

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**OMP No.540 of 2024 in
COMS No.13 of 2024
Reserved on: 08.08.2024
Decided on: 28.08.2024**

Novenco Building & Industry A/S ... Plaintiff.

Versus

Xero Energy Engineering Solutions
Private Ltd. & Another ... Defendants.

Coram**Hon'ble Mr. Justice Ajay Mohan Goel, Judge.****Whether approved for reporting?¹Yes**

For the non-applicant/
plaintiff :

Mr. Neeraj Gupta, Senior Advocate
(through V.C.), with M/s Shradha
Karol, Vineet Rohilla, Rohit Rongi,
Vaibhav Singh and Aastha Kohli,
Advocates.

For the applicants/
defendants :

M/s Shadan Farasat, Kush Sharma,
Aman Naqvi and Pranav Dhawan,
Advocates.

Ajay Mohan Goel, Judge

By way of this application, filed under Order, VII, Rule 11 (C) read with Section 151 of the Civil Procedure Code, the applicants/defendants have prayed for rejection of the plaint, *inter alia*, on the ground that the plaint is barred by law.

2. As per the applicants, as admittedly the subject-matter of the suit constitutes a "commercial disputes", as defined under Section 2 (c) (xvii) of the Commercial Courts Act, 2015, therefore, the non-applicant/plaintiff was mandatorily required to comply with Pre-

¹ Whether reporters of the local papers may be allowed to see the judgment?

Institution Mediation, as enunciated under Section 12-A (1) of the Act and the only exception, being cases where urgent relief was involved; and as in terms of the law declared by Hon'ble Supreme Court of India, mere filing of an application for interim relief is not sufficient and a Commercial Court is obliged to holistically examine and scrutinize the nature, subject-matter and cause of action to affirm the genuineness in the urgency to seek and interim injunction and as the plaintiff had sought an exemption from complying the Pre-Institution Mediation on account of seeking urgent injunctive relief, whereas perusal of the plaint along with documents demonstrates that there was no urgency so as to allow the plaintiff to do away with the provisions of Section 12-A (1) of the Act, the plaint was liable to be rejected.

3. Learned counsel for the applicants/defendants have taken the Court through the averments made in the plaint and has submitted that in terms of the averments made in Para-60 onwards of the plaint, as per the plaintiff the cause of action accrued in favour of the plaintiff, on or about the month of July/August, 2022, when it received information about the infringements of its patents and design. The cause of action thereafter arose on 14.10.2022, when plaintiff terminated Distributor Agreement and informed defendant No.1 about its subsisting patent rights. The cause of action was renewed when plaintiff issued Cease-and-Desist notice on

23.12.2022 to defendant No.2, calling upon it to cease all further activities with respect to the plaintiff's patents and design rights and it again arose and continued when despite knowledge of the patents and design rights and grant thereof in favour of plaintiff, defendants continued to make, use, offer for sale and sell at various physical and online portals including, but not limited to www.indiamart.com without plaintiff's consent the axial fans, which was in violation of patents and design rights of the plaintiff. Thereafter, by referring to Paras 61 and 62 of the plaint, learned counsel submitted that in terms of the averments made therein, the cause of action again arose in December, 2023, when a technical expert, Mr. Peter Holt after conducting visual inspection, evaluation and analysis, confirmed that the impugned fans infringes the plaintiff's patents and design and as per the plaintiff, the cause of action was continuing and it arose each time, the defendants make, use, offer for sell the impugned fans, through online presence, both direct and via e-commerce website and cause of action was continuing as defendants were regularly carrying on business and soliciting business and derive revenue from goods and services provided to individuals within the territorial jurisdiction of the State.

4. Learned counsel submitted that it is evident from the averments made in the plaint that as per the plaintiff, the cause of action initially accrued in the month of July/August, 2022, then on

14.10.2022 and thereafter, on 23.12.2022 and then again in the month of December, 2023, whereas the suit was filed in the Court in the month of June, 2024. He submitted that in terms of Section 12-A (1) of the Commercial Courts Act, 2015, a suit which does not contemplate any urgent interim relief under the Commercial Courts Act, shall not be instituted unless the plaintiff exhausts the remedy of Pre-Institution Mediation, in accordance with such manner and procedure, as may be prescribed by rules made by the Central Government. In the present case, as the plaintiff has not exhausted the Pre-Institution Mediation and Settlement remedy and has directly filed the Civil Suit, which does not contemplate any urgent relief, the plaint is liable to be rejected on said count.

5. Learned counsel submitted that from the averments made in the plaint *per se*, it cannot be said that the suit contemplated any urgent relief. He argued that there is nothing mentioned in the plaint that when as per the plaintiff itself, the cause of action initially accrued in the month of July/August, 2022 and the plaintiff waited to file the Civil Suit till the month of June, 2024, then why it did not resort to the provisions of Section 12-A (1) of the Act, more so, in light of the fact that the contents of the plaint do not demonstrate that there was any urgency at the time of the filing of the suit so as to allow the plaintiff to do away with the provisions of Section 12-A (1) of the Act, because nothing had

happened which had necessitated the filing of the suit seeking urgent relief. He further submitted that the filing of the application for interim relief was just an exercise undertaken by the plaintiff so as to circumvent the provisions of Section 12-A (1) of the Act and as indeed a perusal of the plaint clearly demonstrates that the suit did not contemplate any urgent relief, the plaint is liable to be rejected.

6. On the other hand, learned Senior Counsel appearing for the non-applicant/plaintiff has submitted that the plaint is not liable to be rejected on the ground that the plaintiff has not gone for Pre-Institution Mediation and Settlement, for the reason that as the suit contemplates urgent relief which is evident from the application filed under Order XXXIX, Rules 1 and 2 of the Civil Procedure Code, therefore, the application filed under Order VII, Rule 11 of the Civil Procedure Code was liable to be dismissed.

7. Learned Senior Counsel argued that defendant No.1 was omnipresent in the State of Himachal Pradesh online on e-portal and any day anyone could have purchased the product of defendant No.1 which was infringing the patents and design of the plaintiff and it was this urgency which necessitated the filing of the suit without going for Pre-Institution Mediation and Settlement. Learned Senior Counsel referred to the 'Techno Economic Offer' that has been made by defendant No.1 to Dr. Reddy's at Baddi and submitted that in light of the commercial activities of defendant No.1 in the State of

Himachal Pradesh, the suit contemplated urgent relief and therefore also, the plaintiff was within its right to approach this Court, praying for interim relief as actually has been done. He denied that filing of the application under Order XXXIX, Rules 1 and 2 of the Civil Procedure Code was just to circumvent the provisions of Section 12-A (1) of the Act. Learned Senior Counsel submitted that there was a Distributor Agreement entered into between the plaintiff and defendant No.1 on 01.09.2017, however, when in the month of July/August, 2022, it came to the notice of the plaintiff that defendant No.1 was infringing the agreement by manufacturing and selling a product by infringing the patents and design of the plaintiff, it terminated the agreement. The plaintiff also served a Cease-and-Desist notice upon defendant No.2 on 23.12.2022, but the defendants continued to infringe the patents as well as design of the plaintiff. He argued that the intent of the defendants is to delay the matter which is also evident from the fact that even the response to the notice of the plaintiff by the defendants was evasive. He reiterated that as the plaintiff had approached the Court with a suit which contemplated the interim relief, the prayer of the applicants for rejection of the plaint is liable to be rejected.

8. I have heard learned counsel for the parties and have also carefully gone through the application as well as reply filed thereto and contents of the plaint.

9. The Commercial Courts Act, 2015 was brought into force to provide for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Divisions and Commercial Appellate Divisions in the High Court for adjudicating commercial disputes of specific value and matters connected therewith or incidental therewith. Commercial dispute has been defined in Section 2 (c) of the Act. Chapter III (A) was introduced in the Commercial Courts Act, w.e.f. 03.05.2018, containing Section 12-A of the Act, which provides as under:-

“12. Determination of Specified Value.—(1) The Specified Value of the subject-matter of the commercial dispute in a suit, appeal or application shall be determined in the following manner:—

(a) where the relief sought in a suit or application is for recovery of money, the money sought to be recovered in the suit or application inclusive of interest, if any, computed up to the date of filing of the suit or application, as the case may be, shall be taken into account for determining such Specified Value.”

10. A bare perusal of sub-section (1) of Section 12-A of the Act demonstrates that a suit which does not contemplate any urgent relief under the Commercial Courts Act shall not be instituted unless the plaintiff exhausts the remedy of Pre-Institution Mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

11. Hon'ble Supreme Court of India in *Patil Automation Private Limited and Others vs. Rakheja Engineers Private Limited, (2022) 10 Supreme Court Cases 1*, had an occasion to deal with the provisions of Section 12-A of the Commercial Courts Act, 2015. The question which Hon'ble Supreme Court was called upon to answer was whether the statutory 'Pre-Litigation Mediation' contemplated under Section 12-A of the Act, as amended by the Amended Act of 2018 is mandatory and whether the Courts erred in not allowing applications filed under Order VII, Rule 11 of the Code of Civil Procedure to reject the plaint filed by the respondents in the appeal before it without complying with the procedure under Section 12-A of the Act. Hon'ble Supreme Court held that the Commercial Courts Act is a unique experiment to push the pace of disposal of commercial disputes as there was a direct relationship between ease of doing business and an early and expeditious termination of disputes, which may arise in commercial matters. It held that in this background, the Court must approach the issue of whether Section 12-A has been perceived being a mandatory provision, for the reason that the decisive element in the search for the answer, in the interpretation of such a Statute, must be to ascertain the intention of the Legislature. Hon'ble Court held that the first principal of course must be the golden rule of interpretation, which means, the interpretation in conformity with the plain language, which is used

and there cannot even be a shadow of doubt that the language used in Section 12-A is plainly imperative in nature. Thereafter, Hon'ble Supreme Court summed up its reasoning on the issue in Para-99 of the judgment as under:-

“ 99. We may sum-up our reasoning as follows:

99.1. 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 the 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.

99.2 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.

99.3 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. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation. The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders.

99.4 Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgement of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of [Section 30\(4\)](#) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. [The Act](#) confers power to order costs based on conduct of the parties.”

12. Hon'ble Supreme Court, thereafter, went on in Para-113.1 of the judgment to declare that Section 12-A of the Act is mandatory and suit instituted violating the mandate of Section 12A

must be visited with rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure. Hon'ble Supreme Court held that this power can be exercised even suo moto by the Court. However, the declaration was made effective from 20.08.2022.

13. This was followed by another judgment of Hon'ble Supreme Court in *Yamini Manohar vs. T.K.D. Keerthi*, (2024) 5 Supreme Court Cases 815, in which Hon'ble Supreme Court again reiterated that the prayer for urgent relief should not be a disguise or mask to wriggle out of and get over Section 12-A of the Commercial Courts Act. The relevant paras of the judgment are quoted hereinbelow:-

“ 10 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 12A 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.

11. 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).

12. 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."

14. The application filed under Order VII, Rule 11 of the Code of Civil Procedure in the present case shall be decided by the Court in light of the principals so enunciated by Hon'ble Supreme Court in the judgments referred to hereinabove.

15. There is no iota of doubt that as per the pronouncement made by Hon'ble Supreme Court of India, Section 12-A of the Commercial Courts Act is mandatory. Hon'ble Supreme Court has also made it manifestly clear that the power can be exercised suo motu by a Court while dealing with the Commercial Civil Suit and when a plaint is filed under the Commercial Courts 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 and 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 Commercial Courts Act.

16. Coming back to the facts of the present case, herein in terms of the averments made in the plaint, the cause of action accrued in favour of the plaintiff, as spelled out in Paras-60 and 61 of the plaint, on or about the months of July/August, 2022, when plaintiff received information about the infringement of its patents and design by the defendants and thereafter, on 14.10,2022, when plaintiff terminated the Distributor Agreement. In terms of the plaint, it again was renewed when plaintiff issued Cease-and-Desist

notice on 23.12.2022 and the same continued when despite knowledge of the patents and design of the plaintiff, defendants continued to make, use offer for sale and sell at various physical and online portals its product without the knowledge of the plaintiff. Cause of action as per plaintiff again arose in the month of December, 2023, when the technical expert Peter Holt after conducting visual inspection, evaluation and analysis confirmed that impugned fans infringes the plaintiff's patents and design and it continues as defendants were regularly carrying out the business by infringing the patents and design of the plaintiff by soliciting business within the territorial jurisdiction of this Court.

17. At this stage, it is pertinent to refer to the application also filed under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code to determine the element of urgency spelled out therein. In the application filed under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code, on the issue of urgency, all that can be culled out is that it stands spelled out in para-61 thereof that the plaintiff has suffered and will continue to suffer irreparable loss on account of defendants' continuing sale of impugned fans if the Court does not intervene and plaintiff would loose out on substantial market and sales on account of defendants' act of unfair competition by misappropriating the plaintiff's technology.

18. I have carefully perused the averments made in the

application and there is no whisper in the entire application of any urgency so as to do away with the mandatory provision of Section 12-A of the Commercial Courts Act.

19. Coming back to the averments made in the plaint. as has been referred by me hereinabove, as per the plaintiff, the cause of action firstly accrued somewhere in the month of July/August, 2022. It lastly accrued in terms of the averments made in the application in the month of December, 2023, when the technical expert Peter Holt, after conducting visual inspection and evaluation and analysis, confirmed that the impugned fans infringed the plaintiff's patents and design that too at a place in the State of Uttrakhand. This also means that as upto December, 2023, probably even the plaintiff was not very sure that whether the alleged commercial activity of the defendants was infringing the patents and design of the plaintiff.

20. Be that as it may, as from the month of December, 2023, the Civil Suit has been filed in this Court on 04.06.2024. There is no mention in the plaint as to why if the plaintiff waited from December, 2023 upto June, 2024 for the purpose of filing of the suit, it could not have resorted to the Pre-Institution Mediation and Settlement as is emphasized in Section 12-A of the Act and what urgency necessitated doing away with the said mandatory statutory provision.

21. The jurisdiction of this Court has been invoked by referring to the commercial activity of defendant No.1 in the State of Himachal Pradesh primarily on the basis of a 'Techno Economic Offer' made by it to a party in the State of Himachal Pradesh. Incidentally, this 'Techno Commercial Office Offer', copy whereof is filed as Annexure P-21 with the documents filed by the plaintiff is dated 08.07.2022.

22. There is no material placed on record whatsoever from which any inference can be drawn by the Court qua the urgency involved in the case so as to do away with the provision of Section 12-A of the Commercial Courts Act, in the nature of the actual sales being carried out of the fans in issue in the State of Himachal Pradesh, more so, in the close vicinity of the filing of the Civil Suit, so as to enable this Court to come to the conclusion that there indeed was an urgency involved in the case and the Civil Suit does contemplate an urgent interim relief, *de hors* Section 12-A of the Commercial Courts Act.

23. In this backdrop, this Court has no hesitation in holding that the present suit does not contemplate any urgent interim relief and filing of the application under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code is just an act to wriggle out of and get over Section 12-A of the Commercial Courts Act. In said circumstances, as the Civil Suit could not have been filed by the plaintiff without

resorting to the Pre-Institution Mediation and Settlement in terms of Section 12-A of the Commercial Courts Act, 2015, the application is allowed and the plaint is rejected.

(Ajay Mohan Goel)
Judge

August 28, 2024
(Rishi)