

9th September, 2022

PRE-MEDIATION UNDER SECTION 12A OF COMMERCIAL COURTS ACT – WHY MANDATORY?

INTRODUCTION

In a significant decision, on 17.08.2022, a Division Bench of the Hon'ble Supreme Court of India ["**SCI**"] consisting of Justice KM Joseph and Justice Hrishikesh Roy held that pre-mediation under Section 12A of the Commercial Courts Act, 2015 ["**the Act**"] is mandatory and plaints in violation of the same would be liable to be rejected under Order VII Rule 11 of Civil Procedure Code, 1908 ["**CPC**"]. [*M/S. Patil Automation Private Limited and Others v. Rakheja Engineers Private Limited, 2022 SCC OnLine SC 1028.*]

MEDIATION: MEANING

Mediation is one of the methods of alternative dispute resolution to resolve disputes 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.

BACKGROUND

A. Insertion of s.12A of the Act

- By way of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 ["**the Amendment Act**"], Chapter IIIA was inserted wherein Section 12A was the sole Section in the said Chapter.
- It came into force w.e.f. 03.05.2018
- As per the provision, 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 and procedure, which is to be prescribed by the Central Government.

- Timelines are contemplated, both in the matter of pleadings and also other steps to be taken. [Sub-Section (3)]
- The settlement under Section 12A has been accorded the same status and effect as if it is an Arbitral Award on agreed terms under s.30(4) of the Arbitration and Conciliation Act, 1996. [Sub-Section (5)]

B. Rules under s.12A

- Section 12A also contemplated the making of Rules to give effect to the scheme of prelitigation mediation. The Rules were 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.
- Rule 3(1) provides 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.

JUDICIAL APPROACH: CONFLICTING VIEWS OF THE HIGH COURTS

1. In *Awasthi Motors v. Managing Director M/s. Energy Electricals Vehicle and Another* [AIR 2021 Allahabad 143], a learned Single Judge of the Allahabad High Court having regard to the object and purpose of the Act, held that the provision is mandatory.
2. In *Ganga Taro Vazirani v. Deepak Raheja* [2021 SCC Online Bombay 195], the learned Single Judge of the Bombay High Court took the view that Section 12A is a procedural provision and 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 comply-



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-ing with Section 12A. However, in *Deepak Raheja v. Ganga Taro Vazirani* [(2021) SCC OnLine Bom 3124], a Division Bench of the Bombay High Court had held that Section 12A is mandatory since the object and purpose of Section 12A is rooted in public interest and therefore there is no question of it being waived.

3. In *Dhanbad Fuels Ltd. v. Union of India and Others* [2021 SCC Online Calcutta 429], a learned Single Judge of the Calcutta High Court took the view that mediation in India is still at a nascent stage and requires more awareness - a party cannot be denied the right to participate in the justice dispensation system. However, in *Dredging and Desiltation Company Pvt. Ltd. v. Mackintosh Burn and Northern Consortium and Others* [2021 SCC Online Calcutta 1458], distinction was made between filing of a Suit and institution of a Suit under the CPC and found that the bar under Section 12A is absolute w.e.f. 12.12.2020, being the date immediately after the date on which standard operating procedure for undertaking pre-litigation procedure under Section 12A was made. Section 12A of the Act was held mandatory in *Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd. and Another* [AIR 2021 Calcutta 190] by the Calcutta High Court.
4. In *Curewin Pharmaceuticals Pvt. Ltd. v. Curewin Hylico Pharma Pvt. Ltd.* [AIR 2021 MP 154.], the Division Bench of the Madhya Pradesh High Court followed the judgment of the learned Single Judge of High Court of Bombay in *Ganga Taro Vazirani*, and found that a Suit, which does not contemplate an urgent interim relief, cannot be instituted unless prelitigation mediation is exhausted.

JUDGEMENT: BASIS

1. Applying the Golden Rule of Interpretation of statutes: The golden rule of interpretation means the interpretation in conformity with the plain language used therein. The language used in Section 12A is plainly imperative in nature which uses the word 'shall'.
2. Having regard to the object and reasons behind the amendment: Reading Section 12A of chapter IIIA along with Rules framed therein 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.

3. Interpreting Rules framed therein: The use of the word 'may' in the Rules framed detracts from the mandatory flavour of Section 12A of the Act which was not accepted by SCI. Rule 3, being a subordinate legislation, must be interpreted harmoniously with the parent enactment.
4. Application of s.12A: The provision provides for pre-institution mediation only in suits, which does not contemplate any urgent interim relief. Therefore, pre-institution mediation under Section 12A has been mandated only in a class of suits and not in entirety.
5. Status of an award: Since a settlement under Section 12A 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
6. Refuting other arguments: The argument that Section 12A does not provide for any penalty and, therefore, the provision is not mandatory, was not accepted by the SCI as penal consequences is only one of the aspects to be considered while interpreting whether the word 'shall' is to be treated as mandatory and or not. Another argument that not following a mandate of Section 12A does not violate the right of any other person was not accepted by the SCI seeing the larger and real object of the Act.

CONCLUSION

Mediation provides an alternative to the disputing parties to resolve the dispute in an amicable and time-bound manner. The SCI recognising this contemporary development in the justice delivery system and confirming to the views expressed by the legislators has rightly upheld the plain reading of the provision which clearly and expressly points out that pre-institutional mediation is a condition precedent for instituting a suit barring cases contemplating urgent relief.