

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA.

I.A. No. G.A. 3 of 2021

In

C.S. 254 of 2019

RAMESH CO.

Vs

IMPERIAL TUBES PRIVATE LIMITED

For the Plaintiff/Respondent : Mr. S.N. Mitra, Sr. Adv.
Mr. Soumabho Ghose, Adv.
Mr. Soumalya Ganguly, Adv.
Ms. Tiana Bhattacharyya, Adv.

For the Defendant/Petitioner : Mr. Rajarshi Dutta Adv.
Mr. V.V.V. Sastry, Adv.
Mr. Debjyoti Saha, Adv.
Mr. Tridib Bose, Adv.

Last Heard on : 28.03.2022.

Delivered on : 07.04.2022.

Moushumi Bhattacharya, J.

1. The applicant / judgment-debtor who is the defendant in the suit, seeks recalling of two orders passed by the learned Master granting leave under section 12-A of The Commercial Courts Act, 2015 and leave to the plaintiff to amend the

plaint, respectively. Section 12-A of the 2015 Act – Pre-Institution Mediation and Settlement – provides that a suit which does not contemplate any urgent interim relief, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation under the prescribed rules.

2. The issue, which falls for consideration is whether the Master, under the Original Side Rules of this Court, has the power to grant leave under section 12-A of The Commercial Courts Act, 2015 in a suit instituted under the Commercial Division of a High Court.

The series of events, as contended by the parties, are as follows:

3. The plaint was admitted by the Master on 28.11.2019 and leave was granted by the Master under section 12-A of the 2015 Act.

4. The Master allowed the plaintiff to amend the plaint on 09.01.2020. A learned Single Judge passed a decree in favour of the plaintiff on 16.01.2020 in an application filed under Order XII Rule 6 of The Code of Civil Procedure, 1908. In February, 2020, the defendant came to learn of the fact of leave being granted by the Master under section 12- A of the 2015 Act. The defendant challenged the decree before a Division Bench and was permitted to withdraw the appeal with leave to file a review on 01.07.2020. The review, filed by the defendant, of the judgment and decree dated 16.01.2020 was dismissed by the learned Single Judge on 11.02.2021. A Special Leave Petition filed by the defendant challenging the decree dated 16.01.2020 and the order dismissing the review dated 11.02.2021 was disposed of as withdrawn on 16.07.2021.

5. Learned counsel appearing for the applicant/defendant submits that the defendant received two copies of the plaint, the first being annexed to the petition filed under Order XII Rule 6 of the CPC and the second copy being handed over by the advocate of the plaintiff at the time of passing of the decree dated 16.01.2020. Counsel submits that paragraph 23 of the plaint as it stood before amendment, i.e. on the date of presentation of the plaint refers to attempts of settlement between the parties and that the same failed since the defendant chose not to make any effort for the settlement. Leave was granted by the learned Master under section 12-A on 28.11.2019 on the basis of the pleading in the original plaint. Counsel submits that after leave was granted, the Master permitted amendment of the plaint on 09.01.2021 without a formal application being made in that regard. It is submitted that since the defendant did not have access to the original plaint, this fact came to be known during drawing up and completing of the decree in February, 2020. Counsel urges that granting of leave under section 12-A of the 2015 Act is a judicial act where the Court has to be satisfied of the existence of certain fact before granting such leave. It is also urged that leave has to be prayed for under section 12-A and was required to be done in the present case since the plaintiff sought for urgent interim reliefs from the Court. According to counsel, since the grant of leave was passed by a person having inherent lack of jurisdiction, the said order would be a nullity and the principles of estoppel and acquiescence would have no application in such cases.

6. Learned counsel appearing for the respondent/plaintiff submits that at the relevant time, the Master had granted leave to the plaintiff to institute the suit by

dispensing with the requirements under section 12-A of the 2015 Act and that the advocate of the plaintiff was given to understand that the Master was entitled to grant such leave on the basis of a practice direction, then in force. Counsel submits that the suit was instituted for recovery of a sum of money which became due and payable by the defendant to the plaintiff on account of goods sold and delivered by the plaintiff to the defendant. It is submitted that since the defendant did not challenge the decree long after drawing up and completing of the same, the plaintiff put the decree in execution in June, 2020. The defendant challenged the decree only thereafter and the Appeal Court refused to interfere with the decree. Counsel submits that a perusal of the judgment passed in review of the decree would indicate that all the points which are now being sought to be taken by the defendant were urged before the Single-Bench in the said review. Counsel refers to the observations made by the Supreme Court, though not recorded, while disposing of the Special Leave Petition filed by the defendant including that the Master under the Original Side Rules has wide powers in Courts established by Letters Patent and that the defendant has no defence on merits. Counsel urges that all the points which have been taken in the present application are barred by the principles of *res judicata* and relies on Chapter VI Rule 15 of the Original Side Rules. Counsel submits that there was a practice direction issued by the Court vesting power on the Master to grant leave under section 12-A on the date of presentation of the plaint as also on the date of passing of the decree. It is submitted that allowing the prayer of the applicant / defendant in the application would result in reversing the judgment and decree dated 16.01.2020 as well as the

judgment delivered in review on 11.02.2021. Counsel submits that even if it is presumed that Master did not have the power to grant leave the same can be seen as an irregularity which has subsequently been cured by the decree and reaffirmation of the same in review. Counsel stresses that the present application has been filed in abuse of the process and should be dismissed at the outset.

7. The issues which fall for consideration are :

a) Whether leave can be granted under section 12-A of The Commercial Courts Act, 2015 by the learned Master.

b) Whether the grant of leave by the Master was subsequently cured?

a) Whether leave can be granted under section 12-A of The Commercial Courts Act, 2015 by the Master :

8. Section 12-A of the 2015 Act deals with Pre-Institution Mediation and Settlement. 12-A(1) bars institution of a suit, which does not contemplate any urgent interim relief under the Act, unless the plaintiff has exhausted the remedy of pre-institution mediation in the manner and procedure prescribed by the rules made by the Central Government in that regard. The question of obtaining leave from the Court arises from the prohibition and the same being made conditional upon the plaintiff exhausting the remedy of pre-institution mediation. The construction of the provision is generally read in a manner to presume that leave must first be obtained before the suit is instituted under the 2015 Act. Unlike Clause 12 of the Letters Patent of this Court which specifically mentions that leave

of the Court shall have to be obtained for the Court to receive, try and determine the suit, section 12-A of the 2015 Act requires the leave by implication. Before granting such leave, the Court has to examine whether the claim arises in respect of a “commercial dispute” within the meaning of section 2(1)(c) of the Act and if yes, whether the suit contemplates any urgent interim relief under the Act. Upon being satisfied of these conditions, the Court will thereafter consider granting leave to the plaintiff for instituting the suit without exhausting the remedy of pre-institution mediation and settlement contemplated under section 12-A of the 2015 Act. The accepted practice in the Original Side of this Court is that grant of leave for institution of suits filed in the commercial division is a judicial act and not an administrative act. Leave under the Letters Patent, 1865, including under Clauses 12 and 14 is always granted by the Court and is not an administrative act which can be delegated. In *Laliteshwar Singh Vs. Rameshwar Singh ; (1907) ILR 34 Cal 619* a 5-judge Bench of this Court including Francis Maclean, C.J. had the occasion to consider the terms of Clause 12 of the Letters Patent and was prima-facie of the view that the leave has to be granted by a Judge of the Court. The Court was further of the view that the nature of the act of granting leave to sue has been uniformly regarded as a judicial act, as opposed to a ministerial and administrative act and the order has been treated as a judgment appealable under Clause 15 of the Letters Patent. A Division Bench of the Madras High Court in *M/s. Perfint Healthcare Pvt. Ltd. v. California Institute of Computer Assisted Surgery Inc.; 2019 SCC Online Mad 1* considered the point whether the Master of the Court under the Madras High Court Original Side Rules is a Court for the purpose of

enforcement of foreign awards under the New York and Geneva Conventions. The Madras High Court opined that the Master is not a Court for the purposes of sections 47 and 49 of The Arbitration and Conciliation Act, 1996 since the Master has not been delegated with the powers as contemplated under these sections. Both of the decisions relied on by the defendant proceed on the basis that certain provisions of The Civil Procedure Code and The Arbitration and Conciliation Act contemplate powers which are exclusively within the domain of a Court and must hence be seen as a judicial act. These decisions cannot however be taken as writ in stone for the proposition advanced by the defendant. It must be recognized that the practice adopted and continued is that of a Single Judge sitting in the Commercial Division passing a judicial order for grant of leave for dispensing with the statutory requirement of exhausting the remedy provided under section 12A of the Act. This practice is being followed from the time the courts familiarized themselves with the new regime under the Commercial Courts Act. Granting leave under section 12-A has now been accepted as judicial business within the exclusive domain of the Court / Commercial Division.

9. The second question is whether a grant of leave under section 12-A can subsequently be obtained. It is clear from the language of section 12-A that leave has to be obtained prior to the institution of the suit. This would be evident from the words “...*shall not be instituted*...”. The mandate of pre-institution mediation can only be relaxed where the plaintiff seeks urgent interim relief under the 2015 Act. There is little doubt that section 12-A contemplates grant of such leave before

the suit is instituted and after the court is satisfied that the claim arises in respect of a commercial dispute and the suit contemplates an urgent interim relief.

b) Whether the grant of leave by the Master was subsequently cured.

10. The plaintiff instituted the present suit for recovery of a sum of Rs. 9.68 crores and other reliefs on 28-02.2019. The plaint was presented before and admitted by the Master who at that time also granted leave to the plaintiff to institute the suit by dispensing with the compliance under section 12-A of the 2015 Act. The plaintiff proceeded with the understanding that the Master was empowered to grant such leave on the basis of practice direction which was framed in accordance with the directions of the learned Judge then taking up interlocutory matters. The plaintiff filed an application for urgent interim relief and the defendant filed its affidavit-in-opposition to the said application. The judgment and decree was passed by the learned Single Judge on the basis of an admission on 16th January, 2020. The defendant did not challenge the judgment and decree and the plaintiff put the said decree into execution in June, 2020. The defendant preferred an appeal thereafter but withdrew the appeal with liberty to file an application for review. The defendant thereafter filed a Memorandum of Review of the decree dated 16.01.2020 which was dismissed upon contest by a judgment dated 11.02.2021. The decree was confirmed by the said judgment. The defendant /judgment-debtor preferred a Special Leave Petition before the Supreme Court which was disposed of as withdrawn by an order dated 16.07.2021. The defendant/Judgment-debtor preferred an appeal from the judgment dated

11.02.2021 before the Division Bench which is pending disposal. The Appeal Court has not granted a stay on the said judgment.

11. The above procession of events contains several instances of the defendant having accepted and thereafter cured the defect of the grant of leave by the Master by its own conduct. First, the defendant had raised an objection in the affidavit-in-opposition to the interlocutory application of the plaintiff as to the construction of the meaning and purpose of section 12-A and reserved its right to make appropriate submissions in that regard at the time of hearing. Second, the defendant did not take steps to challenge the judgment and decree dated 16.01.2020 till June, 2020. Further, in the appeal filed by the defendant, the defendant admitted that the objection raised in the affidavit-in-opposition - as stated above - was not urged or argued before the learned Single Judge. The order passed by the Division Bench allowing the defendant to withdraw the appeal also reflects that the learned counsel appearing for the defendant before the Appeal Court had knowledge, as on that date, that the leave under section 12-A had been granted by the Master. Third, the judgment passed by the Single Judge on 11.02.2021 dismissing the review filed by the defendant makes it clear that the point with regard to the Master not being empowered to grant leave was fully urged before the learned Judge. The judgment refers to the decisions cited by the defendant before this Court as also the practice directions prevalent at the material point of time. Upon considering the grant of leave as well as the subsequent act of amendment to the plaint by the Master, the learned Judge was of the view that the defendant failed to raise the issue of leave during the hearing

of the application for judgment on admissions and that the defendant should not be permitted to take the point at the stage of review. Fourth, the defendant withdrew the Special Leave Petition filed against the decree dated 16.01.2020 and the order dated 11.02.2021 dismissing the review petition. The order dated 16.07.2021 by which the Supreme Court disposed of the SLP as withdrawn does not indicate that the defendant urged the point of grant of leave by the Master. Even assuming that the defendant took such point before the Supreme Court, the act of withdrawing the SLP does not commend to the defendant urging the point of leave once again in a fresh application before this Court. It is also relevant that the defendant's appeal from the order of dismissal of the review is presently pending before the Division Bench.

12. The above facts lead to the irrefutable conclusion that after having participated in and allowing the proceedings to progress from one stage to the other, the defendant now seeks to reopen and unsettle the fructified stages of the proceedings by trying its luck, yet again, in a fresh application. Apart from the conduct, the points urged by the defendant and decided by the Court are *res judicata* and barred by the principles of estoppel, waiver and acquiescence. The defendant can be said to have abandoned its plea of the Master lacking the power to grant leave.

13. On a technical note, Chapter VI Rule 15 of the Original Side Rules of this Court provides that any person affected by an order of the Master may appeal to a Judge by way of an endorsement on the summons by the Master at the request of

any party or by a notice (No. 1A) in writing to attend before the Judge without a fresh summons within 5 days after the decision complained of or within such further time as may be allowed by a Judge. A copy of the Master's summons dated 18th August, 2021 does not contain any endorsement by the Master or by the Registrar as required under Chapter VI Rule 15. There is also no notice in Form No. 1A to Appendix-B as required under Rule 15 of Chapter VI. The said provision also makes it clear that the required procedure by way of an appeal must be undertaken within 5 days after the decision complained of or within the time extended by the Judge. From the facts, it is evident that the defendant is aggrieved by the decision of the Master granting leave under section 12-A of the 2015 Act which according to the defendant, was granted by the Master on 9th January, 2020. There is no prayer for extension of time in the application. Even if the contention of the defendant is accepted, namely that the defendant became aware of the impugned decision of the Master in February, 2020, the time to take appropriate recourse expired in the beginning of March, 2020, being the outer limit of the time provided in Chapter VI Rule 15 of the Original Side Rules. The orders of the Supreme Court passed in *Suo Motu* Writ Petition (Civil) No. 3/2020 extending the period of limitation provided under the general and special laws in view of the pandemic is applicable to cases where the period of limitation did not expire on or before 15th March, 2020. According to case made out by the defendant itself, the period for filing the appeal from the decision of the Master under Chapter VI Rule 15 expired in the beginning of March, 2020 and hence before 15th March, 2020. The defendant hence cannot seek reliance on the order passed by

the Supreme Court. Notably, the Commercial Courts Act did not amend the Rules in curtailing the power of the Master in the Original Side of a Chartered High Court, reference may be made to Rules 11, 11A and 12 in this context.

14. This Court is also unable to accept the defendant's contention that since the Master lacked the power to grant leave, all subsequent judgment and orders would be a nullity. In *Hasham Abbas Sayyad vs. Usman Abbas Sayyad*; (2007) 2 SCC 355, the question before the Court was whether the property in a suit could be put on auction sale without initiating a formal decree proceeding. A distinction was however made by the Supreme Court between a decree passed by a Court without territorial or pecuniary jurisdiction under section 21 of the Code of Civil Procedure and the decree passed by a Court having no jurisdiction with regard to the subject matter of the suit. The Supreme Court was of the view that the appellate court may interfere with the second category of cases. In *Chiranjilal Shrilal Goenka vs. Jasjit Singh* ; (1993) 2 SCC 507 the judgment and award made by the arbitrator who was appointed by the Court was held to be non est as the arbitrator lacked inherent jurisdiction. The Supreme Court held that the probate court has been conferred with the jurisdiction to grant probate of the will of the deceased and the arbitrator hence does not have jurisdiction to decide on these matters even if consented to by the parties. *Sarup Singh vs. Union of India*; (2011) 11 SCC 198 was a land acquisition case where an award was passed by the Special Land Acquisition Collector. The Supreme Court considered whether the judgment of the High Court of Punjab and Haryana enhancing the quantum of compensation could be negated by the Addl. District Judge, Bhatinda while acting as an executing

court. The Supreme Court held that the matter of payment of compensation to the appellants became final and binding after the award was passed and could not have been reopened by the High Court on the basis of revision applications filed under sections 151 and 152 of the CPC.

15. It is also not in dispute that the practice directions prevalent at the relevant point of time were understood by the plaintiff to confer power on the Master in the matter of granting leave. The power of the Master was revoked only subsequently in March, 2020, i.e., after the decree passed by the learned Single Judge on 16.01.2020. It is of significance that according to the defendant's own case, the defendant came to know of the leave being granted by the Master in February, 2020. Hence, as on this date, the Master had the power to grant the leave which is now being questioned by the defendant.

16. Even if it is presumed that the Master did not have the power to grant leave, the absence of power is at the highest, an irregularity, which has subsequently been cured by the decree dated 16th January, 2020 and the affirmation of the decree in review on 11th February, 2021. This Court is also unable to accept the contention that the grant of leave by the Master would nullify all further proceedings and orders thereafter or would amount to an inherent lack of jurisdiction of the Court in receiving the suit. The registered office of the defendant/judgment-debtor is within the jurisdiction of this Court and the claim of the plaintiff is within the pecuniary jurisdiction of this Court. It is also not the case of the defendant/judgment-debtor that the subject matter of this suit cannot

be received, tried or determined by this Court. The exercise of jurisdiction, even if irregular, cannot set the decree at naught when there is no inherent lack of jurisdiction. Moreover, section 12-A of the 2015 Act cannot non-suit a plaintiff who otherwise has a legal and valid claim. As held in *Laxmi Polyfab Pvt. Ltd. vs Eden Realty Ventures Pvt. Ltd.*; AIR 2021 Cal 190, a plaintiff cannot be non-suited for non compliance in respect of suits filed up to 11th December, 2020 since the requisite infrastructure under section 12-A was not notified.

17. A purposive construction of section 12-A of the Commercial Courts Act read in light of the decisions cited would lead to the conclusion that grant of leave for dispensation of the mandatory requirement of section 12-A is a judicial act - an order to be passed by the Single Judge sitting in the Commercial Division of a High Court upon satisfaction of the two conditions expressed in the said provision; namely that the claim is in relation to a commercial dispute as defined in the Act and that the plaintiff seeks an urgent interim relief.

18. The related question whether failure to obtain such leave from the Judge would be fatal to the suit is a matter of judicial discretion stemming from an adjudication on the individual facts of the case and subject to the plaintiff successfully establishing the *bona fides* of the case made out. But would the failure to obtain leave at the time of institution non-suit a plaintiff? The answer must be in the negative. The failure to obtain leave may be a factor in refusing interim relief or delay the stage at which the interim relief is sought for but would not amount to a fundamental error capable of nullifying all subsequent acts. As

long as the plaintiff has a legal and a valid claim and the suit satisfies the territorial and pecuniary jurisdictional aspect, the defect of non-grant of leave under section 12-A can be cured on a case-to-case analysis by the Court. The conclusion draws strength from the unlikely - and hitherto unheard of - prospect of a defendant applying for revocation of leave granted under section 12-A of the Commercial Courts Act, as opposed to similar applications in relation to Clause 12 of the Letters Patent. The reason is surely the uphill task of a defendant to prove that the suit did not contemplate any urgent interim relief under the Commercial Courts Act at the time of institution and that the plaintiff was therefore required to exhaust the pre-institution mediation option before instituting the suit. Seeking revocation of leave on a territorial jurisdiction issue would any day be a much simpler task!

19. It is also an accepted principle that no one should suffer for mistake of the Court; Ref. *A.R. Antulay vs. R.S. Nayak*; (1988) 2 SCC 602 which advanced the salutary principle that rules and procedures are the handmaids of justice and not the mistress of justice and if a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied.

20. The line-up of proceedings would give a clear indication that the defendant has availed of opportunities before different fora, changed its stand and chose to withdraw from the proceedings at various points of time. The conduct of the defendant suggests misuse of Court processes and hence neutralises the contentions which the defendant seeks to take before this Court. Pleas of technical

grounds can be of merit provided the litigant itself has followed the procedure and has urged the point within the statutory time limits. The litigant himself must also show by conduct that the litigant has been vigilant of its rights and has availed of every recourse to protect the same. The conduct of the defendant does not inspire such credibility or persuade the Court to grant the relief prayed for. Reference in this context may be made to *Sunil Kumar vs State of Haryana ; (2012) 5 SCC 398* where the Supreme Court strongly discouraged misuse of easy access to justice as a license to file misconceived or frivolous petitions. In *H.N. Jagannath vs. State of Karnataka; (2018) 11 SCC 104* the Supreme Court noted that a party had reportedly approached the courts for almost the same relief which was negated by the courts for three decades. Notwithstanding the attractive and painstaking arguments of learned counsel for the defendant, this Court is hence not inclined to accept the stand taken by the defendant.

21. In view of the above reasons, this Court does not find any merit in the present application for recalling the orders passed by the Master and G.A. – 3 of 2021 is accordingly dismissed without any orders as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J)