

**Order below Exhibit-17 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. 1 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. 1 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 the defendant No. 1 is not a necessary party and misjoinder; 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.-21. 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.

[4.1] Considering the pleading and relief prayed by the plaintiff, not a singly relief has been prayed against the defendant No. 1. The plaintiff has pleaded that in the year 1999, the plaintiff came in touch with the defendant No. 1 who was doing business in the name of Umiya Tea Packing; that the defendant No. 1 allotted distributorship; that in the year 2012, the said firm converted as Umiya Tea Private Limited. Further pleaded that the defendant No. 1 is director of the Umiya Tea Pvt. Ltd.; that there was dispute between the defendant Nos. 1 & 2 and the plaintiff and settled by intervention of plaintiff's maternal uncle (*Masa*) and three other mediators including distributors of other company.

[4.2] Considering the heading of the suit, two directors, i.e. defendant No. 2/1 - Hiteshbhai Khimjibhai Sanandiya and defendant No. 2/2 - Dineshbhai Valjibhai Sanandiya has been joined as directors of the Umiya Tea Pvt. Ltd., and the defendant No. 1 has been joined as a separate party. On the contrary, the plaintiff has pleaded in para-(1) of the plaint, on page No. 4 (last four lines) that the defendant No. 1 is director of the Umiya Tea Pvt. Ltd. As pleaded in para-2 of the plaint, on page No. 5, the settlement between the parties has been produced at Mark-3/1. Considering the same, it transpires that there is no signature of the defendant No. 1 as director.

[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. 1 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. 1. 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 **Kisan Uchattar Madhyamik Vidhyalay Samiti**<sup>1</sup>, the Honourable High Court has held that Provisions of Order-1 Rule 10 (2) of the Code clearly empower the Court to implead any person as party suo motu, who ought to have been joined, whether, as plaintiff or defendant or whose presence before the court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit.

[6.3] That is to say that the necessary or property party may be joined.

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<sup>1</sup> Kisan Uchattar Madhyamik Vidhyalay Samiti, Deoria V/s. Additional District Judge reported in AIR 1989 ALL 168

**Necessary Party** : In the case of *Chandra Bhan*<sup>2</sup>, the Hon'ble High Court has held that persons who ought to have been joined as parties are called necessary parties, these persons in whose absence the Court will not be able to give the effective decree at all.

**Proper Party** : The Hon'ble Apex Court has held in case of *Mumbai International Airport Pvt. Ltd.*<sup>3</sup> that the property party is a party who, though not a necessary party, as a person whose presence would enable the Court to completely, effectually and adequately adjudicate upon all the matters in dispute in the suit. Though he may not be a person in favour of or against whom the decree is to be made.

[7.1] In the case of *M/s. Patil Automation Pvt. Ltd.*<sup>4</sup>, the Hon'ble Apex Court has laid down the following ratio in para-84.

*“We declare that Section 12A of the Act is mendatory 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.”*

[7.2] The present suit has been filed on 19/11/2022. As

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2 Chandra Bhan V/s. Misrimal reported in AIR 1955 Rajasthan 11

3 Mumbai International Airport V/s. Regency Convention Centre & Hotels Pvt. Ltd. reported in AIR 2010 SC 3109 (3112)

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

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 Sanandiya as per the Mediation Report produced at Mark-3/1. As per above para-[6.1] to [6.3] and the pleadings as well as relief of the suit, the defendant No. 1 is neither necessary or property party. Therefore, it shall meet with the ends of justice, if the defendant No. 1 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 ::-**

- (a) The application at Exh.- 17 is hereby allowed.
- (b) The defendant No. 1 – Rameshbhai Valjibhai Sanandiya, R/o. 2, Sai Society, 150 Ft. Ring Road, Behind West Zone Big Bazar, Rajkot 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 12<sup>th</sup> day of January, 2023.

Halvad.

Date : 12/01/2023.

**(Anil Nanalal Gajjar)**

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