the voluntary resolution of the dispute and assist the parties in reaching a settlement. Rule 6 provides for authority with the party to either appear personally or through his duly authorised representative or counsel. The significance of being represented by counsel in pre-litigation mediation, cannot but be underlined. Apart

from the fact that the Legislature must be treated as aware, that, both, public interest, as also the interest of the parties, lies in an expeditious disposal of, what is described as, commercial litigation, with a sublime goal of fostering the highest economic interests of the nation, allowing the Counsel to appear before the Mediator is intended to facilitate in arriving at a settlement, which is legally valid and otherwise just.

We have noticed that a settlement arrived at in pre- litigation mediation under Section 12A, is to be treated as an award under Section 30(4) of the Arbitration and Conciliation Act. Section 30(4) of the Arbitration and Conciliation Act, 1996, reads as follows:

> "30(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute." A mediation settlement arrived at under Section 89 of the CPC must be scrutinised by the court and only on its imprimatur being given it is effective [see paragraph 40 of Afcons Infrastructure Limited and Another v. Cherian Varkey Construction Company Private Limited and Others25].
>
> Since a settlement under Section 12A of the Act is accorded the status of an award under the Arbitration & Conciliation Act, it unerringly points to the object of the legislature to make pre-litigation mediation compulsory. We again underscore the vital role, the lawyers engaged can and must discharge in arriving at a just and valid settlement translating into an effective award and therefore, a decree.
>
> 52. Rule 7 deals with the procedure to be adopted by the Mediator. Rule 9 enshrines the principle of confidentiality of mediation. The Mediator, the parties, their authorised representatives or Counsel are to maintain confidentiality about the mediation. Rule 9 further declares that the Mediator is not to allow stenographic or audio or video 25 (2010) 8 SCC 24 recording of the mediation sittings. Rule 11 provides for the mediation fee. There is to be one-time mediation fee, which is to be shared equally, as per the quantum of claim as specified in Schedule II. We may set out Schedule II.

"SCHEDULE-II Mediation Fee [See rule 11] S.NO QUANTUM OF CLAIM MEDIATION FEE PAYABLE TO AUTHORITY (in Indian rupees).

1. From Rs. 3,00,000 to Rs. 15,000/-

Rs.10,00,000.

2. From Rs. 10,00,000. to Rs. Rs. 30,000/-

50,00,000.

3. From Rs. 50,00,000. to Rs. Rs. 40,000/-

1,00,00,000.

4. From Rs.1,00,00,000. to `Rs. 50,000/-

Rs.3,00,00,000.

5. Above Rs. 3,00,00,000. Rs. 75000/-

”

53. Timelines are contemplated, both in the matter of pleadings and also other steps to be taken. They are geared to ensure an expeditious culmination of the proceedings. Originally, the specified value within the meaning of Section 2(i) was fixed as ‘which shall not be less than one crore rupees’. Within three years of the birth of the Act, Parliament found that it was necessary to reduce the specified value from the sum of Rs.1 crore to Rs.3 lakhs, which is what is reflected in the present avatar of the definition of the word ‘specified value’. It is simultaneously with the reduction of the specified value and by the same amendment that Section 12A came to be inserted. We have already noticed the Statement of Objects and Reasons, which led to the amendment. On a conspectus of the Act, as from its birth till the Law-giver stepped- in with the amendment in 2018, the Act read with the Rules represent an economic experiment as much as it deals more directly with a vital aspect of administration of justice. Commercial disputes have been clearly identified. The value has been fixed. Courts, at different stages, have been contemplated. Timelines are contemplated. The whole object of the law is clear as day light. Disputes of a commercial hue, must be extinguished with the highest level of expedition. The dispute resolution would witness a termination of the lis between the feuding parties. But even, more importantly, it would prepare the ground for the country becoming a destination attracting capital by enhancing the ease of doing business. It does not require much debate to conclude that there is a direct relationship between ease of doing business and an early and expeditious termination of disputes, which may arise in commercial matters. The speed with which the justice delivery system in any country responds to the problem of docket explosion, particularly in the realm of commercial disputes can be regarded as a very safe index of the ease of doing business in that country. The Act, therefore, is, in the said sense, a unique experiment to push the pace of disposal of commercial disputes. It is in this background that the Court must approach the issue of whether Section 12A has been perceived as being a mandatory provision. We say this for the reason that the decisive element in the search for the answer, in the interpretation of such a Statute, must be to ascertain the intention of the Legislature. The first principle, of course, must be the golden rule of interpretation, which means, the interpretation in conformity with the plain language, which is used. There cannot even be a shadow of a doubt that the language used in Section 12A is plainly imperative in nature. However, we will not be led by the mere use of the word ‘shall’. Even going by the sublime object of the Act, as we have unravelled, we are fully reinforced in our opinion that the pre-institution mediation is intended to produce results, which has a direct bearing on the fulfilment of the noble goals of the Law-giver. It is apparent that the Legislature has manifested a value judgement. We are not called upon to decide the

constitutionality of the provision. Parliament is presumed to be aware of the felt necessities of the times. It best knows the manner in which the problems on the ground are redressed. Section 89 of the CPC, does contemplate mediation ordered by a Court. However, it must be noticed that Section 12A contemplates mediation without any involvement of the Court as it is done prior to the institution of the suit.

54. The potential of Section 89 of the CPC for resolving disputes has remained largely untapped on account of the fact that mediation has become the product of volition of the parties. Courts, no doubt, have begun to respond positively. However, there was a pressing need to decongest the trial courts, in commercial matters in particular, as they bear the brunt of docket explosion. It is noteworthy that Section 12A 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 Law-giver has, in Section 12A, 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 Law-giver has carefully vouch-safed 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.

55. Section 9 of the CPC is not the law, which creates a right to file a civil suit. It would, undoubtedly, require a law, however, to invade, absolutely or conditionally, the vital civil right of a person to take his grievance to a civil court. A civil suit can be barred by a law, either expressly or by necessary implication. The jurisdiction of a civil court can be ousted. In other words, there is no Fundamental Right with anyone to contend that he has a right to file a civil suit, which cannot be taken away. It is another matter that the courts will not lightly infer the ouster of a jurisdiction of a civil court. The very presence of Order VII Rule 11(d), which mandates rejection of a plaint, where a suit is barred, is a reminder of the principle that there is no absolute right to file a civil suit.

56. Under Section 12A, all that is provided is, a cooling period wherein the parties are to be referred for mediation at the hands of skilled Mediators. While on mediation, we may notice the following views expressed by this Court in the judgment reported in Vikram Bakshi and Others v. Sonia Khosla (Dead) by Legal Representatives26:

> "16. According to us it would have been more appropriate for the parties to at least agree to resort to mediation as provided under Section 89 CPC and make an endeavour to find amicable solution of the dispute, agreeable to both the parties. One of the aims of mediation is to find an early resolution of the dispute. The sooner the dispute is resolved the better for all the parties concerned, in particular, and the society, in general. For parties, dispute not only strains the relationship but also 26 (2014) 15 SCC 80 destroys it. And, so far as society is concerned it affects its peace. So what is required is resolution of dispute at the earliest possible opportunity and via such a mechanism where the relationship between individual goes on in a healthy

manner.

Warren Burger, once said:

> "The obligation of the legal profession is ... to serve as healers of human conflict ... we should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about." MEDIATION is one such mechanism which has been statutorily brought into place in our justice system. It is one of the methods of alternative dispute resolution and resolves the dispute in a way that is private, fast and economical. It is a process in which a neutral intervenor assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. It embraces the philosophy of democratic decision-making [Alfin, et al., Mediation Theory & Practice (2nd Edn., 2006) Lexis Nexis].
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> xxx xxx xxx
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> 19. This Bench is of firm opinion that mediation is a new dimension of access to justice. As it is one of the best forms, if not the best, of conflict resolution. The concept of Justice in mediation is advanced in the oeuvres of Professors Stulberg, Love, Hyman, and Menkel-Meadow (Self-

Determination Theorists). Their definition of justice is drawn primarily from the exercise of party self-determination. They are hopeful about the magic that can occur when people open up honestly and empathetically about their needs and fears in uninhibited private discussion. And, as thinkers, these jurists are optimistic that the magnanimity of the human spirit can conquer structural imbalances and resource constraints.

> xxx xxx xxx
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> 19.3. Professor Carrie Menkel-Meadow

presents a related point of view in making the case that settlement has a political and ethical economy of its own and writes:

> "Justice, it is often claimed, emerges only when lawyers and their clients argue over its meaning, and, in turn, some authoritative figure or body pronounces on its meaning, such as in the canonical cases of the late twentieth century ... For many years now, I have suggested that there are other components to the achievement of justice. Most notably, I refer to the process by which we seek justice (party participation and empowerment, consensus rather than compromise or command) and the particular types of outcomes that might help to achieve it (not binary win-lose solutions, but creative, pie-expanding or even shared solutions)." [Emphasis

supplied]

57. On the one hand, the staunchest criticism against mediation has been that it is opposed to the fundamental principle of access to justice. It is in keeping with the traditional notions of the right of a person to have a dispute adjudicated by an impartial and a trained Judge. On the other hand, as noticed by this Court in Vikram Bakshi(supra), mediation offers a completely new approach to attaining the goal of justice. A win-win situation resulting from assigning a greater role to the parties themselves, with no doubt, a spirit of accommodation represents a better and what is more in the era of docket explosion, the only meaningful choice. The realisation has been growing over a period of time, that formal court rooms, long drawn-out proceedings, procedural wrangles, mounting and crippling costs, delay, which never wanes but only increases with the day that at least, in certain categories of cases, mediation can be the way out. It, undoubtedly, requires a complete change in the mindset. The change in approach, undoubtedly, can be achieved only if the litigants become aware of its benefits in comparison with the great disadvantage in waiting in the serpentine queue for the day of reckoning to arrive in a court of law. The role of the Bar is vital in taking mediation forward. With increase in population and a skewed Judge-population ratio and a huge spiralling of litigation in the courts, it is logical, just and imperative, to attempt and persevere in out of the box thinking. We can no longer afford to remain in the past. A clean break with the past is urgently needed. What was a mere writing on the wall as early as in the last decades of the previous century has become the harsh reality. It is important that the courts also adapt to the changing times. At least when the Parliament has decided to move ahead, it becomes the court's duty not to greet it with undue scepticism. It becomes necessary to fulfil the intention of the Parliament by realising the true role of judiciary.

58. A perusal of the Act and the Rules reveal the existence of a complete Code. Mediation contemplated under Section 12A and the Rules, may not succeed in every case. To begin with, the figures may not be reassuring but even if success does not elude the Mediator, in a few of the cases, a good part of the object of the Legislature, would stand achieved. Such is the condition of the docket explosion perceived particularly in commercial disputes. It is not difficult to appreciate the concern of the people through their elected representatives. Particularly with the lowering of the monetary limit from rupees one crores to rupees three lakhs, there would be a stupendous load on the courts to achieve the timeline and dispose of commercial matters by the conventional mode of adjudication, even with the amended provisions of the CPC as applicable under Section 16 of the Act.

59. We are not impressed by the argument of Shri Saket Sikri that Section 12A does not provide for any penalty and, therefore, the provision is not mandatory. No doubt, he does admit that it is only one of the aspects to be considered whether the word 'shall' is to be treated as mandatory. If the argument of learned Counsel is accepted, neither Section 80 of the CPC nor Section 69 of the Partnership Act, which do not provide for any penalty for a suit brought in contravention of their terms, would be mandatory. However, it is a settled law that a plaint instituted transgressing the mandate of Section 80, that is, when there is no notice at all and no urgent relief is contemplated and leave sought, the plaint would have to be rejected, as the suit would not be maintainable. The position is equally the same in regard to absence of registration contemplated under Section 69 of

the Indian Partnership Act. Therefore, the principle canvassed by the learned Counsel would not apply.

60. Equally, we are unimpressed by the contention of the learned Counsel Shri Saket Sikri that contravention of mandate of Section 12A does not affect any legal right of the defendant and therefore, the suit filed without resorting to compulsory mediation must be countenanced. It may be true that it may be relevant input to inquire as to whether, not following a mandate of a statute, will violate the right of another person.

61. We may proceed on the basis that if the suit is brought without complying with Section 12A, 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 12A, 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 12A 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. Further, on the same logic, Section 80(1) of the CPC and Section 69 of the Indian Partnership Act would not be mandatory. This is however not the case.

62. One of the arguments of Shri Saket Sikri is that, if a plaint is rejected under Order VII Rule 11, the plaintiff would be saddled with the deprivation of the court fee paid. He would contend that this aspect may be considered, when the Court decides the question as to whether the provision is mandatory or not. Whenever a plaint is rejected on the ground that the suit is barred under any law, this consequence is inevitable. [We may only, in this context, observe, that under Section 4A of the Kerala Court Fee and Suit Valuation Act, 1959, the plaintiff needs to pay only one-tenth of the total court fee at the time of institution of the suit. The balance is to be paid not later than fifteen days from the date of framing of issues, inter alia. Section 4A further provides that if the parties further settle the dispute within the period specified or extended by the Court for payment of the balance court fee, the plaintiff shall not be called upon to pay the balance court fee.] If a plaint is rejected for failure to give a notice, as contemplated in Section 80 of the CPC, the court fee paid, may be lost. Equally, for violation of Section 69 of the Indian Partnership Act, if the plaint is rejected, the plaintiff loses the court fee. While it may appear to be hard on the plaintiff, the effect of the provision contained in Order VII Rule 11, cannot be diluted. Therefore, we are not impressed by the argument, subject to what we will hold later on.

63. One of the aspects which weighed with the learned single judge of the Bombay High Court in Ganga Taro (supra) is that in a case where the suit is instituted under Section 80 of the CPC without issuing any notice, if the defendant does not take up the plea of violation of Section 80, there can be waiver. Thus, even if Section 12A in a given case, where the defendant does not set up the case there can be waiver and therefore, Section 12A is not mandatory. No doubt, the Division Bench of the

Bombay High Court while reversing the learned single judge proceeded to hold that there cannot be waiver as Section 12A is based on public interest. The approach of the learned Single Judge does not commend itself to us. The question as to whether Section 12A is mandatory or not, must be decided with reference to language used, the object of the enactment and a host of other aspects. The fact that if a defendant does not raise the plea about compliance of Section 12A, it may result in a given case of waiver cannot result in Section 12A not being mandatory. If it were so, then in a case where there is no notice under Section 80, a plaint can never be rejected. It is legally untenable and defies logic. Another argument raised by Shri Saket Sikri, learned counsel is that by the impugned order, the High Court has affirmed the trial Court order that the suit be kept in suspended animation and referred the parties for mediation. According to him, it is substantial compliance of Section 12A of the Act. It is eminently just. He also points out the conduct of the appellant in not even cooperating in the mediation process. We are unable to accept this argument. We will refer to Section 80 of the CPC to assist us in justifying our conclusion. Under Section 80 (1) of the CPC, a suit not covered by Section 80(2), which is filed in defiance of the former provision, that is without serving any notice, is not maintainable. The suit would be barred and liable to be rejected under Order VII Rule 11. The only exception is what is provided in Section 80 (2). It contemplates a suit to obtain an urgent or interim relief. Such a suit may be instituted with the leave of the court without serving any notice as required under Section 80 (1). In a case where a plaintiff does not seek urgent interim relief under Section 80(2), the suit would fall within the four walls of Section 80(1). Section 80(1) is mandatory. In regard to such suit, there is no question of substantial compliance. The suit must culminate in rejection of the plaint on invoking power under Order VII Rule 11. We may immediately draw a parallel between Section 80(1) of the CPC and 12A of the Act. In Section 12A also, the bar of institution of the suit is applicable only in a case in which plaintiff does not contemplate urgent interim relief. The situation is akin to what is contemplated in Section 80(1) of the CPC. In other words, the suit under the Act which does not contemplate urgent interim relief is like a suit covered by Section 80(1) of the CPC which does not project the need for any urgent or interim relief. In regard to a suit covered under Section 12A of the Act, namely, in a suit where interim relief is not contemplated, there can be no substantial compliance by way of post institution reference to mediation. The argument of the plaintiff overlooks the object apart from the language used besides the design and scheme of the law. It will, if accepted, lead to courts also spending their invaluable time on such matters which follow from adjournments, objections and hearings. There is no need to adopt such a course.

64. Take a case where notice is given under Section 80(1). A contention is taken that the notice is not effective as it does not comply with what is required in Section 80(1). In such a case, it may be a different matter that the Court may take a liberal view as to whether there is compliance. In fact, Section 80(3) makes this position clear. Even before Section 80 was substituted by Act 104 of 1976 by which 80(3) was inserted, in Raghunath Das v. Union of India & Another27 while dealing with a case where a notice was given, this Court inter alia held as follows:

> “8. The object of the notice contemplated by that section is to give to the concerned Governments and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised, without litigation. The legislative intention behind that section in our opinion is that public mone y and time should

not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80 of the CPC are not intended to be used as boobytraps against ignorant and illiterate persons. I n this case we are concerned with a narrow question. Has the person mentioned in the notice as plaintiff brought the present suit or is he someone else? This question has to be decided by reading the notice as a whole in a reasonable manner.

9. In Dhian Singh Sobha Singh v. Union of India [(1958) SCR 781, 795] this Court observed that while the terms of Section 80 of the CPC must be strictly complied with that does not mean that the terms of 27 AIR 1969 SC 674 the section should be construed in a pedantic manner or in a manner completely divorced from common sense. The relevant passage from that judgment is set out below:

"We are constrained to observe that the approach of the High Court to this question was not well founded. The Privy Council no doubt laid down in Bhagchand Dagadua v. Secretary of State that the terms of section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock C.B. in Jones v. Nicholls, "we must import a little common sense into notices of this kind". Beaumont, C.J. also observed in Chandu Lal Vadilal v. Gove rnment of Bombay "One must construe Se ction 80 with some regard to common sense and to the object with which it appears to have been passed."

65. The period of mediation is three months. If parties warm-up to the prospect of settlement through mediation, on their consent, it can be extended for another two months. Thus, for payment of a one-time fee, in the case, which is successfully mediated by a skilled Mediator and with the assistance of Counsel, the very dispute gets settled. The pressure on the courts is taken off to the extent that the parties, without reference of the court, are compelled to undergo mediation.

66. Section 12A of the Act provides for mediation. This is a provision, which was inserted as per the Amending Act (Act 28 of 2018) enacted in the year 2018 and it came into force w.e.f. 03.05.2018. By the said amendment, in fact, Chapter IIIA was inserted and Section 12A is the sole Section in the said Chapter. A plain reading of Section 12A makes the following position clear:

The Law-giver has declared that if a Suit under the Act does not 'contemplate' any urgent interim relief, then, it cannot be instituted unless the plaintiff seeks pre-litigation mediation. The pre-

institution mediation is to be done in the manner, procedure, which is to be prescribed by the Central Government. The pre-litigation mediation is to be completed within a period of three months from the date of the application made by the plaintiff under Sub-

Section (1) [See Section 12A sub-Section (3)]. The period of three months can, however, be extended for a period of two months provided there is consent to the same by the parties [See the first proviso to Section 12A sub-Section (3)]. By the second proviso, the Legislature has taken care to provide that the period, during which the parties remained occupied with the pre-litigation mediation, is not to be reckoned for the purpose of computing the period of limitation under the Limitation Act, 1963. As to what would happen, if the parties arrive at the settlement, is provided for in Section 12A sub-Section (4). The settlement is to be reduced into writing and signed by the parties to the dispute and the Mediator. The effectiveness of a settlement arrived at in the course of the pre-

institution mediation contemplated in Section 12A, has been dealt with in Section 12A sub-Section (5).

Parliament has accorded the settlement, 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. Spread over five sub-Sections, this standalone Section in Chapter IIIA, no doubt, supported by the Rules, in our view, substantially manifests a definite scheme to effectively deal with the perceived urgent problem of acute clogging of the justice delivery system, which had to be de-congested. Section 12A cannot be perceived as merely intended to reach quicker justice, and what is more, on terms, which are mutually acceptable to the parties concerned. Even, more importantly, it was to produce a vital and significant effect on the very interest of the nation. We have perused the Statement of Objects and Reasons. To attract foreign capital by enhancing its rather low standard in the ease of doing business, it was and is still necessary to showcase an efficient and quick justice delivery system in commercial matters. In fact, India, which was ranked at 142 out of 189 countries, in the Ease of Doing Business Index, in 2015, climbed-up to only 130 in the year 2016. By 2020, India stood at the 63rd position.

THE REGIME UNDER ORDER VII RULE 11 OF THE CPC

67. Order VII Rule 11 declares that the plaint can be rejected on 6 grounds. They include failure to disclose the cause of action, and where the suit appears from the statement in the plaint to be barred. We are concerned in these cases with the latter. Order VII Rule 12 provides that when a plaint is rejected, an order to that effect with reasons must be recorded. Order VII Rule 13 provides that rejection of the plaint mentioned in Order VII Rule 11 does not by itself preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Order VII deals with various aspects about what is to be pleaded in a plaint, the documents that should accompany and other details. Order IV Rule 1 provides that a suit is instituted by presentation of the plaint to the court or such officer as the court appoints. By virtue of Order IV Rule 1(3), a plaint is to be deemed as duly instituted only when it complies with the requirements under Order VI and Order VII. Order V Rule 1 declares that when a suit has been duly instituted, a summon may be issued to the defendant to answer the claim on a date specified therein. There are other details in the Order with which we are

not to be detained. We have referred to these rules to prepare the stage for considering the question as to whether the power under Order VII Rule 11 is to be exercised only on an application by the defendant and the stage at which it can be exercised. In Patasibai and Others v. Ratanlal28, one of the specific contentions was that there was no specific 28 (1990) 2 SCC 42 objection for rejecting of the plaint taken earlier. In the facts of the case, the Court observed as under:

> "13. On the admitted facts appearing from the record itself, learned counsel for the respondent, was unable to show that all or any of these averments in the plaint disclose a cause of action giving rise to a triable issue. In fact, Shri Salve was unable to dispute the inevitable consequence that the plaint was liable to be rejected under Order VII Rule 11, CPC on these averments. All that Shri Salve contended was that the court did not in fact reject the plaint under Order VII Rule 11, CPC and summons having been issued, the trial must proceed. In our opinion, it makes no difference that the trial court failed to perform its duty and proceeded to issue summons without carefully reading the plaint and the High Court also overlooked this fatal defect. Since the plaint suffers from this fatal defect, the mere issuance of summons by the trial court does not require that the trial should proceed even when no triable issue is shown to arise. Permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation. This cannot be done." (Emphasis supplied)
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> 68. On a consideration of the scheme of the Orders IV, V and VII of the CPC, we arrive at the following conclusions:
>
> (A) A suit is commenced by presentation of a plaint.

The date of the presentation in terms of Section 3(2)of the Limitation Act is the date of presentation for the purpose of the said Act. By virtue of Order IV Rule 1 (3), institution of the plaint, however, is complete only when the plaint is in conformity with the requirement of Order VI and Order VII.

(B) When the court decides the question as to issue of summons under Order V Rule 1, what the court must consider is whether a suit has been duly instituted. (C) Order VII Rule 11 does not provide that the court is to discharge its duty of rejecting the plaint only on an application. Order VII Rule 11 is, in fact, silent about any such requirement. Since summon is to be issued in a duly instituted suit, in a case where the plaint is barred under Order VII Rule 11(d), the stage begins at that time when the court can reject the plaint under Order VII Rule 11. No doubt it would take a clear case where the court is satisfied. The Court has to hear the plaintiff before it invokes its power besides giving reasons under Order VII Rule 12. In a clear case, where on allegations in the suit, it is found that the suit is barred by any law, as would be the case, where the plaintiff in a suit under the Act does not plead circumstances to take his case out of the requirement of Section 12A, the plaint should be rejected without issuing summons. Undoubtedly, on issuing summons it will be always open to the defendant to make an application as well under Order VII Rule 11. In other words, the power under Order VII Rule 11 is available to the court to be exercised suo motu.(See in this regard, the judgement of this Court in Madiraju Venkata Ramana Raju (supra).

PRESENTATION OF PLAINT AND INSTITUTION OF SUIT

69. Another area of debate has been about the distinction between the presentation of a plaint and institution of a suit. Section 3(2) of the Limitation Act, 1963, provides that for the purpose of the Limitation Act, a suit is instituted in the ordinary case, when the plaint is presented to the proper Officer. In the case of a pauper, the suit is instituted when his application to leave to sue as a pauper is made. Order IV Rule 1 of the CPC reads as follows:

> "Order IV Rule 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 sub-rules (1) and (2)."

70. Sub-Rule (3) of Order IV Rule 1 was inserted by Act 46 of 1999 w.e.f. 01.07.2002. Shri Sharath Chandran has drawn our attention to the Judgment of the High Court of Madras reported in Olympic Cards Limited v. Standard Chartered Bank29. In the said case, the question, which arose was, whether there was an abandonment or withdrawal of suit within the meaning of Order XXIII Rule 1 of the CPC, which would operate as a bar to file a fresh suit. In this context, we notice the following discussion:

> "16. Rule (1) of Order 4 of C.P.C. provided for institution of Suits. Rules 3 & 4 of Order 4 contains the statutory prescription that the Plaint must comply with the essential requirements of a valid Plaint and then only the process of filing would culminate in the registration of a Suit. Rule 21 of Civil Rules of Practice contains the basic difference between presentation and institution. There is no dispute that the date of filing the Plaint would be counted for the purpose of limitation. 29 (2013) 1 CTC 38 However, that does not mean that the Suit was validly instituted by filing the Plaint.

The Plaint, which does not comply with the Rules contained in Orders 4 & 7, is not a valid Plaint. The Court will initially give a Diary Number indicating the presentation of Suit. In case the Plaint is returned, it would remain as a "returned Plaint" and not a "returned Suit". The act of numbering the Plaint and inclusion in the Register of Suits alone would constitute the institution of Suit. The stages prior to the registration of Suit are all preliminary in nature. The return of Plaint before registration is for the purpose of complying with certain defects pointed out by the Court. The further procedure after admitting of the Plaint is indicated in Rule 9 of Order

7. This provision shows that the Court would issue summons to the parties after admitting the Plaint and registering the Suit.

Thereafter only the Defendants are coming on record, exception being their appearance by lodging caveat. Even after admitting the Plaint, the Court can return the Plaint on the ground of jurisdiction under Rule 10 of Order 7 of C.P.C. The fact that the Plaintiff/Petitioner served the Defendant/respondent the copies of Plaint/Petitions before filing the Suit/Petition would not amount to institution of Suit/filing Petition. It is only when the Court admits the Plaint, register it and enter it in the Suit register, it can be said that the Suit is validly instituted.

17. It is, therefore, clear that any abandonment before the registration of Suit would not constitute withdrawal or abandonment of Suit within the meaning of Order 23, Rule 1, C.P.C., so as to operate as a legal bar for a subsequent Suit of the very same nature. It is only the withdrawal or abandonment during the currency of a Legal proceedings would preclude the Plaintiff to file a fresh Suit at a later point of time on the basis of the very same cause of action."

71. The contention appears to be that it may be a fair view to take that there is no institution of the suit within the meaning of Section 12A, until the Court admits the plaint and registers it in the suit register. In other words, presentation of the plaint may not amount to institution of the suit for the purpose of Order IV Rule 1 of the CPC and Section 12A of the Act. If this view is adopted, it is pointed out that before the plaint is registered after presentation and there is non-compliance with Section 12A, the plaintiffs can, then and there, be told off the gates to first comply with the mandate of Section 12A. This process would not involve the Courts actually spending time on such matters. In the facts, this question does not arise and, it may not be necessary to explore this matter further.

72. We may sum-up our reasoning as follows:

> The Act did not originally contain Section 12A. It is by amendment in the year 2018 that Section 12A was inserted. The Statement of Objects and Reasons are explicit that Section 12A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The Legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion. Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled.
>
> Cases in point, which amply illustrate this principle, are Section 80 of the CPC and Section 69 of the Indian Partnership Act. The language used in Section 12A, which includes the word 'shall', certainly, go a long way to assist the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation.

The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgement of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability.

The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties.

73. In the cases before us, the suits do not contemplate urgent interim relief. As to what should happen in suits which do contemplate urgent interim relief or rather the meaning of the word 'contemplate' or urgent interim relief, we need not dwell upon it. The other aspect raised about the word 'contemplate' is that there can be attempts to bypass the statutory mediation under Section 12A by contending that the plaintiff is contemplating urgent interim relief, which in reality, it is found to be without any basis. Section 80(2) of the CPC permits the suit to be filed where urgent interim relief is sought by seeking the leave of the court. The proviso to Section 80 (2) contemplates that the court shall, if, after hearing the parties, is satisfied that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to the court after compliance. Our attention is drawn to the fact that Section 12A does not contemplate such a procedure. This is a matter which may engage attention of the lawmaker. Again, we reiterate that these are not issues which arise for our consideration. In the fact of the cases admittedly there is no urgent interim relief contemplated in the plaints in question. SOME CONCERNS

74. Mediation can become a potent alternate dispute resolution device. There are, however, a few indispensable requirements. The first requirement is the existence of adequate infrastructural facilities and, what is more important, availability of trained and skilled Mediators. The role of the Mediator, as per Rule (5) of the Rules, is to facilitate the voluntary resolution of a commercial dispute and assist the parties in this regard. How can a Mediator, who is not properly trained, fulfil his responsibility under Rule (5)? Another area of concern is the availability in the number of Mediators in the country, particularly, in the light of lowering of the monetary valuation from Rs. 1 crore to Rs. 3 lakhs. It is all well to pass a law with sublime objects as in this case. However, the goal will not be realised unless the State Governments and all other relevant Authorities bestow their attention in the matter of providing adequate facilities. Knowledge of the laws, which are the subject matter of the suits under the Act, is indispensable for a Mediator to effectively discharge his duties. His role is supreme and it is largely shaped by his own knowledge of the law that governs commercial cases. There must be training by Experts, including at the State Judicial Academies. This must be undertaken on a regular and urgent basis, particularly keeping in mind when there is a

dearth of trained mediators. There is a need to have a dedicated bar for mediation. The effective participation of the bar which must be adequately remunerated for its service will assist in mediation evolving. The concerned High Court may also undertake periodic exercise to establish a panel of trained mediators in District and Taluka levels as per need.

75. In Civil Appeal arising out of SLP(C) No. 14697 of 2021, it is brought to our notice that after the filing of the Special Leave Petition, suit was proceeded with under Order XXXVII of the CPC, Shri Ayush Negi, would contend that the respondent\plaintiff has pressed the summary judgment and, in case, this Court does not grant relief to the appellant, safeguard may be incorporated allowing the appellants written statement to be treated as leave to defend.

THE RELIEF

76. On the findings we have entered, the impugned orders must be set aside and the applications under Order VII Rule 11 allowed. This would mean that the plaints must be rejected. Necessarily, this would involve the loss of the court fee paid by the plaintiffs in these cases. They would have to bring a fresh suit, no doubt after complying with Section 12A, as permitted under Order VII Rule 13. Moreover, the declaration of law by this Court would relate back to the date of the Amending Act of 2018.

77. There is a plea by Shri Saket Sikri, that if this Court holds that Section 12A is mandatory it may be done with only prospective effect. He drew support of the judgment of this Court in, Jarnail Singh and Others v. Lachhmi Narain Gupta and Others30.

30 2022 SCC Online SC 96 “35. While interpreting the scope of Article 142 of the Constitution, this Court held that the law declared by the Supreme Court is the law of the land and in so declaring, the operation of the law can be restricted to the future, thereby saving past transactions.

36. The power of this Court under Article 142 of the Constitution is a constituent power transcendental to statutory prohibition [(1997) 5 SCC 201]. In Orissa Cement Ltd. v. State of Orissa [(1991) Suppl.1 SCC 430], this Court observed that relief can be granted, moulded or restricted in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. The doctrine of prospective overruling is in essence a recognition of the principle that the Court moulds the reliefs claimed to meet the justice of the case, as has been held in Somaiya Organics (India) Ltd. v. State of U.P. [(2001 5 SCC 519]. It was further clarified that while in Golak Nath (supra), ‘prospective overruling’ implied an earlier judicial decision on the same issue which was otherwise final, this Court had used the power even when deciding on an issue for the first time. There is no need to refer to other judgments of this Court which have approved and applied the principle of prospective overruling or prospective operation of judgments. There cannot be any manner of doubt that this Court can apply its decision prospectively, i.e., from the date of its judgment to save past transactions.”

78. The Doctrine of prospective overruling began its innings with the decision of this Court in L.C. Golak Nath and Others v. State of Punjab and Another31. This Court in the said case relied upon

Articles 32, 141 and 142 of the Constitution and extended this doctrine which was in vogue in the United States. The principle involves giving effect to the law laid down by this Court, from a prospective date, ordinarily the date of the judgment. There is no dispute that while initially the doctrine was confined to matters arising under the Constitution, later on it has been applied to other areas of law as well.

79. In Taherakhatoon (D) By Lrs. v. Salambin Mohammad32, this Court while dealing with its powers or rather limitation on its power even after grant of special leave under Article 136 held as follows:

> "20. In view of the above decisions, even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error — still we may not interfere if the justice of the case on facts does not require interference or if we 31 AIR 1967 SC 1643 32 (1999) 2 SCC 635 feel that the relief could be moulded in a different fashion...."

80. In M/s. Somaiya Organics (India) Ltd. v. State of Uttar Pradesh33, the Court went on to hold as follows in regard to the doctrine of prospective overruling.

"25. The words "prospective overruling" implies an earlier judicial decision on the same issue which was otherwise final. That is how it was understood in Golak Nath [AIR 1967 SC 1643: (1967) 2 SCR 762]. However, this Court has used the power even when deciding on an issue for the first time. Thus, in India Cement Ltd. v. State of T.N. [(1990) 1 SCC 12] when this Court held that the cess sought to be levied under Section 115 of the Madras Panchayats Act, 1958 as amended by Madras Act 18 of 1964, was unconstitutional, not only did it restrain the State of Tamil Nadu from enforcing the same any further, it also directed that the State would not be liable for any refund of cess already paid or collected.

28. In the ultimate analysis, prospective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case — justice not in its logical but in its equitable sense. As far as this country is concerned, the power has been expressly conferred by Article 142 of the Constitution which allows this Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending 33 AIR 2001 SC 1723 before it". In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants' favour in order to do 'complete justice'."

81. We may next notice the judgment of this Court in, P.V. George & Ors. v. State of Kerala & Ors.34 In the said case, the doctrine was sought to be invoked in a service matter. The Full Bench of the High Court overruled a Division Bench which had declared a rule unconstitutional. On the strength of the Full Bench decision the employees were sought to be reverted. This Court adverted to the decision of the House of Lords reported in National Westminster Bank Plc. v. Spectrum Plus Ltd. & Ors.35 wherein the Court held:

> "9. Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.
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> 10. Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The 34 AIR 2007 SC 1034 35 (2005) UK HL 41 ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme." (Emphasis supplied)

82. This is not a case where this Court is overruling its previous decision, which was the case in the decision reported in 2005 8 SCC 618. This is also not a case where this Court is pronouncing a law under which various transactions have been affected void. It may be true that the doctrine of prospective overruling may not be confined to either of the above circumstances as such and its ambit is co-extensive with the equity of a situation whereunder on the law being pronounced it is likely to intrude into or reopen settled transactions. This is not a matter where the court is overruling a decision of the High Court which has held the field for a long period. See in this regard, Harsh Dhingra v. State of Haryana and others36. In the said judgment this Court held as follows:

> 36 (2001) 9 SCC 550 "7. Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty-bound to apply such dictum to cases which would arise in future. Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation. These principles are enunciated by this Court in Baburam v. C.C. Jacob [(1999) 3 SCC 362:
>
> 1999 SCC (L&S) 682: 1999 SCC (Cri) 433] and Ashok Kumar Gupta v. State of U.P. [(1997) 5 SCC 201: 1997 SCC (L&S) 1299]"

83. The statute which has generated the controversy is the Amending Act of year 2018. We have noticed that there is undoubtedly a certain amount of cleavage of opinion among the High Courts.

The other feature which is to be noticed is that, this is a case where the law in question, the Amending Act containing certain Section 12A is a toddler. The law necessarily would have teething problems at the nascent stage. The specified value has been lowered drastically from Rs.1 crore to Rs.3 lakhs. The imperative need to comply with the mandate of Section 12A which we have unravelled if it has not been shared by the parties on the advice they received or on the view prevailing in the High Courts would necessarily mean that unless we hold that the law, we declare is prospective such suits must perish. The court fee paid would have to be written off. In a fresh suit which would be otherwise barred by limitation, shelter can be taken only under Section 14 of the Limitation Act. The availability of the power under Section 14 itself may have to be decided by the court.

84. Having regard to all these circumstances, we would dispose of the matters in the following manner. We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even suo moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 so that concerned stakeholders become sufficiently informed. 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. Finally, if the plaint is filed violating Section 12A after the jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief.

85. 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 XXXVII and the matter considered on the said basis. 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. 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.

.....J. [K.M. JOSEPH] .....J. [HRISHIKESH ROY] NEW DELHI DATED; AUGUST 17, 2022