

---

# **IP INFRINGEMENT GRANTS AN AUTOMATIC PASS FROM MEDIATION IN NOVENCO V. XERO: THE STATUTORY INTERSECTION OF SECTION 12A AND PROPRIETARY RIGHT**

---

Anjali Sharma, Bishop Cotton Women's Christian Law College, Bangalore.

Tamanna Huda Dania Inam, Bishop Cotton Women's Christian Law College, Bangalore.

## **ABSTRACT**

The Law Commission of India submitted its 253rd Report in January 2015 titled, "Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015". In light of the ever-piling number of cases before the courts a remarkable recommendation given by the Committee was the introduction of mandatory pre-litigation mediation. This concept was further institutionalised under Section 12A of the Commercial Courts Act, 2015. With the growing persistence of choosing arbitration over litigation, the case of Novenco Building and Industry AS v. Xero Energy Engineering Solutions is of paramount importance as it derails from the norm of commercial suits being preferred to mediation prior to litigation.

This paper seeks to examine the question posed by this case, primarily being whether a commercial suit alleging continuing infringement of patent and design rights, accompanied by a prayer for interim injunction, can be said to contemplate "urgent interim relief" within the meaning of Section 12A of the Commercial Courts Act, 2015, notwithstanding a significant delay in its institution. Further, the paper analyses the Court's interpretation of 'urgency' and the factors for an interim relief in civil cases where proprietary rights are at risk, while also examining the role of courts in the interference of protecting IP rights and simultaneously maintaining procedural compliance.

Through a normative analytical framework, this paper seeks to demonstrate the transformative impact that this judgment has in resolving historical procedural ambiguities and establishing a more definitive jurisprudential standard.

## INTRODUCTION:

The current landscape of commercial law in India is being defined by a struggle between the legislative need for speedy court processes and the urgent necessity to protect business proprietary. At the centre of this debate lies Section 12A of the Commercial Courts Act, 2015. This provision fundamentally altered the nature of Indian litigation by instituting pre-institution mediation as a mandatory "gatekeeper" that parties must exhaust before they are permitted to enter a courtroom.<sup>1</sup> The Supreme Court initially adopted a rigid stance on this rule in *Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.*<sup>2</sup> observing that any lawsuit filed without attempting mediation must be rejected at the threshold. However, this solution of "one-size-fits-all" has created quite a difficult paradox for owners of Intellectual Property (IP). In a modern economy where intangible assets serve as primary driving force, the time lost in mandatory mediation process can allow an infringer to cause irreparable damage to a creator's market position and financial viability.<sup>3</sup>

The landmark decision in *Novenco Building and Industry AS v. Xero Energy Engineering Solutions*<sup>4</sup> represents a paradigm shift in how the judiciary views this conflict. Prior to this ruling, courts often focused on penalising plaintiffs who delayed in filing their cases by forcing them back into the loop of mediation. The prevailing logic was that if a plaintiff did not act with immediate celerity, they could not later claim their case was an "emergency" to bypass Sec. 12A.<sup>5</sup> Since every unauthorised sale or use of a product constitutes a fresh violation of the owner's right and potentially deceives the public, the situation remains an emergency regardless of when the plaintiff first discovered the infringement.<sup>6</sup>

The Supreme Court's prioritisation of substantive proprietary rights over the procedural hurdle of Section 12A signals a necessary evolution toward litigant autonomy. By recognising that IP infringement is a "persistent peril", the Court essentially grants IP cases an inherent "free pass"

---

<sup>1</sup> Deepika Kinhal & Apoorva, Mandatory Mediation in India - Resolving to Resolve, 2(2) Indian Public Policy Review 49, 52 (2020), available at: <https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf>

<sup>2</sup> *Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.*, (2022) 10 SCC 1

<sup>3</sup> James F. Smith, Mediating International Intellectual Property Disputes, The Indian Law Institute, available at: [http://14.139.60.116:8080/jspui/bitstream/123456789/17735/1/008\\_Meditating%20International%20Intellectual%20Property%20Disputes%20%28238-259%29.pdf](http://14.139.60.116:8080/jspui/bitstream/123456789/17735/1/008_Meditating%20International%20Intellectual%20Property%20Disputes%20%28238-259%29.pdf)

<sup>4</sup> *Novenco Building and Industry AS v. Xero Energy Engineering Solutions Pvt. Ltd.*, 2025 INSC 1256

<sup>5</sup> *Chandra Kishore Chaurasia v. RA Perfumery Works*, 2022 SCC OnLine Del 3529

<sup>6</sup> *Supra* note 4.

from the mediation mandate.<sup>7</sup> This shift is not merely a procedural shortcut, but a vital recognition of the intangibility factor of IP. Through the lens of Novenco, we explore how the Indian Judiciary is moving toward a model where the unique nature of IP justifies an automatic bypass of mediation, ensuring that the public enforcement machinery remains a shield for innovation rather than a bureaucratic obstacle.

**FACTS:**

1. The Novenco Building and Industry AS, a Danish entity engaged in manufacture of industrial fans under the 'Novenco ZerAx' brand. The brand had secured statutory protection for its innovation under various patent and design laws in India and globally as well. On 1st September 2017, Novenco entered into an Dealership Agreement with Xero Energy Engineering Solutions Pvt. Ltd., for marketing and sales of the Novenco ZerAx fans in the Indian market.
2. It was alleged that Xero Energy's Director breached the agreement by establishing Aeronaut Fans to produce and sell identical fans under deceptively similar name and design. Later in July 2020, it was discovered that Xero Energy was involved in marketing of Aeronaut Fans.
3. Despite repeated requests for clarification and after failing to receive explanations for the competing products, Novenco terminated the dealership in October 2022 and issued cease and desist notice in December 2022.
4. Novenco's technical experts inspected Aeronaut's installations at Cavendish Industries and Hero Moto Corp, confirming infringement via an affidavit in February 2024. Final patent and design certificates were obtained by May 2024.
5. On 4th June 2024, Novenco filed a commercial suit (COMS No. 13 of 2024) before High Court of Himachal Pradesh seeking an ad interim injunction under Order XXXIX Rules 1 and 2 along with an application under Section 151 of CPC seeking an exemption from pre-institution mediation due to urgency.<sup>8</sup>

---

<sup>7</sup> Yogesh Byadwal, *Novenco v. Xero: Do IP Cases Get a Free Pass to Bypass Sec 12-A?* (Nov. 2025), <https://spicyip.com/2025/11/novenco-v-xero-do-ip-cases-get-a-free-pass-to-bypass-sec-12-a.html>

<sup>8</sup> *Supra* note 4, Para 8.

6. By order dated 28.08.2024, the learned Single Judge rejected the plaint, holding that the party had failed to demonstrate “urgent interim relief,” particularly a six month delay from inspection to filing of the suit as a “lack of genuine urgency” and pre-institution mediation in mandatory.<sup>9</sup>
7. A Division Bench of the High Court upheld this rejection on 13th November 2024, ruling that continuous infringement of intellectual property rights does not waive mandatory mediation.<sup>10</sup>
8. The matter was before The Supreme Court of India through a Special Leave Petition. By an order dated 07.02.2025, the Hon’ble Supreme Court directed the parties to attempt mediation while the matter was pending. On 23rd June 2025, the mediation proceedings culminated in failure and bringing the matter back to the court to determine the legal standard for “urgent interim relief” under the governing statutory framework.<sup>11</sup>

#### **ISSUES:**

The Appellant approached the Supreme Court by the way of a Special Leave Petition, wherein the primary issue for determination was whether a commercial suit alleging continuing infringement of patent and design rights, accompanied by a prayer for interim injunction, can be said to contemplate "urgent interim relief" within the meaning of Section 12A of the Commercial Courts Act, 2015, notwithstanding a significant delay in its institution.<sup>12</sup>

To answer this central question the court further examined whether the determination of urgency must be assessed holistically from the standpoint of the plaintiff based on the pleadings rather than through a merit-based “mini-trial”. Furthermore, the Court considered whether the “persistence of the peril” creates a state of inherent urgency that overrides procedural laches. Finally, the Court addressed whether the public interest in preventing consumer deception and market confusion imparts a necessary “color of immediacy” to intellectual property disputes, thereby justifying an exemption from the mandatory pre-institution mediation mandate.

---

<sup>9</sup> Supra note 4, Para 10.

<sup>10</sup> Supra note 4, Para 11.

<sup>11</sup> Supra note 4, Para 12.

<sup>12</sup> Supra note 4, Para 21.

## **DECODING THE JUDGMENT:**

The two-judge bench of the Supreme Court began its analysis by clarifying the judicial role under Section 12A of the Commercial Courts Act, 2015. The Act was amended in the year 2018 by Act No. 28 of 2018. By the aforesaid amending Act, Section 12A was also incorporated with an object to provide for compulsory mediation before initiation of a suit where no urgent interim relief is contemplated.<sup>13</sup> The provision in question reads out:

### **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 preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.

(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of three months from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of two months with the consent of the parties:

Provided further that, the period during which the parties remained occupied with the pre-institution mediation, such period shall not be computed for the purpose of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties to the dispute and the mediator.

---

<sup>13</sup> Supra note 4, Para 15

(5) The settlement arrived at under this section shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

While considering the question of law, the Supreme Court tugged with the urgency of the interim relief and the procedural delay. For this purpose, the Court referred to previous cases dealt with these issues.

The Supreme Court referred to *Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.*<sup>14</sup>, in which this Court examined the necessity of Section 12A before filing a civil suit. It primarily ruled that Section 12A is not optional but rather mandatory. It specifically declares that Section 12A of the Act is mandatory and holds that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11.<sup>15</sup>

The same was reiterated further in *Yamini Manohar v. T K D Keerthi*<sup>16</sup>, where it was held that an ‘absolute and unfettered right’ approach is not justified if the pre-institution mediation under Section 12A of the CC Act is mandatory. This led to the observation that while the judiciary’s role is limited, it must ensure that prayers for urgent relief are not used as a mere camouflage or detective guise to circumvent the statutory mandate. If not exercised properly, Section 12A would be taken as a matter of discretion rather than procedure rendering the legislative intent of the Commercial Courts Act, 2015 nugatory.

Further the Court directed its attention to *Dhanbad Fuels (P) Ltd. v. Union of India*,<sup>17</sup> where it was observed that the test under Section 12A is not whether the prayer for the urgent interim relief actually comes to be allowed or not, but whether on an examination of the nature and the subject-matter of the suit and the cause of action, the prayer of urgent interim relief by the plaintiff could be said to be contemplable when the matter is seen from the standpoint of the plaintiff.

In the present case, the question of whether a suit contemplates any urgent relief needs to be examined on the touchstone of the aforementioned criteria arose. Since the principle laid down

---

<sup>14</sup> (2022) 10 SCC 1

<sup>15</sup> Supra note 14, Para 84

<sup>16</sup> (2024) 5 SCC 815, Para 8.

<sup>17</sup> (2025) SCC OnLine SC 1129, Para 44

in Patil Automations & Yamini Manohar was being heavily relied on it begs the question of the continuous infringement of intellectual property.

To determine this, the court laid down 5 factors, namely,

(i) Section 12A mandatorily requires pre-institution mediation for commercial suits, non-compliance of which would ordinarily render the plaint institutionally defective.

(ii) A plaintiff can be exempted from the requirement of Section 12A only when the plaint and the documents attached with it clearly show a real need for urgent interim intervention. A wholesome reading of the plaint and the material annexed to the plaint ought to disclose the need for urgent relief.

(iii) The court must look at the plaint, pleadings and supporting documents to decide whether urgent interim relief is genuinely contemplated. The court may also look for immediacy of the peril, irreparable harm, risk of losing rights/assets, statutory timelines, perishable subject-matter, or where delay would render eventual relief ineffective.

(iv) A proforma or anticipatory prayer for urgent relief used as a device to skip mediation will be ignored and the court can require the parties to comply with Section 12A of the Act.

(v) The court is not concerned with the merits of the urgent relief, but if the relief sought seems to be plausibly urgent from the standpoint of the plaintiff the court can dispense with the requirement under Section 12A of the Act.<sup>18</sup>

Deviating from those precedents the Supreme Court shifted its view from rigid procedural compliance to substantive protection of proprietary rights. The court began its analysis by identifying the fundamental error in the High Court's approach, which had prioritised the timeline of cause of action over the nature of the injury. To correct this error, the Court clarified the judicial role under Section 12A of the Act, which mandates pre-institution mediation unless a suit contemplates urgent interim relief. It was further stated by the Court, "It is well settled in law that mere delay in bringing an action does not legalise an infringement and the same cannot defeat the right of the proprietor to seek injunctive relief against the dishonest user".<sup>19</sup>

---

<sup>18</sup> Supra note 4, para 20.

<sup>19</sup> Supra note 4, para 22.

By referring the precedent laid down in *Midas Hygiene Industries*<sup>20</sup>, it was observed that mere delay in bringing action is not sufficient to defeat grant of injunction in such cases.

At this stage, it is worth pointing out that disputes of intellectual property are not confined to the private realm; there is an obvious involvement of consumers of said products. Therefore, the necessity to protect the marketplace from deception imparts a colour of urgency to the relief sought, justifying an exemption from the Section 12A mandate to prevent ongoing harm to both the plaintiff's reputation and the general public.

The Appellant's prayer for an interim injunction was a valid grievance founded on the irreparable prejudice rather than a mere camouflage to escape mediation, is what the court opinionated. A rigid insistence on pre-litigation mediation in such ongoing infringement would effectively render the plaintiff remediless while allowing the infringer to continue profiting under the protection of procedural formality.

Finally, the court was of the view that in matters of urgency assessment of the standpoint of the plaintiff, as shown by the plaint in facts and annexed documents, is absolutely necessary. Under Section 22 of the Limitation Act, 1963, a fresh period of limitation begins at every moment during which a wrong continues. In this case, by focusing more on the lapse of time between discovery of infringement and filing of the suit, the High Court applied a premise that is contrary to established principles of persistence of peril. However, the Supreme Court implicitly incorporates the Doctrine of Continuing Wrong into the assessment of urgency under Section 12A of the Commercial Courts Act, 2015.

#### **AFTERMATH OF THE NOVENCO RULING:**

While the Supreme Court in *Novenco Building and Industry AS v. Xero Energy Engineering Solutions Pvt. Ltd.*,<sup>21</sup> held that continuing intellectual property infringement inherently satisfies the urgency requirement of Section 12A of the Act in a pro-litigant spirit, there is yet another question that remains unanswered in this judgement. The most important issue remains: the lack of a clear threshold to distinguish between a 'genuine' plea for urgent interim relief and a 'camouflaged' prayer designed solely to circumvent mandatory pre-institution mediation. The Supreme Court fell short in providing a granular test for this distinction and instead focused on

---

<sup>20</sup> (2004) 3 SCC 90

<sup>21</sup> Supra note 4.

the persistence of peril, effectively creating a categorical exemption for Intellectual Property cases by concluding that the nature of the wrong itself provides the immediacy.

The effect of this “*presumption of urgency*” on the broader mandate of Section 12A is still uncertain. The issue lacks a conclusive framework for non-IP commercial disputes. While it is argued that the plaintiff centric test ensures that legitimate rights are not stifled by procedural hurdles, many criticise that allowing parties to bypass mediation so easily undermines the legislature's intent to unclog the dockets of commercial courts. Ironically, while the ruling emphasized that mere delay does not defeat urgency if the infringement is ongoing, it failed to address the scenario where a plaintiff's prior inaction contradicts the imminence pleaded in the plaint, leaving the trial courts with the difficult task of balancing the Novenco mandate against the anti-avoidance principles of *Patil Automation*.<sup>22</sup>

There have been other observations made in different contexts. In *Yamini Manohar v. T.K.D. Keerthi*<sup>23</sup> and *Dhanbad Fuels*<sup>24</sup>, which were relied upon the High Courts in cases like *Aarathi Scans Pvt. Ltd. v. Konica Minolta Business Solutions*<sup>25</sup> and *Warana Sugar Limited v. IL & FS Financial Services*<sup>26</sup> later, the courts struggled with the subjectivity of “*urgent interim relief*”. While Novenco clarifies that IP cases get a free pass due to the dynamic nature of the harm, the question whether parties in a standard money suit can manufacture urgency by pleading a fear of asset dissipation remains an area of active friction. *Warana Sugar* where the High Court adopted what may be termed a “plaintiff-centric test”, relying on the pleadings alone to determine whether a case contemplates urgent interim relief. In recognizing the plaintiff's apprehension of asset dissipation as a persistence of peril, the court extended the reasoning in Novenco beyond intellectual property disputes to general commercial matters. It held that procedural mandates should not render a plaintiff remediless in the face of imminent harm. It raised concerns regarding subjectivity, as it permits courts to rely heavily on the plaintiff's assertions without rigorous scrutiny at the threshold stage.<sup>27</sup> Conversely, *Aarathi Scans* initially rejected a similar bypass, viewing it as a purely contractual matter lacking inherent urgency. The court distinguished the case from Novenco by categorizing it as a contractual dispute rather than one involving continuing infringement. Although the High Court later set aside this

---

<sup>22</sup> Supra note 16.

<sup>23</sup> Supra note 18.

<sup>24</sup> Supra note 19.

<sup>25</sup> 2026 SCC OnLine Mad 2440

<sup>26</sup> IA No. 5723/2025 in COM.SUM. No. 93/2022

<sup>27</sup> Supra note 26 Para no. 40

rejection, the case highlights a growing trend where trial courts engage in preliminary merits based assessments to determine urgency, effectively blurring the line between procedural scrutiny and substantive adjudication.<sup>28</sup>

The question of whether the persistence of peril doctrine should be restricted to Intellectual Property or extended to all continuing wrongs has not been explicitly dealt with and remains unanswered. Although, based on the application in *Warana Sugar*, it is possible to reason that non-IP parties can skip mediation if they can frame their commercial injury as an ongoing bleed analogous to trademark dilution. Thus, the ruling has inadvertently created an elastic standard for urgency. Such an interpretation, while consistent with the Supreme Court's protective stance on substantive rights, risks making Section 12A a dead letter for any clever drafter.

Thus, Novenco has thrown light on the convoluted issue of procedural and substantive priority in commercial litigation and has had a significant impact in solving the dilemma for Intellectual Property owners, but failed on account of not providing an authoritative filter for camouflaged urgency. Hence, uncertainty still looms around the boundaries of this exemption, and one can only await further precedent to determine whether this mediation free fast track remains an exclusive privilege for Intellectual Property holders or evolves into a broad access area for all commercial litigants.

---

<sup>28</sup> Supra note 25.