

September 2024

Pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015 is mandatory to file a counterclaim in a commercial suit

The single bench of the Hon'ble High Court of Delhi ("Delhi High Court") in *Aditya Birla Fashion and Retail Limited vs. Saroj Tandon*¹ has held that pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015 ("Commercial Courts Act") is a mandatory requirement, even in respect of counterclaims in a commercial dispute.

Brief facts

Saroj Tandon ("**Respondent**") owned a shop which was leased to Aditya Birla Fashion and Retail Limited ("**Petitioner**"). Owing to the COVID-19 pandemic, the Petitioner was constrained to close its business operation from the leased shop and issued a notice terminating the lease while demanding a refund of its security deposit. The Respondent failed to refund the security deposit. Accordingly, the Petitioner considered filing a suit against the Respondent seeking recovery of the security deposit.

Prior to instituting a suit, the Petitioner filed an application in terms of Section 12A of the Commercial Courts Act for pre-institution mediation and settlement. Despite due service of the notice of summons, the Respondent failed to appear and the process of mediation was declared a non-starter. Consequently, a commercial suit was filed by the Petitioner.

After the institution of the suit, the Respondent filed its written statement and counter claims for recovering rentals from the Petitioner. Considering that the Respondent's counter claims involved a commercial dispute, a commercial suit was registered. No urgent relief was contemplated in respect of the Respondent's counter claims.

Given that the Respondent had failed to invoke pre-institution mediation prior to lodging its counter claims, the Petitioner filed an application for rejection of the counter claims under Order VII Rule 11 of the Code of Civil Procedure, 1908 ("**Code**"). However, the Petitioner's application was rejected by the Ld. Trial Court on the ground that the process for pre-institution mediation under Section 12A of the Commercial Courts Act was not mandatory for counterclaims. In these circumstances, the Petitioner filed a petition under Article 227 of the Constitution of India.

Issue

Whether recourse to pre-institution mediation under Section 12A of the Commercial Courts Act is obligatory for filing counterclaims in commercial disputes when no urgent relief is contemplated?

¹ 2024 SCC OnLine Del 6099

Analysis and findings

The single bench of the Delhi High Court dismissed the petition and *inter alia* observed as follows:

1. the Commercial Courts Act and the Code do not contain any provision providing different treatment for counterclaims. A counterclaim is a suit in its individual and distinct capacity. Once counterclaims are lodged, it must be treated as a regular suit for all practical and procedural purposes. Like any other commercial suit, the counterclaims in a commercial dispute must go through all stipulated rigours scrupulously as may be prescribed for any general commercial suit;
2. as per Rule 2(g) of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 ("**Rules**"), an opposite party means a party against whom relief is sought in a commercial dispute. The scheme of the Rules is not to oust the requirement of pre-institution mediation and settlement for any party. Consequently, an opposite party in respect of a counterclaim has a legal right to participate in mediation prior to the institution of counterclaims;
3. the process of pre-institution mediation is mandatory for every suit including a commercial suit and no distinction can be drawn when it comes to a counter claim involving a commercial dispute which does not contemplate any urgent relief;
4. the objective behind the pre-institution mediation is a benevolent one and it does not frustrate speed trial at all. To the contrary, it aims and visualises a situation where there may not be institution of any fresh case, once the matter is settled through such pre-institution mediation. Thus, attempting to settle disputes through mediation cannot be labelled a futile exercise;
5. merely because the defendant in a suit did not participate in settling the matter does not *ipso facto* mean that such defendant is not bound by the mandate of law. It would be incorrect for the defendant to presume that the plaintiff may also not participate in such process. The state of mind of any such party cannot be decoded mechanically;
6. the fact that the same parties had already participated or had opportunity to participate in the pre-institution mediation would not render Section 12A of the Commercial Courts Act a nugatory in the context of any such counterclaim, not contemplating any urgent relief; and
7. in *Patil Automation Private Limited vs. Rakheja Engineers Private Limited*², the Supreme Court of India has held:
 - a) that recourse to Section 12A of the Commercial Courts Act is mandatory in nature and non-compliance thereof would entail rejection of the plaint under Order VII Rule 11 of the Code; and
 - b) the cut-off date for rejection of plaints filed in non-compliance of Section 12A of the Commercial Courts Act is August 20, 2022. Any such plaint filed in violation of Section 12A of the Commercial Courts Act after the jurisdictional High Court has declared Section 12A of the Commercial Courts Act to be mandatory would disentitle the plaintiff from seeking any relief.

In the facts of the above case and the observations made, given that the counterclaim was filed on February 21, 2022 (before the cut-off date of August 20, 2022), the Delhi High Court allowed the Respondent's counterclaim. However, the Delhi High Court held that Section 12A of the Commercial Courts Act is not only mandatorily applicable to suits but also to counterclaims.

Conclusion

Pursuant to this judgement, a defendant in a suit under the Commercial Courts Act, 2015 who seeks to raise a counterclaim is mandatorily required to initiate pre-litigation mediation under Section 12A of the Commercial Courts Act, 2015 when it raises a counterclaim. The judgement clarifies that a defendant raising a counterclaim in a commercial suit is required to exhaust the remedy of pre-institution mediation so long as no urgent relief is

² 2022 SCC OnLine SC 1028

contemplated. This decision promotes a comprehensive and holistic pro-mediation approach prior to initiating long drawn court proceedings.

Disputes Practice

With domain experts and strong team of dedicated litigators across the country, JSA has perhaps the widest and deepest commercial and regulatory disputes capacity in the field of complex multi-jurisdictional, multi-disciplinary dispute resolution. Availing of the wide network of JSA offices, affiliates and associates in major cities across the country and abroad, the team is uniquely placed to handle work seamlessly both nationally and worldwide.

The Firm has a wide domestic and international client base with a mix of companies, international and national development agencies, governments and individuals, and acts and appears in diverse forums including regulatory authorities, tribunals, the High Courts, and the Supreme Court of India. The Firm has immense experience in international as well as domestic arbitration. The Firm acts in numerous arbitration proceedings in diverse areas of infrastructure development, corporate disputes, and contracts in the area of construction and engineering, information technology, and domestic and cross-border investments.

The Firm has significant experience in national and international institutional arbitrations under numerous rules such as UNCITRAL, ICC, LCIA, SIAC and other specialist institutions. The Firm regularly advises and acts in international law disputes concerning, amongst others, Bilateral Investor Treaty (BIT) issues and proceedings.

The other areas and categories of dispute resolution expertise includes; banking litigation, white collar criminal investigations, constitutional and administrative, construction and engineering, corporate commercial, healthcare, international trade defense, etc.

This Prism is prepared by:







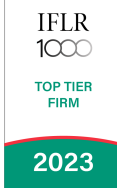







Farhad Sorabjee
Partner



Pratik Pawar
Partner



Shanaya Cyrus Irani
Partner

		
Ranked Among Top 5 Law Firms in India for ESG Practice	Outstanding Energy and Infrastructure	Recognised in World's 100 best competition practices of 2024
		
19 Practices and 19 Ranked Lawyers	12 Practices and 42 Ranked Partners IFLR1000 APAC Rankings 2023 ----- Banking & Finance Team of the Year ----- Fintech Team of the Year ----- Restructuring & Insolvency Team of the Year	Among Top 7 Best Overall Law Firms in India and 11 Ranked Practices ----- 11 winning Deals in IBLJ Deals of the Year ----- 12 A List Lawyers in IBLJ Top 100 Lawyer List
		
18 Practices and 25 Ranked Lawyers		14 Practices and 38 Ranked Lawyers
		
Employer of Choice 2024 ----- Energy and Resources Law Firm of the Year 2024 ----- Litigation Law Firm of the Year 2024 ----- Innovative Technologies Law Firm of the Year 2023 ----- Banking & Financial Services Law Firm of the Year 2022	7 Ranked Practices, 16 Ranked Lawyers ----- Elite – Band 1 - Corporate/ M&A Practice ----- 3 Band 1 Practices ----- 4 Band 1 Lawyers, 1 Eminent Practitioner	Ranked #1 The Vahura Best Law Firms to Work Report, 2022 ----- Top 10 Best Law Firms for Women in 2022
		
		7 Practices and 3 Ranked Lawyers

For more details, please contact km@jsalaw.com

www.jsalaw.com



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi



This prism is not an advertisement or any form of solicitation and should not be construed as such. This prism has been prepared for general information purposes only. Nothing in this prism constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this prism disclaim all and any liability to any person who takes any decision based on this publication.