OD-7

IA NO. GA/1/2022

GA/2/2022

In CS/227/2022

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

ADITYA BIRLA FINANCE LIMITED

Vs.

WILLIAMSON FINANCIAL SERVICES LIMITED AND ORS.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On : 29th September, 2022

Order On : 3rd November, 2022.

Appearance
Mr. Ratnanko Banerjee, Ld. Sr. Adv.
Mr. Sakya Sen, Adv.
Mr. Rohit Das, Adv.
Mr. Dwipayan Basu Mullick, Adv.
Mr. Abhishek Kisku, Adv.
Mr. Subhankar Das, Adv.
...For the petitioner

Mr. Abhrajit Mitra, Ld. Sr. Adv.
Mr. Debnath Ghosh, Adv.
Mr. Ritban Sarkar, Adv.
Mr. Sanjoy Ginodia, Adv.
Mr. Shwetank Ginodia, Adv.
Mr. Sushait Dutt Mazumdar, Adv.
Mr. Bhavesh Garodia, Adv.
...For the Respondent no. 2.

Mr. Jishnu Saha, Ld. Sr. Adv.
Mr. Soumya Roy Chowdhury, Adv.
Mr. Deepak Agarwal, Adv.

...For the Respondent No. 6.

Mr. Jay Saha, Ld. Sr. Adv.
...For the Respondent no. 2.

Mr. Satadeep Bhattacharya, Adv.
Mr. Ritban Sarkar, Adv.
Mr. Sanket Sarkar, Adv.
Subhajit Ghosh, Adv.
...For Respondent No. 22

ORDER

The question which arises for consideration is whether the petitioner is entitled for leave to file the instant suit without exhausting the remedy of pre-institution mediation as provided under Section 12-A of the Commercial Courts Act , 2015.

The petitioner has filed the suit praying for a decree of Rs. 132,00,04,279/- along with interest and allied prayers against the respondents.

The petitioner has also filed an application for grant of ad interim injunction against the respondents. The petitioner has also filed the instant application for grant of leave under Section 12-A of the Commercial Courts Act, 2015 for dispense with requirement for pre-institution of mediation and settlement.

The case of the petitioner in the plaint that in the month of February and March, 2017 in WM Group through the respondent nos. 2 and 3 and other entities of the WM Group, including respondent nos. 1 and 4 approached the

petitioner and represented that it was in dire requirement of funds and proposed to avail of term loan facilities of Rs.150 crores and the same would be repaid by sale of treasury shares of the respondent no. 6 held by its wholly owned subsidiary, the respondent no. 15 through its Director and trustees, the respondent no. 16. At the time of said demand, the defendants have also handed over the latest available unaudited financial statements of the respondent no. 15 showing investment in shares of the respondent no. 6 comprising approximately 25 % of the shareholding of the respondent no. 6 having an estimated market value approximate 450 crore as on March, 2017.

The overall financial strength of WM Group, in particular, that of its too large public State companies, respondent nos. 6 and 34, as reflected in their audited books of accounts were relied upon by the respondents and create an impression of a strong financial background upon the petitioner. The petitioner being satisfied with the credibility of the said representation and relying on the same as well as assurance given by the respondents including the assurance of repayment facilities from identified cash flows out of sale of Treasury shares of respondent no. 6 within the specified period, the petitioner had lent an amount of Rs. 150 crores by issuance of Credit Agreement Letter dt. 24.03.2017 on the terms and conditions as mentioned in the said Agreement. The facility Agreement was executed among others on behalf of the respondent no. 1, by respondent no. 16, one of the Directors of the respondent no. 1 at the relevant point of time. On execution of the facility Agreement, the total amount of Rs. 150 crores was advanced to the respondent no. 1 on 30.03.2017.

Subsequently, another separate credit facility/ financial assistance was availed by the WM Group from the petitioner in the year 2018 by way of subsequent transaction entered into between the petitioner and MBECL. The credit facility/ financial assistance was granted by the petitioner by way of subscription to compulsory convertible different share of Rs. 70 crores in respect of which the petitioner had entered into Put Option Agreement on 24.03.2018. The parties further agreed by way of execution of certain cross security/ cross pledge agreement that some of the securities created by the WM Group in favour of the petitioner for securing in previous facility, which is the subject-matter of the instant suit, put also the security for securing the obligation of MBECL under the subsequent Put Option Agreement, which is not the subject-matter of the instant suit. Such securities common to both the aforesaid facility has also the Put Option Agreement, inter alia, included pledge of shares of respondent no. 6 (MRIL) and respondent no. 34.

The respondents particular the respondents nos. 1, 2, 3, 4 and 6 have not taken any steps for repayment of the facility within June, 2018 as agreed by way of sale of the MRIL Treasury shares despite express undertaking of the said respondents recorded in various agreements and which was disclosed the consideration for grant of the said facility to the said respondents.

The respondent nos. 2, 3, 4 and 6 along with the respondent nos. 15 and 16 had diverted about 25 % share in respondent no. 6 valued at Rs. 450 crores

in express branch of the covenants and undertaking of the said respondents made at the time of disbursement of the facilities.

The petitioner came across the stock exchange disclosure dt. 30.11.2017 is made by the respondent no. 6 on the basis of when intimation dt. 30.11.2017 for the respondent no. 16 in his capacity as trustee of the respondent no. 15 intimating that he has sold 1,00,00,000 equity shares of Rs. 5 each, representing share 9.1361% of the paid-up capital of the respondent no. 6 through market traders at the current market price.

When the petitioner came to know about the said fact, the petitioner had sent a letter to the respondent nos. 2 and 3 with the copy to the respondent nos. 1 and 4 regarding the aforesaid sale of 9.1361 % of the MRIL Treasury holding on 30.11.2017 by the respondent no. 16 contrary to the express undertaking to the promoters that the proceeds obtained from the sale of MRIL treasurer holding of 24.5 % are to be utilized to mandatorily repay the facility. The petitioner requested the promoters to repay the outstanding facilities from the proceeds obtained from the sale of MRIL shares in compliance with the terms of the facility. In spite of the request made by the petitioner, the promoters choose not to issue any reply to the petitioner.

The petitioner further came to know from various disclosures made by the respondent no. 6 to the stock exchange based on intimations from the respondent no. 6, Indusind Bank Limited and the respondent nos. 17, 18 and 27, during the period from 07.05.2019 to 01.10.2021, the remaining

1,70,67,500 MRIL Treasury shares comprising 16.3394% of the trade of share capital of the respondent no. 6, held by respondent no. 15 valued at more than Rs. 100 crore at that time, have also been diverted by the respondent nos. 2 and 3 and the WM Group.

On committing such illegal and fraudulent act, the respondent no. 16, having already resigned from the Board of Directors of the respondent no. 6 Company on 19.07.2019 and also resigned from the Board of Directors from the respondent no. 15 company on 19.06.2020.

The petitioner was misguided on the basis of misrepresentation by the respondent no. 1 and its group of companies particularly, the respondent no. 6 and wrongfully induced entered into the financial facility Agreement.

The respondent nos. 1 to 34 along with the sell are jointly and severally liable to pay the amounts due to the petitioner by the respondent no. 1. On 29.04.2022, the National Company Law Tribunal, Kolkata has declared moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 in respect of MBECL.

The Counsel for the petitioner submits that as the defendants have borrowed the said amount from the petitioner and facility Agreement were executed with the condition that within the stipulated period, the respondents will return the said amount but inspite of returning the said amount, the respondents have illegally transfer/ dispose of the MRIL Treasury shares and divert the proceeds thereof and as such there is an urgency to file the instant

suit without exhausting the remedy of pre-institution mediation as provided under Section 12-A of the Commercial Courts Act.

The Counsel for the respondents have entered into appearance and oppose the prayer made by the petitioner for grant of leave to file the suit without exhausting the remedy of pre-institution mediation.

Counsel for the respondents no. 1 by referring the Provision of Order XI Rule 1 of the Commercial Courts Act, submits that the petitioner has to file the list of all documents and photo copies of all documents in its power, possession, control or custody pertaining to the suit along with the plaint but in the instant suit, the petitioner has not filed the said documents and filed the documents in the instant application without any leave from the Court to bring the said documents on record as part of the plaint and as such the documents as relied upon by the petitioner in the instant application cannot be taken into consideration.

Counsel for the respondent no. 1 by referring the page no. 90 to page no. 112 of the instant application (GA 2 of 2022) and submits that the said documents are not the documents listed along with the plaint. Counsel for the respondent no. 1 further submits that Annexure – “A”, “B” and “C” of the instant application (GA 2 of 2022) are the pre suit documents but the petitioner has not disclosed the said documents in the plaint.

Counsel for the respondent no. 1 submits that the cause of action for filing of the suit arose in the year 2017 onwards as the petitioner came to know

that respondents are not returning the said amount and transferring their shares but had not filed the suit immediately now, the petitioner cannot claim urgency in the suit to avoid the Provision of pre-institution mediation as provided under Section 12-A Of the Commercial Courts Act, 2015.

The Counsel for the respondent no. 2 submits that there is no application for ad interim relief and no relief can be granted. It is further contended that it is admitted by the petitioner that the instant suit involves a Credit Facility Agreement dt. 28.03.2017 and the petitioner has sent various reminders from time to time including the letters dt. 01.12.2017, 10.12.2017, 22.08.2019, 24.09.2019 and 25.10.2019 and 12.03.2020 and as such there is no urgency after the lapse of five years as the petitioner came to know that the respondents have not repaid the said amount and also transferring the shares in the year 2017 and 2020 itself. It is further contended that in the pleading, the petitioner has admitted that he has sent the notice on 31.03.2020 and 31.03.2021 but the respondents have not repaid the said loan and thus at this stage, the petitioner cannot claim urgency.

Learned Counsel for the respondent no. 2 further submits that moratorium order was passed in the year 2020 which was in the knowledge of the petitioner but the petitioner has not taken any step for these two years and all of a sudden after more than two years, the petitioner has came with the urgent application which cannot be entertained.

Learned Counsel for the respondent no. 2 further pointed out that the petitioner has also admitted in the pleading that in the month of July, 2022, the petitioner came to know from the audited financial for the quarter entered on 31.03.2022 of the respondent no. 1 uploaded on 24.05.2022 which cannot be relied upon. The Counsel for the respondent no. 2 further submits that the petitioner has also admitted that the Reserve Bank of India has already cancelled the license of the respondent no. 4 to operate the non banking finance company. Counsel for the respondent no. 2 further submits that the plaintiff has not served the copy of the plaint and also not enclosed any document to support the ingredients of Order 38 Rule 5 of the Code of Civil Procedure for grant of injunction.

The Counsel for the respondent no. 2 further submits that the incident as narrated by the petitioner is prior to the filing of the suit but in the plaint, the petitioner has not disclosed the said document and the petitioner has enclosed the said document in the instant application without any prayer for grant of leave to bring the said document on record and as such the said document cannot be relied upon.

The Counsel for the respondent no. 2 submits that there is no urgency in the suit filed by the petitioner and as such the plaintiff has to exhaust the remedy of pre-institution mediation as provided under Section 12-A of the Commercial Courts Act, 2015. Counsel for the respondents prays for rejection of the instant application.

The Counsel for the respondent no. 6 submits that the petitioner has referred the total plaint in the instant application. The Counsel for the respondent no. 6 further submits that the petitioner has not filed any document to prove the urgency to obtain an urgent relief as provided under Order 38 Rule 5 of the Code of Civil Procedure. Counsel for the respondent no. 6 further submits that the petitioner has not obtained any leave from this Court to produce further documents in addition to the documents disclosed in the plaint. Counsel for the respondent no. 6 further contended that the suit was filed on 05.09.2022 and was presented on 12.09.2022 but no application is filed to obtain leave to incorporate further documents in the plaint. It is further contended that the petitioner cannot file suit for secure debts. Counsel for the respondent no. 6 submits that the petitioner has filed the suit along with an application for ad interim relief and as such the instant application being GA 2 of 2022 is not maintainable. Counsel for the respondent no. 6 further submits that there is no urgency appears on the face of record and as such no leave can be granted for filing the suit without exhausting the remedy of pre-institution mediation.

Heard, the Learned Counsel for the respective parties, pleadings and the documents available on record. The petitioner has filed the suit against the respondents for recovery of money along with interest and allied prayers. At the time of filing of the suit, the petitioner has also filed an application for grant of ad interim injunction.

Admittedly, the suit is the commercial suit and none of the parties have denied regarding the nature of the suit.

The only dispute between the parties is that whether the petitioner is entitled for leave to file the suit without exhausting the remedy of pre-institution mediation as provided under Section 12-A of the Commercial Courts Act.

Section 12-A of the Commercial Courts Act, 2015 reads as follows:-

"12-A : 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 pre-institution 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, authorize the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purpose of pre institution mediation."*

In the case reported in (2022) SCC OnLine SC 1028 (Patil Automation Private Limited & Ors. Vs. Rakheja Engineers Private Limited), the Hon'ble Supreme Court held that :

*"**92.** Having regard to all these circumstances, we would dispose of the matters in the following manner. We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even suo moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 though that concerned stakeholders become sufficiently informed. Still further, be however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the plaint has been*

> *acted upon by filing a fresh suit, the declaration of the prospective effect will not avail the plaintiff. Finally, if the plaint is filed violating Section 12A after the jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief."*

In the said judgment, the Hon'ble Supreme Court has declared Section 12-A is mandatory if the suit do not contemplate urgent relief.

The Division Bench of the Delhi High Court in the case of Dinesh Lal Dabani and Anr. Vs. M/s. DSPC Engineering Private Limited and Ors., dt. 14.10.2022 held that "The words which does not contemplate any urgent interim relief referred to the contemplation of the plaintiff i.e., whether the plaintiffs desires to seek any urgent interim relief or not. The language of the Section does not suggest that it is for the Court to first access, whether a case for grant of urgent relief ex parte, or otherwise, is made out or not and, thereafter, on the basis of that prima facie determination, decide the issue whether exemption from exhaustion of the remedy of pre-institution mediation should be granted or not."

The Division Bench of the Delhi High Court in the case of Ms. Intense Fitness and Spa Private Limited vs. M/s. Apnaghar Builders Private Limited dt. 16.02.2022 held that "We are of the view that where a suit contemplates any urgent interim relief under the Commercial Courts Act, it could be instituted without exhausting the remedy of pre-institution mediation. The words "which does not contemplate any urgent interim relief refer to the contemplation of the plaintiff desires to seek any urgent interim relief, or not."

In the present suit, the petitioner has filed an application for grant of ad interim relief. The petitioner has also filed the instant application being GA 2 of 2022 praying leave to file the instant suit without exhausting the remedy of pre-institution mediation. In the plaint as well as in the application, the plaintiff had made out a case that the plaintiff had lent Rs.150 crores to the respondents with the assurance that the respondents will return the said amount within two years by selling the share of respondent no. 6 but subsequently that the petitioner came to know that the respondents have fraudulently and illegally transfer/dispose of MRIL Treasury Share and diverted the proceeds thereof. The main contention of the plaintiff is that if an injunction is not passed there is every apprehension that if any decree is passed in favour of the petitioner would merely be in a paper decree which the petitioner will not be in opposition to execute the same. The respondents and the caveator have raised their objection that the petitioner came to know about the transfer of the share by the respondent in the year 2017 itself and subsequent thereof the petitioner has made several correspondences till 2020 inspite of knowing of the fact in the year 2017 to 2020, the petitioner has not taken any steps and as such all of a sudden at this stage, it cannot be said that there is any urgency. The respondents have also raised the contention that the petitioner has not disclosed all the documents in the plaint and subsequent by filing the instant application being GA 2 Of 2022, the petitioner has added some documents which cannot be treated as a part of the documents of the plaint as the plaintiff has not taken any leave from this Court to bring the said

documents as part of the documents of the plaint. The Counsel for the respondent no. 6 has relied upon the judgment reported in (2011) 6 SCC 321 (Mahadev Govind Gharge and Ors. Vs. Special Land Acquisition Officer, Upper Krishna Project Jamkhandi, Karnataka and submits that the law contemplates that a caveator is to be heard by the Court before any interim order can be passed against him. In the instant application (GA 2 of 2022), the petitioner has not prayed for any interim order against any party but the petitioner has only prayed for leave to file the suit without exhausting the remedy of pre-institution mediation. The petitioner prays for leave to file the said suit so as to enable the petitioner to move an application for grant of urgent interim relief and thus this Court is of the view, the judgment relied by the respondent no. 6 is not applicable in the instant application as the respondent will get an opportunity of hearing at the time of hearing of application for grant of interim relief. The petitioner during the argument submits that the petitioner is not relying upon the documents which are annexed with the instant application and is only relying upon the documents disclosed in the plaint.

The object of the Act of 2015 is to ensure expeditious and speedy disposal of a commercial dispute. Expedition and speed in disposing of commercial dispute is attained, in the wisdom of the legislature, by a pre-institution mediation. Section 12A(1) of the Act of 2015 distinguishes suits filed under the Act of 2015 into two categories. It treats the two categories of suits differently. Suits are categorize into two on the basis of need of the plaintiff to obtain urgent interim relief. One category is a suit where the plaintiff does not seek

urgent interim relief. In such category Section 12A of the Act of 2015 debars the plaintiff from instituting a suit unless the plaintiff exhausts the remedy of the pre-institution mediation. The provisions of sub-Section (1) of Section 12A of the Act of 2015 are such that, a plaintiff is obligated to approach the appropriate authority for a pre-institution mediation, unless he seeks urgent interim relief, in respect of a commercial dispute, to approach the Court for resolution of the commercial dispute. Section 12A of the Act of 2015 prescribes an obligation on the plaintiff to undertake the pre-institution mediation and vests a corresponding right on the defendant. The defendant enjoys the right of a pre-institution mediation and in the default of the plaintiff not going for pre-institution mediation, then having a suit against the defendant by such defaulting plaintiff, being barred by law. Failure of the plaintiff to exhaust pre-institution mediation, unless, he seeks urgent relief, in a commercial dispute, gives a corresponding right to the defendants to claim that, such suit could not have been instituted by the plaintiff. Such failure of the plaintiff will result in the dismissal of the suit if allowed to be instituted. The other category of suits under Section 12A of the Act of 2015 is a suit where the plaintiff seeks urgent interim relief.

The two categories of the suits under Section 12A of the Act of 2015 are treated differently. In the category of suits where the plaintiff does not seek urgent relief, the plaintiff is statutorily required to exhaust pre-institution mediation, whereas a plaintiff seeking urgent interim relief is not required to do so. In a suit where the plaintiff does not seek urgent reliefs, imitation is

extended or kept in abeyance, as one may perceive it, till the conclusion of the statutorily mandated period of mediation while in the other category no such benefit is extended.

Given the nature of the language used in the Section 12A of the Act of 2015, and the two categories of suits being dealt with thereunder, and taking into consideration the distinction between 'filing' of a suit and its 'institution' in my view, it requires the Court to apply its mind at the time of the suit being presented before it, as to whether the plaintiff in a suit which does not contemplate any urgent interim relief under the Act of 2015 exhausted the remedy of pre-institution mediation in accordance with the manner and the procedure prescribed or not. Sub-Section (1) of Section 12A of the Act of 2015 casts a duty upon the Court to ensure that a suit is instituted by a plaintiff in accordance with procedure laid down therein. The duty is akin to a duty under Section 3 of the Limitation Act, 1963. A plaintiff may not undertake pre-institution mediation if the plaintiff is in a position to demonstrate that, the plaintiff requires urgent interim relief. In order to do so, the plaintiff has to approach the Court before which the suit is to be instituted and satisfied the Court that it needs to institute such suit without undertaking a pre-institution mediation in view of the urgency claimed by the plaintiff.

In view of the above, this Court is of the view that the petitioner has filed the suit along with an application for grant of urgent relief and this court satisfied that the petition filed by the petitioner for grant of urgent relief is

required to be heard urgently on the facts and circumstances mentioned in the plaint and in the application for grant of urgent relief.

In view of the above, GA 2 of 2022 is allowed by granting leave to the petitioner to file the suit without exhausting the remedy of pre-institution mediation.

GA 2 of 2022 is thus disposed of.

(KRISHNA RAO, J.)

Later :

Counsel for the respondent No. 1 prays for stay of the order. Prayer is considered and rejected.

(KRISHNA RAO, J.)