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# Pre-Institution Mediation- the Provision and the Interpretation

## INTRODUCTION

### 1. The Commercial Courts Act, 2015

1.1. The recommendations of the Law Commission of India in its 253rd Report provided for establishment of Commercial Division, Commercial Appellate Division and Commercial Courts on the basis of territorial and pecuniary jurisdiction for disposal of commercial disputes of specified value.

1.2. The Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (for short "**the said Act**") was enacted pursuant to such recommendation. It came into force with effect from 23<sup>rd</sup> October, 2015.

1.3. The Statement of Objects and Reasons under the said Act enumerates the purpose of the enactment as speedy disposal of high value commercial disputes so as to create a positive image in the global investment scenario.

1.4. An amendment to the said Act was carried out in 2018 which came into force on 3<sup>rd</sup> May, 2018. The amendment inserted Chapter IIIA under which the provision for Pre-Institution Mediation and Settlement was provided for.

### 2. Section 12A

2.1. The said Act encourages speedy disposal of cases of high value through specified timelines for disposal of commercial disputes. Section 12A is another feather to the wing of the Commercial Courts Act in promoting quick disposal of cases and minimizing the burden of the courts.

2.2. Section 12A under Chapter IIIA was inserted by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts(Amendment) Act, 2018 to encourage parties for out-of-court settlements or mediation keeping in view the overburdened status of the courts and pendency of huge number of cases.

2.3. The Central Government also notified The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 which came into force on 3<sup>rd</sup> July, 2018. The Rules deal with the procedure to be followed in mediation and the confidentiality thereof.

2.4. Section 12A under sub-section (1) states that no suit shall be instituted before a commercial

court unless the remedy of pre-institution mediation has been exhausted by the plaintiff. The only exception available under this provision is when the suit contemplates a prayer for an urgent relief under the said Act.

2.5. The section also provides that the mediation is to be conducted in accordance with the rules made by the Central Government in this regard and the Legal Services Authorities Act, 1987 may be followed for the process. Further, the pre-institution mediation shall be completed within the specified time of three months with a further extension of two months with mutual consent. The period during which the parties remain occupied with mediation shall not be computed for the determination of limitation period on filing of the suit.

2.6. Thus, unless the plaintiff proves that the relief sought for is urgent in nature, the parties must access the route of pre-institution mediation to fructify the purpose of the provision which is to ensure that the parties try to settle the dispute amicably or reach a settlement through mediation before approaching the courts.

### 3. The interpretation

3.1. The most relevant debate regarding Section 12A is whether the pre-institution mediation contemplated under such section is mandatory or optional, i.e., whether a commercial court is liable to dismiss a suit when the provision of section 12A has not been complied with and the route of mediation has not been availed.

3.2. The Courts have sought to answer the question in different facts as to the intention of the legislature in inserting this provision and whether it merely sought to open newer avenues for the parties in dispute or to formulate a mandatory requirement of exhausting the remedy of mediation.

3.3. In *M/s. Dhanbad Fuels Ltd. vs. Union of India*[2021 SCC OnLine Cal 429], the Calcutta High Court dealt with the question of maintainability of a suit on the ground of non-compliance of the provisions of section 12A. The Court observed that the object of the section is to encourage a party to explore the possibility of settlement and reduce the pendency of commercial litigation in India. The Court did not dispense with the requirement of



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section 12A but allowed the suit to be kept in abeyance until the parties try to resolve their disputes by negotiation in the presence of a mediator.

3.4. The Delhi District Court in *Bank of Baroda vs. M/s. Suhail Garments* (2<sup>nd</sup> December, 2020) gave a liberal interpretation to the section and has clearly put across a view that the mandate under section 12A is a compulsory requirement and not a mere directive. It made the following observations:

- The words used under section 12A do not come across as a simple requirement but a formal condition.
- Supreme Court's decision in *Ambalal Sarabhai Enterprises Ltd. vs. K.S. Infraspace LLP* [(2020) 15 SCC 585] held that the procedural aspects of the Commercial Courts Act cannot be ignored, thus, the words "shall" in the provision cannot be read as "may".
- The plaintiff made a mockery of the statute by not paying heed to the mandatory step of mediation to be taken prior to institution of the suit.
- The plaint must be rejected under Order VII Rule 11 of The Code of Civil Procedure, 1908, on ground of non-compliance of section 12A.

3.5. The Calcutta High Court in *Terai Overseas Private Limited vs. Kejriwal Sugar Agencies Private Limited* [2020 SCC OnLine Cal 1591] dismissed a suit since it found that the pleading in the plaint mentioning that the defendants had been acting in collusion and hence there was no chance of settlement was not a ground contemplated under section 12A for dispensing the requirement of pre-institution mediation. The mandate can only be dispensed when the plaintiff seeks an urgent relief.

3.6. In contrast to the above decisions, the courts have also in many instances granted leave under section 12A. However, such cases deal with a relief which the court believed to be urgent in nature. For instance, in *M.K. Food Products vs. M/s S.H. Food Products and GSD Constructions Pvt. Ltd. vs.*

*Balaji Febtech Engineering*, the courts have allowed the suit in spite of non-compliance of the directions under section 12A and granted interim relief on the observation that the same were urgent in nature and not granting relief at the relevant time would lead to irreparable loss or injury.

3.7. The decision of the Bombay High Court in *Ganga Taro Vazirani vs. Deepak Raheja* [2021 SCC OnLine Bom 195] which held that the provision of pre-institution mediation is not mandatory cannot be considered as good law as it sets back the clock to the time when the country wasn't as well versed with the benefits and necessity of alternate dispute resolution mechanism. It undermines the purpose of the enactment.

3.8. However, as the decision in *Raza Buland Sugar Co. Ltd. vs. Municipal Board, Rampur* [AIR 1965 SC 895] held that the question whether a provision is mandatory or directory cannot be resolved by laying down any general rule. The interpretation to section 12A and decisions there under shall be based on the respective facts of each case.

#### 4. Conclusion

4.1. In the discussions for passing of the Bill for Amendment for introduction of the provision for pre-institution mediation to the said Act the Hon'ble Minister for Law and Justice expressly referred to the pre-mediation initiative being taken by the entire world and called the introduction of this provision "an important milestone".

4.2. All these decisions and discussions clearly elaborate the importance being accorded to mediation in the current legal scenario. The courts have taken a pro-arbitration and mediation view, especially since the introduction of the said Act, and the amendments brought about in the Arbitration and Conciliation Act, 1996, as amended in the same year. All legal experts and thinkers have been stressing on the importance of mediation in India owing to large number of cases pending in courts. Thus, the provision of pre-institution mediation under section 12A must be interpreted as a mandatory requirement in advancing the object of the said Act.