

Court No. - 21

Case :- MATTERS UNDER ARTICLE 227 No. - 1220 of 2023

Petitioner :- Indian Oil Corporation Ltd. Mumbai Having Divisional Office,Lko. Thru. G.M. Engineering Department

Respondent :- Commercial Court-Ii, Lko. And Another

Counsel for Petitioner :- Ashok Kumar Singh

Counsel for Respondent :- Ashish Shukla

Hon'ble Manish Mathur,J.

1. Supplementary affidavit filed on behalf of opposite party no. 2 is taken on record.

2. Heard Mr. Ashok Kumar Singh, learned counsel for petitioner and Mr. Ashish Shukla, learned counsel for opposite party no. 2.

3. Notice to opposite party no. 1 stands dispensed with as it is proforma party.

4. Petition under Article 227 of the Constitution of India has been filed raising challenge to order dated 08.02.2023 passed by the Commercial Court in Civil Suit No. 274 of 2022 rejecting preliminary objections raised by petitioner/defendant regarding maintainability of suit on the ground that pre-institution remedy of mediation as contemplated under Section 12 (A) (1) of the Commercial Courts Act 2015 having not been undertaken, without which suit in terms of the aforesaid provisions is barred.

5. Learned counsel for petitioner has placed reliance on judgment rendered by Hon'ble Supreme Court in the case of **M/s. Patil Automation Private Limited and others versus Rakheja Engineers Private Limited reported in 2022 (10) SCC (1)** to submit that the provisions of Section 12 A(1) of the aforesaid act have been held to be mandatory in nature and therefore, any suit filed before the Commercial Court in terms of the Act of 2015 without availing the remedy of Section 12 A of pre institution mediation is liable to be rejected. It is further submitted that in the present case, a contract was entered into between the parties on 02.12.2021 with regard to supply, transportation, installation and commissioning of new unipols at the retail outlets/KSK's of the petitioner. It is submitted that due to unfulfilment of terms and conditions of contract, show cause notice was issued to the opposite party no. 2 and after

considering its reply, the contract was terminated on 31.10.2022. It is submitted that suit challenging the termination order has been filed only on 08.12.2022 and as such, there is no question of any urgency in the case due to which waiver of provisions of Section 12 A(1) of the Act of 2015 would not be required. It is submitted that it was in these circumstances that preliminary objections were filed before the Court concerned and have been rejected by means of impugned order on the ground that since the plaintiff has sought urgent interim relief, therefore, the suit would not be barred in terms of Section 12 A of the Act. Learned counsel has placed reliance on judgment rendered by High Court of Madras in the case of **M/s Microlabs Limited versus Mr. A.Santosh , C.S (Comm. Div) No. 185 of 2022** to buttress his submissions.

6. Learned counsel appearing for opposite party no. 2 has refuted submissions advanced by learned counsel for petitioner with the submission that although the contract was terminated on 08.12.2022 but the same has also invoked provisions of clause 6.13 (b) of the contract pertaining to price adjustments for delays with the submissions that in pursuance of termination of contract, further action has been contemplated against the answering opposite party including forfeiting of security deposits, holiday listing or initiating any other penal action as deemed fit by Indian Oil Corporation/petitioner. It is thus submitted that it was only when the petitioner started initiating action against the opposite party no. 2 that the suit was filed along with an application for temporary injunction for restraining the petitioner/defendant from invoking the termination letter. Learned counsel has adverted to judgment rendered in the case of **M/s. Patil Automation Private Limited and others versus Rakheja Engineers Private Limited reported in 2022 (10) SCC (1)** as well as judgment of Division Bench of the Delhi High Court in the case of **Chandra Kishor Chaurasiya versus R A Perfumery Works Private Limited (2022/DHC/004454 decided on 27.10.2022)** to buttress his submissions.

7. In view of submissions advanced, the following question would require to be adjudicated:

'Whether contemplation of urgent interim relief as envisaged under Section 12 A of the Commercial Courts Act 2015 requires consideration by the Court only as per averments made in the plaint/Temporary Injunction application or other incidental aspects as well?'

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is

evident and undisputed that termination order was issued to the answering opposite party on 31.10.2022 whereafter suit was filed on 08.12.2022 along with an application for grant of temporary injunction. The petitioner had filed preliminary objection regarding maintainability of suit since pre institution mediation as contemplated under Section 12 A of the Act of 2015 was not availed of. The said application has been rejected by means of impugned order holding that since plaintiff has sought urgent interim relief, necessity for exhausting the remedy of pre institution mediation would not bar suit proceedings. It has also been held that the use of words 'contemplate any urgent interim relief ' are used to qualify the category of a suit which is determined solely on the frame of plaint and relief sought and since plaintiff is the sole determinant of the pleadings and relief sought, it was held that suit involves urgent interim relief due to which it would not be barred in terms of Section 12 A of the Act of 2015.

9. For the purpose of adjudication of aforesaid question, it would be necessary to refer to the termination letter dated 31.10.2022 which clearly stipulates invocation of clause 6.13 (b) of the special terms and conditions of contract of tender document which has been indicated hereinabove. The plaint filed by answering opposite party has sought the relief of declaration of termination letter dated 31.10.2022 as null and void with a decree being sought for permanent and mandatory injunction seeking to restrain the defendant from terminating the contract dated 08.12.2021 and further a decree injuncting the defendant, their assigns, representatives etc from invoking the termination letter dated 31.10.2022. An application for temporary injunction has also been filed with the prayer to restrain the defendant, their assigns etc from invoking the termination letter dated 31.10.2022.

10. Clearly, the prayer as made not only in the plaint but also in the application for temporary injunction is to the effect that the defendants should be restrained/injuncted from invoking the termination letter dated 31.10.2022. The aforesaid termination letter clearly makes reference to clause 6.13 of the general conditions of contract with clause (b) pertaining to other action to be taken against the vendor including forfeiting of security deposits, holiday listing or initiating any other penal action as deemed fit by the Indian Oil Corporation (I.O.C). From the prayer so made and especially the reference made to clause 6.13 (b) of the general terms of contract, urgency is clearly borne out.

11. However, learned counsel for petitioner has specifically adverted to the fact that the plaint has been filed after almost

one and a half months of issuance of the termination letter, which in itself does not indicate any urgency in the case to waive of the mandatory condition of Section 12 A of the Act of 2015.

12. For proper appreciation of the aforesaid submissions, it is necessary to advert to the judgment rendered in the case of **Patil Automation (Supra)** in which the relevant paragraphs are as follows:

88. "In Section 12 A, the bar of institution of the suit is applicable only in case in which plaintiff does not contemplate urgent interim relief. The situation is akin to what is contemplated in Section 80(1) CPC. In other words, the suit under the Act which does not contemplate urgent interim relief is like a suit covered by Section 80 (1) CPC which does not project the need for any urgent or interim relief. In regard to a suit covered under Section 12-A of the Commercial Courts Act, namely, in a suit where interim relief is not contemplated, there can be no substantial compliance by way of post institution reference to mediation. The argument of the plaintiff overlooks the object apart from the language used besides the design and scheme of the law. It will, if accepted, lead to courts also spending their invaluable time on such matters which follow from adjournments, objections and hearings. There is no need to adopt such a course."

99.1 " The Act did not originally contain Section 12-A. It is by amendment in the year 2018 that Section 12-A was inserted. The Statement of Objects and Reasons are explicit that Section 12-A 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 provisions have 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."

13. In the case of **M/s Microlabs Limited**, High Court at Madras has held that since suit was presented nearly four months after the service of cease and desist notice and no steps (Section 12 A) was taken during this period, it was held that there was no urgency clause for waiving of provisions of Section 12 A of the act.

14. On the other hand, the issue has also been adverted to by High Court at Delhi in the case of **Chandra Kishor**

Chaurasiya (supra) in which after examining the mandate of law of case in **Patil Automation Private Limited (supra)** and the provisions of Section 12 A of the Act of 2015, it has been held that the question whether plaintiff desires any urgent relief is to be decided solely by the plaintiff while instituting a suit and it is not relevant to determine whether plaintiff was required to exhaust the remedy of pre institution mediation since grant of urgent interim relief is not contingent on whether the Court accedes to the plaintiff's request for interim relief or not. It has been held that the terminology of Section 12 A is used to qualify category of a suit which is to be determined solely on the frame of plaint and relief sought.

15. With regard to question required to be determined, it would be apposite to refer to Section 12 A of the Act, which is as follows:

'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.'

16. Upon evaluation of aforesaid judgments and particularly the terminology used in Section 12 A of the Act of 2015, it is evident that a suit which does not 'contemplate' any urgent interim relief under the Act cannot be instituted unless the plaintiff exhausts remedy of pre institution mediation in terms of Section 12 A of the Act. For a suit to be maintainable without the pre institution mediation and settlement as such, would require that it contemplates any urgent interim relief. In the considered opinion of this Court, the word 'contemplate' would be quite relevant for the purposes of examining the provisions and applicability of Section 12 A of the Act. The word 'contemplate' would necessarily mean examination of relief prayed for in the suit as well as urgency shown in the plaint with regard to such relief being sought. The contemplation of urgent interim relief as such, would be dependant on the ground of said interim relief. For the purposes of waiver of mandatory provision of Section 12 A of the act of 2015 as such, it is for the Court to determine contemplation of urgent interim relief. The aspect as to whether a suit has been filed after a considerable delay, would not be a criteria required to determine urgent interim relief. There may be instances when an order of termination has been passed but is not enforced for a certain length of time and it is only its enforcement that would require filing of a suit, which would thus contemplate urgent interim relief being sought for in the plaint.

17. To that extent, this Court is in respectful agreement with the judgment rendered by the High Court at Delhi. Further, in the considered opinion of this Court, it is not solely the plaintiff who is the only arbiter of urgent interim relief, but it is also the Court concerned which has to look into the factor of urgent interim relief in terms of relief sought in plaint or in the application for temporary injunction.

18. In view of discussion made hereinabove, the question framed is answered that contemplation of urgent interim relief for the purpose of Section 12 A of the Commercial Courts Act 2015 is to be considered by the court concerned only as per averments made in plaint or temporary injunction application.

19. Upon applicability of the aforesaid judgments and discussions, in the present facts and circumstances although the suit has been filed after almost one and a half months of the termination of contract but since it indicates urgent interim relief particularly in view of clause 6.13 being invoked against plaintiff, in the considered opinion of this Court, the plaint as such contemplates urgent interim relief and therefore mandatory provisions pertaining to pre institution mediation have been rightly waived by the Commercial Court. As such, no exception can be taken to the order impugned.

20. Resultantly, the petition being devoid of merit is **dismissed**. Parties to bear their own cost.

Order Date :- 12.5.2023

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