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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI
&
HON'BLE SHRI JUSTICE DEVNARAYAN MISHRA
ON THE 4th OF JANUARY, 2024
MISC. PETITION No. 3837 of 2022**

BETWEEN:-

1. PUSHPSHREE HOSPITALS AND RESEARCH CENTRE THROUGH PROPRIETOR DR. GIRISH TAORI 12-13, PRAKASH NAGAR, NAVLAKHA INDORE (MADHYA PRADESH)
2. DR. GIRISH TAORI S/O SHRI M.M. TAORI, AGED ABOUT 57 YEARS, OCCUPATION: PROPRIETOR PUSHPSHREE HOSPITALS AND RESEARCH CENTRE 12-13, PRAKASH NAGAR, DISTRICT INDORE. (MADHYA PRADESH)

.....PETITIONERS

(SHRI KARPE PRAKHAR MOHAN, COUNSEL FOR PETITIONERS).

AND

1. KOTHARI CHEMIST (PROPRIETORSHIP CONCERN) THROUGH PROPRIETOR JAGDISHCHANDRA S/O LATE SHRI MANAKCHAND KOTHARI, AGED 78 YEARS, OCCUPATION: BUSINESS 14 PRAKASH NAGAR INDORE (MADHYA PRADESH)
2. JAGDISHCHANDRA S/O LATE SHRI MANAKCHAND KOTHARI OCCUPATION: PROPRIETOR KOTHARI CHEMIST 14, PRAKASH NAGAR, DISTRICT INDORE (MADHYA PRADESH)

.....RESPONDENTS

(SHRI YOGESH KUMAR MITTAL, COUNSEL FOR THE RESPONDENTS).

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This petition coming on for admission this day, Justice Sushrut Arvind Dharmadhikari passed the following:

ORDER

This Miscellaneous Petition under Article 227 of the Constitution of India assails the order dated 01.07.2022 (Annexure-P/4) passed in Comms-20/2022 whereby the application under Order 7 Rule 11 of the Code of Civil Procedure, filed by the petitioners/defendants has been rejected.

2. Briefly stated facts of the case are that the respondents are plaintiffs before the trial Court who have filed a suit for recovery under Order 7 Rule 1 of the CPC read with Section 16 of the Commercial Courts Act, 2015 (hereinafter referred to as the Act of 2015). On the basis of the transactions and averments, plaintiffs have sought recovery of the amount. After issuance of notice, petitioners/defendants filed an application under Order 7 Rule 11 of CPC contending that Section 2 of the Commercial Courts Act defines "Commercial Disputes" and looking to the aforesaid definition, the alleged transaction is not covered under any of the clauses mentioned in Section 2 of the Act and therefore, the provisions of the Act are not applicable and the plaint is liable to be rejected. Another ground that was raised in the application was the non-compliance of Section 12-A of the Act as the suit was filed without exhausting the remedy of pre-institution mediation, hence the same is not maintainable.

3. Learned trial Court, while passing the impugned order held that as per Section 2 (1)(c-xviii) which provides for '*Agreement for sale of goods or provisions of services*', there is a commercial dispute between the parties. It was further held that the compliance of provisions of Section 12-A of the Act of 2015 is not mandatory, and accordingly the application under Order 7 Rule 11 filed by the petitioners/defendants was rejected. Hence, this petition.

4. Learned counsel for the petitioners contended that the trial Court has failed to consider that the alleged transactions cannot be said to be falling within

the purview of the commercial dispute as defined under Section 2 of the Act of 2015. If a recovery suit is treated to be and tried in Commercial Court, then the purpose of enactment of the Act of 2015 will be frustrated. Further, the trial Court has erred in holding that compliance of Section 12-A of the Act are not mandatory. The provisions of Section 12-A is clear and unambiguous, which shows that a suit which does not contemplate any urgent interim relief under this Act cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. Hence, the impugned order passed by the trial Court is illegal and contrary to law and deserves to be set aside. In support of his contention, learned counsel for the petitioners placed reliance on the judgment passed by the Apex Court in case of **Patil Automation Pvt. Ltd. & Ors. vs. Rakheja Engineers Pvt. Ltd., (2022) 10 SCC 1.**

5. Per contra, learned counsel for the respondents opposed the prayer and submitted that the dispute between the parties is a commercial dispute under Section 2(1)(c-xviii) of the Act of 2015 since there was implied contract between the parties for supply of goods. Learned counsel for the respondents placing reliance on the judgment of the Apex Court in case of **Patil Automation (Supra)** further contended that the mandatory effect of Section 12-A is prospective in nature and shall be effective from 20.08.2022. No retrospective effect is provided to the said mandate and hence it is not applicable on the suits which were instituted prior to 20.08.2022 without due compliance of Section 12-A. It is further contended that the impugned order is based on legal ground as it was decided on 01.07.2022 based upon the prevailing law laid down in catena of judgments wherein it was held that the suits shall not be dismissed for non-compliance of Section 12-A as the procedural law prescribes procedure to facilitate the justice. He further submitted that the

petitioners/defendants have a remedy of filing a revision petition under Section 115 of the CPC against the order impugned. Hence, this petition under Article 227 of the Constitution of India is not maintainable.

6. Heard learned counsel for the parties. Perused the impugned order.

7. In this case, the three pertinent questions that needs to be answered are as follows:

(i) Whether this miscellaneous petition under Article 227 of the Constitution of India is maintainable in the light of the fact that the petitioners had an alternate remedy to file civil revision under Section 115 of the CPC?

(ii) Whether the present suit falls under the term 'Commercial Dispute' as per Section 2(1)(c-xviii) of the Act of 2015?

(iii) Whether the compliance of Section 12-A of the Act of 2015 is mandatory before instituting the Commercial Suit?

8. Firstly, as far as the maintainability of this petition under Article 227 of the Constitution of India is concerned, it is settled law that whenever the trial Court rejects an application filed under Order 7 Rule 11 of the CPC, the only remedy is of filing a civil revision under Section 115 of the CPC. But in the present case, the petitioners bypassing the said remedy has raised their grievance by filing this petition under Article 227 of the Constitution of India. Though, there are catena of cases wherein it has been held that the High Courts shall refrain from exercising supervisory jurisdiction under Article 227 when an alternative efficacious remedy exists, but recently, the Apex Court in case of **Raj Shri Agrawal @ Ram Shri Agrawal & Anr. vs. Sudheer Mohan & Ors. in Civil Appeal No. 7266/2022** has held that when a civil revision lies before the High Court, in such case, the High Court ought to have converted the writ petition under Article 227 of the Constitution of India into revision petition under Section 115 CPC and ought to have considered the same in

accordance with law and on its own merits, rather than permitting the writ petitioner to file a fresh revision application under Section 115 of the CPC. Therefore, in view of the aforesaid, this Court, considering the important question of law to be answered, is of the opinion that the supervisory jurisdiction needs to be exercised for the sake of justice. In the present case, the first question being answered positively, therefore, this Court is taking up question number two and three accordingly.

9. The second controversy involved, which has been vehemently argued by the learned counsel for the petitioners is that in the present case, it is only a simple case of recovery of money, therefore, the Commercial Court ought to have allowed the application filed under Order 7 Rule 11 of the CPC as it does not have jurisdiction but this Court concurs with the view taken by the trial Court because at the very outset, in the plaint, it is being pleaded that the plaintiffs/respondent is a chemist and the defendants/petitioner is a hospital and amidst the plaintiff and defendant, various business transactions have taken place. As per Section 6 of the Act of 2015, it is very clear that the Commercial Courts shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction. In the present case, the plaintiff and defendant, being two business entities, have business transactions as pleaded under the plaint.

10. The Apex Court, in case of **Saleem Bhai vs. State of Maharashtra, (2003) 1 SCC 557** has held that while deciding the application under Order 7 Rule 11 of the CPC, the trial Courts have to consider the averments made in the plaint only. The relevant portion of the aforesaid judgment reads as under :

"A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects. We are, therefore, of the view that for the afore-mentioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law."

11. Considering the same, the trial Court has rightly held that both, the plaintiff and the defendant being business entities, the dispute between them falls under the category of the commercial dispute as mentioned under Section 2(1)(c-xviii) of the Act of 2015. As per Section 2(1)(c-xviii), any dispute with respect to the agreement for sale of goods or provision of service is considered as commercial goods and falls under the definition of Commercial Disputes. Therefore, there is no error or controversy with respect to the findings given by the trial Court with respect to the suit falling under the definition of 'Commercial Dispute'.

12. The third issue that has been raised by the petitioner in the present case is regarding non-compliance of Section 12-A of the Act before the institution of suit. Section 12A of the Act of 2015 is reproduced as under :

"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."

13. This issue, has been dealt with in detail by the Apex Court in case of **Patil Automation (supra)**. The relevant paragraph of the aforementioned judgment is reproduced hereunder :

"113. Having regard to all these circumstances, we would dispose of the matters in the following manner;

113.1 We declare that Section 12-A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12-A must be visited with rejection of the plaint under Order 7 Rule 11. This power can be exercised even suo motu by the Court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 so that stakeholders concerned become sufficiently informed.

113.2 Still further, we however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff.

113.3 Finally, if the plaint is filed violating Section 12-A after the jurisdictional High Court has declared Section 12-A mandatory also, the plaintiff will not be entitled to the relief.'

14. The judgment in case of **Patil Automation (supra)** was pronounced on 17.08.2022 wherein the Apex Court has issued certain directions by which the controversy has been settled. Before answering question No. (iii), it would be appropriate to mention the chronology of events of the present case :

(i) The civil suit was filed by the plaintiffs/respondents on 26.03.2021.

(ii) In the civil suit, application under Order 7 Rule 11 of CPC was filed by the defendants/respondents on 21.12.2021.

(iii) Reply to the application under Order 7 Rule 11 of CPC was filed on 15.03.2022.

(iv) The order impugned rejecting the application under Order 7 Rule 11 was passed by the trial Court on 01.07.2022.

15. It is pertinent to mention here that the Coordinate Bench of this

Court, while deciding similar issue regarding Section 12-A of Act of 2015 in case of **Curewin Pharmaceuticals Pvt. Ltd. vs. Curewin Hylico Pharma Pvt. Ltd., in M.A.No. 1269/2021 dated 01.07.2021** has held as under :

"11). The provision is clear and unambiguous, which shows that a suit which does not contemplate any urgent interim relief under this Act cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation."

16. This Court by way of judgment in case of **Curewin Pharmaceuticals (supra)** has held that pre-institution mediation under Section 12-A is mandatory before filing of a commercial suit. However, the Apex Court in case of **Patil Automation (supra)** has held that declaration by which Section 12-A has been made mandatory before filing any commercial suit shall be brought into effect from 20.08.2022.

17. In the present case, the suit was filed on 26.03.2021 and by applying the guidelines in case of **Curewin Pharmaceuticals (supra)**, admittedly, there was no pre-institution mediation and settlement as required under Section 12-A of the Act of 2015. However, the suit filed by the plaintiffs/respondent could not have been rejected by filing application under Order 7 Rule 11 as Section 12-A of the Act of 2015 has been made mandatory by the Apex Court in case of **Patil Automation (supra)** w.e.f. 20.08.2022. Therefore, this Court is of the view that the suit cannot be rejected for non-compliance of Section 12-A as the same was filed on 26.03.2021 that is prior to 20.08.2022.

18. In view of the aforesaid, we do not find any error in the impugned order passed by the trial Court and hence, this petition being bereft of merit and substance, is hereby dismissed.

No order as to cost.

(S. A. DHARMADHIKARI)
JUDGE

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(DEVNARAYAN MISHRA)
JUDGE

