

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5177 OF 2021

Metro Ortem Ltd,
A Public Limited Company,
Duly incorporated under the Companies Act,
1956, having its registered office
at Metro Towers, C-49, Sector 62,
Noida – 201307, Utter Pradesh represented
through its authorized representative
Mr. M.K. Goel.

.. Petitioner
(Orig. Plaintiff)

Versus

Maharashtra State Road Transport Corporation,
represented through its General Manger,
Stores & Purchase Department,
having its office at Jahangir Boman Behram
Mag, Mumbai – 400 008.

.. Respondent
(Orig. Defendant)

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- Mr. Rajesh Singh a/w. Mr. Surel Karoth, Mr. Rahul Singh, Ifterkhan Sayed, Mr. Nitin Pandey, Mr. Nadeem Khan, Mr. Ranjan Mishra, Mr. Chandresh Tiwari, Advocates for the Petitioner.
 - Mr. G.S. Hegde a/w. Ms. P.M. Bhansali and Dharni Jain, Advocates for Respondent.
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CORAM : MILIND N. JADHAV, J.
RESERVED ON : DECEMBER 08, 2022.
PRONOUNCED ON : DECEMBER 21, 2022.

JUDGMENT:

1. By the present Writ Petition, Petitioner has prayed for the following two reliefs:-

“a. That this Hon’ble Court be pleased to call for the records and proceedings of Notice of Motion No.1707 of 2019 and Application at Exhibit “4” in Commercial Suit No. 3 of 2019 pending before the Hon’ble City Civil Court at Mumbai and on

appreciating the merit of the same be pleased to quash and set aside the impugned Order dated 08/04/2021 passed in Application at Exhibit “4”, on such terms and conditions as this Hon’ble Court may deem fit and proper;

d. Direction to the Respondent for return of original Performance Bank Guarantee No. 0429818BG0000061 dated 27/04/2018 to Petitioner for submitting the same to the issuing Bank for cancellation / release of the same.”

2. In so far as prayer clause ‘d’ is concerned, both parties are *ad idem* that the Performance Bank Guarantee has expired. Petitioner fairly does not press for the same. Petitioner is the Plaintiff and Respondent is the Defendant in Commercial Suit No.3 of 2019 filed before the Bombay City Civil Court at Mumbai (for short “**the said suit**”).

3. The present Petition takes exception to the common order dated 08.04.2021 passed in Notice of Motion No.1707 of 2019 and Application (Exhibit 4) in Commercial Suit No.3 of 2019, *inter alia*, permitting the Defendant to submit its written statement and marking the written statement as Exhibit “7”. According to Plaintiff, the written statement cannot be taken on record as it is filed beyond the prescribed period of limitation. At the heart of the controversy is the question whether the writ of summons is required to be served, if the Defendant has entered appearance before the Court and is served with the copy of plaint and Notice of Motion. Defendant however has entered appearance, but denied receiving copy of the plaint and Notice of Motion.

4. Before I advert to the submissions, it would be pertinent to refer to such relevant facts only as are necessary to decide the issue:-

4.1. Plaintiff is a Private Public Company (as described) duly incorporated under the Companies Act, 1956 (now Companies Act, 2013) (for short “**Companies Act**”) and engaged in the business of manufacturing / trading of auto rubber tubes etc.

4.2. Defendant is a leading state-owned Passenger Road Transport Organization in Maharashtra having a fleet of over 18,500 buses.

4.3. Defendant floated an e-open tender for purchasing new Butyl Rubber Inner Tubes for Radial Tyre Size 9.00 x 20 Radial Tubes for its buses.

4.4. Plaintiff was one of the successful bidder alongwith another entity and was awarded a Rate Contract dated 17.05.2018 for supply of tubes. Plaintiff furnished security amount of Rs.30,42,000/- in the form of Performance Bank Guarantee dated 27.04.2018 to Defendant. It was also awarded additional business for supply of Radial Tubes @ Rs.602/- subsequently for different dimensions. According to Plaintiff, 14 bus depots accepted the Radial Tubes supplied by Petitioner without any complaint. However, 16 bus depots allegedly complained about defects in the tubes. Correspondence ensued between the parties in respect of pricing, defect liability clause and release of

payments etc.

5. Being aggrieved, Plaintiff filed Commercial Suit No.3 of 2019 for a claim of Rs.73,51,817/- and Notice of Motion No.1707 of 2019 seeking urgent ad-interim / interim relief on 30.03.2019. On 24.04.2019, both parties alongwith their Advocates appeared before the learned Trial Court and opportunity was given to Respondent to file Reply to the Notice of Motion and written statement in the suit.

6. For the purpose of the present controversy, roznama of the following 8 dates and appearances before the Trial Court is relevant and is reproduced below:-

Sr. No	DATE	PARTICULARS
1.	24.04.2019	<i>Hearing on notice of motion. Nitin Dalvi, Advocate for the Defendant stated that Order 39 Rule 3A of CPC has not been complied with.</i> <i>Advocate for Plaintiff had submitted that the copy of order and other documents filed along with the Plaint was delivered in the office of the Defendant.</i> <i>Advocate for Defendant pointed out the letter which was served upon them and stated that only the copy of the order was served upon them however, no document or the copy of the plaint has been supplied to them.</i> <i>Plaintiff had stated that the advance service of the copy of the plaint has already been served upon the Respondent and they will be filing the said document along with the Affidavit.</i> <i>Opportunity was given to the Defendant to file reply to the Notice of Motion and Written Statement.</i>
2.	30.04.2019	<i>Advocate for the Plaintiff present. Advocate Amruta Devkar I/B Advocate Dalvi present for the Defendant. Plaintiff had filed registered</i>

		<i>Notice of Motion No. 1707/19.</i>
3.	07.06.2019	<i>Plaintiff present. However, the Defendant was Absent. Opportunity was granted to the Defendant to file their Written Submission on/or before 17.08.2019, failing which the Suit will proceed without Written Statement. Furthermore, the Defendant was also granted with an opportunity to file reply to the notice of motion on/or before 17.08.2019 failing which the notice of motion will be heard without reply.</i>
4.	20.06.2019	<i>The Court was on leave.</i>
5.	16.09.2019	<i>Plaintiff was present. Defendant was absent. Matter was adjourned to 22.10.2019 for reply to the Notice of Motion and Written Statement to the Plaintiff.</i>
6.	22.10.2019	<i>Plaintiff was present. Defendant was absent. Ex-2 i.e. Affidavit of Service was filed. The Defendant was served with Writ of Summons on 18.04.2019 however did not filed their Written Statement. Hence, suit to be proceeded without Written Statement.</i>
7.	02.11.2019	<i>Plaintiff present. Defendant absent. Matter adjourned to 11.12.2019.</i>
8.	11.12.2019	<i>Adv. for Plaintiff present. Heard argument of Advocate of Plaintiff. Nobody on behalf of Defendant. Adv. for Plaintiff filed pursis for extension of time. Adv. Amruta Devkar stated that her Senior Advocate Mr. Nitin Dalvi expired lat week. Therefore, adjourned the Suit. Nilesh Shelar Senior Clerk of MSRCT present.</i> <i>Advocate for Plaintiff has filed pursis to extend the ad-interim order. The said ad-interim order was not extended on the last date i.e. 02.11.2019. The Plaintiff has apprehension that the Bank Security will be revoked by the Defendant and they will withdraw the amount. The Defendants are directed not to revoke the Bank Guarantee till next date with direction to the Defendant to argue Notice of Motion on the next date failing which the Notice of Motion will be decided without argument of Defendant. Matter adjourned to 10.01.2020 for argument.</i>

7. Mr. Singh, learned Advocate for Petitioner - Plaintiff has vehemently submitted that in view of the recording in the roznama dated 24.04.2019 confirming the presence of Advocate for Defendant before the Trial Court and subsequent roznama dated 22.10.2019, it was incumbent upon Defendant to file its written statement within the stipulated period as prescribed under the provisions of Order VIII Rule 1 of the Code of Civil Procedure, 1908 (for short “**CPC**”), which was admittedly not filed. That apart, it is contended that since Defendant was duly aware of the direction passed on 24.04.2019 about filing the written statement, it was not mandatory on Plaintiff to serve the writ of summons as required under the extant provisions of CPC.

7.1. He submitted that in the interregnum Defendant filed an Interim Application dated 10.01.2020 in the Suit before the Trial Court, *inter alia*, seeking condonation of delay of 244 days to file its written statement. To that, Plaintiff filed its Reply dated 18.01.2020 and sought dismissal of the same, *inter alia*, contending that the timeline before the learned Trial Court on various dates from 24.04.2019 onwards clearly suggested that Defendant failed to appear before the Trial Court on numerous occasions until 11.12.2019 and has thereafter misled the Trial Court by taking advantage of the demise of its Advocate. He submitted that regardless of the timeline, keeping in view that the statutory period of 120 days for filing written

statement in terms of Order VIII Rule 1 read with Rule 10 of the CPC having been lapsed, Defendant was precluded from filing its written statement subsequently and therefore Plaintiff is aggrieved with the impugned order. It is contended that on 08.04.2021 Respondent sought withdrawal of its own Application seeking condonation of delay with liberty to file fresh proceeding and the Application was withdrawn.

7.2. In the aforesaid backdrop, Mr. Singh contended that the impugned order as passed is contrary to and in violation of the statutory provisions in as much as it permits Respondent to file its written statement beyond the stipulated 120 days time period. He submitted that the learned Trial Court on 04.04.2019 i.e. the first date of hearing after filing the suit on 30.03.2019 granted exparte ad-interim relief to Petitioner in Notice of Motion No.1707 of 2019 and the copy of the order and the entire papers and proceedings were thereafter served upon Defendant before the next date in the Trial Court i.e. on 24.04.2019. He therefore submitted that in that view of the matter, the extant provisions of Order 39 Rule 3(a) of CPC would not be attracted in the present case, since Plaintiff filed its Affidavit of service to the satisfaction of the Trial Court about effecting service of papers and proceedings of suit on Defendant.

7.3. Therefore according to Mr. Singh, Defendant was not required to be served with the writ of summons and in support of this proposition, he has relied upon the decision of the Single Judge of this Court dated 23.10.2013 in Appeal From Order No.807 of 2011 in the case of ***Suresh s/o Daduram Abnave Vs. Municipal Corporation of Greater Mumbai***¹ and more particularly paragraph No.10 of the said decision which reads thus:-

“10. Admittedly the contesting Respondents were duly served and recorded also in the roznama accordingly. The parties represented through their Advocates. The vakalatnama, therefore, once filed by the Advocate and/or if the Advocate appears on behalf of the respective parties, the vakalatnama cannot be dissected and/or treated for filing only for Notice of Motion and not for any other proceedings. Considering the provisions so recorded above once the party appears through his Advocate and due vakalatnama is filed, it is for all the proceedings. Therefore, to say that a separate summons required to be served to the Respondents/Defendants is unacceptable. No fresh service of writ of summons is contemplated in such circumstances. The Advocate's appearance, not permitted for want of specific provision and/or instruction for a part of the proceeding arising out of the suit. The vakalatnama cannot be conditional and restricted to any part of the proceedings. The learned Judge, therefore, in my view, wrong in dismissing the Suit for want of service of writ of summons.”

7.4. That apart, he has referred to and relied upon another decision of the Single Judge of this Court dated 10.10.2019 in Writ Petition No.5873 of 2018 in the case of ***Parasmal Daulatram Jain Vs. Rameshwar Rathanlal Karwa***², wherein paragraph No.9 is relevant and which reads thus:-

1 LEX (Bom) 2013 10 162

2 MANU/MH/2781/2019

“9. A profitable reference, in this context can be made to a judgment by this Court in the case of Suresh s/o Daduram Abnave vs. Municipal Corporation of Greater Mumbai, MANU/MH/1804/2013 : 2014 (3) ALL Mr. 756 wherein it was observed that, “the filing of vakalatnama and/or appearance of the parties through Advocate amounts to service of summons for all the purposes and the time to file written statement within 30 days, from the date of appearance/service of summons, in given facts and circumstances, requires to be considered by the Court basically when the Suit was not registered for want of delay and/or for other such circumstances. The submission that the fresh writ of summons should be served even after service of summons and though parties appeared through Advocate in Notice of Motion and/or interim application, is unacceptable as that would cause great injustice and hardship to the plaintiff and/or the parties one who has already served the defendants/other parties though at the interim and/or Notice of Motion stage. There is no question of issuing fresh notice of motion and/or multiple notices and/or services of warrant of summons at every stage of the pending legal proceedings.”

7.5. He next contended that the period of limitation for filing written statement in Commercial Suits is already settled by the decision of Supreme Court in the case of ***SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. and Ors.***³ and has relied on paragraph Nos.8, 10 and 11 of the said decision which read thus:-

“8. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23.10.2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order V, Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:

Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other days, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from

3 MANU/SC/0227/2019

the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.

Equally, in Order VIII Rule 1, a new proviso was substituted as follows:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

This was re-emphasized by re-inserting yet another proviso in Order VIII Rule 10 CPC, which reads as under:-

Procedure when party fails to present written statement called for by Court.- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgment a decree shall be drawn up.

Provided further that no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.”

A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.

10. Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing

of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku Tech Private Limited vs. Sangeet Agarwal & Ors. by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No. 3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics vs. Oasis Commercial Pvt. Ltd. 2018 SCC Online Del 6698.

11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non- extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught.”

7.6. On the basis of the above decisions, he has contended that a separate writ of summons is not required to be served on Defendant and it stands dispensed with, once the Defendant appears before the Court through its Advocate after receiving notice. Hence, he has prayed for setting aside of the impugned order.

8. ***PER-CONTRA***, Mr. Hegde has raised serious objections to the Plaintiff's claim and drawn my attention to the Roznama dated 24.04.2019 and 22.10.2019. He submitted that though the roznama dated 22.10.2019 records that Defendant is served with writ of summons on 18.04.2019, admittedly the writ of summons is not served at all on the Defendant and in that view of the matter there is an incorrect recording of the factual status of service of the writ of summons by the Trial Court.

8.1. He has drawn my attention to the affidavit-in-reply dated 06.12.2022 filed by Pradeep A. Kheratkar, Senior Stores Officer working with MSRTC and contended that in the present case the writ of summons as contemplated and required under the provisions of Order VIII Rule 1 of CPC has admittedly not been served on the Defendant till date. He submitted that though admittedly, Defendant had filed application seeking condonation of delay of 244 days for filing its written statement, however, the same came to be withdrawn since admittedly writ of summons was not served and hence limitation did not start running against the Defendant. Hence, it was realised that there was no necessity of seeking condonation of delay of any time period. He submitted that service of copy of Complaint and Notice of Motion on Defendant cannot be construed as equivalent to service of writ of summons as contemplated by CPC. He submitted that under Order V Rule 9 and 9A it is contemplated that service of writ of summons is effected by delivery of summons by through the Court. He has drawn my attention to the affidavit of service dated 24.04.2019 filed by Plaintiff in its compilation and submitted that in the said affidavit of service there is no reference to the writ of summons at all and it merely states that copy of suit complaint alongwith copy of Notice of Motion has been served on Defendant on 18.04.2019. He submitted that provisions of Order VIII Rule 1 are required to be given a literal meaning; that the Defendant shall within 30 days of service of the writ

of summons present the written statement in his defence. He has emphasised on the words "service of summons on him". He submitted that provisions of Order V Rule 9 in this context are relevant in as much as under the said provisions the Court may in addition to service of summons under Rule 9, on the application of Plaintiff for issuance of summons for appearance of Defendant, permit the Plaintiff to effect service of such summons on such Defendant and shall in such a case deliver the summons to such Plaintiff for such service. Further, he submitted that Rule 9A(2) states that such summons delivered to the Defendant personally will be a copy signed by the Judge or such officer of the Court as appointed and will bear the seal of the Court and shall be delivered by such mode of service as referred to in sub- Rule (3) of Rule 9 and only on effecting such service of writ of summons, from the date of such service, time contemplated under Order VIII Rule 1 of CPC begins to run.

8.2. He therefore submitted that the impugned order is sustainable and correctly passed. That the statutory procedure of service of writ of summons cannot be dispensed with in the present case. He submitted that findings of the learned single Judge in the decision of *Suresh s/o Daduram Abnave (first supra)* that filing of Vakalatnama and appearance of parties through Advocate would amount to service of summons for all purposes is contrary to the

statutory and salutatory provisions of Order V Rule 9, 9A and Order VIII Rule 1 of CPC. Hence he has submitted that the impugned order deserves to be sustained.

9. I have heard Mr. Singh, learned Advocate for Petitioner and Mr. Hegde, learned Advocate for Respondent and with their able assistance perused the record and pleadings of the case.

10. Before I advert to record my findings, it will be appropriate to consider the statutory provisions of CPC, which clearly establish the steps required to be adopted for the writ of summons to be issued under the seal of the Court and to be served on the Defendant. The said provisions are reproduced below:-

10.1. Order VIII Rule 1 of CPC reads thus:-

***“1. Written statement.-** The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:*

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

10.2. Order V of Rule 9 and 9A of CPC reads thus:-

***“9. Delivery of summons for final disposal, defendant to be directed to produce his witnesses.-** (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of*

his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of Rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1)."

9A. Summons given to the plaintiff for service.- *(1) The Court may, in addition to the service of summons under Rule 9, on the application of the plaintiff for the issue of a summons for the appearance of the defendant, permit such plaintiff to effect*

service of such summons on such defendant and shall, in such a case, deliver the summons to such plaintiff for service.

(2) The service of such summons shall be effected to or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof signed by the Judge or such officer of the Court as he may appoint in this behalf and sealed with the seal of the Court or by such mode of service as is referred to in sub-rule (3) or rule 9.

(3) The provisions of Rules 16 and 18 shall apply to a summons personally served under this rule as if the person effecting service were a serving officer.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or for any reason such summons is not be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.”

11. It will be apposite to consider the above statutory provision relating to service of writ of summons and what the Supreme Court has held. It is seen that the Supreme Court in *Uma Nath Pandey and Ors. Vs. State of Uttar Pradesh and Anr.*⁴ has held that service of summons was mandatory. The Supreme Court in *Auto Cars Vs. Trimurti Cargo Movers Private Limited and Ors.*⁵ has held that not only service of summons was mandatory but also the date of the hearing must be communicated. The Supreme Court in *Sushil Kumar Sabharwal Vs. Gurpreet Singh and Ors.*⁶ has also held so.

11.1. This Court in *Tardeo Properties Pvt. Ltd. Vs. Bank of Baroda*⁷ has held that time to file written statement commences

⁴ (2009) 12 SCC 40

⁵ (2018) 15 SCC 166

⁶ (2002) 5 SCC 377

⁷ 2007 SCC Online Bom 614

only from the date of service of summons and, therefore, when summons itself has not been served, the time to file written statement had not commenced. That service of summons is a mandatory procedural requirement and is not dispensed with merely on account of the party entering appearance by filing a Vakalatnama. In this decision it has been held that failure to comply with the mandatory requirement of the service of writ of summons to enable defendant to file the written statement cannot be said to be a mere procedural irregularity. The provisions of law essentially prescribe fetters on the power of the Court to proceed with the matter against defendant in the absence of the service of the writ of summons. That the appearance of an Advocate and filing of a Vakalatnama by him cannot and does not dispense with the requirement to serve the writ of summons.

12. In the present case, it is clear that the Defendant was never served with any writ of summons. The burden of proof to establish that Defendant had been served with the writ of summons is on Plaintiff.

13. In the present case, admittedly Plaintiff has not produced any evidence/document to establish that writ of summons was in fact created and served on Defendant in accordance with the above provisions of CPC. In fact, the Plaintiff has accepted this fact.

13.1. However, Plaintiff has in ground Nos.(e), (f) and (g) attempted to justify the non-service of summons. Ground Nos.(e), (f) and (g) read as follows:-

“(e) The Ld. Judge ought to have appreciated that as the notice of moving to the Hon’ble Trial Court for urgent relief along with papers and proceeding of the aforesaid suit was already served upon the Respondent, therefore the provision of Order 39 Rule 3(a) of C.P.C. would not attract. However, inspite therefore the Petitioner has filed Two Affidavit of Service to satisfy the Trial Court about effecting the service upon the Respondent.

(f) The Ld. Judge erred in appreciating the Order dated 24/04/2019 passed in the aforesaid suit and observing in operative order that “... 3. Considering specific liberty granted by this Court in roznama dated 24/04/2019, Defendant to submit written statement. Defendant to supply the copy of Written Statement to the Plaintiff.” Admittedly, the Respondent has not challenged the Order dated 24/04/2019 passed by the Hon’ble Trial Court, as inspite of making all allegation of non-service of papers and proceeding, the Hon’ble Trial Court satisfying with the Affidavit of service / service report submitted by the Petitioner, instead of directing the Petitioner for service, fixed the aforesaid matter for Reply to the Notice of Motion and Written Statement to the suit.

(g) The Ld. Judge ought to have appreciated that assuming for sake of argument, if the contention of the Respondent is accepted to be true about not service of paper and proceeding upon it, in such circumstances it is presumed that the Respondent is till date not being served with the Copy of the Plaint along with annexure and Notice of Motion and Affidavit in Support thereof. If the Respondent is actually not being served with the papers and proceeding of the suit, than how does the Respondent its Written Statement much before moving its Application for Condonation of delay at Exhibit “4”, and immediately tendered the same, on passing of the impugned order dated 08/04/2021 by the Hon’ble Trial Court. Admittedly, it is not the case of the Respondent that it has drafted the said Written Statement after collecting the certified copy of the papers and proceeding of the aforesaid suit from the Hon’ble Trial Court.”

14. The Supreme Court in the case of *Auto Cars (fifth supra)*, while dealing with the issue of substituted service of summons, has held as follows:

“6. The summons of the suit was initially sent to the Defendants at their place of business mentioned in the cause title of the plaint, which was shown at Aurangabad (MH). Since the Defendants were not being served with the ordinary mode of service, the Plaintiff sought permission to serve them with the substituted service by way of publication Under Order V Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). The permission was granted to the Plaintiff.

7. The summons dated 17.11.2014 was accordingly published in the Times of India (Pune Edition) and Dainik Bhaskar (Aurangabad Edition) on 25.11.2014. The summons, which was published in papers, reads as under :

...

16. Section 27 of the Code deals with issuance of the summons to Defendants. It says that where a suit has been instituted, summons may be issued to the Defendant to appear and answer the claim and may be served in the "manner prescribed on such day" not beyond thirty days from the date of the institution of the suit.

...

21. In other words, the legislature while prescribing the format of summons in the Code has provided one column where the Court is required to mention a specific "day, date, year and time" for the Defendant's appearance in the Court to enable him to answer the suit filed against him/her. This is also the requirement prescribed Under Section 27 of the Code as is clear from the words occurring therein "and may be served in the manner prescribed on such day".

...

24. Indeed, mentioning of the specific "day, date, year and time" in the summons is a statutory requirement prescribed in law (Code) and, therefore, it cannot be said to be an empty formality. It is essentially meant and for the benefit of the Defendant because it enables the Defendant to know the exact date, time and the place to appear in the particular Court in answer to the suit filed by the Plaintiff against him.

25. If the specific day, date, year and the time for Defendant's appearance in the Court concerned is not mentioned in the summons though validly served on the Defendant by any mode of service prescribed Under Order V, it will not be possible for him/her to attend the Court for want of any fixed date given for his/her appearance.

26. The object behind sending the summons is essentially threefold-First, it is to apprise the Defendant about the filing of a case by the Plaintiff against him; Second, to serve the Defendant with the copy of the plaint filed against him; and

Third, to inform the Defendant about actual day, date, year, time and the particular Court so that he is able to appear in the Court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer.

...

29. The material infirmity in the summons was that it did not mention any specific day, date, year and time for the Defendants' appearance in the Court. This being the requirement of Section 27 read with Order V Rule 20(3) and Process-IA of Appendix-B, it was mandatory for the Court to mention the specific working day, date, year and time in the columns meant for such filling. It would have enabled the Defendants to appear before the Court on the date so fixed therein. It is a settled Rule of interpretation that when the legislature provides a particular thing to be done in a particular manner then such thing has to be done in the same prescribed manner and in no other manner.

...

32. In the light of the foregoing discussions, service of summons on the Defendants without mentioning therein a specific day, date, year and time cannot be held as "summons duly served" on the Defendants within the meaning of Order IX Rule 13 of the Code. In other words, such summons and the service effected pursuant thereto cannot be held to be in conformity with Section 27 read with statutory format prescribed in Appendix B Process (I and IA) and Order 5 Rule 20(3) of the Code.

...

34. Once the Appellant (Defendant No. 1) is able to show that "summons were not duly served on him" as prescribed Under Section 27 read with Appendix B Process IA and Order V Rule 20(3) of the Code then it is one of the grounds for setting aside the ex parte decree Under Order IX Rule 13 of the Code. In our view, the Appellant (Defendant No. 1) is able to make out the ground."

(emphasis supplied)

15. This Court has had the occasion to interpret the provisions of the CPC with respect to beginning of the time of limitation despite the party being served only with the Advocate's notice and not with the writ of summons. In the case of *Axis Bank Limited V/s. Mira Gehani*⁸

⁸ 2019 SCC Online Bom 358

the Division Bench of this Court observed as follows:

“110. Having answered the question of law as above, it would also be necessary to clarify when the aforesaid period of 120 days commences. In this context, it has been brought to my notice that the Ld. Prothonotary & Senior Master of this Court had previously issued a Notice dated 29th September, 2008 directing :

“IT IS HEREBY NOTIFIED for the information of the Advocates and those appearing-in-person that whenever the learned Counsel has filed Power of Attorney or Vakalatnama and appears for the Defendant/s Respondent/s etc., in the matter, there shall be no necessity of serving the Writ of Summons or filing Affidavit of Service.”

111. In view of the above notification, it may be argued that in Commercial Suits before this Court, where the Defendant enters its appearance prior to receipt of the summons, the period of 120 days ought to commence from such earlier date viz. the date a Defendant enters its appearance. However, as has been recorded above, this Court is mandated to follow the provisions of the CPC as amended by the Commercial Courts Act whilst adjudicating Commercial Disputes. Hence, as the amendments to Order V Rule 1 and Order VIII Rule 1 now state “...but which shall not be later than one hundred twenty days from the date of service of summons...” the period of 120 days ought to be calculated from the date of service of summons and not the date on which a Defendant enters its appearance as provided for in the above notification. This will not only ensure that the provisions of the Commercial Courts Act are implemented uniformly but also that a Defendant will be made aware of the case it has to meet after being served with the Plaint duly registered with this Court after the removal of all office objections etc. In fact, the Writ of Summons now being served by our Court have the following endorsement :

“And you are hereby summoned to file a written statement within 30 days of the service of the present summons and in case you fail to file the written statement within the said period of 30 days, you shall be allowed to file the written statement on such other day, as may be specified by the court for reasons to be recorded in writing and on payment of such costs as the court may deem fit, but which shall not be later than 120 days from the date of service of summons. On expiry of one hundred and twenty days from the date of service of summons, you shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

112. In view of the above, it is clarified that the period of 120 days will commence from the date of service of the Writ of Summons and not the date a Defendant first enters appearance. In other words, a party or its Advocate/s can no longer rely on

the above notification and avoid serving the writ of summons on the Defendant/s. However, in order to ensure expeditious disposal of Commercial Suits and in order to save time of this Court as also the office of Ld. Prothonotary & Senior Master of this Court, in the event a Defendant/its Advocate enters appearance and by consent, agrees to waive service, the period of 120 days will commence from the date of such waiver. In such instance, there would be no requirement to serve the Writ of Summons. This will prevent the loss of days involved in serving the Writ of Summons and will expedite commencement of trial and consequently, disposal of Commercial Suits.

113. The question of law is decided as above.”

(emphasis supplied)

16. Thus, it is seen that time to file written statement commences only after service of the writ of summons. Furthermore, it is settled law that the time to file written statement commences only from the date of service of summons. This Court in *Tardeo Properties Pvt. Ltd. (seventh supra)* held as follows:

“17. ... Being so, mere filing of the vakalatnama would not begin the period of twelve weeks for filing of the written statement nor the defendant of his own can file written statement, without the permission of the Court. It is not a matter of right for any party to the proceedings to place on record pleadings in the suit. The pleadings in the suit are allowed to be placed on record in accordance with the rules framed for that purpose and for taking on record the pleadings on behalf of the defendant, initially the issuance of writ of summons for that purpose is absolutely necessary. Undoubtedly, such a period can be extended by specific order in case the defendant fails to file the written statement within the specified period and further seeks extension of such period.”

(emphasis supplied)

17. From the above quoted decisions, it is seen that the appearance of an Advocate and filing of a Vakalatnama by him cannot

and does not dispense with the requirement to serve the writ of summons. Accordingly, Defendant, in the absence of service of summons, could not have made any representation and/or filed its written statement. In light of the above, it is immaterial that the Advocate for Defendant appeared on his behalf before the Trial Court. Mere filing of a Vakalatnama and appearance of the said Advocate could not have dispensed with/waived the requirement of service of summons. The said Vakalatnama cannot be considered to be a proof of service of summons.

18. In view thereof, it is evident that there has been a serious lapse of procedure in the present case. There has been no service of the writ of summons on Defendant which Plaintiff has been able to establish otherwise.

19. With reference to reliance placed by the Plaintiff on the decision in the case of *Suresh s/o. Daduram Abnave (first supra)* which has been followed by another Single Judge Bench of this Court in the case of *Parasmal Daulatram Jain (second supra)*, it is seen that in the decision of *Suresh s/o. Daduram Abnave (first supra)*, provisions of Order V Rule 9 and 9A have not been considered. Further, the decision in the case of *Parasmal Daulatram Jain (second supra)* though been upheld by the Supreme Court as informed by the Plaintiff, the facts in that case enumerated in paragraph No.8 of the

decision were completely different as compared to the facts in the present case and the said decision is clearly distinguishable.

20. Having considered the above decision, I respectfully do not agree with the decision in the case of *Suresh s/o Daduram Abnave (first supra)*, decision of the learned Single Judge of this Court. The Supreme Court in the case of *Kailash V/s. Nanhku and Ors.*⁹, in paragraph No.42 of the said decision while referring to the time schedule prescribed by Order VIII Rule 1 has held that no sooner the writ of summons is served on him (Defendant) he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The emphasis is on the words “**no sooner the writ of summons is served on him.....**”.

21. In the decision in the case of *SCG Contracts India Pvt. Ltd (third supra)* relied upon by Plaintiff incidentally would not apply to the facts and circumstances of the present case as the decision deciphers and emphasizes on the provisions of Order VIII Rule 1 which are required to be construed as mandatory and not directory. Once again the emphasis is the words “**service of writ of summons**” as can be found in paragraph Nos.4, 8, 10, 11 and 16 of the decision relied upon by the Plaintiff and hence the said decision infact supports the

9 (2005) 4 SCC 480

Defendant's case.

22. In the case of *Tardeo Properties Pvt. Ltd. (seventh supra)*, the Division Bench while referring to another Division Bench decision of the Calcutta High Court after enumerating the applicable Original Side Rules and the relevant provisions of the CPC has held that service of writ of summons in accordance with law gives jurisdiction to the Court over the person summoned and therefore in the absence of service of summons Court cannot assume jurisdiction to proceed *ex parte* or otherwise against the person who has not been served with the writ of summons. In the said decision, in the absence of service of writ of summons upon the Defendant, it was held that the learned Single Judge could not have proceeded to dispose of the suit and certainly not under Order VIII of the CPC. It is held that the provisions of law essentially prescribe fetters on the power of the Court to proceed with the matter against the Defendant in the absence of service of the writ of summons. In the said decision the fetter of law is in terms of Rule 87 of the Original Side Rules, which clearly provided that the Plaintiff can be non-suited if he fails to get the writ of summons served upon the Defendant within the period specified thereunder. This virtually discloses that the Defendant is not under obligation to file the written statement unless the writ of summons is served upon him. Hence, non-compliance or any irregularity in that

regards to service of writ of summons cannot be equated with a jurisdiction error. The sum and substance is that it is a mandatory requirement stipulated under Order VIII Rule 1 and not a mere procedural irregularity which can be substituted with the service of an Advocate's notice on the Defendant enclosing the copy of the Plaint and the Notice of Motion as has been done in the present case.

23. In another recent unreported decision in the case of *Sunil Gupta Vs. Asset Reconstruction Company (India) Ltd. and Ors.*, the Division Bench of this Court in Writ Petition No.4885 of 2020 alongwith companion Writ Petitions delivered on 12.09.2022, has reiterated the aforesaid legal position after analysing various decisions of the Supreme Court and High Courts.

24. Considering the above legal position, in the present case admittedly no writ of summons at all as prescribed under the provisions of CPC was ever served. Defendant has been able to show that writ of summons was not duly served on them. In these circumstances, the impugned order is sustained and calls for no interference.

25. Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

26. After pronouncement of Judgment, Mr. Singh, learned Advocate appearing for Petitioner has requested the Court to stay the Judgment for a period of six (6) weeks to enable the Petitioner to approach the Supreme Court. Though opposed by Ms. Bhansali, learned Advocate appearing for Respondent – Corporation, the request made by Mr. Singh is allowed. It is directed that the present Judgment shall stand stayed for a further period of six (6) weeks from today.

[MILIND N. JADHAV, J.]