
(2021) 10 BOM CK 0006

Bombay High Court

Case No: Commercial Appeal (L) No. 11950 Of 2021

Deepak Raheja

APPELLANT

Vs

Ganga Taro Vazirani

RESPONDENT

Date of Decision: Oct. 1, 2021

Acts Referred:

Code Of Civil Procedure, 1908 " Section 9, 80, Order 7 Rule 2(a), Order 15A, Order 20, Order 37 Rule 2(3)#Commercial Courts (Pre-Institution Mediation And Settlement) Rules, 2018 " Rule 2(c), 3, 3(1), 3(3), 4, 5, 6, 7, 11#Negotiable Instruments Act, 1881 " Section 138, 143A, 148#Commercial Courts Act, 2015 " Section 2(1)(c), 12A, 12A(1), 12A(2), 12A(3) #Arbitration And Conciliation Act, 1996 " Section 11, 17, 23, 30(4)#Indian Partnership Act, 1932 " Section 69#Specific Relief Act, 1963 " Section 6, 10, 11, 14, 15, 16, 19, 20, 21, 25, 41#Right To Information Act, 2005 " Section 2(h), 4(c), 4(1)(v), 4(2), 4(3)

Citation: (2021) 10 BOM CK 0006

Hon'ble Judges: Nitin Jamdar, J; C. V. Bhadang, J

Bench: Division Bench

Advocate: Gautam Ankhad, Sunny Shah, Viral Dilip Shukla, Priti Viral, Shukla, Zal Andhyarujina, Ishani Khanwilkar, Ativ Patel, Darshit Dave

Final Decision: Disposed Of

Judgement

Nitin Jamdar, J

1. The Respondent filed a commercial summary suit in the Commercial Division of this Court for a decree against the Appellant for Rs.5.54 crores

with accrued interest. In this suit, the Respondent took out a summons for judgment. By the impugned order, the learned Single Judge, as Commercial

Division, disposed of the summons for judgment granting leave to defend to the Appellant but upon a condition of depositing Rs.5.54 crores. Being

aggrieved, the Appellant has filed this Commercial Appeal.

2. The Appellant-Defendant requested the Respondent-Plaintiff for rendering financial assistance and a business loan. The Respondent advanced a

sum of Rs.5.00 crores to the Appellant. The loan was to be paid along with interest at 19% per annum. The Respondent issued a cheque for Rs.5.00

crores dated 1 January 2011 in favour of the Appellant. The Appellant encashed the cheque. The Appellant issued a Bill of Exchange dated 3 January

2011 in favour of the Respondent as a security in the sum of Rs.5.00 crores. The Appellant paid interest on the loan to the Respondent as agreed till 9

December 2016. On 9 December 2016, the Appellant wrote to the Respondent to reduce interest to 12% per annum and acknowledged the loan of

Rs.5.00 crores. The Appellant, through this communication, sought confirmation of the revised terms. The Appellant stated that Rs.27,22,192/- will be

paid as interest at the rate of Rs.12% per annum. The Appellant gave an undertaking on 20 December 2016 acknowledging the loan. The Appellant

issued two post-dated cheques, one dated 1 January 2018 for the sum of Rs.5 crore and the other dated 31 December 2017 for Rs.54 lakh towards

principal and interest, respectively. The Respondent deposited the cheques with the bankers on 26 March 2018. The cheques were dishonoured on 27

March 2018 with the remark ""Funds Insufficient"". The Respondent issued notice through his advocate to the Appellant on 17 April 2018 under Section

138 of the Negotiable Instruments Act, 1881. The Appellant made no payment.

3. The Respondent filed Commercial Summary Suit No.972/2019 on 6 July 2019 seeking a decree against the Appellant in the sum of Rs.5.54 crores

with an interest of an amount of Rs.1,49,75,342.47 at the rate of 12% from 1 January 2017 till 30 June 2019. Writ of summons was served, and the

Appellant filed an appearance under Order XXXVII Rule 2(3) of Code of Civil Procedure, 1908. Summons for Judgment bearing No.45/2019 was

filed in the Summary Suit on 16 August 2019. The delay in filing the reply to the summons for judgment was condoned on 10 December 2019. The

Appellant filed an affidavit in reply on 11 December 2019. The Respondent filed a rejoinder on 18 December 2019 and a sur-rejoinder by the

Appellant on 10 January 2020. When the matter came up on 4 November 2020 before the Commercial Division (the learned Single Judge), it was

adjourned at the request of the Appellant to explore settlement. Since the settlement did not take place, the matter was heard on merits by the learned

Single Judge.

4. Before the learned Single Judge, the Appellant advanced various arguments. First, the suit is barred under the Maharashtra Money Lending

(Regulation) Act, 2014. Second, the suit is barred for non-compliance with Section 12A of the Commercial Courts Act. Third, the plaint does not

comply with Rule 2(a) of Order VII of the Code of Civil Procedure. The learned Single Judge rejected all the contentions raised by the Appellant. The

learned Single Judge observed that the suit is not barred under the provisions of the Act of 2014, nor it can be said that the plaint does not comply with

Rule 2(a) of Order 7 of C.P.C. The learned Single Judge observed that Section 12A of the Act of 2015 is not mandatory and is procedural and the

substantial compliance of the same is enough. The learned Single Judge opined that Section 12A is a procedural provision, and there is no absolute

embargo on instituting the suit unless Plaintiff exhausts the remedy of mediation. The learned Judge opined that it is clear from Section 12A(1) that

where there is urgent interim relief, a party is not required to exhaust the remedy of mediation, which itself shows that the provision is not mandatory.

The learned Single Judge further observed that it would be futile to drive the parties to pre-institution mediation when they unsuccessful in resolving

the dispute. The learned Single Judge observed that if Section 12A is held mandatory, it will negate the purpose of the Act of 2015 of ensuring speedy

disposal of commercial causes. The learned Single Judge held that the doctrine of substantial compliance would have to be invoked, and it is open to

Defendant to waive the option to go for mediation. The learned Single Judge also held that the objection must be taken at the earliest. Then the

learned Single Judge considered the position under Section 80 of the Code of Civil Procedure with Section 12A and found them to be *pari materia* to

invoke the concept of waiver. The learned Single Judge held that on parity of reasoning in the facts and circumstances, Defendant had waived the

privilege of asking Plaintiff to invoke the remedy of pre-institution mediation. After having interpreted the provisions, the learned Single Judge found in

the facts of the case that since the Appellant had not raised any objection earlier, the provision under Section 12A is deemed to have been waived.

5. Accordingly, the learned Single Judge by the impugned order dated 16 February 2021 disposed of the summons for judgment granting conditional

leave upon the Appellant depositing a sum of Rs.5.54 crores within twelve weeks and upon this condition being complied with, leave was granted to

defend the suit and to file written statement within eight weeks from the date of deposit. If the condition of deposit was not complied with within the

stipulated period, the Respondent- Plaintiff was permitted to apply for an *ex parte* decree.

6. Being aggrieved by the judgment and order dated 16 February 2021, the Appellant is before us in this commercial appeal.

7. We have heard Mr. Gautam Ankhad for the learned Advocate Appellant and Mr. Zal Andhyarujina, learned Senior Advocate for the Respondent.

8. The learned Counsel for the Appellant has clarified that the appeal is being prosecuted on questions of law, and there is not much dispute regarding

the events that have taken place.

9. The main controversy before us is whether Section 12A of the Act of 2015 is mandatory or directory in nature.

10. It is not in dispute that the suit filed by the Respondent does not seek any urgent interim relief and that the Respondent has not approached the

Legal Services Authority to exhaust the remedy under Section 12A of the Act of 2015 before instituting the present suit. When the suit was filed on 6

July 2019, Section 12A, which was retrospectively brought into operation on 3 May 2018, was already in force. The Commercial Courts (Pre-

Institution Mediation and Settlement) Rules of 2018 were also notified. The Appellant raised the objection based on Section 12A of the Act at the Summons for Judgment stage.

11. Section 12A of the Act of 2015 reads thus:

“12A. Pre-Institution Mediation and Settlement.” (1) 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.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987),

for the purposes of pre- institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government

under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under

sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for

the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the

dispute and the mediator.

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4)

of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

12. The Appellant contends as follows. The legislative scheme of Section 12A makes it clear that Section 12A is mandatory, and there is no scope for

construing it as a procedural provision. Section 12A is a part of a legislative scheme by which simultaneous amendments have been carried out in

various other Acts such as the Arbitration Act and the Code of Civil Procedure. No reference can be made to Section 80 of C.P.C. as these two

provisions operate in different fields. Even otherwise, Section 80 of C.P.C. is mandatory as the decisions of the Apex Court in the cases of *Bihari*

Chowdhary v. State of Bihar (1984) 2 SCC 627; *Amar Nath Dogra v. Union of India* AIR 1963 SC 424; *State of Andhra Pradesh v. Gundugola*

Venkata Suryanarayana Garu AIR 1965 SC 11; and *State of A.P. v. Pioneer Builders* (2006) 12 SCC 19, has laid down. Once the provision of

Section 12A is mandatory, there is no question of invoking any concept of substantial compliance or waiver. The reading of Section 12A of the Act of

2015 along with Section 9 of C.P.C. demonstrates that the suit was barred. The Appellant has relied upon the decisions of the Calcutta High Court in

the case of *Laxmi Polyfab Pvt. Ltd. v. Eden Realty Ventures Pvt. Ltd.* 2021 SCC Online Cal 1457 and *Dredging and Desiltation Company Pvt. Ltd.*

v. Mackintosh Burn and Northern Consortium 2021 SCC Online Cal 1458. The Appellant has also relied upon the decision in the case of *Awasthi*

Motors v. Energy Electricals Vehicle 2021 SCC Online All 256 and the order passed by the Supreme Court extending the limitation in *Cognizance for*

Extension of Limitation, In Re 2020 (9) SCC 468. The Appellant has also relied upon the decisions of the Apex Court in the case of *Sharif-ud-din v.*

Abdul Gani Lone (1980) 1 SCC 404 and *Union of India v. A.K. Pandey* (2009) 10 SCC 552. The learned Counsel submits that there is a difference

between the scheme under Section 80 of C.P.C. and Section 12A of the Act of 2015. Regarding Section 69 of the Indian Partnership Act, the

Appellant has placed reliance on the decision of the Apex Court in the case of *SCG Contracts (India) Private Ltd. v. K.S. Chamankar Infrastructure*

Private Limited(2019) 12 SCC 210. The Appellant contends that thus, for not following the mandate of Section 12A of the Act, the plaint must be returned for non-compliance.

13. The Respondent argues that Section 12A is not mandatory and is directory. The Respondent contends as follows. Section 12A is analogous to

Section 80 of the Code of Civil Procedure. A notice under Section 80 can be waived, and if such notice is waived, the plaint need not be returned for

compliance. Though the provision of Section 80 may be mandatory and must be enforced, it can be waived by the authority for whose benefit the

provision is enacted. This view is taken by this Court in Chandrashekhar Purushottam Rathi v. State of Maharashtra 2002(2) Mah LJ 181and ALAR

Vellayan Chettiar and Ors. v. Government of the Province of Madras and Anr. AIR 1947 PC 197. Section 12A has to be interpreted keeping in mind

the well-settled canons of statutory interpretation. To determine whether this provision is directory or mandatory, first, it will have to be seen whether

there are any consequences provided for non-compliance. If a failure to adhere to a provision has no consequences, the provision cannot be

considered mandatory. The scheme of the Act of 2015 nowhere provides for any consequences for non-compliance with Section 12A. Second, if the

statutory requirement is considered to be fulfilled if there is substantial compliance, then such provision will have to be considered as a directory

provision. Third, if non-compliance can be waived; then, it cannot be considered a mandatory provision. Section 12A is purely procedural, and the

procedural law is subservient to the substantive law in aid of justice, and the mediation is always non-binding and procedural. The alternate dispute

resolution process can only be with the consent of both sides, and therefore, it cannot be considered as substantive law. Reliance is placed on the

decision in Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. Pvt. Ltd. and Ors. (2010) 8 SCC 24 and Salem Advocate Bar

Association, T.N. v. Union of India (2003) 1 SCC 49 It is contended that, therefore, it will have to be held that Section 12A is not mandatory and no

other view is possible.

14. The scheme of Section 12A of the Act (reproduced earlier) is thus. A commercial suit of the specified value that does not contemplate any urgent

interim relief shall not be instituted unless the party exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as

may be prescribed by Rules. The Central Government will authorise the authorities constituted under the Legal Services Authorities Act, 1987 for the

purposes of pre- institution mediation. The mediation process is to be completed within a period of three months from the date of application. The

period may be extended for a further period of two months with the consent of the parties. The period of pre-institution mediation shall not be

computed for the purpose of limitation under the Limitation Act, 1963, and Section 12A(3) excludes the period taken for mediation from the limitation

period for filing the suit. Under this Section, the settlement arrived at shall have the same status and effect as if it is an arbitral award under

Arbitration and Conciliation Act, 1996.

15. The guidance to the question as to which principles of interpretation of statutes need to be applied to the provision at hand, is found in the decision

of the Supreme Court in *Ambalal Sarabhai Enterprises Ltd. v. K.S. Infraspace LLP. & Anr.* (2020) 15 SCC 585. The appellant before the Supreme

court was a plaintiff in commercial suit where the respondents - defendants had contended that the suit was not maintainable as the dispute involved

therein could not be termed as a commercial dispute within the meaning of Section 2(1)(c) of the Commercial Courts Act. The question reached the

Supreme Court for consideration. On the approach to be adopted while interpreting the Act of 2015, the Supreme Court made the following

observations, which relevant to the topic at hand.

13. The learned Senior Advocate for the appellant would, however, contend that a strict interpretation as in the case of taxing statutes would not be

appropriate in the instant case where the issue relates to jurisdiction. In that regard, the learned Senior Advocate has referred to the Statement of

Objects and Reasons with which the Commercial Courts Act, 2015 is enacted so as to provide speedy disposal of high-value commercial disputes so

as to create the positive image to the investors world about the independent and responsive Indian legal system. Hence, he contends that a purposive

interpretation be made. It is contended that a wider purport and meaning is to be assigned while entertaining the suit and considering the dispute to be

a commercial dispute. Having taken note of the submission, we feel that the very purpose for which the CC Act of 2015 has been enacted would be

defeated if every other suit merely because it is filed before the Commercial Court is entertained. This is for the reason that the suits which are not

actually relating to commercial dispute but being filed merely because of the high value and with the intention of seeking early disposal would only clog

the system and block the way for the genuine commercial disputes which may have to be entertained by the Commercial Courts as intended by the

lawmakers. In commercial disputes as defined, a special procedure is provided for a class of litigation, and a strict procedure will have to be followed

to entertain only that class of litigation in that jurisdiction. If the same is strictly interpreted, it is not as if those excluded will be non-suited without any

remedy. The excluded class of litigation will in any event be entertained in the ordinary civil courts wherein the remedy has always existed.

36. A perusal of the Statement of Objects and Reasons of the Commercial Courts Act, 2015 and the various amendments to the Civil Procedure Code

and insertion of new rules to the Code applicable to suits of commercial disputes show that it has been enacted to provide an early disposal of high

value commercial disputes. A purposive interpretation of the Statement of Objects and Reasons and various amendments to the Civil Procedure Code

leaves no room for doubt that the provisions of the Act require to be strictly construed. If the provisions are given a liberal interpretation, the object

behind constitution of Commercial Division of Courts viz. putting the matter on fast track and speedy resolution of commercial disputes, will be

defeated. If we take a closer look at the Statement of Objects and Reasons, words such as "early" and "speedy" have been incorporated and reiterated. The object shall be fulfilled only if the provisions of the Act are interpreted in a narrow sense and not hampered by the usual procedural delays plaguing our traditional legal system.

(emphasis supplied)

Thus, the Supreme Court laid down that the provisions of the Act of 2018 are required to be strictly construed to aid the speedy disposal of

commercial cases, and liberal interpretation which will lead to needless clogging of the Court docket has to be avoided.

16. It is no doubt correct that if the plain meaning of the words of a statute leads to anomaly and absurdity, then the court can look into the purpose for

which the statute is enacted and try to reconcile the interpretation with the purpose of the statute. However, If the words of the statute are plain and

obvious and do not result in any anomaly, then the court must give effect to the words as used in the statute. The use of the word "shall" in a statute

generally raises a presumption that the provision is mandatory. This presumption can be rebutted by looking at the object and scope of the statute and

the consequences flowing from the construction. To displace the presumption, the intention of the legislature is to be considered.

17. On 29 January 2015, the Law Commission of India published the 233rd Report recommending establishing Commercial Courts and Commercial

Divisions and Commercial Appellate Divisions in the High Courts. The Report recommended establishing Commercial Courts and Commercial

Divisions in the High Court primarily to ensure speedy disposal of high-value commercial suits. The Report mentioned that though the reforms so far

aimed to improve the pace at which litigation is conducted in India, they do not make an effort to fundamentally alter the litigation culture in India. The

Report referred to how the litigation is conducted in commercial courts in other countries and stressed that the cases should be disposed of

expeditiously, fairly, and if there is a reduction in backlog, it will further the economic growth and increase the foreign investment.

18. Section 12A was introduced by way of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts

(Amendment) Act, 2018. The Statement of Objects of the (Amendment) Act, 2018 generally stated that the global economic environment has since

become increasingly competitive and to attract business at the international level, India needs to further improve its ranking in the World Bank's

'Doing Business Report, which, inter alia, considers the dispute resolution environment in the country as one of the parameters for doing business. It

referred to the economic development, which has prompted initiating legislative measures for speedy settlement of commercial disputes. Early

resolution of commercial disputes even of lesser value will create a positive image amongst the investors about the Indian legal system. The object

was also to reduce the specified value of commercial disputes and constitute commercial courts at the district level. As regards the introduction of

Section 12A, the Statement of Objects and reasons specifically stated as follows.

(v) to provide for compulsory mediation before institution of a suit, which no urgent interim relief is contemplated and for this purpose, to introduce the

Pre-Institution Mediation and Settlement Mechanism and to enable the Central Government to authorise the authorities constituted under the Legal

Services Authorities Act, 1987 for this purpose.

(emphasis supplied)

The use of the word 'compulsory' has to be noted.

19. Around the same time, with the object of improving the ease of doing business in India, the Parliament amended various other laws. By Specific

Relief (Amendment) Act, 2018, Sections 6, 10, 11, 14, 15, 16, 19, 20, 21, 25 and 41 of the Specific Relief Act, 1963 were amended and inserted. The

Statement of Objects and Reasons of this amending act shows that economic development has brought in enormous commercial activities in India,

which have prompted extensive reforms in the related laws to facilitate enforcement of contracts, settlement of disputes in a speedy manner.

Negotiable Instruments (Amendment) Act, 2018 inserted Sections 143A and 148 of the Negotiable Instruments Act, 1881 with a similar object.

Companies (Amendment) Act, 2019, changed various provisions of the Companies Act, 2013, extending greater ease of doing business to law-abiding corporates.

20. On 3 July 2018, the Central Government notified the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018. On 20 August

2018, the Parliament passed the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act,

2018.

21. By Notification S.O.No.332(E) dated 3 July 2018, the Ministry of Law and Justice in the exercise of Section 12A of the Act of 2015 authorizing

the State Authority and District Authority constituted under the Legal Services Authorities Act, 1987 for the purpose of pre-institution mediation and

settlement under Chapter III-A of the Act of 2015. The Main Mediation Monitoring Committee of Bombay High Court issued a Mediation Scheme on

15 February 2019. The Scheme laid down guidelines for effective implementation of Alternate Dispute Resolution mechanism with reference to

Section 12A of the Act of 2015.

22. Though the Respondent has sought to elaborate on the interpretation of Section 12A as procedural as it does not provide for a consequence and

has cited various decisions, we do not find that in view of the plain language of the statute, a discussion on hypothetical situations is warranted. The

plain grammatical meaning of the statute first has to be looked at. If there is any ambiguity, then further steps in aid of interpretation can be taken.

Section 12A(1) states that the 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. A plain and straightforward reading of the provision is clear. According to the Appellant, the consequence of the breach of Section 12A

is that the plaint will have to be returned.

23. The Respondents contend that compulsory pre-institution mediation will impede speedy resolution of disputes, and therefore holding Section 12A as

a mandatory provision will be against this legislative object, and thus this provision should not be constructed as mandatory. The contention of the

Respondent that compulsory mediation will impede speedy resolution of dispute overlooks the scheme and intent of section 12A, which shows that it is,

in fact, a measure in aid of speedy resolution of commercial disputes.

24. Section 12A does not come into play if the suit contemplates an urgent relief. If a commercial suit (of specified value) contemplates urgent relief, it

can be instituted in the court straightaway. Therefore, two classes of commercial disputes are contemplated under Section 12A. One in which an

urgent interim relief is not contemplated and second where urgent interim relief is contemplated. Section 12A provides different schemes for these

two classes of disputes. Where there is no urgent interim relief to first exhaust the remedy of pre-institution mediation. Where there is an urgent

interim relief contemplated to approach the court directly. The emphasis is that for a particular type of dispute particular kind of remedy is more

appropriate. Section 12A segregates commercial disputes depending on their urgency. Making segregation at the inception of a commercial dispute is

a considered legislative instrument to speed up the disposal of commercial disputes. Court adjudication is not the only type of dispute resolution

mechanism. Negotiations and mediation also resolve the dispute by finding a mutually acceptable solution. The parties can negotiate themselves or

through a private person or machinery provided under the statute. Once the authority conducts the mediation under Section 12A, the mutually

acceptable outcome can be enforced like an arbitral award.

For some disputes with urgent interim reliefs, adjudication in courts can be a suitable remedy, while for some disputes, resolution through mediation

can be more appropriate. Section 12A is recognition of this fact by the legislature. A clear legislative intent emerges from the plain reading of Section

12A that commercial dispute which contemplates an urgent interim relief, dispute resolution by Courts is primary, when there is no such interim relief

contemplated, pre-institution mediation for mutual resolution of disputes to be attempted first should be appropriate.

25. Along with the Act of 2015, the Code of Civil Procedure was also amended. The time limit for filing a written statement is stipulated, which is to

be strictly adhered to. The case management hearing is provided for recording framing of issues, list of witnesses, fixing the date of evidence, fixing

the date for filing written submissions, fixing the date for the oral hearing. The appeal from the orders passed by the Commercial Division to the

Commercial Appellate Division is restricted. In the case of Ambalal Sarabhai, the Supreme Court has referred to this scheme of the Act of 2015 as

under.

34. The Schedule to the Commercial Courts Act amends various provisions of the Code of Civil Procedure and thereby makes a significant departure

from the Code. After Order 13 of the Code, Order 13-A "Summary Judgment" has been inserted. Order 13-A contains the scope and

classes of suits to which Order 13-A applies, grounds for summary judgment, procedure to be followed, evidence for hearing of summary judgment,

orders that may be made by Court in such proceedings for summary judgment, etc. After Order 15 of the Code, Order 15-A "Case

Management Hearing" has been inserted. Order 15-A provides for first case management hearing (Rule 1); recording of oral evidence on a day-to-

day basis (Rule 4); powers of the court in a case management hearing (Rule 6); adjournment of case management hearing (Rule 7); consequences of

non-compliance with orders (Rule 8). By way of amendment, several rules have been incorporated to make the matters of commercial disputes on

fast track. In Order 20 of the Code "Judgment", Rule 1 has been substituted that within ninety days of the conclusion of arguments, the

Commercial Court/Commercial Division/Commercial Appellate Division to pronounce the judgment and copies thereof shall be issued to all the parties

to the dispute through electronic mail or otherwise.

35. Various provisions of the Act, namely, case management hearing and other provisions makes the court to adopt a pro-active approach in resolving

the commercial dispute. A new approach for carrying out case management and strict guidelines for completion of the process has been introduced so

that the adjudicatory process is not delayed. I have referred to the various provisions of the Act and the Schedule bringing in amendments brought to

the Civil Procedure Code to deal with the commercial disputes, only to highlight that the trial of the commercial dispute suits is put on fast track for

disposal of the suits expeditiously. Various provisions of the Act referred to above and the amendments inserted to the Civil Procedure Code by the

Schedule is to ensure speedy resolution of the commercial disputes in a time-bound manner. The intent of the legislature seems to be to have a

procedure which expedites the disposal of commercial disputes and thus creates a positive environment for investment and development and make

India an attractive place to do business.

(emphasis supplied)

Thus the Act of 2015 provides a fast track methodology for commercial disputes and section 12A now forms an integral part of the same.

26. The incentive to delay the court proceedings and not mediate partly arises from the delay in disposal of the matter. The Act of 2015 has also

brought in a new regime of costs by amending the Code of Civil Procedure. The costs imposed can be significant to be a deterrent. The court

considers various factors, such as the parties' conduct, to discourage dishonest defences. It is envisaged that when the commercial suits will get

disposed of faster with imposing substantial costs for frivolous defences, there would be fewer incentives for the defendants to delay the commercial

causes. Generally, the commercial suits that do not contemplate urgent interim relief are simplicitor money recovery suits. It is common knowledge

that the majority of such commercial disputes revolve around the rate of interest. Once the segregation under Section 12A takes place, and the

disposal of commercial causes speeds up, the incentive will be reduced, and there could be more incentive for resolution of disputes through mediation.

Keeping this long term perspective, legislature has enacted Section 12A as an intervention to boost speedy disposal of the commercial causes.

Therefore it cannot be said that Section 12A impedes the speedy resolution of commercial disputes.

27. It is not possible to accept the Respondent's contention that Section 12A is only a facility or an option given to the parties which a party can waive.

As we have discussed above, pre-institution mediation achieves a larger purpose of speedy resolution of commercial disputes. Section 12A is not a

facility but a mandate by the legislature. If no interim relief is being sought, before rushing to clog the court docket, mediation must be explored. In the

case of *Ambalal Sarabhai Enterprises*, the Supreme Court observed that the suits that are not actually relating to commercial dispute but being filed

merely because of the high value and merely intending to seek early disposal would only clog the system and block the way for the genuine

commercial disputes. Therefore speedy disposal of only those cases is to be considered which are specifically stated. Section 12A is intended also to

prevent clogging of dockets by non-urgent matters, and for those mediation could be more appropriate remedy. Therefore, the pre-institution mediation

under Section 12A is not a privilege or an option to a party.

28. The Respondent sought to contend that pre-institution mediation would be futile if the other party did not participate. It may be true that in some

cases, a party may not want to participate in pre-institution mediation, but then the expedited procedure and the resultant substantial costs would follow

if the defence is un-meritorious. Even if the other party does not participate in pre-institution mediation, the claimant is not prejudiced as the limitation

period is the same, and if any urgent interim relief is contemplated, the party can directly approach the Court. If the pre-institution mediation is

successful, it results in an award that can be enforced without the parties incurring any litigation cost. Section 12A does not take away the right to

institute the proceedings or the right of access to justice. It merely directs the parties to resort to another remedy before approaching the court. If

mediation is successful, the relief can be by way of an award. If the mediation is unsuccessful, the party can always approach the court. It can

approach the court even when urgent interim relief is contemplated. Therefore, the argument that Section 12A bars access to justice, is without any

merit.

29. Another enactment, the Arbitration & Conciliation (Amendment) Act, 2019, brought about a change in Sections 11, 17, 23 of the Arbitration &

Conciliation Act, 1996 as regards the establishment of an independent body for grading of arbitral institutions. This amendment has also reduced the

role of the courts in appointing the arbitrators. A slew of legislative amendments to the commercial laws in the country, brought about around the same

time, demonstrates an emphasis on exploring various means to speed up the resolution of commercial disputes. These amendments underscore the

need to change the traditional litigation oriented mindset to acknowledge that the mediation is also an effective tool to resolve the commercial disputes.

30. The learned Counsel for the Appellant is right in contending that the analogy of Section 80 of the Code of Civil Procedure is entirely inapplicable

for interpreting Section 12A. First, interpretation by analogy or referring to another provision would be resorted to if there was any doubt regarding the

plain meaning of the provision under consideration, which in the case at hand, there is none. Section 80 of the Code of Civil Procedure is also held to

be mandatory by the Supreme Court in *Bihari Chowdhary v. State of Bihar*(1984) 2 SCC 627, *Amar Nath Dogra v. Union of India* AIR 1963 SC 424,

State of Andhra Pradesh v. Gundugola Venkata Suryananrayana Garu AIR 1965 SC 11 and *State of A.P. v. Pioneer Builders*(2006) 12 SCC 119 , the

Supreme Court has consistently held that Section 80 of CPC, to be mandatory. On the aspect of the notice under Section 80 being waived, it has to be

noted that Section 80 only speaks of a notice, while Section 12A provides a self-contained methodology of dispute resolution. Therefore, Section 80 of

the Code cannot be considered as *pari materia* to Section 12A of the Act of 2015 in this aspect.

31. Even though the civil court has jurisdiction to try all suits of civil nature under Section 9 of Code of Civil Procedure, the jurisdiction of the civil

court can be expressly or impliedly as has been done in various statutes. Therefore, it cannot be contended that right to approach the civil court is an

unconditional and absolute right. Such right under Section 9 can always be regulated. Section 12A of the Act is such a provision which regulates the

right of the parties to have a civil dispute in terms of commercial causes adjudicated by the civil court (commercial court/commercial division).

32. On the purpose and object of Section 12A, an useful reference can be made to the debates in Lok Sabha and Rajya Sabha when the Commercial

Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 was moved in the Lok Sabha. These

have been placed on record by the Appellant. The Hon'ble Minister of Law and Justice while introducing the Bill dwelled at length on the aspect of

pre-institution mediation under Section 12A and stated that "pre-mediation is the most important commercial law initiative perhaps in the entire

world where pre-mediation initiative has been given a very important focus. It was emphasized that the amendment stipulates that except for any

case of urgent interim relief, every commercial dispute must go to mediation first. The Hon'ble Minister referred to pre-institution mediation as an

important milestone. The Hon'ble Minister also stated that no new mechanism of mediation is being brought in as under the National Legal Services

Authority there are already a considerable number of trained mediators available whose services can be utilized. The Hon'ble Minister

emphasized that the enormous focus on the use of alternative dispute mechanism forums is a very important component of the Bill. One of the hon'ble

members opined that compulsory mediation before the institution of commercial suit is a positive outcome of the Bill and a welcome step. One

member stated that when the specified value is brought down to three lakh, more people will access pre institutional mediation, which can end half of

litigation. These debates in the Parliament support the view that Section 12A is mandatory and enacted in the larger public interest. The debates also

indicate that Section 12A is an innovative legislative tool enacted to expedite the commercial disputes resolution in the economic interest.

33. The learned Single Judge of Calcutta High Court in *Laxmi Polyfab v. Eden Realty* 2021 SCC Online Cal 1457 and *Dredging and Desiltation*

Company Pvt. Ltd. v. Mackintosh Burn and Northern Consortium and Ors. 2021 SCC Online Cal 1458 has referred to the object of Section 12A and

has held it to be mandatory and the object being to have expedited disposal of the suit. We agree with this conclusion of the learned single Judge in

Laxmi Polyfab and in Dredging and Desiltation Company.

34. Thus, we hold that section 12A of the Act of 2015 is mandatory, and a commercial suit of specified value which does not contemplate any urgent

interim relief under the Act of 2015, cannot 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. Considering the object and purpose of Section 12A of

being rooted in the public interest, there is no question of it being waived by a party. The findings in the impugned order to the contrary are set aside.

35. The Respondent's contention, which is upheld in the impugned order, is that in the facts of the case that since the parties have attempted

negotiations by themselves and failed, it will be futile to send the parties for mediation. It was also sought to be argued that there is a substantial

compliance of Section 12A. Another facet of substantial compliance was to argue that if substantial compliance is acceptable, then the provision

cannot be held to be mandatory. We do not agree with this submission. The proposition based on attempted negotiations is too simplistic and

undermines the efficacy of the mediation process. A trained mediator's guidance can break the impasse in the negotiations. It has been our experience

in several cases where seemingly difficult disputes have been resolved through skillful handling by the mediators. The proposition advanced also

overlooks the distinction between the parties' negotiations and the resolution through the help of a skilled mediator. Also, the approach of the parties is

mediation in different disputes is different. For example, the mindset of the parties in a mediation in a matrimonial matter will be different than in a

commercial matter. Therefore, we do not agree that mediation will be futile because the parties have failed to resolve the issue by themselves.

36. The Respondent then contends that Section 12A(2) of the Act of 2015 provides for the constitution of the Legal Services Authority and

contemplates a procedure to be made known to the litigating parties. Respondent contends that Section 2(h) of the Right to Information Act (RTI

Act) defines 'Public Authority', which includes the Legal Services Authority. Section 4(1)(v) of the RTI Act mandates that rules and regulations must

be notified. It is argued that Section 4(c), Section 4(2) and Section 4(3) of the RTI Act stipulates a duty to publish the modalities of how pre-litigation

mediation is to be carried out. It is contended that the Maharashtra State Legal Services Authority has not published any such methodology, and

therefore, the provision of Section 12A is not satisfied, and therefore, the mandate of Section 12A, assuming the provision is mandatory, has not come

into operation. Respondent contends that unless the litigants are informed, it is not possible for them to resort to pre-institution mediation. It is

contended that the Rules of 2018 do not provide adequate guidance and details. It was contended that the other Legal Services Authorities such as

Delhi Legal Services Authority and West Bengal State Legal Services Authority have published their Standard Operating Procedure. The learned

Counsel for the Appellant submits no such requirement under the Act of 2015 or the Rules of 2018 that mandates the Legal Services Authority to

publish any such methodology.

37. As regards the provision of the Right to Information Act, (RTI Act) it mandates publication of Rules and Regulations required to be statutorily

enacted. To argue that Section 12A does not come into operation till a Standard Operating Procedure is published by the Legal Services Authority,

such mandate must be found in the Act or the Rules. Section 12A only contemplates authorizing the authority under the Legal Services Act for pre-

institution mediation. Section 12A(1) refers to the manner and procedure prescribed by Rules made by the Central Government. On 3 July 2018, the

Central Government published the Rules of 2018 in the Gazette of India. Rule 2(c) of the Rules defines the "Authority" to mean the authority

notified by the Central Government under sub-section (2) of Section 12A of the Act. On 3 July 2018, the Central Government under Section 12A(2) of

the Act, authorized the State Authority and District Authority constituted under the Legal Services Authorities Act, 1987 for pre-institution mediation

and settlement under Chapter IIIA of the Act. For the State of Maharashtra, the Maharashtra State Legal Services Authority is the State Authority

under the Legal Services Authorities Act . Rules 3 to 7 of the Rules of 2018 provide the procedure on how the mediation will be conducted under

Section 12A of the Act and the Rules framed thereunder. Rule 3(1) of the Rules require that a party to a commercial dispute will apply to the

Authority as per Form 1 specified in Schedule I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee

of one thousand rupees payable to the Authority either by demand draft or through online. The Rules of 2018 do not require the MSLSA to separately

publish any procedure or SOP for conducting mediation under Section 12A of the Act and the Rules. Therefore the argument based on provisions of

the RTI Act cannot be accepted.

38. Respondent urged that since Section 12A of the Act came into retrospective effect, the institution of commercial disputes without pre-institution

mediation till 1 January 2016 is not wrong because the litigants were not aware of the requirement till January 1, 2016. This proposition does not arise

as the present suit was filed after 1 January 2016. The Respondent then contends that even after January 1, 2016, till the manner and procedure for

the pre-institution mediation is notified and there is availability of requisite infrastructure for pre-institution mediation as also the availability of trained

mediators, pre-institution mediation need not be resorted to. It is submitted that it is only when the procedure has been prescribed, and the requisite

infrastructure to undertake a pre-institution mediation is in place, a party can first exhaust the remedy under Section 12 A of the Act of 2015.

39. During the hearing, the learned Counsel prayed that report be called for from the Legal Services Authority on the issue of publication of procedure

and the necessary infrastructure and facilities available to undertake pre-institution mediation, as they cannot assist the court on this aspect.

Accordingly, we requested the State Legal Services Authority to appraise the position on the Commercial division of the Bombay High Court since we

are considering the suit filed in the Commercial Division. The Member Secretary of the Maharashtra State Legal Services Authority has submitted a

report, copies of which were given to the learned Counsel.

40. The report of the Member Secretary shows that the Main Mediation Monitoring Committee of Bombay High Court, in its meeting dated 30

December 2018, formed a separate Mediators Panel pre-institution mediation with the list of the mediators. On 24 January 2019, the main Mediation

Monitoring Committee approved the Mediation Scheme for the High Court of Bombay. The Mediation Scheme is implemented with effect from 15

February 2019. The Member Secretary has stated that after receiving the pre-institution mediation and settlement application along with the requisite

fee, prescribed in Rule 3(1) of the Rules of 2018, the Maharashtra State Legal Services Authority (MSLSA) refers the application to Mediation

Monitoring Committee for further process. After receiving the application, Mediation Monitoring Committee carries further process as per Rules of

2018 and the Mediation Scheme. The Mediation Monitoring Committee issues notices to all the parties, by post and also by email. Where the opposite

party fails to appear, or no response receives the Mediation Monitoring Committee issues final notice as per Rule 3 (3) of the Rules of 2018. Where

such notice remains unacknowledged or where the party refuses to participate in the mediation process, or where the opposite party appears, seek

time and then fails to appear on the next date, the Mediation Monitoring Committee issues Non-Starter certificate as per the Rules of 2018. The

Member Secretary has informed that where both parties consent to take part in the mediation process, the Mediation Monitoring Committee asks the

parties to pay mediation fees vide Rule 11 of the Rules of 2018. After payment of fees, the Mediation Monitoring Committee appoints a mediator from

the panel. This panel is separately maintained for pre-institution mediation. The mediator so appointed conducts the mediation process as per Rule 7 of

the Rules of 2018.

41. Regarding the infrastructure at Mumbai of pre-institution mediation, the Member Secretary, has informed that two air-conditioned rooms with

adequate furniture and support staff are available to carry out the mediation meetings. As regards the scheme, the Member Secretary has informed

that the Bombay High Court Mediation Scheme dated 15 February 2019 for the Principal Seat, Benches and at Panaji, applies for all mediations.

Member Secretary has clarified that the scheme does not alter the procedure for mediation provided under the Rules of 2018 in any manner. It stated

the cases of pre-institution mediation, the fees is levied as per Schedule II of the Rules of 2018. The Maharashtra State Legal Services Authority

decides the quantum of Mediator's fees and disburses the same per the Mediation Monitoring Committee's guidelines. This is, in short, the current

position placed on record by the Member Secretary.

42. To a specific query as to what was the position regarding mechanism and structure as of 6 July 2019 (date on which the present suit was filed),

the Member Secretary has placed on record that mechanism and formalized structure to avail of pre-institution mediation under Section 12A of the

Act was available on the Original Side of the Bombay High Court. Copies of the report were supplied to the parties. Neither parties have disputed the

factual assertion, and we find no reason not to accept the position placed before us by the report. Therefore, when the present suit was instituted,

Section 12A was in operation, and the structure and modalities were available for the Respondent to exhaust the remedy of pre-institution mediation.

We are not considering a situation where no infrastructure is available at all.

43. It is also not that a party is entirely at a loss for proceeding with the pre-institution mediation. Under the Act, notification is issued authorizing the

Maharashtra Legal Services Authority for pre-institution mediation. The office of the Authority is known. A party has to approach to office wherein

further guidance as to the actual venue, time, etc., would be given. Rule 3 of 2018 states about the initiation of the mediation process. Forms have

been appended to the Rules. Venue of the mediation is provided in Rule 4. Rule 5 stipulates the role of the mediator. Rule 7 lays down the procedure

for mediation. The mediation fee is specified. Enough guidance is provided under the Rules of 2018 to initiate the pre-institution mediation. The Legal

Services Authority can fill in further details by Standard Operating Procedure (SOP), but it cannot be contended that because there is no detailed

SOP, it is impossible to undertake pre-institution mediation or that it is a statutory mandate. It may be that, for providing better clarity, some state legal

services authorities have published their standard operating procedure for pre-institution mediation. The Maharashtra State Legal Services Authority

may also consider publishing a separate standard operating procedure for better assistance to the litigants. From this observation, however, we do not

intend to suggest any legal lacuna in the absence of such a procedure, as it cannot be held that unless such a procedure is published, Section 12A will

not come into operation.

44. Now, we come to the order to be passed in this appeal. According to the Appellant, the plaint has to be returned to the plaintiff to be filed for

compliance. The Respondent contends that facts of the present case be considered where the suit was allowed to be filed by the registry because of

confusion in the registry in the initial period when the Amending Act came in force, and the suits came to be registered because of oversight. The

Respondents contend that the Appellants took no objection, and this is a first suit in which the mandate of Section 12A was debated. The Respondent

submits he is not averse to going for mediation even now. The learned counsel for the Appellant is also agreeable to go for mediation. The learned

counsel for the parties after the arguments, fairly states that considering the peculiar facts and circumstances of this, an arrangement equatable to

both sides can be arrived at. We have heard the suggestions of the learned counsel. The learned Counsel suggests that the Suit and implementation of

the impugned order be kept in abeyance, and the parties will approach the Legal Services Authority for mediation to be conducted within the time

frame stipulated under Section 12A as if it is initiated under that provision. We find, in the facts of this case, the suggestion to be fair. If the mediation

is successful, the dispute will end. If it is unsuccessful, then the Suit and the impugned order can stand revived, and if the Appellant seeks to challenge

the impugned order by an appeal, he can file a fresh appeal. The Appellant agrees he will co-operate with the disposal of the mediation within the time

frame, and will not require any specific notice.

45. Hence, the Appeal is disposed of in the following terms :

(i) The Appellant and the Respondent will attend the Office of the Member Secretary, Maharashtra State Legal Services Authority on 8 October 2021

for initiating the mediation process;

(ii) No separate notice to the Appellant is required of the said mediation;

(iii) The suit and the impugned order shall remain in abeyance for three months from 8 October 2021;

(iv) If the learned Mediator is of the opinion that if an extension is required and grants extension, the direction to keep the suit and the impugned order

in abeyance shall stand suitably extended for the period of such extension granted by the mediator;

(v) Upon completion of the mediation, the Member Secretary shall forward the report of the same to the Prothonotary and Senior Master of this Court

with copies to the parties;

(vi) On the submission of the report of the Mediator as per Clause (v), the direction for keeping the Suit and the impugned order in abeyance shall

stand lifted.

(vii) If the outcome of the mediation is positive, then no further orders from the Court would be required as the scheme of Section 12A will take place;

(viii) In the event of the mediation being unsuccessful, the time to deposit the amount shall stand extended by four weeks from the date the report is

received in the Office of the Prothonotary and Senior Master;

(ix) In that event, it will be open to the Appellant, if so advised, to challenge the impugned order of the learned Single Judge on the grounds as may be

available in law. All contentions of the parties will be open except the ones concluded in this judgment and order.

46. In view of the facts and circumstances of the case, no order as to costs.