

**DETERMINING URGENCY IN COMPULSORY PRE-
LITIGATION COMMERCIAL MEDIATION**

*Aravind Sundar**

ABSTRACT

Section 12A of the Commercial Courts Act mandates litigants to compulsorily attempt to settle their disputes through mediation, prior to instituting a suit and litigating the dispute. However, it provides an exception to this rule and allows suits that “contemplate urgent interim relief” to bypass pre-litigation mediation. This article identifies and critically analyses three conflicting approaches given by various High Courts on how this exception is to be interpreted and applied, and how a Court must determine whether a suit qualifies for this exception. It reconciles the conflicts on how urgency is determined, keeping in mind the landmark judgement of Patil Automation v. Rakheja Engineers, in which the Supreme Court held that the requirement of pre-litigation mediation in Section 12A is mandatory and not optional. This article underscores the need for courts to meticulously adhere to Section 12A and uphold its intent of reducing judicial workload and docket explosion by directing suits to undergo

*Aravind is a second-year B.A. LLB. (Hons.) student at the National Law University, Delhi. The author may be reached at aravindsundar.as7@gmail.com.

mediation. It advocates for a rigorous assessment of urgency claims and argues that plaintiffs must be burdened to prove that their suit falls within the exception of Section 12A. This rigorous assessment is aimed at ensuring that litigants do not misuse its exception and render the pre-litigation mandate to be discretionary, which would defy the ruling of Patil Automation and the intent of Section 12A. Furthermore, it delves into some criticisms surrounding the compulsory pre-litigation mediation mechanism propounded by Section 12A and addresses concerns about the existing inadequacies in the Indian commercial mediation infrastructure, and the supposedly coercive nature of a mandatory mediation mechanism.

Keywords: *The Commercial Courts Act, 2015, Pre-Litigation Commercial Mediation, Patil Automation, Section 12A, Interim relief, Pleadings Approach, Justification Approach, Antecedent Conduct Approach*

I. INTRODUCTION

The Commercial Courts Act, 2015, (“CCA”) creates specialised, fast-track forums that deal with high-value commercial suits. Section 12A of the CCA states that commercial suits, except for those that *contemplate urgent interim relief*, cannot be instituted under the provisions of the CCA unless the plaintiff exhausts the remedy of pre-

institution mediation.¹ The Supreme Court settled the law on whether Section 12A was directory or mandatory in nature when a Division Bench in *Patil Automation v. Rakheja Engineers*² (“**Patil Automation**”) held that the requirement of pre-institution mediation is mandatory in nature. It was further held that non-compliance would lead to rejection of the complaint under Order VII, Rule 11 of the Code of Civil Procedure.

Recently, in *Yamini Manohar v. TKD Keerthi*³ (“**Yamini Manohar**”), the Supreme Court in an order stated that no absolute power to invoke the exception in Section 12A existed by simply making a prayer for urgent interim relief and that the Court had to be satisfied that an urgency existed. In light of this judgement, this piece aims to critically analyse a key aspect of the compulsory pre-litigation mediation (“**PLM**”) mechanism in the CCA and the conflicting approaches that had been taken up by the High Courts in determining whether a suit *contemplates urgent interim relief*. It seeks to add on to the rule of urgency determination made in *Yamini Manohar* by delineating the various approaches that have been taken up by the High Courts and attempts to reconcile these approaches with the observations in *Patil Automation* and the intent of the legislature in enacting Section 12A.

Section II summarises the Apex Court’s observations in *Patil Automation*, and shines a light on other judicial interpretations or observations related to Section 12A. Section III draws attention to the conflicting High Court jurisprudence that has arisen in attempting to determine whether a suit falls under the exception of Section 12A. In doing so, it explains the three conflicting approaches to determining such an urgency: the Pleadings Approach (Section III A), the Justification Approach (Section III B), and the Antecedent Conduct Approach (Section III C). Section IV attempts to provide a solution to

¹The Commercial Courts Act, 2015 (4 of 2016) s 12A.

²*Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1.

³*Yamini Manohar v TKD Keerthi* (2023) SCC OnLine SC 1382.

the conflict arisen in such a manner that would be in line with the intent of the CCA. Section V addresses some critiques related to Section 12A and its compulsory PLM mechanism. Section VI summarises the observations made in this article.

II. UNDERSTANDING SECTION 12A AND THE OBSERVATIONS IN *PATIL AUTOMATION*

The CCA is a by-product of two Law Commission Reports: the 188th Report⁴ and the 253rd Report.⁵ In the 188th Report, the Law Commission recommended the constitution of Commercial Division Benches in High Courts across the country, which would be equipped with high-tech facilities, fast-track procedures, and specialised judges, so as to quickly dispose high-value commercial disputes and assure foreign investors that India would be a viable country to conduct their business in.

In the 253rd Report, which was submitted in response to a 2009 Bill⁶ passed by the Lok Sabha, the Law Commission recommended the constitution of specialised Commercial Courts at the trial level and Division Benches in the High Courts. The Report also made other recommendations on fast-track procedures and cost regimes. Most importantly, it noted that the 2009 Bill had failed to “*fundamentally alter the litigation culture in India*”,⁷ and that merely creating fast-track courts would not be enough to resolve the disposal rate issues. The Report noted that a change in the Indian litigation culture, from a

⁴Law Commission of India, ‘One Hundred and Eighty Eighth Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts’ (2003).

⁵Law Commission of India, ‘Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015’ (2015).

⁶The Commercial Divisions of High Courts Bill, 2009 (139 of 2009).

⁷Law Commission of India, ‘Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015’ (2015) para 2.11.

litigant-managed to a court-managed process, was required.⁸ In light of these reports, the Legislature enacted the CCA in 2015, and further amended it in 2018, to introduce the mechanism of compulsory PLM through Section 12A.

Section 12A was added to the CCA via the 2018 Amendment Act.⁹ It states that “*a [commercial] 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.*”¹⁰ Various High Court judgements had given conflicting interpretations of the word “*shall*” in Section 12A, with some holding that the requirement was mandatory in nature,¹¹ whilst others holding that the requirement under Section 12A was merely directory in nature.¹² In 2022, the Supreme Court settled the law on this point in *Patil Automation*.

In *Patil Automation*, a Division Bench referred to the Statement of Objects and Reasons of the 2018 Amendment Bill, which states that the objective of introducing the PLM mechanism under Section 12A was to provide for “*compulsory mediation before the institution of a suit where no urgent interim relief is contemplated*” (emphasis provided).¹³ This was noted by the Bench, which held that the word *shall* must be interpreted in such a sense, so as to give Section 12A a mandatory flavour, keeping in mind the legislative intent.

⁸Law Commission of India, ‘Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015’ (2015) para 2.14.

⁹The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (28 of 2018).

¹⁰The Commercial Courts Act, 2015 (4 of 2016).

¹¹*Ganga Taro Vazirani v Deepak Raheja* (2021) SCC OnLine Bom 195 [17-19]; *Shahi Exports (P) Ltd v Gold Star Line Ltd* (2021) SCC OnLine Mad 16514 [20-24].

¹²*Deepak Raheja v Ganga Taro Vazirani* (2021) SCC OnLine Bom 3124; *Dredging and Desiltation Co (P) Ltd v Mackintosh Burn & Northern Consortium* (2021) SCC OnLine Cal 1458.

¹³Statement of Objects and Reasons, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 (123 of 2018).

The Court therein also referenced a Bombay High Court judgement, which held that Section 12A was enacted in the larger public interest.¹⁴ A similar view was taken in *Patil Automation*, wherein it was held that the mandatory nature of Section 12A would help in bettering the ease of doing business in India, thereby making the country a “*destination attracting capital*.”¹⁵ Keeping in mind issues of docket explosion and the requirements of terminating commercial disputes expeditiously, the mechanism of mediation would offer a viable alternative to the drawn-out court proceedings and help in reaching a speedy end to commercial disputes, which in turn would better the ease of doing business in India. The Supreme Court constructed this to be the legislative intent behind Section 12A and deemed it necessary to fulfil this intention by interpreting the section in a mandatory manner.¹⁶

However, since *Patil Automation*, there have been various conflicting approaches by High Courts on how to determine whether a suit would fall under the exception of the concerned section, that is, whether it *contemplates urgent interim relief*. These approaches will be introduced in the next section.

III. WHAT IS AN URGENT INTERIM RELIEF?

While Section 12A states that a suit that contemplates urgent interim relief would be allowed to bypass the requirement of PLM, the CCA does not explain what a suit *contemplating urgent interim relief* actually means, or how a Court is to determine whether an application can or should contemplate urgent interim relief, or whether a Court should even delve into the merits of the urgency aspect of the suit. Prior to *Yamini Manohar*, the High Court jurisprudence on Section 12A reveals three different approaches to determining whether a suit contemplates urgent relief. The first approach (Section IIIA) relies

¹⁴*Deepak Raheja v Ganga Taro Vazirani* (2021) SCC OnLine Bom 3124 [35].

¹⁵*Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [70].

¹⁶*Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [77-79].

merely on a pleading of urgency filed by the plaintiff. The second approach (Section IIIB) burdens the plaintiff with justifying their pleadings of urgency. The third approach (Section IIIC) applies the second approach, but also takes into relevance the antecedent conduct of the plaintiff.

A. The ‘pleadings’ approach

A Division Bench of the Delhi High Court in *Chandra Kishore Chaurasia v. RA Perfumery Works*¹⁷ (“**Chandra Kishore**”) held that the question of determining whether a suit even requires urgent interim relief is one that is to be decided solely by the plaintiff.¹⁸ Therefore, a court can only determine whether a suit contemplates urgent interim relief based on the pleadings in the plaintiff’s suit and the relief(s) sought.¹⁹ In other words, if a plaintiff in their pleadings aver that they require urgent interim relief, the court must take that averment as it is and allow them to invoke the exception of Section 12A. As explained by the Delhi High Court in *Ajay Gupta v M/S Greenways*²⁰ (“**Ajay Gupta**”), once an application contemplating urgent interim relief has been filed, it cannot be said that the plaintiff is not entitled to bypass compulsory PLM.²¹

It was rightfully held in *Chandra Kishore*,²² *Ajay Gupta*²³ and other cases²⁴ that the question of whether a suit involves any urgent interim

¹⁷*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529.

¹⁸*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529 [33-35].

¹⁹*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529 [35].

²⁰*Ajay Gupta v M/s Greenways* (2023) MANU/DEOR/53131/2023.

²¹*Ajay Gupta v M/s Greenways* (2023) MANU/DEOR/53131/2023 [9].

²²*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529 [33].

²³*Ajay Gupta v M/s Greenways* (2023) MANU/DEOR/53131/2023 [8].

²⁴*Royal Challengers Sports (P) Ltd v Sun Pictures A Division of Sun TV Network Ltd* (2023) SCC OnLine Del 5263 [4]; *Sharad Enterprises v Saboo Emery Stone*

relief is not contingent on whether the court would actually accede to that request, that is, the merits of the application for the relief are not relevant in deciding whether the case is urgent and should be allowed to bypass Section 12A. If a plaintiff requests relief for a reason, and requests it urgently for a different reason, these cases correctly held that the court must consider only the different reason while determining whether the case falls within the ambit of Section 12A.²⁵ At the stage of determining urgency, the court must not look into the merits of the request for relief (which would be delved into once the Court allows a bypassing of Section 12A and begins to hear arguments on whether the urgent interim relief should be granted or not).

However, there is a problem in claiming that the plaintiff is the sole determinant of urgency in reliefs and that the court should allow bypassing of Section 12A merely if the pleadings of the suit say so. In other words, it is problematic to blindly accede to an averment that claims urgency for the purposes of bypassing Section 12A simply because it was pleaded. As was held by the Bombay High Court in *Future Corporate Resources v. Edelweiss Special Opportunities Fund* (“*Future Corporate*”), the words “*which does not contemplate*” in Section 12A cannot be equated to “*in the opinion of the plaintiff*.”²⁶ Merely because a plaintiff pleads that their suit requires urgent interim relief, does not mean that the court should blindly accede to that request and allow them to bypass Section 12A. Such an approach would enable the plaintiff to misuse their right to plead ‘urgency’, and hence, bypass the mediation mechanism propounded by the CCA without a justifiable cause and on their own whims and fancies. This would defeat the

Industries (2023) MANU/RH/0893/2023 [8.1]; *Yamini Manohar v TKD Keerthi* (2023) SCC OnLine Del 2653 [14].

²⁵An example of this distinction between the reason for the relief and the reason for urgency is given in Section IV of this article.

²⁶*Future Corporate Resources (P) Ltd v Edelweiss Special Opportunities Fund* (2022) SCC OnLine Bom 3744 [42].

purpose of Section 12A and only serve to exacerbate the pendency issues faced by the judiciary.

This leads us to the approach taken up by the Calcutta High Court, which also criticised the *Chandra Kishore* approach on similar grounds.²⁷

B. The ‘justification’ approach

Rather than blindly acceding to a request for urgent reliefs, this approach stipulates that the court must delve into the merits of the urgency aspect of the reliefs pleaded, and question whether the reliefs sought are actually ‘urgent’ in nature. In *Laxmi Polyfab v. Eden Realty Ventures*²⁸ (“*Laxmi Polyfab*”), the Calcutta High Court observed that the regulation in approaching a commercial court, by way of Section 12A, was in place to expedite the resolution of the commercial dispute.²⁹ Hence, a plaintiff, pleading for the application of the exception of Section 12A, must demonstrate and satisfy the court that there is a need for bypassing mediation, due to the urgency of the reliefs sought.³⁰ The same Court in *Indian Explosives v. Ideal Detonators*³¹ (“*Indian Explosives*”) relied on *Laxmi Polyfab* and criticised the very premise of the test laid down in *Chandra Kishore* and held that the exercise of seeking urgent dispensation cannot be made plaintiff-centric, and instead requires some judicial discretion in determining whether the claim of urgency is actually reasonable in nature.³²

²⁷*Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944.

²⁸*Laxmi Polyfab (P) Ltd v Eden Realty Ventures (P) Ltd* (2021) SCC OnLine Cal 1457.

²⁹*Laxmi Polyfab (P) Ltd v Eden Realty Ventures (P) Ltd* (2021) SCC OnLine Cal 1457 [56].

³⁰*Laxmi Polyfab (P) Ltd v Eden Realty Ventures (P) Ltd* (2021) SCC OnLine Cal 1457 [54].

³¹*Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944.

³²*Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [12].

The Court held in *Indian Explosives* that the plaintiff must be made to prove that if the merits of their case are accepted, then there is a sense of urgency in the reliefs that they seek, which would justify the bypassing of Section 12A.³³ The Court further observed that allowing the plaintiff to bypass Section 12A merely on the grounds that they have averred a contemplation of urgency would render the purpose of compulsory PLM futile, as anybody could bypass Section 12A by simply pleading urgency, regardless of whether the reliefs that they seek are actually urgent or not.³⁴ An inquiry into the justification of the pleading of urgency was required to ensure compliance with the legislative intent of the CCA, which perceived mediation as a way to unclog the judiciary and as a new mechanism of access to justice, except for those cases that satisfied the court that there was a sense of urgency in the reliefs pleaded.

Similarly, the Bombay High Court in *Kaulchand Jogani v. Shree Varshan Investment*³⁵ (“*Kaulchand Jogani*”) observed that the mandate in Section 12A could be easily circumvented if the court allowed an application that merely pleaded urgency, howsoever unjustified or unwarranted.³⁶ Hence, it was held that a court dealing with the bypassing of Section 12A must delve into an extremely narrow inquiry of whether there is an element of justifiability in the urgency aspect of the suit, while not considering the actual merits of the prayer for relief. In other words, the assessment must be on whether there are elements that prima facie indicate urgency of the suit, or whether there

³³*Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [11].

³⁴*Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [12].

³⁵*Kaulchand H Jogani v Shree Vardhan Investment* (2022) SCC OnLine Bom 4752.

³⁶*Kaulchand H Jogani v Shree Vardhan Investment* (2022) SCC OnLine Bom 4752 [28].

is a justification for seeking urgency, irrespective of whether the suit would actually succeed on its merits.³⁷

The exercise that was taken up by these courts was to determine whether the need for urgency in obtaining interim relief was reasonably made out from these pleadings. By doing so, the courts were able to ensure that only cases which are actually urgent in nature and require interim relief immediately, are allowed to bypass PLM. This enabled the courts to uphold the mandatory intent of Section 12A.

C. *The 'antecedent conduct' approach*

The exercise taken up by the courts in the previous section slightly differs from what was taken in the below-mentioned cases, which relied on both the pleadings and the antecedent conduct of the plaintiff. In *Indian Explosives*, the Court rejected the request based on the antecedent conduct of the plaintiff: since the right to sue had arisen more than 5 years prior to the filing of the commercial suit, it could not be contended that there was any urgency in filing the suit, or that the plaintiff could not await the process of mediation.³⁸

Antecedent conduct of the plaintiff has been recognised as a relevant factor in similar cases involving parties that file for exceptions to Section 12A. In *Srmb Srijan v. BS Sponge*,³⁹ the Calcutta High Court distinguished *Chandra Kishore* and refused to exempt the plaintiff from Section 12A on the grounds that the plaintiff had filed the suit 2 years after the right to sue first arose.⁴⁰ In *Riveria Commercial*

³⁷*Kaulchand H Jogani v Shree Vardhan Investment* (2022) SCC OnLine Bom 4752 [30-31].

³⁸*Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [13].

³⁹*Srmb Srijan Private Limited v BS Sponge Pvt Limited* (2023) MANU/WB/1666/2023.

⁴⁰*Srmb Srijan Private Limited v BS Sponge Pvt Limited* (2023) MANU/WB/1666/2023 [5-7].

*Developers v. Brompton Lifestyle Brands*⁴¹ (“**Riveria**”) and *Bolt Technologies OU v. Ujoy Technology*⁴² (“**Bolt Technologies**”) the Delhi High Court noted that the plaintiff had attempted to reach an amicable settlement with the defendant before the institution of the suit, and such a factor would favour granting the bypass of Section 12A.⁴³ On a similar note, the plaintiff in *Gavrill Metal v. Maira Fabricators*⁴⁴ (“**Gavrill**”) had pleaded that the defendants were habitual defaulters in nature and that their conduct was such that they would be likely to dispose of their property to render any decree in favour of the plaintiff infructuous, therefore giving rise to a necessity for bypassing Section 12A.

In the aforementioned cases, the courts had delved into the antecedent conduct of the plaintiff in relation to the dispute at hand. Relevant conduct included any attempts that were being made to amicably reach an out-of-court settlement and the urgency with which the plaintiff instituted the suit. In other words, the courts considered a long waiting period between when the right to sue first arose and when the suit was actually instituted, to be a relevant factor in rejecting an application to bypass Section 12A.

In some cases, the courts have also taken the defendant’s conduct in relation to the dispute into consideration while ruling in favour of the exception. In *Zee Entertainment Enterprises v. Triller Inc.*,⁴⁵ the Bombay High Court ruled in favour of granting an exception on the grounds that there was reasonable anxiety on part of the plaintiff that the foreign defendant would alienate its Indian assets and properties in

⁴¹*Riveria Commercial Developers Ltd v Brompton Lifestyle Brands (P) Ltd* (2022) SCC OnLine Del 4624.

⁴²*Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639.

⁴³*Riveria Commercial Developers Ltd v Brompton Lifestyle Brands (P) Ltd* (2022) SCC OnLine Del 4624 [51]; *Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639 [25].

⁴⁴*Gavrill Metal (P) Ltd v Maira Fabricators (P) Ltd* (2023) SCC OnLine Cal 2443.

⁴⁵*Zee Entertainment Enterprises Ltd v Triller* (2023) SCC OnLine Bom 1916.

an effort to deprive the former of their rightful dues.⁴⁶ In *Bolt Technologies*, the Delhi High Court noted both the attempt of the plaintiff to reach an amicable settlement and the conduct of the defendant in refusing and condemning the same, while granting an exemption to Section 12A.⁴⁷ The Court also condoned an alleged delay in the filing of the suit, on the grounds that the conduct of the defendant had strengthened the need for the urgency of the reliefs pleaded.⁴⁸

The focus on the defendants' conduct in these two cases was related to the possibility of the defendant depriving the plaintiff of their right to collect their dues, and the defendant's refusal to participate in attempts at reaching an amicable settlement.

IV. WHAT SHOULD BE THE CORRECT APPROACH?

While attempting to reconcile these conflicts, it is important to remember the legislative intent of the CCA that was affirmed by the Supreme Court in *Patil Automation*: there is a need for the speedy resolution of commercial disputes, which in turn would ensure an expeditious delivery of justice by reducing docket explosion.⁴⁹ This need can be met by mandating that all commercial cases must first go through compulsory PLM, which would lighten the load on judges and in turn, allow them to focus on cases that require urgent relief.⁵⁰ This is important, especially keeping in mind the fact that the 2018 Amendment Act reduced the pecuniary jurisdiction of Commercial Courts from Rs. 1 crore to Rs. 3 lakhs,⁵¹ which has resulted in an

⁴⁶*Zee Entertainment Enterprises Ltd v Triller* (2023) SCC OnLine Bom 1916 [22].

⁴⁷*Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639 [23-25].

⁴⁸*Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639 [21-24].

⁴⁹*Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [70-72].

⁵⁰*Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [74].

⁵¹The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (28 of 2018) s 4.

increase in the workload of these courts to over three-quarters of all civil disputes in the country.⁵²

The Supreme Court has also firmly attested to the quality of mediation as a dispute resolution mechanism, calling it “*one of the best forms, if not the best, of conflict resolution.*”⁵³ Commercial mediation has also largely received backing from the business world as well, with commercial entities of various sizes willing to go through mediation in order to take advantage of the various benefits arising out of it, such as the maintenance of business relationships, or the expeditious settlement of disputes.⁵⁴

In light of the above observations, it becomes imperative for courts to strictly enforce the mandate of Section 12A, and not blindly grant the exception. The *Pleadings Approach* suffers from a key problem: while it correctly refuses to consider the actual merits of the relief, it gives the plaintiff full power in determining whether their reliefs would qualify as urgent, and then puts an overworked judicial system at the mercy of such a determination. Such an approach brings about a real possibility of plaintiffs circumventing the mandate under Section 12A if a Court must accept a mere pleading of urgency. This also takes us back to the observation made by the Law Commission in its 253rd Report, wherein it was stated that the achievement of expeditious disposal rates through the Commercial Courts system is possible only

⁵²Sudhir Krishnaswamy and Varsha Mahadeva Aithala, ‘Commercial Courts in India: Three Puzzles for Legal System Reform’, (2020) 11(1) *Journal of Indian Law and Society* 20, 29.

⁵³*Vikram Bakshi v Sonia Khosla* (2014) 15 SCC 80 SC [19].

⁵⁴Juvraj Singh and Pragya Jain, ‘Compulsory Pre-Litigation Mediation for Commercial Suits – A Boon or a Bane?’ (*Cyril Amarchand Mangaldas Blogs*, 11 October 2022)

<<https://corporate.cyrilamarchandblogs.com/2022/10/compulsory-pre-litigation-mediation-for-commercial-suits-a-boon-or-a-bane/>> accessed 13 October 2023; Abhijnan Jha and Urvashi Misra, ‘Mandatory Pre-Institution Mediation - Effective Remedy to Declog Courts in India’ (*AZB Partners*)

<<https://www.azbpartners.com/bank/mandatory-pre-institution-mediation-effective-remedy-to-declog-courts-in-india/>> accessed 13 October 2023.

if the Indian litigation culture changes from one that is litigant-managed to one that is court-managed.⁵⁵

A similar ruling was made by the Supreme Court in *Yamini Manohar*. The Court therein held that “*the prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12A.*”⁵⁶ Giving the plaintiff the absolute choice and right to determine whether their suit qualifies for the exception goes against the legislative intent of Section 12A, which seeks to mandate litigants to compulsorily undergo PLM. Furthermore, the Pleadings Approach, which the Court in *Yamini Manohar* refers to as the “*absolute and unfettered right*”⁵⁷ approach, would not be justified in light of *Patil Automation* making Section 12A mandatory. As was correctly held by the Court, the word ‘*contemplate*’ means that “*the plaint, documents and facts should show and indicate the need for an urgent interim relief*”⁵⁸ and that the phrasing of Section 12A “*should be read as conferring power on the court to be satisfied.*”⁵⁹

Therefore, it becomes imperative for courts to test the justifiability and the reasonability of the urgency pleaded, and determine whether a plaintiff should be allowed to bypass mediation. In other words, the plaintiff must satisfy the court that a delay of 3-5 months by way of directing the parties to mediation⁶⁰ would actually be fatal to the achievement of justice and therefore justifies the need for bypassing

⁵⁵Law Commission of India, ‘Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015’ (2015) 25-27.

⁵⁶*Yamini Manohar v TKD Keerthi* (2023) SCC OnLine SC 1382 [9].

⁵⁷*Yamini Manohar v TKD Keerthi* (2023) SCC OnLine SC 1382 [10].

⁵⁸*ibid.*

⁵⁹*ibid.*

⁶⁰The Commercial Courts Act, 2015 (4 of 2016) s 12A(3) states that the pre-institution mediation proceedings must be completed within 3 months, which may be extended to 5 months at the behest of the parties. If a settlement is not reached within this time period, the mediator is bound by Rule 7(1)(ix), Commercial Courts Rules 2018, to file a Failure Report. This Report may be produced before the Commercial Court to entitle the plaintiff to begin litigation.

mediation. There is an onus on the party seeking to avoid mediation to explain why the process should be bypassed.⁶¹ To take up this test of justifiability and reasonability, courts may refer to the plaintiff's pleadings and documents, the facts and circumstances of the case, the antecedent conduct of the plaintiff in filing the suit and if required, the conduct of the defendants, but not the merits of the reliefs pleaded. To quote *Yamini Manohar*, “*this is the precise and limited exercise that the commercial courts will undertake.*”⁶²

To summarise, courts must limitedly delve into the following factors while dealing with a request for exemption of Section 12A:

Firstly, it must determine whether the pleadings aver ‘urgency.’

Secondly, it must satisfy itself that the claim of urgency is justified and warranted, without actually delving into the merits of the pleadings. This means that if a plaintiff pleads that interim relief is required for certain reasons, and is required urgently for some other reasons, the court must not delve into the merits of the reasons for the interim relief and must only determine the justifiability and warranted basis of reasons for the urgency of the relief. For example, if we were to refer to *Gavrill*, the interim relief sought by the plaintiff was a claim for recovery of price of goods.⁶³ However, the plaintiff pleaded urgency to bypass Section 12A on the grounds that the defendant was a habitual defaulter who was likely to sell off his properties to render any decree infructuous.⁶⁴ The Court therein did not delve into the merits of the claim for recovery of price but merely determined that the defaulting nature of the defendant was sufficient to meet the requirement of the

⁶¹Campbell Hutchinson, ‘The Case for Mandatory Mediation’ (1996) 42 Loyola Law Review 85, 91.

⁶²Campbell Hutchinson, ‘The Case for Mandatory Mediation’ (1996) 42 Loyola Law Review 85, 100.

⁶³*Gavrill Metal (P) Ltd v Maira Fabricators (P) Ltd* (2023) SCC OnLine Cal 2443 [5].

⁶⁴*Gavrill Metal (P) Ltd v Maira Fabricators (P) Ltd* (2023) SCC OnLine Cal 2443 [18].

exception of Section 12A, and allowed the suit to bypass PLM. Only after this bypassing was allowed, did the Court permit the parties to submit arguments on the merits of the claim for recovery of price.

Thirdly, in order to determine the justifiability of the urgency pleaded, the courts may refer to the pleadings and documents, the facts and circumstances of the case, and the conduct of the parties. An important factor is to see if there is a considerable delay between the time when the right to sue first arose, and when the suit was actually filed. If there is a delay, the courts must satisfy themselves that the facts and circumstances of such a delay would not take away from the urgency of the specific interim reliefs pleaded before them.

V. SHOULD THE CCA PROPOUND COMPULSORY PLM?

The effect of this solution is to completely remove any discretion afforded to the plaintiff on deciding whether to pursue PLM or not. Not only are they required to plead urgency for bypassing mediation, but they are also required to substantiate their pleading of urgency and prove its merit. While it is in line with the intent of Section 12A, there have been criticisms against the same primarily on the grounds that there are not sufficient or skilled mediators in India that enable plaintiffs to seek effective mediation,⁶⁵ nor is there an effective mediation machinery in India.⁶⁶ Moreover, there have been recommendations from the Prime Minister's Economic Advisory Council to make PLM voluntary in nature, keeping in mind the high

⁶⁵Deepika Kinhal and Apoorva, 'Mandatory Mediation in India – Resolving to Resolve' (2020) 2(2) Indian Public Policy Review 49, 53.

⁶⁶Umakanth Varottil, 'Supreme Court on Mandatory Pre-Litigation Mediation in Commercial Court Cases' (*IndiaCorpLaw*, 5 September 2022) <<https://indiacorplaw.in/2022/09/supreme-court-on-mandatory-pre-litigation-mediation-in-commercial-court-cases.html>> accessed 18 October 2023.

failure rates of commercial mediation and the voluntary nature of mediation.⁶⁷

This problem primarily existed due to the fact that the CCA had only authorised the Legal Services Authorities (“LSA”) to carry out PLM. The main function of the LSAs is to provide free legal services to weaker sections of society⁶⁸ and consequently, their mediators were provided with training in family laws, consumer rights, criminal laws, and sexual harassment laws, but not in high value commercial disputes.⁶⁹ This meant that the mediators in these LSAs were not sufficiently trained to effectively mediate in high-value commercial disputes. Statistics provided by the National Legal Services Authorities prove their inability to effectively carry out commercial mediation. In 2022, while 23.3% of the overall cases received for mediation were successfully settled by the LSAs, only 1.9% of the commercial cases received were successfully settled.⁷⁰

However, the Mediation Act, 2023 rectifies this issue to a certain extent. It amends Section 12A to also allow a plaintiff to approach a private mediator for pursuing PLM and subjects this private mediator to the same rules as the LSA mediators.⁷¹ PLM can also be pursued using online mediation, which further reduces the costs and resources taken up.⁷² Such a move is in line with the party-centric and voluntary

⁶⁷Sanjeev Sanyal and Apurv K Mishra, ‘Why Commercial Mediation Should be Voluntary’ (2023) EAC-PM Working Paper Series EAC-PM/WP/25/2023 <<https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf>> (accessed 1 December 2023).

⁶⁸The Legal Services Authorities Act, 1987 (39 of 1987).

⁶⁹NALSA, ‘Training Modules’ (5 March 2019) <<https://nalsa.gov.in/training-modules>> accessed 28 November 2023; NALSA, ‘Manual For District Legal Services Authorities 2023’ (30 June 2023) <<https://nalsa.gov.in/library/manual-for-district-legal-services-authorities-2023>> accessed 28 November 2023.

⁷⁰National Legal Services Authorities, ‘Statistical Snapshot 2022’ (9 August 2023) 26-27 <<https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2022>> accessed 28 November 2023.

⁷¹The Mediation Act, 2023 (32 of 2023) s 64.

⁷²The Mediation Act, 2023 (32 of 2023) s 30.

nature of mediation,⁷³ as the parties are now free to appoint any mediator who they think would be the most effective in resolving their dispute. While it is too soon to see if the Mediation Act is starting to solve the institutional problems in the domestic mediation framework, commentators have reacted positively to the Mediation Act and its attempt to institutionalise the mediation process in India.⁷⁴

Another argument raised against compulsory PLM in the CCA is the fact that it mandates litigants to go through mediation, and such a mandate supposedly contradicts the voluntary nature of a dispute resolution method like mediation,⁷⁵ which emphasises on self-determination, collaboration and creative dispute resolution that addresses each party's concerns.⁷⁶ Critics characterise such a mechanism as coercing unwilling parties to sit through a long-drawn mediation process.⁷⁷

⁷³Sriram Panchu, *Mediation - Practice and Law* (3rd edn, LexisNexis) ch 3.2.

⁷⁴'Mandatory Pre-Litigation Mediation Needs Lot of Ground Work before Rollout' *The Hindu BusinessLine* (9 January 2022) <<https://www.thehindubusinessline.com/business-laws/mandatory-pre-litigation-mediation-needs-lot-of-ground-work-before-rollout/article38204536.ece>> accessed 28 November 2023; Justice RS Chauhan, 'Why the Mediation Act 2023 Is a Great Leap Forward' (*Moneycontrol*, 14 November 2023) <<https://www.moneycontrol.com/news/opinion/why-the-mediation-act-2023-is-a-great-leap-forward-11738231.html>> accessed 28 November 2023; PTL, 'Mediation Act a Watershed Moment in Indian Legal Landscape: Justice Hima Kohli' *Deccan Herald* (23 September 2023) <<https://www.deccanherald.com/india/mediation-act-a-watershed-moment-in-indian-legal-landscape-justice-hima-kohli-2698533>> accessed 28 November 2023.

⁷⁵Sanjeev Sanyal and Apurv K Mishra, 'Why Commercial Mediation Should be Voluntary' (2023) EAC-PM Working Paper Series EAC-PM/WP/25/2023, 7 <<https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf>> (accessed 1 December 2023).

⁷⁶Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution* 479, 481; Lon Fuller, 'Mediation: Its Forms and Functions' (1971) 22 *Southern California Law Review* 305, 308.

⁷⁷Sanjeev Sanyal and Apurv K Mishra, 'Why Commercial Mediation Should be Voluntary' (2023) EAC-PM Working Paper Series EAC-PM/WP/25/2023, 7

This is an incorrect characterisation: there is a distinction between coercion *within* mediation, which forces a party to settle in the mediation process,⁷⁸ and coercion *into* mediation, which merely forces a party to *try* to settle the dispute via mediation, as opposed to compulsorily reaching a settlement.⁷⁹ The requirement is not for the parties to reach a settlement, but only for them to make a good faith effort in mediating their dispute.⁸⁰ The party's right to litigate the dispute still exists, but is merely delayed until mediation fails.⁸¹ This delay is justified on two counts: *firstly*, it helps in reducing the number of cases that the judicial system is forced to deal with, and *secondly*, the mechanism of mediation itself provides benefits such as: a chance for parties to contribute to the resolution process,⁸² improved communication between parties and their lawyers,⁸³ greater compliance with the settlements (as opposed to a judgement emanating

<<https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf>> (accessed 1 December 2023).

⁷⁸This defeats the very purpose of mediation in not allowing the parties to collaboratively achieve a mutually beneficial agreement.

⁷⁹Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution* 479, 486; Frank Sander, H William Allen and Debra Hensler, 'Judicial (Mis)use of ADR? A Debate' (1996) 27 *University of Toledo Law Review* 885, 886.

⁸⁰Campbell Hutchinson, 'The Case for Mandatory Mediation' (1996) 42 *Loyola Law Review* 85, 91.

⁸¹Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution* 479, 486.

⁸²Roselle Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641, 690.

⁸³Roselle Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641, 691.

from a litigation process),⁸⁴ maintenance of business relationships,⁸⁵ and many more. There may be a few instances where certain types of disputes should not be mediated and must be litigated, and a conjoint reading of the Mediation Act, 2023 and the CCA's interim relief exception covers such instances.⁸⁶

VI. CONCLUSION

While the Supreme Court of India has provided clarity on the mandatory nature of the PLM mechanism under the CCA, the mechanism still suffers from fundamental flaws regarding the types of suits that are allowed to bypass it. *Yamini Manohar*, by interpreting Section 12A in a manner that takes power of determining urgency away from the litigant and returns it to the courts, has succeeded in ensuring that the purpose of Section 12A is not defeated.

The current jurisprudence reveals divergent approaches that are a representation of the two opposing litigation cultures that the 253rd Report identified: *firstly*, the pleadings approach, which represents a litigant-centric judicial process that causes structural issues of long delays, frivolous litigations and an overall abuse of the judicial process, and *secondly*, the justifiability and the antecedent conduct approaches, which represent a court-centric judicial process that empowers the Courts to force the plaintiff into acceding to fast-track measures and policies. The report argued that a change in litigation culture from being litigant-centric to court-centric was important to give effect to the creation of the fast-track forums and procedures under the CCA.

⁸⁴Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution* 479, 482.

⁸⁵Campbell Hutchinson, 'The Case for Mandatory Mediation' (1996) 42 *Loyola Law Review* 85, 88.

⁸⁶The Mediation Act, 2023 (32 of 2023) s 6; The Commercial Courts Act, 2015 (4 of 2016) s 12A(1).

The mechanism of compulsory PLM was enacted to further increase the speed with which commercial disputes are resolved. While it has attracted some criticisms regarding its effectiveness in resolving disputes, the recently enacted Mediation Act, 2023 seems to provide solutions for these criticisms. Hence, there is a need for courts to deal with suits seeking bypass of mediation under Section 12A in a stricter sense. Courts cannot merely rely on a pleading of urgency and allow a litigant-centric approach to hijack the fast-track procedures and hold the system hostage to their determinations. Instead, courts must delve into the justifications and warranted basis of such pleadings, and take control from the litigants by creating a standard that they are expected to meet in order to bypass the pre-litigation mediation mechanism. Such an exercise must be taken in order to promote the intent of Section 12A and help decongest the judiciary's workload.