

IN THE COMMERCIAL COURT, CHENNAI

**Present : Dr. L.S. SATHIYAMURTHY, M.A.,M.L., Ph.D.,
District Judge**

Monday, the 05th day of February 2024.

C.O.S. S.R. No. 07/2024

M/s. A.S. Nichani HUF,
a Hindu Undivided Family firm,
Represented by its Manager and Karta,
Mr. Ajay S. Nichani,
Having Office at :
Flat No.2A, Heritage Apartments,
2nd Floor, 18-21, Ormes Road,
4th Cross Street, Kilpauk,
Chennai - 600 010.

...Plaintiff

Vs.

M/s. Ram Charan Company Private Limited,
Rep. by its Director,
Having registered office at:
No. 505, 5th floor, Delta wing,
Raheja Towers,
Old No. 113-134, New No. 177, Anna Salai,
Chennai - 600 002.

...Defendants

Counsel for Plaintiff: M/s. T. Srikanth and T. Shrinikethan

ORDER, DATED: 05.02.2024

1. This plaint has been presented without exhausting the Pre Institution Mediation and Settlement (PIMS) provided in (Chapter III A) Section 12 A, of the Commercial Courts Act, 2015 (hereinafter referred to CC Act, 2015).

2. The Registry raised a query and clarification whether a petition under Order XXXVIII Rule 5 of CPC is sufficient to approach the Commercial Court directly without exhausting remedy of PIMS u/s. 12 A, of CCA, 2015.

3. The learned counsel appearing for the Plaintiff, submitted that the plaint is accompanied with a petition for Attachment Before Judgment (ABJ) under Order XXXVIII Rule 5 CPC which fulfills the ingredients of “contemplating urgent interim relief” the words used in Section 12 A, CC Act, 2015. Further, he prayed to take the plaint on file and pass and interim order of Attachment Before Judgment after issuing a notice under form VI A CPC.

Factual Matrix:

4. The Plaintiff has presented this plaint for the relief of recovery of amount due under Promissory Notes, said to have executed by the Defendants. The plaint averments would go to show that the Defendants are known to the Plaintiff as family friends for years together. Therefore, at the request of the Defendant the Plaintiff had extended financially assistance to them and the borrowings of the Defendants are duly evidenced by the Promissory notes. There has been exchange of E-mails between plaintiff and defendant and notice, reply, rejoinder and surrejoinder also taken place.

5. The Plaintiff along with this plaint has filed a petition under Order XXXVIII Rule 5 CPC for Attachment Before Judgment (ABJ) and contented that the Defendants are seriously attempting to alienate the immovable properties. A third party affidavit from a broker dealing with real estate business also produced in support of the affidavit and prayed for ABJ. The Plaintiff has not availed the remedy provided for Pre Institution Mediation and Settlement u/s. 12 A, CCA, 2015 and sought for exemption from invoking from the said PIMS, on the ground that the petition for ABJ would fulfill the requirements of urgent interim relief.

6. Therefore, before taking the plaint on file this Court has to consider whether a plaint accompanied with a petition under Order XXXVIII Rule 5 CPC can be taken on file sans resorting the PIMS process, as per section 12A, CCA, 2015.

Discussion and Analysis:

7. The Commercial Courts Act, 2015, which was originally titled the Commercial Courts, Commercial Division and Commercial Appellate Division Act, 2015 came into force on 23.10.2015. As per Act 28 of 2018, this Act has been rechristened as the Commercial Courts Act, 2015. Chapter III-A consist of a section 12 A, introduced with effect from 03.05.2018. Section 12 A 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 preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]”

8. The statutory pre-litigation mediation provided under section 12A, CCA, 2015 is mandatory or not was the question came up for consideration before the Hon'ble Supreme Court on August 17, 2022 *M/s. Patil Automation private limited Vs. Raheja Engineers Private Limited* (2022) 10 SCC 1. The Hon'ble Supreme Court summed up the reasons for making the PIMS as mandatory, 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 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.”

9. Subsequently, on October 13, 2023 in another decision in *Yamini Manohar Vs. TKD Keerthi* 2023 (6) CTC, 302 relating to rejection of plaint in the Commercial Suits for non compliance of Section 12 A, CCA, 2015 decided by the Hon'ble Supreme Court laid down the guidelines to the Commercial Court for scrutiny of plaint filed with a petition for interim relief. Paragraphs 7 and 8 are reproduced hereunder;

“7. We are of the opinion that when a plaint is filed under the CC Act, with a prayer for an urgent interim relief, the commercial court should examine the nature and the subject matter of the suit, the cause of action, and the prayer for interim relief. The prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12 A of the CC Act. The facts and circumstances of the case have to be considered holistically from the standpoint of the plaintiff. Non-grant of interim relief at the ad-interim stage, when the plaint is taken up for registration/admission and examination, will not justify dismissal of the commercial suit under Order VII, Rule 11 of the Code; at times, interim relief is granted after issuance of notice. Nor can the suit be dismissed under Order VII, Rule 11 of the Code, because the interim relief, post the arguments, is denied on merits and on examination of the three principles, namely, (i) prima facie case, (ii) irreparable harm and injury, and (iii) balance of convenience. The fact that the court issued notice and/or granted interim stay may indicate that the court is inclined to entertain the plaint.

8. Having stated so, it is difficult to agree with the proposition that the plaintiff has the absolute choice and right to paralyze Section 12A of the CC Act by making a prayer for urgent interim relief. Camouflage and guise to bypass the statutory mandate of pre-litigation mediation should be checked when deception and falsity is apparent or established. The proposition that the commercial courts do have a role, albeit a limited one, should be accepted, otherwise it would be up to the plaintiff alone to decide whether to resort to the procedure under Section 12A of the CC Act. An ‘absolute and unfettered right’ approach is not justified if the pre-institution mediation under Section 12A of the CC Act is mandatory, as held by this Court in *Patil Automation Private Limited* (supra). The words ‘contemplate any urgent interim relief’ in Section 12A(1) of the CC Act, with reference to the suit, should be read as conferring power on the court to be satisfied. They suggest that the suit must “contemplate”, which means the plaint, documents and facts should show and indicate the need for an urgent interim relief. This is the precise and limited exercise that the commercial courts will undertake, the contours of which have been explained in the earlier paragraph(s). This will be sufficient to keep in check and ensure that

the legislative object/intent behind the enactment of Section 12A of the CC Act is not defeated.”

10. With the above guidelines now this Court can scrutinize the plaint filed along with a petition for interim relief, without exhausting the remedy u/s. 12 A, CCA, 2015.

11. The learned counsel for the petitioner placed his reliance into a decision in *Pappammal Vs. Chidambaram*, 1983 (96) LW 599, in which the Hon’ble High Court, Madras discussed the relief of ABJ under historical perspectives and held that the genesis of Order XXXVIII Rule 5 CPC clearly demonstrate that it was a protective measure conceived in the interest of the defendant and intended to invalidate order of attachment before judgment of his or her properties passed indiscriminately without notice giving an opportunity to stave off the attachment by the offer of security and without rigidly conforming to the requirements of Order XXXVIII Rule 5(1) CPC.

12. Therefore, a relief of attachment before judgment is a protective measure which ensures the plaintiff to enjoy the fruits of decree from the evading debtors.

13. The Hon’ble Madras High Court in *Varathan, Proprietor, M/s. Cinetekk Vs. Prakash Babu Nakundhi Reddy, Proprietor, M/s. Shankarnag Theatre, C.S. (Comm.Div.) No. 202 of 2022, Dated: 13.10.2022*, has discussed the terms ‘contemplate urgent interim relief’ and considered the petition filed for the relief of ABJ. After analysis of various factors the Hon’ble High Court has held that the petition under Order XXXVIII Rule 5 of CPC *ipso facto* not comes within the scope of urgent interim relief in Section 12 A, CCA, 2015. This decision is squarely applicable to the present case. There was exchange of emails and notices from the mid half of the year 2021, but the plaint has been presented only in the month of December, 2023. Therefore, it is not considered as urgent interim relief claimed through the petition under Order XXXVIII Rule 5 CPC.

14. The scope, nature and ambit of Order XXXVIII Rule 5 CPC explained in a decision in *Raman Tech and Process Engineering Company and another* (2008) 3 LW 744: 2008(2) SCC 302. The Hon’ble Supreme Court has held that it is a drastic

and extraordinary power conferred upon the Courts under Order XXXVIII Rule 5 CPC and it cannot be exercised mechanically and it would debarred a defendant from dealing with this property. Paragraphs 5 and 6 of the above decisions are extracted hereunder:

“5. The power under Order XXXVIII Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII Rule 5 CPC as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of Court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A Plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passes against him, before power is exercised under Order XXXVIII Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See-Prem Raj Mundra Vs. Md. Maneck Gazi AIR (1951)cal 156, for a clear summary of the principles.”

15. In the light of the guidelines laid down by the Hon’ble Supreme Court in the above cited *Raman Tech and Process Engineering* case, the present petition for attachment has to be discussed and analyzed.

16. The Plaintiff has filed three similar suits consecutively against the

defendant herein and all the suits claims are based on the foot of promissory notes. A plain perusal of complaints would go to show as follows:

(1) Mrs. A.S. Nichani HUF, represented by its manager and karta namely Mr. Ajay S. Nichani, has made his claim for a sum of Rs. 12,50,000/- in the basis of three pro-notes dated 06.10.2018, 20.03.2019 and 11.06.2018.

(2) Mr. Ajay S. Nichani's wife Mrs. Divya A. Nichani in her complaint relied upon four pro-notes dated 06.10.2018, 20.03.2019, 10.06.2019 and 11.06.2019.

(3) Mr. Shamsunder as karta of M/s. Shamsunder P. Nichani HUF, in his complaint made a claim of Rs. 14,37,500/- on the basis of three pro-notes dated 06.10.2018, 20.03.2019 and 11.06.2019.

17. The above facts that all the borrowings in the said three complaints taken place on dates such as 06.10.2018, 20.03.2019, 10.06.2019 and 11.06.2019 is peculiar.

18. The plaintiffs are from the same family and defendants are also same in all the complaints. The execution of multiple pro-notes for the borrowings in one single day and subsequent days would encompass piquant circumstances upon the case of the plaintiff. It is not appropriate to exercise the drastic and extraordinary power under Order XXXVIII Rule 5 of CPC (As described by the Hon'ble Supreme Court in *Raman Tech and Process Engineering company* case cited above) in favour of the Plaintiff / Petitioner ex-parte, without providing an opportunity to the defendants.

19. The Plaintiffs have stated that the Defendants are known to them and family friends. The long and continuous e-mail transaction among them for about more than 18 months would also show that a Pre-institution mediation, u/s. 12 A, CCA, 2015 would avoid the legal battle and save the time and cost of litigation among the parties.

20. Therefore, as directed by the Hon'ble Supreme Court in the decision in *Yamini Manohar* case cited supra, it is a fit case to return the complaint for representation after exhausting the remedy of PIMS provided u/s. 12 A, CCA, 2015.

Result:

In the result, this plaint is returned for representation after availing the remedy u/s. 12A, CCA, 2015. Time is one month from the date of receipt of report from the DLSA, Chennai.

Dictated to Steno-typist, typed by him directly, corrected and pronounced by me in the open Court this the 05th day of February 2024.

District Judge,
Commercial Court,
Egmore, Chennai-8

Draft/Fair/ Order of

C.O.S. S.R.No.

07/2024

Dated: 05.02.2024

Commercial Court,
Egmore,
Chennai-8.