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Delhi High Court: The defendant's refusal to participate in the pre-institution mediation will suffice as compliance of Section 12-A of the Commercial Courts Act, 2015

The Delhi High Court ("Delhi HC") recently in the case of *Kapil Goel v. Ram Dulare Yadav @Gandhi Bhai*¹ held that the defendant having refused to participate in the pre-institution mediation will suffice for the plaintiff to prove the compliance under mandate of Section 12A² of the Commercial Courts Act, 2015 ("CC Act").

Brief Facts

The dispute arises out of a default in the payment of INR 17,98,319 (Indian Rupees seventeen lakh ninety-eight thousand three hundred nineteen) by Ram Dulare Yadav ("**Defendant**") for purchase of fabric from Kapil Goel, proprietor of M/s Kapil Creations ("**Plaintiff**").

In compliance under Section 12-A of the CC Act and Rule 3(1) of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 ("**CC Rules**"), the Plaintiff initiated pre-institution mediation before the Delhi Legal Services Authority ("**DLSA**"). The DLSA gave a non-starter report for the mediation. Accordingly, the Plaintiff filed the recovery suit for INR 27,33,433 (Indian Rupees twenty-seven lakh thirty three thousand four hundred thirty-three) ("**Suit**") before the Ld. District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi ("**District Judge**"). The District Judge issued summons, and the Defendant filed its written statement and the Plaintiff filed its replication. The Defendant also filed an application for rejection of plaint under Order VII Rule 11(d) of the Civil Procedure Code ("**CPC**") on the ground of non-compliance of mandatory pre-institution mediation under Section 12A of the CC Act. The District Judge dismissed the Suit by observing that Section 12A of the CC Act is mandatory in nature, and since the Plaintiff has not acted in good faith by refusing to participate in the pre-institution mediation process, the Suit is barred by law. Aggrieved, the Plaintiff filed an appeal before the Delhi HC.

In the appeal, the Plaintiff argued that the pre-institution mediation proceedings before the DLSA was in accordance with the CC Act and CC Rules. The Plaintiff further argued that (a) the District Judge wrongly recorded the Plaintiff's unseriousness to participate in the mediation, while it was the Defendant who was unwilling; and (b) the Supreme Court decision in *Patil Automation Private Limited and Others v. Rakheja Engineers Private Limited*³ (which held pre-institution mediation to be mandatory) were in the facts where the Plaintiff was unwilling to participate in the Pre-Institution Mediation, and hence, this dictum cannot apply to the present facts. The Defendant objected to the Plaintiff's seriousness to participate in the pre-institution mediation by stating that Plaintiff went through these proceedings as

¹ RFA(COMM) 14/2022; November 16, 2022.

² Section 12A provides that a suit which does not contemplate any urgent interim reliefs under the CC Act, cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in such manner and procedure as may be prescribed.

³ Patil Automation Private Limited and Others v. Rakheja Engineers Private Limited, 2022 SCC OnLine SC 1028

a mere formality without any serious intent to mediate. Accordingly, the Defendant submitted that the dictum of *Patil Automation (supra)* on the mandatory pre-institution mediation must apply.

Issues

Whether the Defendant's unwillingness to participate in pre-institution mediation would suffice satisfaction of Section 12A of the CC Act.

Findings and Observations

The Delhi HC answered the issue in the affirmative to hold that the Defendant's unwillingness to participate in pre-institution mediation would suffice satisfaction of Section 12A of the CC Act. Accordingly, the Delhi HC restored the suit setting aside the District Judge's order on the following findings on the Section 12A regime and its application to the facts of the case in hand:

1. Under Section 12A, all that is required on the part of the plaintiff is to initiate pre-institution mediation prior to filing of a commercial suit. Once this is satisfied – (a) if it is the plaintiff refused to proceed with mediation, then the suit would be barred by law; (b) if both, the defendant and the plaintiff, do not wish to pursue the mediation and a non-starter report is generated, then the suit would not be barred by law.
2. As per the decision of *Patil Automation (supra)*, Section 12A of the CC Act is mandatory and the Suit can be dismissed under Order VII Rule 11 of the CPC if the *Plaintiff* does not fulfil the mandate of Section 12A of the CC Act.
3. In the present case, both the Plaintiff and the Defendant have refused to participate in the mediation. Therefore, it is not the case that the Defendant was keen in pursuing the mediation and the Plaintiff was not interested. Accordingly, the decision of *Patil Automation (supra)* will not apply.

Accordingly, the Delhi HC observed that the Defendant's refusal to participate in the pre-institution mediation initiated by the Plaintiff will suffice for the suit of the Plaintiff to be allowed to proceed in terms of mandatory compliance under Section 12A of the CC Act.

JSA Comment

This judgement brings quitous to a practical issue with pre-institution mediation in commercial suits where defendants have been exploiting the (mandatory) pre-institution mediation regime by not meaningfully participating in these mediation proceedings but just using this as a tool to delay the actual institution of the suit. However, in such cases, the Plaintiffs are getting stuck having to wait out the period of pre-institution mediation (in view of the decision of *Patil Automation (supra)* mandating pre-institution mediations) before they can actually institute the suit. Recognising that the defendant's non-participation in a pre-institution mediations can constitute sufficient compliance of Section 12A of the CC Act comes as a big relief to the plaintiffs as it prevents errant defendants from misusing Section 12A of the CC Act.

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