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Role of Mediation under Section 12A of the Commercial Courts Act

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In order to resolve business disagreements, mediation is a method of alternative dispute resolution that is gaining popularity. In lieu of traditional litigation or arbitration, it enables parties to reach a settlement, which is more flexible and affordable. The Commercial Courts Act aims to enhance the 'ease of doing business' in India by encouraging parties to enter into business agreements that comply with the law. The act's primary objective was to strengthen India's commercial activities, including foreign direct investment and public-private partnerships, in order to improve India's standing in the World Bank's report on the ease of doing business. In the Commercial Courts Act, 2015 (the 'Act'), chapter IIIA was added in 2018, and section 12A (the 12A) mandated pre-institution mediation in cases involving commercial disputes of a certain value. However, it has been disputed whether or not this section is required or merely directory in nature. This article examines pre-mediation disputes in commercial contexts and addresses the benefits of pre-mediation litigation's implications as well as solutions to its disadvantages. Additionally, it looks at recent Supreme Court rulings.

Keywords: *mediation, commercial court, dispute, settlement.*

INTRODUCTION

Warren Burger once said: “The obligation of the legal profession is to serve as healers of human conflict. We should offer procedures that can deliver a suitable outcome in the shortest amount of time, for the least amount of money, and with the least amount of strain on the participants that is the essence of justice.”

The Commercial Courts Act 2015 was passed with the intention of elevating India's ranking in terms of business accessibility and drawing in more foreign direct investment. A nation's economic development and progress can be significantly aided by foreign direct investment. Direct foreign investment into a nation's economy is what is meant by Foreign Direct Investment. This infusion of money can aid in closing the savings-to-investment divide in emerging nations by serving as a source of finance for domestic investment initiatives that support economic expansion. By way of taxes, royalties, and other fees, FDI can bring in money for the host nation. These monies can be used to fund public infrastructure, healthcare, education, and other social programs that support the growth of the nation's economy as a whole and of its human capital.

It is possible to draw a direct link between the ease of doing business and the swift resolution of commercial issues. The 253rd Report¹ suggested setting up commercial courts and Commercial Divisions and Commercial Appellate Divisions in the High Courts to accomplish this goal. In response to the recommendation The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Act, 2015 (the ‘2015 Act’) came up as an outcome passed by both Houses of Parliament on 01 January 2016 and went into force on 23 October 2015.²

After the Commercial Courts Act 2015 became effective, the Ease of Doing Business Report recognised India, which improved its ranking from 142 to 63 after enacting regulatory reforms, as one of the top 10 economies in the world with the highest improvement in the ease of doing

¹ Law Commission, *Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015* (Law Com No 253, 2015)

² Sudhir Krishnaswamy and Varsha Mahadeva Aithala, ‘Commercial Courts in India: Three Puzzles for Legal System Reform’ (2020) 11(1) *Journal of Indian Law and Society*

<<http://publications.azimpremjifoundation.org/2376/>> accessed 18 August 2023

business in 2020. Mediation is a type of alternative dispute resolution that effectively and affordably settles the conflict, and it's an instrument that has been formally accepted within our legal system. It is a non-binding process where parties can communicate their issues and objectives while working to find a solution that takes into account their continued business relationship.

Litigation consumes a lot of time and costs incurred by both the parties and the government to give justice. The parties may suffer negative consequences as a result of the decision. The tendency for litigation to resolve disputes would ultimately impair the administration of justice by adding to the backlog of cases. Commercial disagreements can be resolved through mediation, which also contributes to a company's long-term success. It offers a practical, economical method for settling conflicts, upholds confidentiality, and protects goodwill and reputation, in commercial conflicts, mediated agreements frequently provide high satisfaction evaluations and have a higher possibility of long-term compliance.

Although there are drawbacks to mediation, the benefits far outweigh the cons. Commercial litigation is expensive and takes a while to complete. Legal fees, court charges, and other associated costs are decreased during mediation, making it a more affordable option.

VIKRAM BAKSHI AND OTHERS V SONIA KHOSLA (DEAD) BY LEGAL REPRESENTATIVES

Case:³ One of the mediation's objectives is to bring the conflict to a swift conclusion. The sooner the problem is settled, in particular for all parties concerned and society as a whole, the better. Disagreement causes the parties' connection to become strained and perhaps potentially ruined. Additionally, it affects the tranquility in society. It is important to settle conflicts as quickly as possible to make sure that the relationships between people remain good.

³ *Patil Automation Private Ltd & Ors v Rakheja Engineers Private Ltd* (2022) livelaw sc 678

PRE-INSTITUTION MEDIATION AND SETTLEMENT UNDER 12A OF THE COMMERCIAL COURTS ACT

In 2018, The Commercial Court Act 2015 was amended where Pre-institution mediation was made mandatory for parties under Section 12A⁴ except for situations when urgent temporary relief is preferred. The Commercial Court Act 2015 was amended to change Section 3(1A)⁵ of the Act, which decreased the suit's financial value from one crore to three lakhs. Intellectual property rights disputes were classified as 'Commercial disputes' under Section 2(c)(xvii)⁶ of the Act. Without ever requiring the valuable time of a court, Section 12A⁷ enables a fast track. Pre-institution mediation only applies to lawsuits that do not demand immediate interim relief, according to Section 12A⁸ of the law, it is necessary to mention this at this point. Thus, only class action cases are needed to use pre-institution mediation.

IS PRE INSTITUTION MEDIATION MANDATORY?

Judges' opinions on the application of 12A of the Commercial Courts Act 2015 varied. Some people supported the 12A's mandatory compliances, while others said it was up to the individual whether or not to do so. Whether 12A is required or discretionary was the topic of discussion before the Supreme Court.

It was believed that 12A is a mechanism to facilitate a settlement between the parties and that filing a lawsuit without following the provisions of 12A is not mandatory as it has no penal consequences. However, it was argued neither Section 80⁹ nor Section 69¹⁰, which does not provide any penalty for a suit brought in contravention of their terms would be mandatory. Some judges believed that the rules' section 12A gave the benefit of the doubt to the opposing party's right to decline to take part in the mediation sessions. The mediation process will also

⁴ Commercial Court Act 2015, s 12A

⁵ Commercial Court Act 2015, s 3(1A)

⁶ Commercial Court Act 2015, s 2(c)(xvii)

⁷ Commercial Court Act 2015, s 12A

⁸ *Ibid*

⁹ Code of Civil Procedure 1908, s 80

¹⁰ Indian Partnership Act 1932, s 69

be judged to be dead on arrival if the opposing party fails to show up. Time and money spent by the parties seeking justice will be wasted.

The Supreme Court strongly weighed the plain language of section 12A of the Commercial Courts Act while determining whether or not the mediation process was necessary. Unless there is an urgent interim relief contemplated by this act, no suit shall be initiated unless the plaintiff has exhausted the remedy of pre-institution according to the procedure and rules provided by the central government.

In the case of the **State of UP & Ors v Babu Ram Upadhya**,¹¹ when the statute uses the term shall, Justice K. Subba Rao summarised the relevant Rules relating to interpretation. Although a statute's use of the word 'shall' suggests that it is mandatory on the surface when a statute specifies that something must be done in a certain way but does not specify the repercussions of noncompliance. The court may determine the legislature's true intent by examining the statute's scope, object and purpose.

The main goal of the act was to boost India's commercial operations, such as foreign direct investment and public-private partnerships, to raise India's ranking in the World Bank's Doing Business Report. If commercial conflicts of lower value are resolved quickly, foreign investors will have a better positive impression of the Indian legal system and India will draw in more of them. In order to do this, it is proposed to change the 2015 Commercial Courts Act, which decreased the monetary authority of commercial courts from one crore to three lakh rupees and made pre-institution mediation necessary.

In the **Patil Automation Private Ltd & Ors v Rakheja Engineers Private Ltd Case**¹², It was determined to make Section 12A a requirement. The Commercial Courts Act, 2015's Section 12A mandates pre-litigation mediation as a mandatory requirement. According to the bench of KM Joseph and Hrishikesh Roy, JJ, any lawsuit filed in violation of this requirement will have the

¹¹ *State of UP & Ors v Babu Ram Upadhya* (1961) SCR (2) 679

¹² *Patil Automation Private Ltd & Ors v Rakheja Engineers Private Ltd* SLP (C) No 14697/2021

plaint rejected under Order VII Rule 11 of the Civil Procedure Code, 1908¹³. The court may even exercise this authority suo moto.

PROBLEMS WITH SECTION 12A IMPLEMENTATION

The definition of urgent interim relief is nowhere given in the Commercial Court Act. It is at the discretion of the court to decide whether the matter is urgent or not and whether interim relief should be granted or not. The plaintiff is the one asking the court for remedy. If the injunction is not issued, he experiences irreparable loss and harm. It is controversial whether the court or the plaintiff should determine the urgency of the interim relief.

Under CPC Order 39¹⁴, the court has the authority to provide temporary relief while the case is pending. A temporary or interim injunction forbids a party from carrying out the stated act for a limited period of time, up until the end of the litigation or the issuance of further orders by the court. It could be given at any time during the legal proceedings.

In the case of **Kashinath Sansthan v Srimad Sudhindra Thirtha Swamy**, the following standards were established by the court for temporary injunctions: 'The party who requests the issuance of an order of injunction must demonstrate that he has established a prima facie case to proceed to trial, that the balance of convenience also favours him, and that he will suffer irreparable loss and harm if the injunction is not granted. However, if that party fails to establish a sufficient basis for a trial, the court is not authorised to issue an injunction in his or her favour.'

In a recent ruling in *Kapil Goel v Ram Dulare Yadav*, the Delhi High Court stated that the Plaintiff's consent to the institution of Pre Mediation Proceedings under Section 12A of the Commercial Courts Act 2015 was irrelevant in cases where the Defendant itself refused to participate in the Pre Institution Mediation Proceedings and that it would be sufficient for the Plaintiff's suit to proceed unhindered.¹⁵

¹³ Code of Civil Procedure 1908, Or 7 r 11

¹⁴ Code of Civil Procedure 1908, Or 39

¹⁵ Maneck Mulla et al., 'Consent Of The Plaintiff For Pre Institution Mediation Proceedings Under S 12a Of The Commercial Courts Act, 2015, Is Irrelevant If The Defendant Itself Refuses To Move Forward With It' (*Mondaq*, 24 February 2023) <<https://www.mondaq.com/india/arbitration--dispute-resolution/1286486/consent-of-the->

According to the 2018 (Pre-Institution Mediation and Settlement) Rules, when the mediation process was started, the authority was required to notify the opposing party so that they could appear and give their consent to participate in the mediation process on such days within a 10-day window of the date of issuance of the said notice. The authority was compelled to send the opposing party a final notice if it didn't respond to the initial notice. However, the authority was compelled to treat the mediation process as a non-starter and produce a report on it if the final notice issued remained unacknowledged or the opposing party declined to take part. Furthermore, the opposing party is required to appear on the scheduled day under Sub-Section 6 of Rule 3 of the Rules if they do not want the mediation process to be cancelled¹⁶.

Foreign investors do not want to deal with legal issues. Without the intervention of the court, disputes can be settled through mediation, saving both parties money and time. The goal of 12A is defeated by the parties' non-appearance. If the parties do not plan to participate in mediation, there is no use in making it mandatory. Making 12A mandatory has the goal of preventing litigation delays in order to draw in greater numbers of foreign investors.

CONCLUSION

Kristalina Georgieva stated that 'foreign direct investment is an important driver of economic growth, productivity enhancement, and competitiveness, helping countries integrate into global value chains and seize opportunities in the global marketplace.' If foreign investors are not faced with challenges that are associated with delayed dispute settlement, ambiguous legal interpretation, and perceived difficulties with contract enforcement, which can all increase uncertainty, then only the ease of doing business be achieved.

The need for pre-mediation before the institution of litigation under Section 12A of the Commercial Courts Act is a crucial step towards achieving this goal. Increasing foreign direct investment can only be accomplished by creating a system where disputes can be resolved swiftly. Mediation aids in building an environment that is advantageous to investment by

[plaintiff-for-pre-institution-mediation-proceedings-under-section-12a-of-the-commercial-courts-act-2015-is-irrelevant-if-the-defendant-itself-refuses-to-move-forward-with-it](#)> assessed 14 August 2023

¹⁶ *Ibid*

promoting effective dispute resolution, sustaining connections, fostering trust, upholding secrecy, permitting conversations, and avoiding confrontations. By offering a cooperative and constructive approach, mediation can help attract foreign investors looking for regularity, predictability and a welcoming business climate.

SUGGESTIONS

There should be enough infrastructure in place, but trained and skilled Mediators should be readily available. Parties should be aware of the benefits of mediation and how it can lead to a situation where both parties win if the dispute is handled through mediation, it should be taken into consideration. Many times, it is seen that the opposing parties fail to show up for the mediation session, making it impossible to proceed. The plaintiff then goes to court to seek remedy. It defeats the intent of 12A by wasting the plaintiff's and the court's time and money. The Commercial Court Act needs to include a penal clause so that non-attendance by the parties in pre-mediation proceedings can result in consequences. The parties should keep in mind the value of the pre-mediation session and not use 12A as an excuse to delay the proceedings.