

**CONSENT OF THE PLAINTIFF FOR PRE INSTITUTION MEDIATION PROCEEDINGS UNDER SECTION 12A OF THE COMMERCIAL COURTS ACT, 2015, IS IRRELEVANT IF THE DEFENDANT ITSELF REFUSES TO MOVE FORWARD WITH IT**

**INTRODUCTION:**

The Delhi High Court in a recent decision in **Kapil Goel v. Ram Dulare Yadav**<sup>1</sup> observed that consent of the Plaintiff for institution of Pre Mediation Proceedings under Section 12A of the Commercial Courts Act, 2015, was irrelevant where the Defendant itself refused to participate in the Pre Institution Mediation Proceedings and it would be suffice for the suit of the Plaintiff to proceed without any encumbrance.

**FACTS:**

The Appellant/Plaintiff runs a business of sale and purchase of fabric in the name and style of M/s Kapil Creations.

The Respondent/Defendant had purchased fabric from the Appellant herein on credit basis and defaulted in the payment of Rs. 17,98,319/.

Before instituting a suit, the Appellant approached the Secretary, Delhi Legal Services Authority ("**DLSA**") for initiation of Pre Institution Mediation proceedings for recovery of the above amount.

The DLSA in terms of Rule 3(2) of the Commercial Courts (Pre Institution Mediation and Settlement) Rules, 2018 ("**Rules**") issued a notice dated 8<sup>th</sup> July, 2019, to the Respondent. Thereafter, a Non starter Report dated 27<sup>th</sup> July, 2019 was issued by the DLSA citing "*Both the parties do no want to participate in the process of Pre-Institution Mediation.*"

As the mediation was a non starter, the Appellant filed a Commercial Civil Suit before the District Judge, Commercial Court-II, Shahdara, Karkardooma Courts, Delhi

("Commercial Court") for the recovery of Rs. 27,33,433/-.

The Respondent preferred an application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908, on the ground that Pre Institution Mediation was a mandate under Section 12A of the Commercial Courts Act, 2015 ("**Act**").

The application was allowed by the Commercial Court vide its order dated 7<sup>th</sup> April, 2021 ("**Impugned Order**"), wherein the Commercial Court inter alia observed that the Plaintiff had filed an application before the DLSA for initiation of Pre Institution Mediation only as a formality and had no intention to proceed with the mediation process. The Commercial Court further observed that Section 12A of the Act was mandatory in nature and since the Appellant had not acted in good faith and refused to participate in the Pre Institution Mediation, the suit was filed without complying with Section 12A of the Act and was therefore barred by law.

Being aggrieved by the impugned Order, the Appellant preferred the present appeal before the Delhi High Court.

<sup>1</sup> RFA(COMM) No. 14 of 2022

**ISSUE FOR CONSIDERATION:**

The main issue for consideration before the Delhi High Court was as follows:

Whether the factum of the Defendant not willing to participate in the Pre Institution Mediation would suffice for Section 12A of the Act to be satisfied?

**SUBMISSIONS ON BEHALF OF THE APPELLANT:**

It was contended that the Appellant had approached the DLSA by filing an application as per Form 1 specified in Schedule I of the Rules and the DLSA issued notice to the Respondent on 8<sup>th</sup> July, 2019.

Thereafter, a non starter report was prepared under Form 3 specified in Schedule 1 of Rule 3(4) and Rule 3(6) of the Rules.

It was submitted that it was not that the Appellant was not serious in pursuing the mediation proceedings. It was the Respondent who was not prepared to participate in the mediation proceedings and therefore a non starter report was filed by the DLSA.

It was further submitted that the judgment of the Apex Court in ***Patil Automation Private Limited v. Rakheja Engineers Private Limited***<sup>2</sup>, would be applied to the case at hand only if the Appellant did not want to participate in the Pre Institution Mediation proceedings.

It was submitted that the Commercial Court had erroneously concluded that the Appellant had not acted in good faith and had refused to participate in the pre institution mediation proceedings.

**SUBMISSIONS ON BEHALF OF THE RESPONDENT:**

It was submitted on behalf of the Respondent that the Appellant had refused to participate in the pre institution mediation proceedings and therefore the order in ***Patil Automation (Supra)*** would apply to the facts of the present case and that the Commercial Court was correct in dismissing the suit of the Appellant as being barred by law.

It was submitted that the Appellant had merely gone through the formality of approaching the DLSA and getting the notice issued without being serious in pursuing the process of pre institution mediation proceedings which had been termed as mandatory by the Apex Court in ***Patil Automation (Supra)***.

**JUDGMENT:**

Referring to the judgment of the Apex Court in ***Patil Automation (Supra)***, the Delhi High Court observed that Section 12A of the Act is mandatory and the Plaintiff, who approaches the Commercial Court, must necessarily resort to Section 12A of the Act. The Apex Court in the said judgment also held that in case Section 12A was not complied with by the Plaintiff then the suit ought to be dismissed under Order VII Rule 11 of the CPC as being barred by law.

The Delhi High Court further observed that a plain reading of Rule 3 of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 demonstrated that when mediation process was initiated, the authority was required to issue notice to the opposite party in order for them to appear and give consent to participate in the mediation process on such days not beyond the period of 10 days from the date of issue of the said notice. If no response was

---

<sup>2</sup> 2022 SCC Online SC 1028

received from the opposite party, then the authority was required to issue a final notice to it. However, if the final notice issued remained unacknowledged or the opposite party refused to participate in the mediation process, then the authority was required to treat the mediation process to be a non-starter and make a report on the same. Further, Sub-Section 6 of Rule 3 of the Rules also places the burden on the opposite party to appear on the date fixed in case it did not want the mediation process to be a non-starter.

The Delhi High Court observed that a holistic reading of the facts of the case as well as the law demonstrated that the consent of the Appellant/Plaintiff for the institution of the mediation proceedings was irrelevant if the Defendant refused to move forward with it. All that was required on the part of the Appellant/Plaintiff was to initiate pre institution mediation prior to filing of a commercial suit. Once this was satisfied, if it was the Plaintiff who refused to move forward with the mediation,

then the suit that was instituted thereafter would be barred by law.

However, if both the parties did not wish to pursue the mediation and a non-starter report was generated subsequent to the same, and thereafter if the Plaintiff filed a suit, the same would not be barred by law.

In the present case, both the Appellant and the Respondent refused to participate in the mediation. It was not the case as if the Respondent was interested in proceeding ahead with the mediation and the Plaintiff was not interested.

The Delhi High Court opined that the Respondent having refused to participate in the pre institution mediation would suffice for the suit of the Appellant to be allowed to proceed without any encumbrance.

In view of the above, the Delhi High Court allowed the present appeal.

---

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*