O/C

Azadi Ka Amrit Mahotsav

OFFICE OF THE PRINCIPAL DISTRICT & SESSIONS JUDGE: ROHINI COURTS, DELHI

No. 2070-2145 **Genl.I/F. 3(A)/N-W & N/RC/2023 Delhi, dated** 20.01.23.

Sub: Order dated 06.01.2023 passed by the Hon'ble High Court of Delhi in CM(M) No. 1325/2022 titled as " Machine Tools Aids India vs. M/s GNC Infra LLP & Anr. ".

Letter bearing No. 1151-X C-1 dated 13.01.2023 received from the Hon'ble High Court of Delhi along with the copy of order dated 06.01.2023 passed by Hon'ble Mr. Justice Tushar Rao Gedela (Delhi High Court) in CM(M) No. 1325/2022 titled as " Machine Tools Aids India vs. M/s GNC Infra LLP & Anr. " is being forwarded for information and necessary action/compliance to:-

1. All the Ld. Judicial Officers **(DHJS & DJS)**, **North-West** and **North** District, Rohini Courts, Delhi.

2. The Dealing Official, Computer Branch, Rohini Courts, Delhi for uploading the same on WEBSITE.

3. The Dealing Official, R & I Branch, Rohini Courts, Delhi for uploading the same on LAYERS.

(SEEMA MAINI)
Principal Judge, Family Court
Officer In-charge, General Branch
North-West & North Disrict
Rohini Courts Complex, Delhi

Encl: As above

156
17/1/23

Genl.

IN THE HIGH COURT OF DELHI AT NEW DELHI

No. 1152-XC-1 Dt.: 13/1/23

From,

The Registrar General,
High Court of Delhi,
New Delhi.

To,

1. The ld. District & Sessions Judge (HQ), Tis Hazari Court, Delhi,
2. The ld. District & Sessions Judge, (Central), Tis Hazari Court, Delhi,
3. The ld. District & Sessions Judge, (West), Tis Hazari Court, Delhi,
4. The ld. District & Sessions Judge, (North-West), Tis Hazari Court, Delhi,
5. The ld. District & Sessions Judge, (North), Rohini Court, Delhi,
6. The ld. District & Sessions Judge, (East), Karkardooma Court, Delhi,
7. The ld. District & Sessions Judge, (North-East), Karkardooma Court, Delhi,
8. The ld. District & Sessions Judge, (Shahdara), Karkardooma Court, Delhi,
9. The ld. District & Sessions Judge, (South), Saket Court, New Delhi,
10. The ld. District & Sessions Judge, (South-East), Saket Court, New Delhi,
11. The ld. District & Sessions Judge, (South-West), Dwarka Court, New Delhi,
12. The ld. District & Sessions Judge, (New Delhi), Patiala House Court, New Delhi,
13. The ld. District & Sessions Judge, Rouse Avenue, New Delhi.

CM(M) No. 1325/2022

MACHINE TOOLS AIDS INDIA ... Petitioner/s

Versus

M/S GNC INFRA LLP & ANR .... Respondent/s

Sir,

I am directed to forward herewith for information and immediate compliance of the copy of order dated **06/01/2023** passed by the Hon'ble Mr. Justice **TUSHAR RAO GEDELA** of this Court in the above noted case.

Thanking you.

Yours faithfully

Joint Registrar 10/1/23

For Registrar General

Encl: Copy of Order dt. **06/01/2023**

IN THE HIGH COURT OF DELHI, AT THE OF NEW DELHI,

CM (MAIN) NO. 1325/2022

IN THE MATTER OF–

M/S MACHINE TOOLS AIDS (INDIA).....Petitioner

Versus

M/S GNC INFRA LLP& ANR .....Respondents

MEMO OF PARTIES

1. M/S MACHINE TOOLS AIDS (INDIA)
   Though its Proprieter.
   Sh. Venkatarama Satya Surya Narayana Murthy Raju Sagi
   Office at:-
   H.No. 62 & 71/3RT,201 Grande Towers.
   S.R. Nagar, Hyderabad.
   Whatsapp- 9866665000
   Email Id- mtaisdia@gmail.com ...Petitioner

VERSUS

1. M/s GNC INFRA LLP,
   Through its, Partner
   Mr. Gaurav Chopra

Office: A-11 Shivalik (FF)

New Delhi-110017

Email: gauravchopra967@gmail.com (9899326522)

Counsel Name- Sh. Alok Bhachwat Advocate

Number- (011-24324777)

Email- alok@bhachawat.com

2. NBCC India Limited

Through its CMD,

NBCC Bhawan. Lodhi Road.

New Delhi-110003

Email Id: law@nbccindia.com

Whatsapp- 8527798440

Counsel Name- Adv Mohit Arura (73300338323)

Email- mohitarura@gmail.com ...Respondents

Petitioner

Date: 28.11.2022

New Delhi

Through

R C TIWARI AND ASSOCIATES
Ch no 569.5th floor.Lawyers Block
Saket Courts Complex
M.No 9868118015

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : 05.12.2022
Pronounced on : 06.01.2023

\+ CM(M) 1325/2022 & CM APPL. 51693/2022 (for stay)

MACHINE TOOLS AIDS INDIA ..... Petitioner

versus

M/s. GNC INFRA LLP & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Jay Savla, Senior Advocate with Ms. Shilpi Chowdhary, Mr. R.C. Tiwari, Mr. Yogesh Sharma and Mr. Vikrant Choudhary, Advocates.

For the Respondents : Mr. Alok Bhachawat, Advocate with Ms. Saloni Jagga, Advocate for R-1.

Mr. Mohit Arora, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J.

1. Petitioner impugns order dated 15.10.2022, passed by the Trial Court in CS (Comm) - 350/2020 titled as M/s. GNC INFRA VS. M/s Machine Tools Aids (India) & Anr., whereby, while allowing the application under Order VIII Rule 10 of Civil Procedure Code, 1908 filed by the respondent/plaintiff, the Court had simultaneously dismissed the application under Order VIII Rule 1 of the Code of Civil Procedure, 1908 ***(hereinafter referred to as* "CPC")** filed by

the Petitioner/ Defendant no.1, foreclosing the right of Petitioner to file Written Statement.

BRIEF BACKGROUND OF THE CASE:

2. Shorn of unnecessary details on merits of the case, which is yet to be adjudicated by the Trial Court, this Court, confines its consideration only to the facts which led to the impugned order. The relevant facts as culled out from Trial Court records are as follows:-

a.) A Commercial Suit, CS (Comm) 350/2020 titled as M/s GNC INFRA VS. M/s Machine Tools Aids (India) & Anr., is laid by the Respondent/Plaintiff seeking recovery of Rs. 1,48,73,337/- along with future and pendente lite interest @ 24% p.a. on the said sum till realization and other ancillary reliefs.

b.) Proceedings were instituted on 09.12.2020 on which date the learned Presiding Officer was on leave and the matter was kept for consideration. On 11.12.2020, the petitioner/defendant appeared in person through video conferencing which were noted by the Court Officer as the Presiding Officer was attending a Training Programme. The matter then was posted to 21.12.2020 on which date again the petitioner/defendant was represented through his son-in-law. Since the Presiding Officer was on leave, matter was adjourned to 04.01.2021.

c.) On 04.01.2021, proceedings were held vide Video Conferencing mode and the Trial Court was pleased to pass an order of 'status quo' in presence of petitioner/defendant.

d.) On 05.01.2022, counsel Sh. Amir Khan had appeared for the petitioner/defendant. On 21.02.2022 and 07.05.2022, counsel Sh. A.N. Khan had appeared. On 05.09.2022, the appearance of Sh. R.C. Tiwari counsel for petitioner/defendant is noted on which date the file was specifically taken up on an application of defendant no. 1 under the provisions of Order XXXIX Rule 4 r/w Section 151 CPC and application u/o VIII Rule 1 of CPC, 1908.

e.) The petitioner/defendant continuously stated that the complete copy of the plaint alongwith the annexures were never furnished to him or his counsel. Counsel for the petitioner/defendant had inspected the file on 22.08.2022, 25.08.2022 and 28.08.2022 and had applied for the certified copies of the plaint and its annexures. The same were received by the counsel for the petitioner/defendant on 08.09.2022.

f.) On 15.09.2022, counsel for the petitioner/defendant pointed out that the suit is deficit in proper and correct court fee, upon which the respondent/plaintiff undertook to make good the deficit fee during the course of the day. At this stage again, petitioner/defendant asked for directions for supply of plaint with documents which were ordered to be supplied.

g.) That thereafter, vide Order dated 20.09.2022, the Learned Trial Court had given five (5) days' time to defendant to file reply to Order VIII Rule 1 CPC, 1908 filed by the Plaintiff and also to file the Written Statement subject to the orders to be passed on the applications under Order VIII Rule 4 and also Order VIII Rule 10 of

CPC, 1908.

h.) In compliance, on 24.09.2022, the Petitioner/Defendant filed their written statement alongwith statement of truth, affidavit of admission/denial, list of documents, and replies to the application under Order XXXVIII Rule 5, Order VIII Rule 10 of CPC, 1908 and Section 12A of the Commercial Courts Act, 2015.

i.) In the meanwhile, on 27.09.2022 the applications under Order XXXIX Rule 1 and 2 and Order XXXIX Rule 4 of the CPC, 1908 were disposed of in view of the oral statement of learned counsel for petitioner/defendant that the petitioner has no objection to retention of suit amount by NBCC and release of remaining amount withheld as Bank guarantee.

j.) Thereafter, on 15.10.2022, the Trial Court had passed the impugned order.

CONTENTIONS OF THE PARTIES:

3. Mr. Jay Savla, Learned Senior Counsel for the Petitioner argued that the Trial Court has failed to consider that the Respondent had filed a defective suit without court fees and without adopting mandatory provision under section 12-A Commercial Courts Act and was therefore, not a duly instituted suit. Separate applications for not filing the court fees and exemption of Section 12-A of the Commercial Courts Act, 2015 were moved by the respondent. Though the Trial Court listed the matter for consideration, but till date, the said applications have not been disposed of, implying that

the Trial Court has not applied its judicial mind to the suit. He submits that therefore, the Trial Court neither issued any notice to the petitioner nor ordered filing of any process. Thus, he submits that the suit as laid by the respondent is not a properly instituted suit.

4. Learned Senior Counsel further submits that due to non-furnishing of complete set of plaint and its annexures despite requests, the petitioner was constrained to inspect the judicial file through its counsel on 22.08.2022, 25.08.2022 and 28.08.2022 whereby it was revealed that the applications filed by the Respondent have not been considered and order of issuance of the process has not been issued by the trial court. Learned Senior Counsel submits that the petitioner had filed three applications i.e., an application for early hearing, application under Order XXXVIII Rule 4 and application under Order VIII Rule 1 CPC, on 31.08.2022. Learned Senior Counsel further submits that the trial court directed the respondent to supply copy of the plaint on 15.09.2022.

5. Learned Senior Counsel further submits that the written statement was directed to be filed within 5 days of the order dated 20.09.2022 and the same was filed on 24.09.2022.

6. Learned Senior Counsel submits that the Trial Court failed to appreciate that admittedly, summons/notice were never issued to the petitioner. Moreover, the petitioner had not admitted the claim of the Respondent No.1 which is the basic requirement of proviso to Rule 1 of Order V, CPC, 1908. He submits that Trial Court failed to

appreciate that application under order VIII Rule 1 CPC, 1908 was partly allowed and the Respondent was directed to supply the copy of suit on 15.09.2022 whereafter the WS was filed within limitation period.

7. Learned Senior Counsel for the Petitioner relies upon the judgement titled as ***"Axis Bank Ltd. & Others vs. Mira Gehani & Ors"*** reported as **2019 SCC OnLine Bom 358** decided on 27.02.2019 by Learned Single Judge of the High Court of Maharashtra at Mumbai to submit that the service of summons was held to be sacrosanct procedure and that the failure of such service cannot be detrimental to the defendant.

8. Learned Senior Counsel also relies upon judgement rendered by the Learned Division Bench of the High Court of Maharashtra at Mumbai in the judgement titled as ***"Sunil Gupta vs. Asset Reconstruction Company (India) Ltd. & Ors"***, Writ Petition No. 4885 of 2022, cited as **2022 SCC OnLine Bom 2159** decided on 12.09.2022, to submit that the service of summons in commercial suits is a mandatory procedure.

9. *Per contra*, learned counsel for the Respondent submits that the suit was listed for the first time before the learned District Judge, (Comm.) South-East District, Saket Court, on 09.12.2020, when the learned Presiding officer was pleased to register the case which was put up for consideration on 11.12.2020. Respondent informed the petitioner herein about the next date of hearing i.e., 11.12.2020

through Gaurav Chopra, one of the partners of respondent no. 1 and on his request, shared the procedure/link for a virtual appearance on WhatsApp vide message dated 11.12.2020. On 11.12.2020, the petitioner joined the proceedings through VC on 11.12.2020 and was made aware of the next date of hearing i.e. 21.12.2020.

10. Learned counsel further submits that on 18.12.2020, the respondent sent a scanned copy of the plaint along with complete documents to the petitioner through email and also apprised him about the next date of hearing i.e. 21.12.2020. Learned counsel further submits that on 04.01.2021, petitioner appeared in person through video conferencing and Trial Court passed an order directing 'status quo' in respect of payment and that none of this is denied by the petitioner.

11. Learned counsel submits that when no written statement was filed by the petitioner, on 07.08.2021, the respondent moved an application under Order VIII Rule 10 r/w with section 151 CPC, 1908 seeking foreclosure of the right of the petitioner to file the written statement and for pronouncing judgment.

12. Learned counsel emphatically submits that on many dates i.e. 05.01.2022, 21.02.2022 and 07.05.2022 the counsel for petitioner, namely, Mr. Khan appeared but still chose not to file any written statement. He further submits that Mr. Khan is defending the petitioner in the proceedings initiated against the petitioner under section 138 Negotiable Instruments Act, 1881, by the respondent.

13. Lastly, learned counsel submits that the petitioner is an educated person, had knowledge of the case and entered appearance in person as also through his counsel and therefore, is deemed to have waived service through summons. He further submits that the petitioner was duly represented by a counsel who knew the strict timelines prescribed under the Commercial Courts Act, 2015 as well as the amended provisions of the Code of Civil procedure, 1908. Thus, learned Counsel submits that the plea of the petitioner that since the summons were not served upon him, the time as prescribed for filing written statement had not commenced, cannot be accepted.

14. Learned counsel for the Respondent relied upon the judgement of the Hon'ble Supreme Court in ***Sunil Poddar and Ors. vs. Union Bank of India*** decided on 08.01.2008, reported in **(2008) 2 SCC 326**, to submit that the question was not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed under Order V of the Code of Civil Procedure, 1908 but whether the defendants had sufficient notice of the date of hearing and had sufficient time to appear and answer the claim of the plaintiffs. Learned counsel thus submits that having appeared before the Trial Court, the Petitioner was precluded from using false defenses.

15. Learned counsel for the Respondent also relied upon the judgement passed by a Coordinate Bench of this Hon'ble Court in the matter titled as ***"HT Media Limited & Ors. Vs. Brainlink International, Inc. & Ors.***, in CS(COMM.) 119/2020 reported in

2021 SCC OnLine Del 5398, decided on 17.12.2021, to submit that once the defendant appears, the service of summons are deemed to have been waived and the timelines prescribed ought to be reckoned from the date of first appearance. Learned counsel for the Respondent also relies upon the judgement titled as "***SCG Contracts (India) Private Limited Vs. K.S. Chamankar Infrastructure Private Limited and Others***", reported in **(2019) 12 SCC 210**, Civil Appeal no. 1638 of 2019 rendered by the Supreme Court on 12.02.2019.

ANALYSIS AND CONCLUSION:

16. This Court has heard the arguments addressed by the learned Senior Counsel appearing for the petitioner as well as the learned Counsel for the respondent and for the reasons mentioned hereunder, the petition is allowed.

17. The facts and the basic contentions to decide the present lis have already been enumerated above and are not being referred to again.

18. In view of the facts obtaining in the present case and keeping in view that the suit has been filed under the provisions of the Commercial Courts Act 2015, it is necessary to examine the provisions thereof as well as the amended provisions of the Code of Civil Procedure, 1908.

19. As per the petitioner, it was never served notice of summons for filing its written statement within 30 days period as stipulated in

Order VIII Rule 1 of the Code of Civil Procedure, 1908 as amended by the Commercial Courts Act, 2015. As per the said provision, the defendant is to file his written statement within period of 30 days. However, for reasons to be recorded by the court and on payment of costs, as the court deems fit, the defendant could be allowed to file his written statement beyond the 30 days period but within 120 days ***"from the date of service of summons."***

20. Order VIII Rule 1 CPC as amended and its proviso as substituted is extracted hereunder:

> *"**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.*
>
> ***SPECIAL AMENDMENT***
>
> *Commercial dispute of a Specified Value:- In its application to any suit in respect of a commercial dispute of a Specified Value, in Order VIII, in Rule 1, substitute the following proviso, namely:-*
>
> *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 twenty days from **the date of service of summons** and on expiry of one hundred 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".*
>
> (Emphasis supplied)

It is evident that the language employed in the proviso is

restrictive and circumscribe the right of the defendant to necessarily file his written statement within 30 days. The proviso further curtails and restricts the inherent power of the Court to grant extension of time beyond 30 days, extendable upto 120 days from the date of service of summons. The proviso simultaneously places a responsibility upon the Court to record its reasons while granting extension of time to defendant who may default in filing the written statement within the stipulated period of 30 days.

21. Besides, the proviso is couched in a negative language and stipulates that the right to file written statement beyond 120 days by the defendant is automatically extinguished by operation of law.

22. Thus, there is no iota of doubt that Order VIII Rule 1 CPC read with proviso as amended by virtue of the Commercial Courts Act, 2015 is prohibitive as well as restrictive in its nature in contradistinction to Order VIII Rule 1 of the CPC, 1908 as applicable to ordinary suits.

23. The wisdom of the legislature in drafting such a strict and rigorous provision is not far to see, in that, commercial suits should not be lingering in courts for years and ought to be resolved at the earliest. This obviously would be in the commercial interest of the nation.

24. Thus, it is clear that the leverage which hitherto before was and is being enjoyed by the defendants in ordinary suits have been taken away and the courts are divested of their powers of extending time of filing a written statement beyond 30 days, except for reasons

to be rendered for extension of time, but not beyond 120 days from the date of service of summons.

25. Learned Senior Counsel for the petitioner had vehemently stressed on the provisions of Order V Rule 1 CPC and the proviso thereto which was amended by the Commercial Courts Act, 2015 to submit that the legislature deemed it necessary to amend the proviso to Rule 1 of Order V, CPC to align the service of summons upon the defendant with the proviso to Rule 1 of Order VIII CPC.

26. Order V Rule 1 CPC and the proviso thereto as amended is extracted hereunder:-

> *"(1) **Summons** :- (1) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant:*
>
> *Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim:*
>
> *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 same on such other days 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.*
>
> *(2) A defendant to whom a summons has been issued under sub-rule (1) may appear:*
>
> *(a) in person, or*
>
> *(b)by a pleader duly instructed and able to answer all material questions relating to the suit, or*
>
> *(c) by a pleader accompanied by some person able to answer all such questions.*
>
> *(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.*
>
> ***SPECIAL AMENDMENT***
>
> *Commercial dispute of a specified value. – In its application to any suit in respect of a commercial dispute of a Specified Value, in*

30. Another provision which may be germane to the resolution of the present dispute in the opinion of this Court would be Rule 5 of Order V, CPC, 1908. The same is extracted hereunder:-

> *"5. **Summons to be either to settle issues or for final disposal.**– The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly;*
>
> *Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit."*

It is manifest that Rule 5 requires the court issuing summons to determine at the time of issuance of summons whether it shall be for settlement of issues only, or for the final disposal of the suit and directs that the summons shall contain a direction in accordance thereto.

31. When the provisions of Rule 5 of Order V CPC are viewed in conjunction with and as made applicable to commercial suits, it is logical that the same shall be read and applied in the manner as provided under second proviso to Rule 1 of Order V as well as proviso to Rule 1 of Order VIII of the CPC, 1908.

32. When viewed in the aforesaid manner, it appears both logical as also in consonance with the strict liability that is sought to be brought upon a defendant in a commercial suit.

33. It is clear from the proviso to Rule 1 of Order V as well as Rule 1 of Order VIII, that filing of the written statement by the defendant within 30 days from the date of service of summons in

Order V, in rule 1, in sub-rule (1), for the second Proviso, substitute the following proviso, namely:–

*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 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 twenty days from the **date of service of summons** and on expiry of one hundred 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."*

(Emphasis supplied)

27. The plain reading of the proviso to Rule 1 Order V CPC brings to fore the same aspect as was intended while substituting the proviso to Rule 1 of Order VIII, CPC.

28. Rule 1 of Order V, CPC makes it clear that once a suit is instituted, summons may be issued to the defendant to appear and answer the claim and to file the written statement within 30 days from the date of service of summons. However, under first proviso, which is applicable to the ordinary suits, the defendant is permitted to file written statement beyond the 30 days period but within the 90 days from the date of service of summons. It is trite that this proviso has been held to be construed liberally and written statement even beyond 90 days period has been directed to be taken on record, for justifiable reasons. The said proposition is settled by the Supreme Court in ***Kailash vs. Nanhku & Ors,*** reported in **2005 (4) SCC 480.**

29. The second proviso to Rule 1 of Order V, CPC as amended and made applicable to the commercial suits is restrictive in its nature when compared to the first proviso as applicable to the ordinary suits.

commercial suits is a strict and mandatory provision, extension whereof would be subject only to the conditions specified therein. In this view of the matter, it becomes relevant to consider as to from which day, the 30 days period is to be reckoned, for the purpose of filing written statement by the defendant.

34. There is no manner of doubt, as stipulated in proviso to Rule 1 of Order V and Rule 1 of Order VIII CPC, that the 30 days period would commence on and from the date of service of summons containing a stipulation that it is obligatory on the part of the defendant to file his written statement, which would be a necessary concomitant to construe if any default in filing the written statement has occasioned.

35. This Court is, therefore, of the opinion that it is imperative to direct the Civil Courts adjudicating commercial suits, while issuing summons of the suit to the defendant, to necessarily incorporate the endorsement that, ***"defendant should file his written statement of defence within 30 days from the date of service/receipt of summons"*** on the notice of summons. It is also apparent from a plain and harmonious reading of all the aforesaid three provisions of the CPC that service of summons itself is a very important procedural step undertaken by the court and there cannot be any laxity insofar as commercial suits are concerned.

36. Moreover, once this Court has concluded that, so far as commercial suits are concerned, the failure in strictly following

procedural steps as stipulated in Order V Rule 1 and Rule 5 CPC, 1908 cannot be to the detriment of the defendant, the logical conclusion would be that the same are mandatory in character.

CONSIDERATION OF THE JUDGEMENTS CITED:

37. Having examined the relevant provisions of the Code of Civil Procedure, 1908 as applicable to present case, this Court proceeds to examine the various judgements relied upon by the parties.

38. The judgements relied upon by the petitioner appear to be applicable to the facts obtaining in the present case and which are also fortified by the judgments rendered by Coordinate and Learned Division Bench of this Court too. The same are as under:

a. Single Judge of High Court of Maharashtra at Mumbai in the case of ***Axis Bank Ltd. & Others vs. Mira Gehani & Ors (supra)*** has held as under:

> *"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."*

b. Learned Division Bench of High Court of Maharashtra at Mumbai in ***Sunil Gupta vs. Asset Reconstruction Company (India) Ltd. & Ors (supra),*** in Para 45, relied upon the judgement rendered by another Division Bench of the same High Court in ***Tardeo Properties Pvt. Ltd. v/s Bank of Baroda*** reported in **MANU/MH/1736/2007** whereby, in Para 25 & 26, it was held as under:

> *"25.... In this view of the matter, there is no substance in the argument that the matter relating to the service of writ of summons pertains to the procedural law and that, therefore, non-compliance or any irregularity in that regard would not relate to the jurisdictional error. Failure to comply with the mandatory requirement of the service of writ of summons to enable the 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 the defendant in the absence of the service of writ of summons.*
>
> *26. For the reasons stated above, in the absence of service of writ of summons upon the defendants/ appellants, the learned Single Judge could not have proceeded to dispose of the suit, and certainly not under Order VIII of the CPC, and hence, the impugned judgment cannot be sustained and is liable to be set aside and the matter to be remanded, allowing the defendant to file the written statement and the Court to proceed to dispose of the suit thereafter in accordance with the provisions of law."*
>
> *(emphasis supplied)*

c. The judgement by a Coordinate Bench of this Court in ***Red Bull AG vs. Pepsico India Holdings Pvt. Ltd. and Ors.***, reported in **2019 SCC OnLine Del 9901** rendered on 28.08.2019 held as under:

> *14. A perusal of the aforenoted statutory provisions would show that when a suit is duly instituted summons may be*

issued to the defendant to appear and answer the claim. Hence, the court has to ensure that the suit has been duly instituted and thereafter the court may issue summons on the defendant.

15. Mulla on CPC, 18th Edn. while interpreting Order 5 Rule 1 CPC states as follows:-

"Under this rule, it is obligatory to issue summons to defendant unless the case falls within the proviso. When a party is sought to be impleaded in a legal proceeding, service of notice on such party cannot be a mere formality but should in fact be a reality."

16. In this background the Division Bench of this Court in the case of ***Bright Enterprises Pvt. Ltd. & Anr. Vs. MJ Bizcraft LLP & Anr. (supra)*** *held as follows:-*

> *"17. From the above and particularly upon examining the provisions of Section 27 and Order V Rule 1(1) CPC, it is evident that when a suit is regarded as having been 'duly instituted', a summons may be issued to the defendant. The use of the expression 'duly instituted' has to be seen in the context of the provisions of Orders VI and VII of the CPC. In the present matter, it is nobody's case that the suit had not been duly instituted in the sense that it did not comply with the requirements of Order VI and VII CPC. It is neither a case of return of a plaint under Order VII Rule 10 nor a case of rejection of a plaint under Order VII Rule 11 CPC. The present case is one of dismissal of the suit itself on merits. Therefore, the only thing that needs to be examined is whether the Court had a discretion to issue or not to issue summons given that the suit had been duly instituted. In our view, the use of the word 'may' does not give discretion to the Court and does not make it optional for it to issue summons or not. This is further fortified by the fact that the first proviso to Order V Rule 1(1) itself gives a situation where summons must not be issued and that happens when a defendant appears at the presentation of the plaint and admits the plaintiffs claim. Therefore, in such a situation, there is no requirement for issuance of*

summons and that is why the word 'may' has been used in Order V Rule 1(1). In all other cases, when a suit has been 'duly instituted' and is not hit by either Order VII Rule 10 or Order VII Rule 11 CPC, summons has to be issued to the defendant.

(emphasis added)

17. Hence, it is quite clear that once a suit is stated to have been duly instituted and the suit is not hit by Order 7 Rule 10 or Order 7 Rule 11 CPC, the suit fulfils the stated requirement. Summons have to then be issued to the defendant thereafter."

The judgements relied upon by the counsel for the respondent are as under:

d. The judgement of the Supreme Court in ***Sunil Poddar and Ors. vs. Union Bank of India (supra),*** relied upon by the learned counsel for the respondent would not be applicable to the facts of the present case inasmuch as the decision did not deal with the amended provisions of the CPC as amended by the Commercial Courts Act, 2015. That apart, in the present case, neither any order to issue summons nor any summons were at all issued by the Trial Court itself.

e. The judgement of Coordinate Bench of this Court in ***HT Media Limited & Ors. vs. Brainlink International, Inc. & Ors. (supra),*** is distinguishable on facts. In that case, summons were indeed issued by the Court by its order and the defendant in that case had started appearing, though without filing his written statement. Thus, the Coordinate Bench was of the

opinion that the appearance by defendant would amount to waiver of service of the summons of the suit. However, in the present case, the Trial Court itself was satisfied after scrutinizing its record that no order to issue summons was at all passed by the Trial Court nor was any summons issued.

39. Applying the aforesaid principle to the facts of the present case, it is clear from the impugned order that the Trial Court itself observed that the summons in the present case were never issued to the defendant. Once the learned Trial Court concluded, upon the perusal of its record, that summons under Rule 5 of Order V CPC, 1908 were never issued in accordance with the prescribed procedure, the failure thereof cannot be detrimental to the rights provided to the defendant.

40. It is trite that no person can be prejudiced for the mistake of the court. The maxim "***Actus Curaie Neminem Gravabit***" is way too well settled by a catena of judgments of the Supreme Court. This doctrine applies on all fours to the admitted facts in so far as the mistake on the part of the Trial Court is concerned.

41. Thus, the impugned order is vitiated on two grounds in that, firstly, Trial Court never passed orders issuing summons to the petitioner and secondly, in the absence of issuance of valid summons, it cannot be assumed that the petitioner had the knowledge of the obligation to file the written statement within a period of 30 days from the date of the service of summons. Logically, since no such

summons were ever issued, the question of not having filed the Written Statement within 30 days period or the extended period of 120 days does not arise and the liability cannot be fastened upon the petitioner.

42. In the facts of the present case and keeping in view the aforesaid legal position, it is obvious that the failure to file written statement within the stipulated period or even the extended period cannot to be detrimental to the interest of the petitioner/defendant. It is trite that procedures are handmaid of justice and the provisions are to be construed accordingly.

43. It is a matter of record that the written statement was indeed filed within five days from order dated 20.09.2022 passed by the Trial Court.

44. Having regard to the entire facts as narrated above as well as the examination of various provisions of Order V read with Order VIII of the CPC 1908 as applicable to Commercial Suits, the impugned order dated 15.10.2022 passed by the Trial Court is unsustainable in law and is quashed and set aside.

45. In view of the maxim ***"Actus Curaie Neminem Gravabit"*** too, the impugned order is unsustainable in law.

46. As a sequiter, the written statement filed by the petitioner is directed to be taken on record with the further directions to the Trial Court to proceed in accordance with law and as per the provisions of

Code of Civil Procedure, 1908 as amended by the Commercial Courts Act 2015.

47. The Registrar of this Court is directed to transmit copies of this order to the learned District & Sessions Judge (HQ) as well as District & Sessions Judge of all other districts in order to pass necessary orders to make the endorsement as stipulated in Para 35 of this judgment a mandatory part of the summons to be issued under Order V Rule 5 CPC, 1908 in cases pertaining to Commercial Suits as a necessary requirement.

48. The petition is disposed of, in above terms, with no orders as to costs. Pending application also stands disposed of.

TUSHAR RAO GEDELA, J

JANUARY 06, 2023
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EXAMINER