

**Order below Exhibit-16 in
Commercial Suit No. 1 of 2022**

Appearance :

On behalf of the plaintiff : Ld. Adv. Shree H. R. Dhoriyani.

On behalf of the defendant No. 1 : Ld. Adv. Mr. S. R. Upadhyay.

On behalf of the defendant No. 2/1 & 2/2 : Ld. Adv. Mr. V. C. Jani.

On behalf of the defendant No. 3 : Ld. Adv. Mr. Shree S. Y. Theba.

[1] The defendant No. 3 has filed this application under Order-I, Rule-10 of the Code of Civil Procedure, 1908; and prayed that the name of the defendant No. 1 may be deleted from the array of the parties; and such further and other orders may be passed as the Court may deem fit and proper.

[2] Heard the Ld. Adv. for the parties. Perused the record and proceedings. Considering the relevant provisions of law.

[3.1] The Ld. Adv. for the defendant No. 3 has orally argued encircling the provisions of Order-I, Rule-10 of CPC and Section-12-A of the Commercial Courts Act, 2015 that there is specific and stringent provision of mediation; that as per the ratio laid down in the case of M/s. Patil Automation Private Ltd., the provision of Sec. 12-A is mandatory, and plaint must be rejected as per the direction of the Hon'ble Supreme Court; that the said direction is effective from 20/08/2022 and the present suit has been filed then after; therefore, as per the direction the suit against the defendant No. 1 may be dismissed. Ultimately, prayed to allow this application.

[3.2] The Ld. Adv. for the plaintiff has filed their written arguments at Exh.-20. Considered the arguments. The Ld. Adv. for the plaintiff has orally argued reiterating the written arguments. Further argued that all the defendants are members of a family; therefore, the defendant No. 2/1 was joined as a party before the Mediation Center. Ultimately, prayed to reject this application.

[4] Considering the pleadings, there is dispute between the Umiya Tea Pvt. Ltd. and the plaintiff; that the defendant No. 3 is distributing in the area where so called distribution ship was of the plaintiff. The plaintiff has prayed for perpetual injunction against the defendant No. 3.

[5] In light of the provisions of Sec. 12 (1) of the Commercial Courts Act, 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 Govt. Now considering the Medication Report produced by the plaintiff at Mark-3/22, the mediation application of the plaintiff was non-starter. In column No. 3 – “*Umiya Tea Pvt. Ltd. its Director Mr. Hiteshbhai Sandiya*” is the opposite party. It transpires that the defendant No. 3 was not shown as opposite party in the application before the Mediation Center. Therefore, the plaintiff has not exhausted the remedy of pre-institution mediation with the defendant No. 3. The Ld. Adv. for the plaintiff has argued that the defendants are family members; therefore, one of them had been shown as opponent before the Mediation Center. Considering the nature of suit, pleadings and the provisions of Sec.-12(1) of the Act, the defendants being separate business entity, they must be a party in pre-institution mediation irrespective of the relations between them.

[6.1] The provisions of Order-1 Rule-10(2) of the Code of Civil Procedure, 1908 read as under :

- (i) *either on application or sue motu;*
- (ii) *the Court may at any stage of the proceedings;*
- (iii) *on terms as may appear to be just;*
- (iv) *Court may strike out the party improperly joined or may add party who ought to have been joined as plaintiff or defendant.*
- (v) *the person to be added whose presence before the Court*

may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

[6.2] In the case of **M/s. Patil Automation Pvt. Ltd.**¹, the Hon'ble Apex Court has laid down the following ratio in para-84.

“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 sue moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20/08/2022 so that concerned stake holders become sufficiently informed. Still further, we 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 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.”

[6.3] The present suit has been filed on 19/11/2022. As discussed above in para-[5], the defendant No. 1 was not a party in pre-litigation mediation. Therefore, the plaintiff has violated the provisions of Sec.-12-A of the Act. On the other hand, the plaintiff has applied for pre-litigation mediation with the defendant No. 2, i.e. Umiya Tea Pvt. Ltd. through its Director Mr. Hiteshbhai Sanandiyas as per the Mediation Report produced at Mark-3/1. Therefore, it shall meet with the ends of justice, if the defendant No. 3 is struck out under the provisions of Order-I, Rule-10(2)(iv) of CPC. Hence, the following order is passed in the interest of justice.

-:: ORDER ::-

1 M/s. Patil Automation Pvt. Ltd. V/s. Rakheja Engineers Pvt. Ltd. reported in 2022 AIJEL SC 0-69698

- (a) The application at Exh.- 16 is hereby allowed.
- (b) The defendant No. 3 – Labhuben Khimjibhai Sanandiya, R/o. Sardar Main Road, Sudhara Street, Morbi is hereby ordered to be struck out.
- (c) The plaintiff to amend the plaint and to submit the amended plaint accordingly.
- (d) No order as to costs.

Pronounced in the open Court today, on this 12th day of January, 2023.

Halvad.

Date : 12/01/2023.

(Anil Nanalal Gajjar)

Principal Senior Civil Judge,
Halvad, Dist. Morbi. (GJ-01166)