

IN BRIEF

RECONCILING MANDATORY PRE-LITIGATION MEDIATION WITH URGENT INTERIM RELIEF



Introduction: Pre-litigation Mediation in India

With a focus on improving and promoting the ease of doing business and recognising that the global economic environment has become increasingly competitive, the Government amended the Commercial Courts Act, 2015 (Act) in 2018^[1]. The increase in commercial activities ushered in the need for speedy resolution of disputes and a mechanism that facilitated quicker resolution. In order to achieve this, Section 12A was added to the Act, which introduced the concept of pre-litigation mediation.

Interpretation of the Mandatory Nature of Section 12A of the Act

The interpretation of Section 12A of the Act by the Courts has focused on giving effect to the legislative intent of introducing the provision in the Act. The divergence in the views on the directory or mandatory nature of Section 12A of the Act taken by different High Courts was finally and conclusively settled by the Supreme Court in the case of *Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.*^[2] (*Patil Automation*). The Supreme Court held that pre-institution mediation is mandatory, and suits filed in violation are liable to rejection under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC). The Court affirmed that Section 12A of the Act embodies the legislative intent to promote early and amicable resolution of disputes.

[1] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, No. 28, Acts of Parliament, 2018

The High Court of Bombay in *Ekta Housing Private Limited v. Shradhha Shelters Private Limited*^[4], examined a money recovery suit wherein the plaintiff filed an application for attachment before judgment. The defendant argued against any urgency on the ground that there was a delay between the demand and the filing of the suit. The High Court, adhering to the “limited exercise” rule mandated by the Supreme Court, scrutinized the plaint and held the averments on urgency to be “bald, vague and baseless” and “devoid of bare minimum particulars”. It held that merely reproducing the language of Order XXXVIII Rule 5 of the CPC was insufficient to demonstrate a genuine apprehension. The Court concluding that the interim application was a “mere eyewash” and an “*afterthought to evade compliance*”, rejected the plaint.

The Interpretation of the Urgency Exception in Section 12A of the Act

The only exception to the mandatory nature of pre-litigation mediation, is a suit which contemplates urgent interim relief. Section 12A of the Act is silent on the manner in which ‘urgent interim relief’ is to be established, unlike Section 80(2) CPC which requires the permission of the Court to file a suit against the Government or Public Officer without complying with the requirement of Section 80(1) of the CPC (i.e., issuance of 2 (two) months’ prior notice) in case of an ‘*urgent interim relief*’. The Courts have since observed that suits were being filed with prayers for interim injunctions, prompting them to develop a test to distinguish genuine urgency from procedural tactics designed to bypass this pre-litigation mediation.

The Supreme Court in *Yamini Manohar v. T.K.D Keerthi (Yamini Manohar)*^[3] clarified that, to establish urgent interim relief, the formality of seeking the permission of the Court is not required, and urgency can be demonstrated through pleadings on record or oral submissions. The Court held that the plaintiff does not have an “*absolute choice and right to paralyse Section 12-A*”. Instead, the commercial court is tasked with a “precise and limited exercise” to determine if the suit genuinely contemplates urgency.

The Supreme Court held that the word “contemplate” connotes to ‘deliberate’ and ‘consider’. It was held that the Court must examine the “*nature and the subject-matter of the suit, the cause of action, and the prayer for interim relief*”. This assessment must be done “*holistically from the standpoint of the plaintiff*”. The test is not whether the Court would ultimately grant the relief, but whether the plaintiff’s contemplation of urgency is plausible and bona fide based on the pleadings. The Supreme Court observed that a “*prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12-A*”.

Urgent Interim Relief: Bald Averments v. Specific Pleadings

The High Courts have applied the principles from Yamini Manohar to make a clear distinction between suits with genuine urgency and those with merely tactical pleadings for interim relief.

[2] (2022) 10 SCC 1

[3] (2024) 5 SCC 815

In *Novenco*, the High Court of Himachal Pradesh had rejected the plaint for patent and design infringement, on the ground of a delay by the plaintiff in filing the suit from the time of discovery of the infringement and held it to be evidence of a lack of urgency. It further held that the plaintiff had adequate time to avail of pre-institution mediation and the plea of urgency was not genuine. The Single Judge rejected the plaint by order dated August 28, 2024. In appeal, the Division Bench by an order dated November 13, 2024, affirmed the decision of the Single Judge. Aggrieved by this, *Novenco* preferred an appeal before the Supreme Court.

The Supreme Court traced out the development of the law by referring to the abovementioned cases on Section 12A of the Act and examined its application to intellectual property disputes. The

In a similar finding given by the High Court of Calcutta in *SKIPPER LTD. V. PRABHA INFRA (P) LTD*^[5], in a suit for recovery of money, the High Court on a “holistic reading of the plaint” held that the averments on urgency were “not only bold but devoid of bare minimum particulars”. The High Court held that the plaintiff had used “clever drafting” in an attempt to “wriggle out or get over the provision of Section 12-A”, and accordingly, rejected the plaint.

Post *Yamini Manohar*, the Courts have emphasised on checking “camouflage and guise to bypass the statutory mandate when deception and falsity is apparent.”

The Transition: The Effect of the Patil Automation Decision on Suits Filed Prior to August 20, 2022

After *Patil Automation*, confusion arose regarding whether the provision (Section 12A of the Act) should be applied prospectively or retrospectively. This ambiguity led to conflicting interpretations regarding the fate of suits instituted without complying with Section 12A of the Act. The Supreme Court in *Dhanbad Fuels Pvt. Ltd. v. Union of India*^[6] clarified this by declaring the mandatory compliance with Section 12A of the Act and the consequence of rejection of plaint in cases of non-compliance, to operate prospectively effective from August 20, 2022.

The Supreme Court held that: (i) suits instituted on or after August 20, 2022 without adherence to Section 12A of the Act must be rejected under Order VII Rule 11 of the CPC, either on an application made by the defendant or suo motu; and (ii) for suits instituted prior to the said date, it would be open to the Court to keep the suit in abeyance and direct the parties to explore the possibility of mediation in accordance with the Act and the applicable rules. It was also clarified that in cases where plaints filed before August 20, 2022, have already been rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this decision.

Interplay between Section 12A of the Act and Intellectual Property Rights

The Supreme Court recently dealt with the application of the urgency exception in the context of intellectual property infringement matters in the matter of *Novenco Building and Industry A/S v. Xero Energy Engineering Solutions Private Ltd. and Another*, ^[7](*Novenco*) wherein it examined the interplay between Section 12A of the Act and intellectual property rights.

[4] 2024 SCC OnLine Bom 3538
[5] 2023 SCC OnLine Cal 5482

Court held that in cases of continuing infringement, such as in intellectual property matters, the urgency is inherent in the nature of the wrong itself. It observed that “each act of manufacture, sale, or offer for sale of the infringing product constitutes a fresh wrong and recurring cause of action”.

The Court also noted that intellectual property infringement is not merely a private dispute; it “sows confusion among consumers, taints the marketplace and diminishes faith in the sanctity of the trade.” This public interest in preventing deception and protecting consumers “imparts a colour of immediacy to the reliefs sought”. The Court observed a crucial distinction between the “age of the cause” and the “persistence of the peril”, holding that mere delay in approaching the Court does not nullify the urgency associated with a continuing violation. The Court recognized that intellectual property is an area where each continuing act of violation causes injury and damage. On the basis of this reasoning, the Supreme Court concluded that insisting on pre-institution mediation in a situation of ongoing infringement would be anomalous, as it would “render the plaintiff remediless, allowing the infringer to continue to profit under the protection of procedural formality”.

This reflects a harmonious interpretation of Section 12A of the Act by highlighting its mandatory nature while also recognising that, in situations where delay would constitute injury, parties have the option to establish before the Court that the matter requires urgent interim relief to bypass the mandatory step of mediation.

Conclusion

The judicial pronouncements and the interpretation of Section 12A of the Act have brought about clarity and helped in forming a framework for the effective implementation of the provision. The judgments maintain mediation’s voluntary nature, while making initiation mandatory. The Courts have upheld the legislative intent to promote alternate dispute resolution, reduce the increasing caseload in Courts and at the same time providing for exceptions to bypass the mandatory step of mediation in cases where urgent interim relief is required.

While pre-litigation mediation has its significance, however, unless it is designed to specific case types, party acceptance, and improvised institutional capacity and infrastructure, the desired results may not be achieved. Pre-litigation mediation thus holds the potential to transform India’s commercial dispute resolution framework into a system that prioritises dialogue over dispute.

[6] (2025) 9 SCC 424
[7] (2025) 9 SCC 424

This newsletter has been contributed by :

Priya Kale, Partner & Abdul Rahman, Associate, Dua Associates, Bangalore

For further information contact :

Priya Kale, Partner, Dua Associates, Bangalore
Email: priya@duaassociates.com

Stay connected with Dua Associates
www.duaassociates.com



advice before acting on any information or views expressed herein. Receipt of this newsletter shall not be construed as an attempt to advertise or solicit business in any manner whatsoever. For private circulation to the addressees only. This is not a Spam mail. You have received this mail because you have either requested for it and/or your name has been added to our mailing list. In case this mail doesn't concern you, please unsubscribe from mailing list.