

IN THE COMMERCIAL COURT, CHENNAI

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

Wednesday, the 14th day of February 2024.

C.O.S. S.R. No. 1280/2023

M/s. RDC Concrete (India) Private Limited.,
Rep. By its Credit Control Manager,
Having Office at
Plot No. 2/129, S.NO. 55/4D1, Avadi road,
Sennerkuppam, Poonamallee Taluk,
Thiruvallur District,
Chennai – 600 056.

... Plaintiff

-Vs.-

M/s. Ocean Life Space India Private Limited,
Represented by its Director,
Mf-1, Industrial Estate,
Cipet Hostel Road, Guindy,
Chennai – 600 032.

... Defendant

Counsel for plaintiff: Mrs. Revathi Manivannan

ORDER, DATED: 14.02.2024

Heard, the learned counsel for Plaintiff. Perused the averments in the plaint and documents.

1. This is a Commercial dispute between a readymix concrete supplier and it's purchaser. The Plaintiff claimed that it had supplied ready mix concrete materials and raised invoices but the Defendant didn't pay the amount for the goods received by him within the period of 30 days. The Plaintiff after issuing a notice to the Defendant has filed this plaint, for the relief of recovery of an amount under invoices

due from the Defendant. 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). Therefore, 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.

2. 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 in which, the banker of the defendant impleaded as a Garnishee and the averments in the affidavit 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, assign a number and pass an interim order of Attachment Before Judgment after issuing a notice under form VI A CPC.

The facts of the which are necessary for the determination the point whether the PIMS under Section 12 A can be dispensed with or not, are in brief as follows:

3. The Plaintiff is carrying on the business of manufacturing and supplying of ready mix concrete. The Defendant had purchased the said ready mix concrete from the Plaintiff. The Plaintiff has produced invoices and claimed the balance amount due from the Defendant under the said invoices.

4. 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 Defendant who is the first repondent in the petition seriously attempting to withdraw the amount from his account by issuing cheques with monies lying in the credit of the second Respondent / Garnishee. The Plaintiff further contented that the present petition is suffice to exempt him from availing the process of PIMS u/s. 12 A, CCA, 2015.

5. 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 in which

prohibition order against Banker / Garnishee, can be taken on file sans resorting the PIMS process, as per section 12A, CCA, 2015?

Discussion and Analysis:

6. Before enter into the arena of discussion, it would be appropriate to look in to the historical perspectives of the new legislation dealing with commercial courts and adjudication of commercial disputes. 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 subsection (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]”

7. In the light of the above provision, this Court has to consider whether the petition under Order XXXVIII Rule 5 CPC filed along with this plaint is sufficient to dispense with the PIMS u/s. 12 A, CCA, 2015. The above 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.”

8. Therefore, Section 12 A, CCA, 2015 is a mandatory provision and the Hon'ble Supreme Court in the above referred decision has directed the Commercial Courts to exercise their powers conferred under Order VII Rule 11 CPC to reject the plaint, in case of non compliance of the said provision. 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."

9. In the above decision, the Hon'ble Supreme Court, has directed the Commercial Courts instead of rejecting the plaint laid down guidelines as to how to scrutinize the plaint presented before a Commercial Court, without exhausting the remedy of PIMS.

10. The interim relief of attachment before judgment is a protective measure which ensures the plaintiff to enjoy the fruits of decree from the evading debtors. 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.”

11. In this case on hand, the plaintiff sought for prohibitory order against the banker/ Garnishee. 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.

12. 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 plaint for representation after exhausting the remedy of PIMS provided u/s. 12 A, CCA, 2015.

Result:

In the result, this plaint is returned for non compliance of PIMS as contemplated in Section 12 A, CCA, 2015.

Dictated to Steno-typist, typed by him directly, corrected and pronounced by me in the open Court this the 14th day of February 2024.

District Judge,
Commercial Court,
Egmore, Chennai-08.

Draft/Fair/ Order of

**C.O.S. S.R.No.
1280/2023**

Dated: 14.02.2024

Commercial Court,
Egmore,
Chennai - 08.