

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
(COMMERCIAL DIVISION)

Present :
THE HON'BLE JUSTICE ARINDAM MUKHERJEE

IA GA NO.2 of 2022

In

CS 223 of 2022

RAJGARIA TIMBER PRIVATE LIMITED
VS.
BHOLA NATH SHAW

For Plaintiff	: Mr. Arindam Halder, Mr. Rohit Banerjee, Ms. Sananda Ganguli, ...Advocates
For the Defendant	: Ms. Sutapa Sanyal Advocate
Last Heard on	: 17.01.2024.
Judgment on	: 31st January, 2024.

Arindam Mukherjee, J:

1. The plaintiff while instituting this suit for recovery of unpaid price of goods sold and delivered had prayed for dispensation of the formalities under Section 12A of the Commercial Courts Act, 2015 (hereinafter referred to as 'the said Act') on the ground that the plaintiff contemplate

an urgent interim relief in as much as the defendant is attempting to sell and liquidate his assets to third parties in order to defraud his creditors including the plaintiff. The pleading in support of such contemplation is in paragraph 25 of the plaint which is set out hereinunder for convenience:-

“The plaintiff has come to learn from the business community that the defendant is attempting to sell and liquidate its asset to 3rd Parties in order to defraud his creditors. There are huge number of creditors of the defendant in the market. The defendant is also enlarged on anticipatory bail. Therefore, there is a necessity for seeking immediate urgent interim relief from this Hon’ble Court. Hence the plaintiff prays for dispensation in compliance of Section 12 A Commercial Courts Act, 2015. A copy of the order dated August 3, 2022 passed by this Hon’ble Court in CRM (A) 3711 of 2022 is annexed hereto and marked with letter “H”.”

The plaintiff thereafter filed an application inter alia for attachment before judgment and prayed for interim orders. The prayer for interim order was however, rejected as will appear from an order dated 22nd September 2022.

2. The sole defendant has taken out this application for revocation of leave granted by which the mandatory provisions of pre-institution, mediation had been dispensed with and prayed for rejection of the plaint for non-compliance of such mandatory provisions. The defendant says that the averments in the plaint allegedly in support of contemplation of urgent interim relief are vague and without any particulars. The defendant says that on a plain reading of paragraph 25 of the plaint which is the only paragraph in support of plaintiff’s

contemplated urgent interim relief the allegation is that the defendant is attempting to sell and/or transfer his assets to defraud the creditors. No particulars of the assets which the defendant is allegedly attempting to sell are provided. On the basis of such vague averments dispensation of the mandatory requirements of Section 12A of the said Act ought not to have been dispensed with. The leave, therefore, should be revoked and the plaint should be rejected.

3. The defendant in support of his contention that the provisions of Section 12A of the said Act are mandatory has relied upon the judgment reported in ***(2022) 10 SCC 1 [Patil Automation Pvt. Ltd. vs. RAKHEJA Engineers Pvt. Ltd.]***.
4. The defendant has also alleged that the claim of the plaintiff is barred by limitation though no specific pleading in support thereof is in the application. The defendant also alleges that right to sue in favour of the plaintiff if any had accrued for the first time in March 2018 as alleged in paragraph 10 of the plaint. The plaintiff did not institute any suit at that juncture but did so only on 30th August 2022 after an elapse of more than four years. The right to sue on having accrued for the first time in March 2018 did not get deferred and as such without complying with the mandatory requirements of Section 12A of the said Act, the plaintiff could not have instituted this suit on alleged contemplation of urgent interim relief. Even at the time when ad interim order of attachment was prayed for by the plaintiff this Court did not accept the urgency pleaded by the plaintiff and as such by an order dated 22nd September 2022 turned down the prayer for interim relief. This will

clearly indicate that no urgent interim relief was contemplated far or less required to be granted to the plaintiff in the facts of the instant case.

5. The defendant in support of his contention that this right to sue on having accrued for first time does not get deferred has relied upon a judgment reported in **2016 13 SCC 1 [Sundaram Finance Ltd. vs. Noorjahan Beevi & Anr.]** which in turn relied upon the judgment in **(2011) 9 SCC 126 [Khatri Hotels Pvt. Ltd. & Anr. Vs. Union of India & Anr.]**. The defendant in support of his contention that the suit is barred under the provisions of Order 7 Rule 11 of the Code of Civil Procedure, 1908 (in short CPC) and is, therefore, required to be dismissed has relied upon a judgment reported in **2020 (7) SCC 366 [Dahiben vs. Arvinbhai Kalyanji Bhanusali (Gajra) (dead) through Legal Representatives and Others]**.
6. The defendant has also relied upon a recent judgment of this court delivered in Sanjay Kumar Mishra v. M/s. Godavari Commodities Ltd. & Others dated 16th February, 2023 to urge that there existed no contemplation of urgent interim relief when the suit was instituted.
7. The plaintiff on the other hand contends that the defendant defaulted in making payment as a result whereof the plaintiff apart from issuing notices demanding the payment had lodged a First Information Report (in short FIR) with Belegghata PS pursuant to which a police case being Belegghata P.S Case No.51/2022 dated 20.05.2022 was registered. The defendant obtained anticipatory bail. In the said bail application the defendant admitted the last transaction to have been made on 3rd

October, 2021. The plaintiff's claim, therefor, cannot be contended to be a time barred one.

8. The plaintiff also says that after obtaining the anticipatory bail the defendant through various sources approached the plaintiff for a settlement of the dispute. The defendant agreed to liquidate the principal sum in excess of Rs.84 Lakhs in installments. In order to show bona fide the defendant in terms of such agreement paid a sum of Rs.1 lakh to the plaintiff on 16th August, 2022. Subsequent thereto, no further payments were, however, made by the defendant. The defendant, therefore, according to the plaintiff is in involved circumstances and is unable to pay its creditors including the plaintiff. Due to failure on the part of the defendant to make subsequent payment the settlement arrived at had fallen through which compelled the plaintiff to approach this Court.
9. Prior to instituting this suit the plaintiff came to know from different sources from the commercial world that the defendant was attempting to sell its properties and assets to defraud his creditors like the plaintiff. The defendant has innumerable creditors and with the motive to delay and defeat a decree which was inevitable in favour of the plaintiff, the defendant was trying to deal with and dispose off his assets. The conduct of the defendant therefore gave rise in the mind of the plaintiff that the defendant if not prevented immediately shall take such steps and/or if not further steps to delay and defeat the plaintiff's principal claim in excess of Rs 83 lakhs.

10. This prompted the plaintiff for dispensation of formalities under Section 12A of the said Act.
11. This Court upon being satisfied with the prima facie case made out by the plaintiff in support of its contemplation of urgent interim relief admitted the plaint by dispensing with the mandatory requirements under 12A of the said Act.

Even though the plaintiff has not been able to obtain *ex parte* ad interim order in its interlocutory application that does not according to the plaintiff mean that the plaintiff's contemplation of urgent interim relief was unfounded. The plaintiff has relied upon a judgment reported in 2022 SCC OnLine Del 3529 and a Division Bench of this Court delivered on 25.08.2023 in APD 3 of 2021 (Gavrill Metal Pvt . Ltd. vs. Maira Fabricators Pvt. Ltd.)

12. The core issue in this application which requires to be decided is whether on the basis of the averments made in the plaint, the plaintiff has been able to prima facie demonstrate its contemplation of an urgent interim relief. This issue has been dealt with in a very recent judgment of the Hon'ble Supreme Court delivered on 13th October 2023 in ***Yamini Manohar vs. TKD Keerthi [2023 SCC OnLine SC 1382]***. In Yamini Manohar (supra), the Hon'ble Supreme Court has held in paragraph 7 and 8 thereof:-

"7. We are of the opinion that when a plaint is filed under the CC Act, with a prayer for an urgent interim relief, the commercial court should examine the nature and the subject matter of the suit, the cause of action, and the prayer for interim relief. The prayer for

urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12A of the CC Act. The facts and circumstances of the case have to be considered holistically⁷ from the standpoint of the plaintiff. Non-grant of interim relief at the ad-interim stage, when the plaint is taken up for registration/admission and examination, will not justify dismissal of the commercial suit under Order VII, Rule 11 of the Code; at times, interim relief is granted after issuance of notice. Nor can the suit be dismissed under Order VII, Rule 11 of the Code, because the interim relief, post the arguments, is denied on merits and on examination of the three principles, namely, (i) prima facie case, (ii) irreparable harm and injury, and (iii) balance of convenience. The fact that the court issued notice and/or granted interim stay may indicate that the court is inclined to entertain the plaint”.

“8. Having stated so, it is difficult to agree with the proposition that the plaintiff has the absolute choice and right to paralyze Section 12A of the CC Act by making a prayer for urgent interim relief. Camouflage and guise to bypass the statutory mandate of pre-litigation mediation should be checked when deception and falsity is apparent or established. The proposition that the commercial courts do have a role, albeit a limited one, should be accepted, otherwise it would be up to the plaintiff alone to decide whether to resort to the procedure under Section 12A of the CC Act. An ‘absolute and unfettered right’ approach is not justified if the pre-institution mediation under Section 12A of the CC Act is mandatory, as held by this Court in Patil Automation Private Limited (supra). The words ‘contemplate any urgent interim relief’ in Section 12A(1) of the CC Act, with reference to the suit, should be read as conferring power on the court to be satisfied. They suggest that the suit must “contemplate”, which means the plaint, documents and facts should show and indicate the need for an urgent interim relief. This is the precise and limited exercise that the commercial courts will undertake, the contours of which have been explained in the earlier paragraph(s). This will be sufficient to keep in check and ensure that

the legislative object/intent behind the enactment of section 12A of the CC Act is not defeated.”

13. On a reading of the said judgment Yamini Manohar (supra) it is clear that the Court while dealing with a prayer for dispensation of the mandatory requirement of Section 12A of the said Act on the ground of urgent interim relief is given an authority to make an enquiry though limited at the stage of presentation of the plaint. The Court should examine the nature and subject matter of the suit, cause of action and the grounds for interim relief seeking dispensation of the formalities of Section 12A of the said Act. A note of caution is also given by the Hon'ble Supreme Court in the said judgment that the prayer of urgent interim relief seeking dispensation of the formalities of Section 12A of the said Act should not be a disguise or mask to wriggle out of and get over Section 12A of the said Act. In Yamini Manohar (supra) the Hon'ble Supreme Court has also held that refusal to pass any interim order in any interlocutory application filed in a suit after seeking dispensation of Section 12A of the said Act does not ipso facto mean that the plaintiff is not entitled to any interim relief consequent upon which the dispensation of 12A formalities was extended inappropriately or requires to be revoked.
14. Applying the ratio laid down in Yamini Manohar to the facts of the instant case it is found that on a meaningful reading of the plaint as a whole without being confined to paragraph 25 thereof which is vague as correctly submitted by the defendant it reveals that the plaintiff had tried to realize money at the earliest keeping in mind the pandemic situation. Criminal case was instituted which led to a settlement

between the parties. The defendant may be as submitted by the plaintiff to avoid the rigours of the criminal proceedings promised to pay but did not honour such terms after initial payment as by that time the defendant has been able to come out of the criminal proceedings showing the agreement by which he had promised to pay and had made initial payments. All these facts as pleaded are to be taken as true and correct at this stage. It is, therefore, apparent that the plaintiff did not sleep on his rights after the cause of action to recover money from the defendant as has been alleged in the plaint accrued. The subsequent agreement pleaded cannot be ignored at this stage unless evidence contrary thereto is placed before the Court. The plaintiff as appears from record has approached the Court by filing the instant suit within a reasonable period from realizing that the defendant is not going to honour the agreement by which he had promised to pay. The cause of action subsequent to the breach of such agreement is fresh cause of action and not one by which it will appear that the plaintiff after the right to sue accrued in its favour for the first time did not approach the Court in contemplation of urgent interim relief to seek dispensation of the formalities under Section 12A of the said Act.

15. In the light of the discussion above the ratio laid down in Sundaram Finance (supra) and Khatri Hotels (supra) cited by the defendant is not applicable in the facts of the case though there can be no quarrel as to proposition laid down therein. All judgments prior to Yamini Manohar (supra) as cited by the plaintiff have to be considered in the light of the ratio laid down in Yamini Manohar (supra). These judgments are,

therefor, not discussed in details as to the applicability of the ratio laid down therein to the facts of the instant case.

16. The point of limitation urged by the defendant though not specifically pleaded in the application is a mixed question of law and fact. In view of the averments made in the plaint it cannot be said at this stage that the plaintiff's claim is ex facie barred by limitation.

As a consequence of the discussion hereinabove GA 2 of 2022 filed by the defendant fails and is accordingly dismissed.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)