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THE UNSETTLED MANDATE: ASSESSING THE EFFICACY, PARADOX, AND JUDICIAL CONTOURS OF PRE-INSTITUTION MEDIATION UNDER SECTION 12A OF THE COMMERCIAL COURTS ACT, 2015

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ABSTRACT

The critical analysis of this article is the role of structural efficacy and changing judicial interpretation of mandatory Pre-Institution Mediation (PIM) under Section 12A of the Commercial Courts Act, 2015 (CCA).[1] The introduction of the provision, which comes through the 2018 Amendment Act, [2]was based on the explicit legislative requirement to encourage amicable settlement and a substantial decrease in the workload on the commercial court.

In the paradigmatic ruling of Patil Automation Private Limited and Ors. v. Rakheja Engineers Private Limited, the Supreme Court confirmed beyond doubt that Section 12A is a binding provision, failure to perform which counters action should be dismissed under the Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC).[3] Nevertheless, this judicial directive is run on a systemic efficacy paradox. The case statistics collected in the district courts of commercial courts in Mumbai indicate that the successful settlement rate is shockingly low, only about 1 per cent out of all applications accepted to be handled or decided upon- the statutory directive has become a mandatory procedural bottleneck.

The central issue of law depends wholly on the statutory exception of suits that speculate pending interim relief. The jurisprudence of the Supreme Court that followed has come up with stringent, multi-faceted criteria as to whether urgency is bona fide.

This structural implication that is against intuition is that instead of providing a judicial system that is lightened by initial judicial burden reduction in the Commercial Courts Act by compulsory mediation, the Act increases the complexity and time investment commitment at the open of litigation, which is the cause of the front-loading of the judicial process.

Keywords: *Unsettled Mandate, Efficacy, Paradox, Judicial Contours of Pre-Institution Mediation, Section 12a, The Commercial Courts Act, 2015*

Introduction: The Legislative Framework and Mandatory Mandate

The Amendment Act of 2018[4] added section 12A to the Commercial Courts Act, 2015[5] and the main focus of the bill was to encourage the friendly resolution of business conflicts by alternative means other than the official adversarial system, in order to put a strain on the judicial backlog and improve the efficiency of the process. This amendment represented a clear transformation of the previous policy of mediation frameworks in India and came to encompass statutory mediation (i.e. the form of mediation under the Indian Industrial Disputes Act, 1947) and court-based mediation as a result of the guidelines embraced in *Salem Bar Association v. Union of India.*[6]

The history of the legislation proves that Section 12A was specifically considered obligatory to all commercial plaintiffs who were not in need of urgent and immediate protection. Procedural mechanism requires PIM proceedings to be fulfilled within three months, with the maximum length of five months in case of a mutual agreement. The plaintiff is only legally entitled to initiate formal litigation when a Failure Report is filed by the mediator.

There was considerable High Court divergence before 2022 on whether the Section 12A was binding. The Supreme Court in *Patil Automation Private Limited and Ors. v. Rakheja*

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Engineers Private Limited[7] conclusively determined this critical ambiguity. The Court made a firm conclusion that Section 12A is an obligatory clause, and is a condition of jurisdiction that precedes the establishment of a commercial suit. The non-compliance consequence is radical, in that case the plaintiff does not consider urgent interim relief, they must be rejected under Order VII Rule 11 of the CPC. The first rationale that the Court used was that the enactment of this mandate would finally save the judicial time as these non-compliant issues would no longer take up judicial time on its merits.

The establishment of the compulsory nature was immediately followed by structural complications such as the absence of effective infrastructure in the Legal Services Authorities 11 and uncertainty in the law as to the territorial jurisdiction which most courts adopt a purposive interpretation allowing substantial compliance to be achieved lest the process becomes technical as seen in instances such as *Ganga Taro Vazirani v. Deepak Raheja.*[8]

The Paradox of Efficacy: A Critical Review of Mandatory PIM

Practically, the compulsory regime has frequently led to the process being an extra round of litigation which parties are bulldozed through with. The willingness to compromise is the essential premise of mediation. Forcing uncooperative parties (which usually have exhausted all other amicable settlement efforts before turning to the litigation process) into a process-structured, long-drawn process (three to five months) puts an element of coercion into the mix and is deadly to the prospect of consensual settlement.

The review of the years 2020-23 showed that about 98 percent of all pre-litigation mediation applications had been classified non-starters because of the outright non-participation of the parties. Among the rest of the cases, only an approximate of 1 percent of the entire application led to a successful settlement. An example is that in the period of January to September 2023, 3,404 applications were registered, 3,170 were non-starters, 120 failed, and only 114 cases were successfully settled. The result can be calculated as the fact that 99 percent of the required resources and time of the mandatory PIM system are used to reach a resolution rate of only 1 percent. This disastrous collapse of the mechanism indicates that the mechanism does not meet its main goal of management of the docket, but on the contrary, it introduces more months of delay and higher legal expenses.

The futility of PIM is so widespread that litigants are forced to devise way to circumvent the requirement by playing the carve-out provision of the urgent interim relief to the futility of the challenge in order to allow adjudicated cases to be determined. This abuse is especially prominent in the Intellectual Property (IP) cases, in which the continuation of infringement plea is actively used to seek urgency. The law commission[9], which remarked on the difficulties of the mandatory PIM by the CCA, did not suggest broadening the application of the mandatory pre-litigation of mediation to general civil cases. As a result, the enacted Mediation Act, 2023, took the voluntary route on pre-litigation mediation in civil cases. This deviation of policies affirms that mandatory PIM under Section 12A is an acknowledged structural anomaly that is urgently necessary to be reassessed.

Statutory Carve-Out: Deconstructing 'Contemplating Urgent Interim Relief'

The essential term that exemption of a suit of PIM takes place is when it considers any urgent interim relief. In *Aditya Birla Fin. Ltd. v. Williamson Fin. Servs. Ltd,*[10] it was stated by the Calcutta High Court that contemplate does not imply the court was bound to hesitate or reflect on whether regard had to be had to the facts and circumstances pleaded, in order to call an urgent relief. This is the meaning that stipulates that the role of the court is active and preliminary and not passive acceptance of what the plaintiff believes to be urgence.

This judicial requirement of provable necessity forces the Commercial Court to perform a substantial, immediate judicial investigation of the presented facts.12A's the procedural denial of the plaint under the Order VII Rule 11 (where urgency is denied) is a final and appeals order (Patil Automation), the court will be functionally precluded against holding a perfunctory inquiry into the urgency claim. The depth of such scrutiny that is needed, necessarily involves a determination by the court as to whether the facts prima facie warrant an immediate judicial intervention. As an example[11], a High Court overturned a civil suit finding that it did not consider any interim relief that would be urgent and it had the freedom to file a new suit only after following Section 12A to the letter.

The Supreme Court's Jurisprudence: Defining the Test for Urgency

The Supreme Court has developed a sophisticated, multi-layered jurisprudence to guide commercial courts in determining the legitimacy of an urgency claim under Section 12A.

In *Yamini Manohar v. T K D Keerthi*[12] the hon'ble court gave the guiding principles that facts and circumstances of the urgency should be viewed according to the plaintiff perspective mainly when pleading urgent interim relief. This aligns with the principle, affirmed in *Dhanbad Fuels Pvt. Ltd. v. Union of India*[13], that courts must focus on the *plausibility* of the urgency rather than the ultimate *entitlement* to the injunction.

Crucially, the Court clarified that the suit cannot be dismissed *merely* because the court fails to grant *ad-interim relief* at the initial stage or even denies it post-arguments on the merits. The non-grant of relief is based on an examination of the three core injunction principles (prima facie case, irreparable harm/injury, and balance of convenience), which is distinct from the jurisdictional test under Section 12A.

The Supreme Court also provided a highly significant specialized standard for commercial torts, particularly IP disputes, in *Novenco Building and Industry A/S v. Xero Energy Engineering Solutions Pvt. Ltd.*[14] This doctrine addresses situations involving continuing infringement of proprietary rights. The Court established that the assessment of urgency must be based on the **ongoing injury** being caused, irrespective of the time elapsed since the discovery of the infringement. The Court famously observed: **"Urgency does not lie in the age of the cause but in the persistence of the peril"**. The public interest was also contributed to the analysis as it was mentioned that continued deception in the market both impacts the consumer trust and the fairness of the market, which also supports the urgency of the intervention.

The New Argument: Section 12A as a *De Facto* Preliminary Merits Inquiry

The elements of the jurisdictional assessment under Section 12A demonstrate a clear conceptual overlap with the traditional requirements for interim injunctions[15] under Order

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XXXIX, Rules 1[16] and 2, [17]CPC; firstly that the duty of the court to determine that the plea was not a farce involves a cursory determination of whether there is legal basis in which the claim was founded to include the protective relief sought a basic step in making the prima facie case and secondly, the factual burden of proving the existence of an imminent necessity of protective relief 12 is practically synonymous with the existence of the so-called traditional element of irreparable harm whose factual determination is traditionally the prerogative of the full injunction hearing.

In order to satisfy this judicial criterion, plaintiffs are forced to frontload immense factual and legal submissions into their complaint about irreparable injury, which would not only satisfy Order XXXIX, but also satisfy the jurisdictional requirement of the Section 12A.

This high level of structural dilemma is subjected to commercial courts. To carry out the high level of scrutiny that they must carry out to preserve the sanctity of the mandate, they have to conduct a very close merits adjacent analysis of harm and urgency. The fact that such a profound analysis is required implies that the judicial time cost is not saved; it is simply pushed around, and pulled to the first stage of litigation as soon as possible. The overall impact of critically low mediation efficacy (1% lower success), and high judicial time cost to police the urgency exception is that, in its current mandatory form, Section 12A is a net source of systemic complexity and inefficiency.

Conclusion and Recommendations

Section 12A was a major undertaking in regard to Alternative Dispute Resolution. But the empirical fact in the operation, which reveals that the settlement success rate is pathetic, in fact, under 1 out of 100, and that the rate of non-starters is also high, approximately 98 out of 100, indicates a severe gap in efficacy. This constructional compulsion imposes a heavy load, which is front-loaded on the judiciary, which basically goes against the legislative intent of the Act.

Since it has been proven beyond reasonable doubt that the Act of Pre-Institution Mediation is structurally ineffective, Section 12A of the Commercial Courts Act, 2015, ought to be revised to render Pre-Institution Mediation voluntary.[18] It is more probable that a voluntary system, backed by the high quality of services, will take its niche in the system of dispute resolution not by force, but by performance. The reform must also include judicial guidelines limiting the 12A inquiry to a temporal test of imminence: Does the relief being sought concern a particular action, event or harm that is actually scheduled or likely to be scheduled to take place within the statutory mediation timeframe (90-150 days)[19]

In order to make mediation an actual and differentiated attractive option, it is possible to make the tremendous and specialized investment in infrastructure, investment and the quality of training of the Legal Service Authorities[20] as stipulated in the Act to make the mechanism a specialized commercial ADR option.

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