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THE DELHI HIGH COURT EXTENDS MANDATE OF PRE-LITIGATION MEDIATION ON FILING OF COUNTER CLAIM IN COMMERCIAL DISPUTES

The Delhi High Court, in its judgement in the case *Aditya Birla Fashion and Retail Limited v. Mrs. Saroj Tandon [CM(M) 459/2023 and CM APPL. 13679/2023]* answered the question whether Section 12A of the Commercial Courts Act, 2015 (“the Act”) will be applicable even for filing the counter-claim, especially when the pre-litigation mediation proceedings instituted by the Plaintiff have been termed non-starter.

Factual background of the case

The Plaintiff and the Respondent were in a lessor-lessee relationship where the Respondent (lessor) has leased out a unit to the Plaintiff (lessee) to conduct its business therefrom. Due to the adverse effect of the Covid-19 pandemic, the Plaintiff issued its notice of termination along with a demand for refund of its security deposited with the Respondent.

The Plaintiff took recourse to pre-litigation mediation under Section 12A of the Act when the Respondent failed to return the security. Due to the Respondent’s failure to appear before the Authority presiding over the mediation proceedings, despite successful service of notices, the proceedings were declared as non-starter. Consequently, the Plaintiff filed a suit, against which the Respondent filed its counter-claim – both being a commercial dispute. The Plaintiff contended that since the counter-claim was for recovery of money (rentals) and not for any urgent relief, the same ought to be rejected by virtue of Order VII Rule 11 Code of Civil Procedure, 1908 (CPC).

The question of application of Section 12A of the Act on counter-claim arose before the Delhi High Court (“the High Court”) in the present case, since the Trial Court had decided that pre-litigation mediation is not obligatory for a counter-claim, thereby, aggrieving the Plaintiff.

Provisions of law applied/interpreted in the case

1. **Section 12A of the Act:** this provision lays down that unless the suit is seeking urgent interim relief, the said suit can only be instituted when the Plaintiff has exhausted the remedy of pre-litigation mediation, in order to facilitate settlement of the dispute.
2. **Order VII Rule 11 CPC:** the said rule lays down grounds for rejection of a plaint, with one such ground being the suit being barred by law.
3. **Order VIII Rule 6A read with Order IV Rule 1 & 2, CPC:** the said rules when read together, lead to the conclusion that even a counter-claim is a suit, thereby, bringing counter-claim within the purview of Order VII CPC.

Respondent’s contentions in brief

The crux of the Respondent’s arguments was:

- a) That the mandate of pre-litigation mediation is done away with in the present case since the previous attempt of the Plaintiff to settle the matter at the stage of institution of the original suit was unsuccessful, any such future attempts reasonably point to the same outcome, and



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- b) That compelling the same parties to go through mediation proceedings again only defeats the provision's legislative intent of speedy trial, therefore, the provision ought to be interpreted in a flexible sense to be an optional recourse for filing the counter-claim.

Reasoning of the High Court

The High Court apart from interpreting the abovementioned provision, also reiterated the fundamental rationale behind introduction of the Act and its prescribed Commercial Courts (Pre-litigation Mediation and Settlement) Rules, 2018 (“**Rules**”) – that whenever there is a commercial dispute, the applicant must initiate mediation process against the opposite party from whom relief is being sought, and that neither the Act nor the CPC have attempted to exempt or differentially treat a counter-claim in this regard. This non-differentiation prima facie establishes that a counter-claim is subject to Section 12A of the Act for practical and procedural purposes, which essentially has been enacted in such a way because,

- a) the mere fact that one party was disinclined to participate in mediation does not lead to the automatic assumption that the other party will not participate, and
- b) that when one party has undertaken the efforts to settle the dispute, does not absolve the other party of this obligation to directly file the counter-claim.

Furthermore, the very phrasing of Section 12A(1) of the Act clearly makes out that the provision is mandatory,

“(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.”

In light of the wording of the provision, liberally interpreting the same will nullify the objective that was intended to be achieved. The High Court, in deciding the matter, had heavily relied on the Supreme Court's verdict in **Patil Automation Private Limited v. Rakheja Engineers Private Limited [SLP (C) No. 14697 of 2021]** wherein the Apex Court had amply clarified that the application of Section 12A of the Act is specially designed to ensure speedy access to justice as well as access to justice through the ordinary recourse of conventional litigation – (i) it opens an avenue for the parties to settle the dispute without incurring heavy costs with both the parties bearing any mediation expenses equally, and (ii) it disburdens the existing pendency in courts by only accommodating cases of urgent nature, which in turn mitigates ballooning of existing pendency in the courts.

The High Court also opined that while a suit may not get settled through mediation but a counter-claim arising from the suit itself still stands a chance of settlement, which ought to be exercised to ensure limited redundancy and not frustrate effective mechanism of law.