

## Counter Claims to be rejected for non-compliance of Pre-Institution Mediation?

Section 12A of the Commercial Courts Act, 2015 (“Act”) had introduced the mandate to exhaust the remedy of Pre-Institution Mediation in a commercial suit not contemplating any urgent relief. An interpretation of the said provision by the Hon’ble Supreme Court in Patil Automation Private Limited vs Rakheja Engineers Private Limited clarified that the procedure to undergo Pre-Institution Mediation is mandatory and non-compliance of the same would entail rejection of the Plaintiff. While this was being followed in commercial suits, the question whether the same also applied to counter claims filed in a commercial suit was recently addressed by the Hon’ble Delhi High Court in Aditya A Birla Fashion and Retail Limited vs Mrs Saroj Tandon.

### **Brief factual matrix**

The Respondent (Defendant) – Saroj Tandon had leased a shop to the Petitioner (Plaintiff) for running business operations. Faced with the financial impact of Covid-19, the Petitioner was constrained to close its business operations from the leased shop. The Petitioner issued a termination notice to the Respondent and sought a refund of its security deposit. When the Respondent did not return the said deposit, the Petitioner filed a commercial suit against the Respondent seeking recovery of the same. In accordance with the mandate of Section 12A of the Act, the Petitioner applied for Pre-Institution Mediation. Despite service to the Respondent, the Respondent did not appear in the mediation proceedings. The mediation proceeding was declared a ‘non-starter’. The Petitioner subsequently filed a suit.



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### **Trial Court proceedings**

Upon institution of the suit, the Defendant filed its written statement and thereafter filed its counter claims inter alia seeking rental arrears. The counter claims did not contemplate any urgent relief and since the counter claim involved a commercial dispute, the same was registered as a commercial suit.

In response, the Plaintiff filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (“CPC”) seeking rejection of the counter claim for non-compliance of the mandate of Pre-Institution Mediation (“Application”).

The Trial Court dismissed the Application holding that the mandate of Pre-Institution Mediation was applicable to a suit and not to counter claims. Aggrieved by the said Order, the Plaintiff approached the Hon’ble Delhi High Court by filing a petition under Article 227 of the Constitution of India.

### **High Court proceedings**

Issue: Whether the recourse to Pre-Institution Mediation under the Act is mandatory in the context of a counter claim?

Contention of the Counter Claimant: In a suit where parties had already undergone the process of Pre-Institution Mediation with the result being unsuccessful or being a ‘non-starter’, resorting to such process mandatorily qua counter claim(s) would be absurd and would cause delay thereby defeating the objective of speedy trial under the Act.

Observations and reasoning of the High Court:

- The Court examined Order VIII Rule 6A and Order IV Rule 1 & 2 of the CPC to observe that a counter claim, once filed, is treated as a separate suit for all purposes. Therefore, a counter claim would be bound to follow all the rules applicable to a suit.
- The CPC and the Act did not have any provision treating counter claims differently. Therefore, a counter claim in a commercial suit shall have to follow the procedures and rules applicable to a commercial suit.
- Rule 2(g) of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (“Rules”) defines “opposite party” to mean “a party against whom relief is sought in a commercial dispute”. Meaning that in a commercial dispute, the concerned party must apply for the Pre-Institution Mediation process against the

“opposite party” in terms of the procedure laid down in the Rules. Therefore, in a counter claim, the “opposite party” gets the right to participate in the mediation process before the institution of counter claim.

- Counter claims in most cases cannot be contemplated at the initial stage of filing a suit by a party. Further, in a counter claim, the nature of relief prayed for, or the subject matter involved may be different or diverse.
- Simply because the defendant/counter claimant did not participate in the initial round of pre-institution mediation initiated by the Plaintiff it cannot be assumed that the Plaintiff would also not participate or show interest in the pre-institution mediation initiated by the defendant/ counter claimant qua its counter claim. There may be a situation where a suit may not get settled but the counter claim may get settled during such mediation.
- Further, the objective behind the amendment that introduced Section 12A of the Act was to inter alia enhance and attract international business and improve India’s ranking in the World Bank’s “Doing Business Report” which factors in the criteria of dispute resolution environment of a country. With such an objective, undergoing the procedure of pre-institution mediation prior to filing a counter claim cannot be understood to be an exercise in vain.

#### **Ruling of the High Court:**

- The procedure of Pre-Institution Mediation provided under Section 12A of the Act is mandatory even for a counter claim involving a commercial dispute and not seeking any urgent relief. Further, non-compliance of this mandate would entail rejection under Order 7 Rule 11 of the CPC.
- This mandate would apply to counter claims (involving commercial dispute and not seeking any urgent relief) irrespective of the fact that the Pre-Institution Mediation initiated by a party at the initial stage prior to filing a suit was unsuccessful or was a ‘non-starter’.
- In a situation where the main suit contemplates an urgent relief, however the Counter Claim does not seek any urgent relief, the Counter Claimant would still be under the obligation to first exhaust the process of Pre-Institution Mediation before filing its counter claim involving a commercial dispute.

It is to be noted that while ruling the above, the Hon'ble High Court observed that in the facts of the case at hand, since the counter claim was filed on 21.02.2022 i.e., before the cut-off date of 20.08.2022, as provided in the Patil Automation case (supra), the counter claim cannot be rejected on the ground that the Counter Claimant did not exhaust the process of Pre-Institution Mediation prior to filing the counter claim. The petition was accordingly disposed of.

In the opinion of the author, such a mandate may present practical difficulties. The mandate to pause ongoing litigation process may be problematic in disputes where time is crucial. Counter claims may be filed as a tactic to delay the ongoing proceedings. However, this mandate reinforces the objective of early resolution of commercial disputes, importance of opting for alternative dispute resolution to settle commercial disputes enabling businesses to maintain cordial relationships instead of being engaged in adversarial litigation.