



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 ORDINARY ORIGINAL CIVIL JURISDICTION
 IN ITS COMMERCIAL DIVISION
 INTERIM APPLICATION (L) NO. 15505 OF 2023
 IN
 COMMERCIAL SUIT NO. 88 OF 2015

Firoz A. Nadiadwala ... Applicant

In the matter between :

Anil Dhanraj Jethani and another ... Plaintiffs

Versus

Firoz A. Nadiadwala and others ... Defendants

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Mr. M.M. Vashi, Senior Advocate, through video conferencing alongwith Ms. Manisha Desai instructed by M/s. M.P. Vashi & Associates, Advocate for the Applicant in IAL-15505-2023.

Mr. Naushad Engineer, Senior Advocate alongwith Mr. Yohaam Limathwalla, Mr. Vipul Makwana and Mr. Nikhil Sonar instructed by Mr. Ashok Dhanuka, Advocate for the Defendant/Original Plaintiffs.

Mr. Pravin Singh, Advocate for the Defendant No.4.

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CORAM : ABHAY AHUJA, J.

Judgment reserved on : 1st April 2025

Judgment pronounced on : 9th June 2025

ORDER :

1. This Interim Application has been filed by the Defendant No.1

seeking the following reliefs :

“(a) That the above Commercial Suit No.88 of 2015 (Regular Suit No.1148 of 2015 bearing (L) No.852 of 2015) be dismissed as the Plaintiffs have

not taken steps to issue and serve Writ of Summons on the Applicant/Org. Defendant No.1 as required by the Code of Civil Procedure, 1908 and/or the provisions of Commercial Courts Act, 2015.

(b) That it be declared that orders dated 21st October 2016 and 13th December 2016 passed by the Prothonotary and Senior Master, High Court, Bombay are non-est, nullity and are liable to be set aside and accordingly be set aside.

(c) That the pending the hearing and final disposal of the present Interim Application, the ad-interim order dated 1st September 2015 passed by this Hon'ble Court (Exhibit-A), be vacated and/or recalled."

2. The facts relevant for deciding this Application are set out hereunder :

2.1 On 13th July 2007, a judgment was passed by this Court in the case of ***Tardeo Properties Pvt. Ltd. vs. Bank of Baroda***¹, holding that entering appearance at the interlocutory stage/filing of Vakalatnama will not do away with the requirement of serving a writ of summons.

2.2 On 29th September 2008, a Notification was issued by this Court stating that if a Defendant/Respondent has entered an appearance and filed its Vakalatnama, "*... there shall be no necessity of serving the Writ of Summons or filing Affidavit of service.*"

¹ 2007 SCC OnLine Bom 614

2.3 On 21st September 2011, a judgment was passed by this Court, in the case of *Meena Ramesh Lulla and Others vs. Omprakash A. Alreja and Another*², holding that if the Defendant enters an appearance/files Vakalatnama, formal service of writ of summons cannot be insisted upon and the suit is deemed to have been served.

2.4 On 19th August 2015, the present Suit No.1148 of 2015 was filed by the Plaintiffs *inter-alia* seeking to recover an amount of Rs. 24,00,00,000/-. It is observed that the said Suit was filed as a regular Suit, i.e. prior to enactment of the Commercial Courts Act, 2015 (the “Commercial Courts Act”).

2.5 On 20th August 2015, copies of the plaint along with exhibits and notice of motion were served upon the Defendant No.1. It is an admitted position that the Defendant No.1 was not only served with a copy of the pleadings, but also notified of the date of hearing viz. 24th August 2015.

2.6 On 24th August 2015, Affidavit of service of Mr. Maruti Gorakh Kamble, Clerk of Plaintiffs’ Attorney was filed in this Court. On the

2 2011 SCC OnLine Bom 2147

same day, at the hearing before this Court, Defendant No.1 had engaged lawyers, i.e. India Law Alliance and was represented by a Senior Advocate.

2.7 On 28th August 2015 as well the same law firm and the same Senior Advocate represented the Defendant No.1.

2.8 Thereafter, on 1st September 2015, the consent order came to be passed, when also the same Senior Advocate and the same law firm represented the Defendant No.1. By the said consent order, Defendant No.2 deposited Rs.12,50,00,000/- in this Court with liberty to the Plaintiffs to withdraw the same unconditionally. The balance amount of Rs.11,50,00,000/- was to be paid to the Plaintiffs prior to release of 1st Defendant's next production film.

2.9 It is not in dispute that the Defendant No.1 was represented not only by the Advocates who had filed Vakalatnama, but also by a Senior Advocate and that the Defendant No.1 was in receipt of the plaint along with all exhibits and the notice of motion.

2.10 On 23rd October 2015, the Commercial Courts Act came to be enacted.

2.11 Thereafter, on 21st October 2016, the learned Prothonotary & Senior Master of this Court passed an order converting the regular Suit No. 1148 of 2015 to Commercial Suit No.88 of 2015 and transferring the same to the Commercial Division of this Court.

2.12 On 9th June 2023, the Defendant No.1 has taken out this Application.

3. Mr. Vashi, learned Senior Counsel, appearing for the Defendant No.1 would submit that after filing of the Suit, the Plaintiffs had applied for an ad-interim relief and vide order dated 1st September 2015, this Court had granted relief by passing an ad-interim order. That, after passing of the said ad-interim order, the Commercial Courts Act came into effect on 23rd October 2015, after which the Prothonotary & Senior Master of this Court had passed an order dated 21st October 2016 converting the Suit to a Commercial Suit and transferring the same to the Commercial Division of this Court.

4. Mr. Vashi, learned Senior Counsel, would submit that although the Defendant No.1 was neither served with the writ of summons when the Suit was filed as a regular Suit No.1148 of 2015 nor after the said

Suit was transferred as a Commercial Suit, the Prothonotary & Senior Master of this Court by order dated 21st October 2016 had directed the original Defendants No.1 and 2 to file written statement on or before 21st November 2016. That, the Prothonotary & Senior Master extended the time to file written statement by the original Defendants No.1, 2 and 4 on or before 13th December 2016.

5. Mr. Vashi would submit that the said order dated 21st November 2016 indicates that the then Advocates appearing for the Defendant No.1 had taken out a Chamber Order No.823 of 2015 for discharge and the Defendant No.1 had also received a notice dated 19th November 2016 in respect of the same.

6. That, thereafter, the Prothonotary & Senior Master passed a further order dated 13th December 2016 which recorded that as the Defendants No.1 and 2 had neither remained present nor had filed written statement, the Suit was transferred to the list of undefended Suits as regards the Defendants No.1 and 2.

7. Mr. Vashi would submit that the orders dated 21st October 2016 and 13th December 2016 passed by the Prothonotary & Senior Master

are *non-est*, a nullity and are contrary to the provisions of Code of Civil Procedure, 1908 (“CPC”) and therefore the Applicant/Defendant No.1 is seeking a declaration to that effect and for setting aside the said orders in terms of prayer clause (b).

8. Mr. Vashi has further submitted that the Applicant was served with two summonses issued by the 18th Additional Civil Judge, ACJM, Rajkot, calling upon the Applicant to answer the charge under Section 138 of the Negotiable Instruments Act, 1881 and after that the Applicant made enquiries with the present Advocates in Bombay and the Applicant /Defendant No.1 was advised that no summons had been served on the Defendant No.1 either in the regular Suit No.1148 of 2015 filed on 19th August 2015 nor in the transferred Commercial Suit No.88 of 2015.

9. Mr. Vashi would submit that where the Plaintiffs do not take any steps to serve the writ of summons within six months from the date of filing of the Suit under Rule 87 of the Bombay High Court (Original Side) Rules, 1980 (the “Bombay High Court Original Side Rules”) the Prothonotary & Senior Master shall notify the Suit on board for dismissal.

10. Mr. Vashi has drawn the attention of this Court to Rule 87 of Bombay High Court (Original Side) Rules, 1980, which at the relevant time was as under :

“87. Suits to be placed on board for dismissal if summons not served within six months

If the Writ of Summons is not served within six months from the date of the filing of the plaint, the Prothonotary & Senior Master shall unless good cause is shown, place the suit on board for dismissal. The Prothonotary & Senior Master shall notify such suits on his notice board one week before they are placed on the board for dismissal.”

11. Mr. Vashi submits that the Plaintiffs have not taken steps to serve or even issue writ of summons for more than seven years and that, therefore, the Suit transferred as a Commercial Suit be dismissed as the Plaintiffs have not taken steps to have the writ of summons issued and served upon the Applicant/original Defendant No.1. Mr. Vashi would submit that since the Commercial Suit No.88 of 2015 is liable to be dismissed, it is just and proper that the ad-interim order dated 1st September 2015 passed by this Court be vacated. In the alternative, Mr. Vashi submits that the ad-interim order be recalled.

12. Mr. Vashi would submit that on another ground also, the ad-interim order is liable to be vacated or recalled. Mr. Vashi submits that

the Plaintiffs have relied upon the Agreement dated 16th July 2013 which is annexed as Exhibit “C” to the Plaint. That the said Agreement dated 16th July 2013 is not even signed and executed by the 2nd Plaintiff. That, therefore, the 2nd Plaintiff cannot rely upon any relief based on the said agreement. That, therefore also, the ad-interim order is liable to be vacated.

13. Accordingly Mr. Vashi submits that in a Commercial Suit or in a transferred Suit, the Plaintiffs must serve a writ of summons on the Defendant and there can be no deemed service even if the Defendant appears at the interlocutory stage and relies upon the case of ***Axis Bank Limited vs. Mira Gehani and Others***³. Mr. Vashi submits that the amended provisions of the CPC would apply to both, Suits originally filed as Commercial Suits and even those which were filed as regular Suits prior to the enactment of the Commercial Courts Act and subsequently transferred and relies upon the decision in the case of ***Reliance General Insurance Company Limited vs. Colonial Life Insurance Company (Trinidad) Ltd. & another***⁴ and ***Bharat Bhogilal Patel vs. Leitz Tooling Systems India Private Limited***⁵. Mr. Vashi submits

3 2019 SCC OnLine Bom 358
 4 2021 SCC OnLine Bom 14147
 5 2019 SCC OnLine Bom 890

that even in regular Suits, a writ of summons has to be served even if a Defendant had entered appearance at the interlocutory stage and filed Vakalatnama and relies upon the decision in the case of *Tardeo Properties Pvt. Ltd. vs. Bank of Baroda (supra)*.

14. Mr. Vashi accordingly submits that this Court may also allow the application in terms of prayer clauses (a) and (c).

15. On the other hand, Mr. Engineer, learned Senior Counsel, appearing for the Plaintiffs, at the outset, submits that as far as prayer clause (b) is concerned, in view of the decision of this Court in the case of *One Square Investments Ltd. vs. Remedial Resolutions Advisors Pvt. Ltd.*⁶, where this Court has held that the Prothonotary & Senior Master does not possess the jurisdiction to fix timelines for filing of the written statement in a Suit which was originally filed as a regular Suit and subsequently converted to a Commercial Suit, post enactment of the Commercial Courts Act, in view of Section 15(4) of the Commercial Courts Act, which stipulates that in the case of transferred Suits, it is the Commercial Division of this Court that would fix the timelines and the orders dated 21st October 2016 and 13th December 2016 would be

6 2020 SCC OnLine Bom 399

required to be interfered with and that this Court, as a consequence, may give directions to the Defendant No.1 to file his written statement.

16. With respect to the prayer clauses (a) and (c) in response to the aforesaid submissions made by Mr. Vashi, Mr. Engineer, learned Counsel, appearing for the Plaintiffs, firstly, submits that the captioned Suit was first filed as a regular Suit before the enactment of the Commercial Courts Act which was subsequently converted to a Commercial Suit and transferred to the Commercial Division of this Court and that being so, the law laid down in *Axis Bank Limited vs. Mira Gehani and Others (supra)* would not apply.

17. Mr. Engineer, learned Senior Counsel, submits that the Suit was filed on 19th August 2015 and the Commercial Courts Act came into force on 23rd October 2015 and accordingly, the Suit came to be transferred to the Commercial Division of this Court on 21st October 2016. Mr. Engineer submits that the decision of this Court in the case of *Axis Bank Limited vs. Mira Gehani and Others (supra)* which stipulates that the writ of summons must be served on the Defendant even if the Defendant had entered an appearance would therefore not be applicable, as the same is applicable only to Suits that were originally

filed as Commercial Suits but not to this Suit which was filed originally as a regular Suit and subsequently converted to a Commercial Suit.

18. Mr.Engineer further submits even otherwise that reliance on *Axis Bank Limited vs. Mira Gehani and Others (supra)* would be of no avail as from a reading of paragraphs 1 and 3 thereof it is clear that the question that this Court was considering in the said case was only whether in a Commercial Suit a Defendant can be permitted to file a written statement after 120 days from the date of service of summons in a case where the Suit had originally been filed as a Commercial Suit.

19. Mr.Engineer submits that, therefore, in a transferred Suit, if a Defendant had previously entered an appearance at the interlocutory stage / filed Vakalatnama, then there is no need for the Plaintiff to thereafter serve writ of summons.

20. Mr.Engineer would submit that the law with respect to service of writ of summons up to the year 2008 was contained in the decision of this Court in decision of *Tardeo Properties Pvt. Ltd. vs. Bank of Baroda (supra)* in which it was held that entering an appearance at the interlocutory stage / filing of Vakalatnama would not do away with the

requirement of serving of writ of summons. However, by Notification dated 29th September 2008 with effect from the said date, it was directed that if a Defendant had filed Vakalatnama and entered an appearance, there was no requirement to formally serve a writ of summons upon such Defendant and that *Tardeo Properties Pvt. Ltd. vs. Bank of Baroda (supra)* is therefore not a good law in view of the Notification of 2008.

21. That, after 2008, the Hon'ble Supreme Court and this Court have consistently held that if a party appears at the interlocutory stage and if a Vakalatnama is filed, then there is no need to serve the writ of summons on such Defendant. Mr.Engineer, relies upon the following decisions :

- (a) *Sunil Poddar and Others vs. Union Bank of India*⁷
- (b) *Meena Ramesh Lulla vs. Omprakash A. Alreja (supra)*
- (c) *M/s. Prime Builders vs. Suman R. Bagwe & Others*⁸

22. Mr.Engineer would submit that even in the case of *Hikal Limited vs. Paxchem Limited*⁹ this Court has held that it would be too technical

7 (2008) 2 SCC 326

8 Notice of Motion No.920 of 2014 in Suit No.60 of 1998

9 2023 SCC Online Bom 1826

to insist on service of writ of summons if a Defendant has entered an appearance and has been informed about the nature of the claim.

23. Mr.Engineer further submits that the rigours of the Commercial Courts Act and the amended CPC in relation to service of summons do not apply to transferred Suits. Mr.Engineer relies upon the decision of this Court in the case of *Reliance General Insurance Company Limited vs. Colonial Life Insurance Company (Trinidad) Limited and Another*¹⁰ in support of his contention. Mr.Engineer submits that the said decision was challenged before a Division Bench of this Court and the Division Bench has dismissed the appeal holding that the provisions of the Commercial Courts Act which deal with transferred Suits, have been prescribed in Section 15 and that such provisions would apply to all transferred Commercial Suits, irrespective of whether writ of summons was served or not.

24. Mr.Engineer would submit that, therefore, since the Defendant No.1 having appeared at the interlocutory stage and filed it's Vakalatama, the writ of summons need not be served as the rigours of the amended provisions of the CPC do not apply to transferred Suits

¹⁰ Notice of Motion No.561 of 2018 in Commercial Suit No.29 of 2013

nor does the time period of 120 days and the Commercial Division of this Court under Section 15(4) of the Commercial Courts Act can fix the timelines at a case management hearing. That, therefore, there is no prejudice caused to the Defendant No.1.

25. Mr.Engineer would submit that this Interim Application has been filed by the Defendant No.1 in a mischievous and malafide manner with a view to wriggle out of a binding obligation pursuant to an undertaking to this Court on 1st September 2015. Drawing this Court's attention to the said undertaking contained in the order dated 1st September 2015, Mr.Engineer submits that being fully aware and cognizant of the Plaintiffs' claim of Rs.24,00,00,000/-, the Defendant No.1 not only permitted the Plaintiffs to unconditionally withdraw the amount of Rs.12,50,00,000/- deposited by the Defendant No.2 but also provided an undertaking that he would not release his next production film until the balance Rs.11,50,00,000/- is paid to the Plaintiffs tendering across the bar the flyer of the 1st Defendant's next production film viz. 'Welcome to the Jungle' which was slated to be released on 28th December 2024 but has been postponed due to certain delays and knowing fully well that he would have to pay the Plaintiffs the balance amount of Rs.11,50,00,000/-prior to its release, the

Defendant No.1 has sought to agitate that this Interim Application filed on 9th June 2023 seeking dismissal of the captioned Suit primarily on the ground of non-service of writ of summons. Mr.Engineer would submit that prayer clause (c) seeking vacation / recall of the consent order reeks of malafides. Mr.Engineer submits that it is abundantly clear that the filing of the Interim Application is nothing but a subterfuge employed by the Defendant No.1 to wriggle out of a solemn undertaking provided to this Court. That, therefore, this Court dismiss the Interim Application, as far as grant of reliefs in terms of prayer clauses (a) and (c) are concerned.

26. I have heard the learned Senior Counsel at length and also considered the rival contentions.

27. As regards prayer clauses (a) and (c), I am of the view that since the rigours of the Commercial Courts Act and the amended CPC in relation to the service of summons do not apply to transferred Suits and considering that the captioned Suit was a regular Suit filed before the enactment of the Commercial Courts Act to which the Commercial Courts Act become applicable and that the Defendant No.1 had already entered an appearance at the interlocutory stage / filed Vakalatnama,

there is no need for the Plaintiffs to thereafter serve a writ of summons as the object of serving writ of summons has been satisfied.

28. It is not in dispute that the captioned Suit was originally filed on 19th August 2015 as regular Suit (L) No.852 of 2015 (Suit No.1148 of 2015). The Commercial Courts Act came into force on 23rd October 2015. It is also not in dispute that the Suit involves a commercial dispute and has to be decided by the Commercial Division of this Court.

29. In *Axis Bank Limited vs. Mira Gehani and Others (supra)* it has been held that a writ of summons must be served on the Defendant even if the Defendant had entered an appearance but the same is applicable only to Suits that have originally been filed as Commercial Suits. Paragraph 114 of the said decision is relevant and is usefully quoted as above :

“114. It is clarified that in so far as the question of applicability of the Commercial Courts Act on Suits transferred from non-commercial Suits to Commercial Suits by the office of this Court is concerned (as has arisen in Commercial Suit No. 29 of 2013 and Commercial IP Suit No.418 of 2016), a separate order will be passed.”

(Emphasis supplied)

30. As can be seen, it has been clarified that the Commercial Courts Act would be applicable only to Suits originally filed as Commercial Suits and that the said ratio has no applicability to Suits originally filed as regular Suits and subsequently converted into Commercial Suits. Moreover, as has been submitted, the said decision was only considering the question whether in a Commercial Suit a Defendant can be permitted to file a written statement after 120 days from the date of service of writ of summons, as in that case, the Suit was originally filed as a Commercial Suit which obviously are not the facts nor the question in this case. Therefore, the ratio in *Axis Bank Limited vs. Mira Gehani and Others (supra)* is not applicable to the case at hand.

31. It must be noted that till the year 2008, the law was that even if an appearance is entered at the interlocutory stage / filing of Vakalatnama, the same would not do away with the requirement of service of a writ of summons. However, on 29th September 2008, the following Notification was issued by this Court:

“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.”

(Emphasis supplied)

32. Therefore, with effect from 29th September 2008, if a Defendant had filed a Vakalatnama and entered an appearance, there was no requirement to formally serve a writ of summons upon such Defendant. Accordingly, the decision in the case of *Tardeo Properties Pvt. Ltd. vs. Bank of Baroda (supra)*, as rightly submitted on behalf of the Plaintiffs, would be of no avail as it is no longer good law given the issuance of the Notification of 2008 by this Court.

33. In *Sunil Poddar and Others vs. Union Bank of India (supra)* this Court has observed that the legal position under the amended CPC is not whether the Defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code but whether he had notice of the date of hearing of the Suit and whether he had sufficient time to appear and answer the claim of the Plaintiff and that once these two conditions are satisfied, an *ex-parte* decree cannot be set aside even if it is established that there was an irregularity in the service of summons. Paragraphs 10, 11 and 23 of the said decision are usefully quoted as under :

“10. The learned counsel for the appellants contended that DRT committed grave error of law and jurisdiction in proceeding with the application and deciding it on merits ex parte in absence of the appellants. It was submitted that no summonses were served upon the appellants and thus no opportunity of hearing was afforded to them before passing the impugned order which is liable to be set aside. DRT in the circumstances, ought to have allowed the application for setting aside ex parte order. By not doing so, DRT had committed grave error and the said order deserves to be quashed.

11. It was also submitted that the appellants were not informed about the transfer of case from the civil court to DRT and no summonses were served upon them. According to the appellants, they had changed their address and new address was available with the Bank. In spite of that, with mala fide intention and oblique motive, summonses were sought to be served upon the appellants at an old address but the appellants were not served because of change of address. Summonses were then published in a Hindi newspaper which had no "wide circulation". That action was also taken with a view to deprive the appellants from knowing about the proceedings before DRT so that they may not be able to appear and defend themselves and the Bank would be able to obtain ex parte order. The appellants had led the evidence in support of their say that they were not in Mumbai at the relevant time and they were not subscribers of Hindi newspaper Nav Bharat Times. They had produced necessary particulars and yet DRT failed to consider the said evidence in its proper perspective and dismissed the application observing that the appellants must be deemed to be aware of the proceedings.

23. It is, therefore, clear that the legal position under the amended Code not whether the defendant was actually

served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code. Since the said provision applies to the Debts Recovery Tribunals and the Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before DRT, they had no sufficient time to appear and answer the claim of the plaintiff Bank and on that ground, ex parte order deserves be set aside.”

34. In the case of *Meena Ramesh Lulla and Others vs. Omprakash A. Alreja and Others (supra)*, this Court has held while considering the object and purpose of the service of writ of summons that when the object of notifying the Defendants of the Plaintiffs' claim is otherwise served, the service of writ of summons would become a redundant formality taking up needless judicial time in passing directions for such service and causing avoidable expenses to the Plaintiffs in serving

summons. That, the evidence of the Vakalatnama of the Advocate for the Defendant itself would therefore show that the service of the summons upon the Defendant has been effected and that the appearance by the Defendant at any stage of the Suit is further such evidence, and therefore, formal service of the writ of summons cannot be insisted upon. Paragraphs 6 to 9, 12 to 14 and 21 to 24 of the said decision are usefully quoted as under :

“6. What is primarily agitated is that the learned Judge mainly considered the non service of the writ of summons for a period of 8 years since the filing of the suit and upheld the order of dismissal on that ground.

*7. The writ of summons has to be served by the Plaintiffs upon each of the Defendants under **Order V Rule 1(1) of the CPC**, which runs thus:*

"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:"

8. The purpose and object of the service of the writ of summons must be first understood. It is only to give notice to the Defendants of the Plaintiffs' claim. It will enable the Defendant who otherwise has no such notice to appear and answer the Plaintiffs' claim. This is, therefore, not an ornamental or a ritualistic requirement. The exercise has not to be undertaken in each and every case without

application of mind. When the object of notifying the Defendants of the Plaintiffs' claim is otherwise served, the service of the writ of summons would become a redundant formality taking up needless judicial time in passing directions for such service and causing avoidable expenses to the Plaintiffs in serving summons. It is, therefore, that when Defendants appear upon notice of the Plaintiffs to defend an application for ad-interim or interim relief either personally or through their Advocate they generally waive service. Once service is waived the service is not to be effected. In fact in this case service was waived when the ad-interim application was considered and the Notice of Motion was made returnable by the order passed on 22 November 2000 (though the order mentions the expression "waive notice" it is essentially the waiver of the service of the writ of summons).

9. The service of the writ of summons is made alongwith a copy of the plaint together with its annexures. This would enable the Defendants to see a claim made by the Plaintiffs and the basis upon which suit claim is made. When a notice for an ad-interim or interim application is given to the Defendants a copy of the plaint along with its annexures is also served upon the Defendants. Nothing other than the copy of the plaint and the annexures is to be served along with the writ of summons. Consequently, the Defendant has full notice of the Plaintiffs' claim and is in full and complete position to set out his defence which the Defendant does in an interim or ad-interim application by way of an affidavit in reply. Hence the appearance by the Defendant is enough evidence to show service of the plaint and proceedings upon the Defendant. Once that is shown, it would be too technical to require the writ of summons itself to be served later.

12. It may be mentioned that **Rule 84 of the Bombay High Court (Original Side) Rules** also show the

circumstances in which a writ of summons is seen to be served. Rule 84 runs thus:

“R. 84. Proof of service of Summons. - Unless the Court shall otherwise order, the service of a Summons to appear and answer shall be proved by the vakalatnama having been filed or when no vakalatnama has been filed, by evidence showing that the Summons was served in the manner provided by the Code of Civil Procedure.....”

13. The evidence of the vakalatnama of the Advocate of the Defendant itself would, therefore, show service of the summons upon the Defendant. The appearance by the Defendant at any stage of the suit is further such evidence. Filing of the affidavit in reply in an interim application is also such evidence. Consequently, when a suit comes up for hearing it would be material to see whether the writ of summons is actually served which can be evidenced by an affidavit of service, failing which it would be seen by the Vakalatnama of the Defendants' Advocate, the appearance of the Defendant, or any other proceeding filed or taken by the Defendant in the suit. Once any of these is shown the formal service of the writ of service cannot be insisted upon.

14. A similar aspect came up for consideration before another single Judge of this Court in the case of *Vijaykumar Ramrang Chaudhary v. D.K. Soonawalla*, (2005) 5 Bom CR 842 in which the Court had to consider the allegation about non-service of the summons after the Defendant appeared, but had not filed his written statement. The Defendant applied for listing the suit for dismissal on the technical ground of non-service. The Defendant had appeared and had filed an application for time to file written statement. Ad-interim relief was granted to the Plaintiff. The Defendant had engaged 3 Advocates on record. His contention that the Advocates were represented only for the specific application in which

they appeared was negated on the premise that there is no provision in the CPC or the High Court Rules engaging an Advocate in respect of each separate interim proceedings. It was held that Rule 84 of the above Rules is itself sufficient to show that the summons were duly served or that the requirements stood dispensed with.

21. The impugned order proceeds on the premise that the writ of summons was not served for 8 years and that the Plaintiff had not taken steps in that behalf. It states that the explanation given in the affidavit cannot be accepted. The impugned order does not show the reasons for non-acceptance of the cause made out by the Plaintiff for the Plaintiffs' nonappearance on the date of the dismissal of the suit. It proceeds upon the footing that explanation is not given for non service of the writ of summons for 8 years. The learned Judge has also not noticed the fact of the waiver of the service of the summons upon the appearance by the Defendants in Court at the time of the grant of the ad-interim relief as also at the time of the grant of the interim relief to the Plaintiff. The learned Judge has not appreciated that the service was deemed to have been effected as per the aforesaid provisions. The Plaintiffs have explained in the affidavit in support of the Notice of Motion for setting aside the dismissal of order about how and why the writ of summons was deemed to have been served upon the Defendant Nos. 1 and 2 and how it was sought to be served upon the other Defendants. Consequently, the Plaintiffs have also shown that they have a good case on merits, that they have obtained interim order of injunction as also an order for disclosure of the assets and properties of their deceased father pending the suit and that the dismissal would cause them irreparable loss. Given the fact that despite waiver of service the written statement was not filed by the contesting Defendant No. 2, which the

Court would allow the Defendants to file condoning the delay, if any, the Plaintiffs also deserved to be heard on merits of their claim. Consequently, the explanation relating to the service of the summons must be accepted and the suit must be restored to file as such a suit could not have been dismissed upon a mere technicality of want of the service of summons as also for a mere default of appearance on a given date under the above circumstances.

22. *Overemphasis upon the procedural requirements rather than considering the substance of the merits of the case of the parties would, as Justice Krishna Iyer came to observe, though in a different context, in paras 20 and 21 of his judgment in the case of Charles K. Skaria v. Dr. C. Mathew, (1980) 2 SCC 752 : AIR 1980 SC 1230:*

"make procedure not the handmaid but the mistress and form not as subservient to substance but as superior to the essence."

23. *The Notice of Motion in which the impugned order came to be passed has been taken out about 3 years after the order of dismissal came to be passed. The Plaintiffs have explained the said delay. It is their case that the Plaintiffs had filed an earlier Notice of Motion. In the meantime some of the Defendants expired. That Notice of Motion was disposed off with liberty to take out a fresh Notice of Motion by impleading the heirs of the deceased Defendants, which the Plaintiffs did. The Counsel on behalf of the Plaintiff stated that if the suit is restored to file the amendments with regard to bringing the heirs of the deceased on record can be carried out.*

24. *Under the aforesaid circumstances we deem it proper to hold that the service of the writ of summons was admitted to have been effected or was waived. In any event when the defendant appears either personally or through Advocate at any stage of the suit service must be*

deemed to have been effected.”

(Emphasis supplied)

35. In *M/s.Prime Builders vs. Suman R. Bagwe and Others (supra)*, it has been observed by this Court that proof of service of writ of summons may be dispensed with if the circumstances of the case show that the Defendant not only had notice of the Suit but in fact appeared in the Suit, even if such appearance be in a miscellaneous proceeding arising in the course of the Suit. In the case of *Hikal Limited vs. Paxchem Limited (supra)*, this Court has observed that it would be too technical to insist on service of writ of summons if a Defendant has entered an appearance and has been informed about the nature of the claim.

36. Further, paragraphs 11, 12 and 13 of the decision in the case of *Reliance General Insurance Company Limited vs. Colonial Life Insurance Company (Trinidad) Limited and Another (supra)* are also relevant and are usefully quoted as under :

“11. In my view, Section 15(4) is a provision specifically introduced by the legislature in its wisdom whilst drafting the Commercial Courts Act. I am therefore, inclined to harmoniously construe Section 15(4) of the Commercial Courts Act with the other provisions introduced by the Commercial Courts Act including the amendments

introduced to Order V and Order VIII. Harmoniously construed, Section 15 (4) vests the Commercial Division / Commercial Court with the necessary jurisdiction to hold Case Management Hearings to prescribe new timelines or issue further directions including prescribing a new time period within which a written statement shall be filed.

12. *In so far as the Plaintiff's argument on waiver is concerned, as has been held by this Court, the delay in filing a written statement within 120 days from the date of waiver of service of writ of summons cannot be condoned in Commercial Suits filed after the enactment of the Commercial Courts Act [see paragraph no. 103 of Axis Bank Limited vs. Mira Gehani & Ors. (cited supra)]. However, such waiver would not divest this Court from the power to exercise its jurisdiction under Section 15 (4) of the Commercial Courts Act in respect of transferred suits. I am also of the opinion that in a transferred suit waiver of Writ of Summons does not amount to a Defendant waiving the applicability of the proviso to Section 15 (4) of the Commercial Courts Act. That is a power or discretion to be exercised by the Court. There is nothing in the scheme or provisions of the Commercial Courts Act to suggest that for transferred suits the strict time limit of 120 days will apply to those cases where service of the Writ of Summons is waived. Also in the facts of the present case, to the extent relevant for deciding the legal issue as set out above, if the period of 120 days was to commence from the date of waiver of the service of the Writ of Summons as noted by the order of the Ld. Prothonotary and Senior Master, then the time period of 4 weeks to file the written statement by the Order dated 27th September, 2017, which was much after the 120 days from the date of waiver of Writ of Summons, would have no meaning. In fact the Plaintiffs through their Advocate appeared before this Court on 27th September, 2017, and the Order appears to*

have been passed with their consent. I am therefore of the opinion that there is no clarity on the submission of the Plaintiffs as to when the period of 120 days for filing the written statement in a transferred suit or in this transferred suit is to begin from. The difficulty in identifying such a starting point for determining the 120 days for filing a written statement in transferred suits, especially as there is no such provision made in Section 15 of the Commercial Courts Act, is yet another reason to accept and apply the plain language of Section 15 (4) and the proviso that such a time period was not intended to apply in transferred suits.

13. It was also the argument of the Plaintiff's Advocates that once a pending suit is transferred as a commercial suit, it becomes subject to all the rigors and provisions of the Commercial Courts Act. However, this argument cannot stand the test of scrutiny for, in my opinion, such argument is in conflict with the express provisions of the Commercial Courts Act itself and especially Section 15 thereof. It was also argued that no discrimination must be permitted between fresh commercial suits and transferred commercial suits. This, according to the Advocates for the Plaintiff, would lead to a complete divide and distinction between fresh commercial suits and transferred commercial suits and would lead to an unfair discrimination to Plaintiffs who have filed transferred commercial suits as they would be unable to avail the benefits under the new mandatory provisions. Once again, the interpretation canvassed on behalf of the Plaintiff is in stark contrast to the very difference/distinction carved out under Section 15 (4). In view thereof, I see no reason to read down Section 15 as suggested by the Advocates for the Plaintiff.”

(Emphasis supplied)

37. The decision in the case of *Reliance General Insurance Company Limited vs. Colonial Life Insurance Company (Trinidad) Limited and Another (supra)* was assailed before a Division Bench of this Court and while dismissing the appeal, the Division Bench has held that the provisions of the Commercial Courts Act which deal with transfers of Suits have been prescribed in Section 15 and all such provisions would apply to all transferred Commercial Suits irrespective of whether writ of summons was served or not. For the sake of convenience, the said paragraphs 9 and 13 to 15 are usefully quoted as under :

“9. Section 15 of the Commercial Courts Act, which is the lone provision made specially for taking care of transfer of ordinary suits pending before the High Courts to Commercial Divisions and their trial as commercial suits by those Divisions, not only makes the timeline provided under the proviso to Sub-rule (1) of Rule 1 of Order V inapplicable to such transferred suits, it empowers the Court, in its discretion, to prescribe a new timeline within which the written statement can be filed. In its plain meaning, what this proviso does is that it bestows discretion on the Court to provide for extension of time beyond the maximum permissible time limit of 120 days from the date of service of writ of summons. If that is so, there is no way to apply the forfeiture clause to a defendant, who does not file his written statement within the period of 120 days and who may be given further time by the Court. It would make scarce sense of the Court's power to grant further time, if one were to hold that the

Court nevertheless does not have power to grant time by virtue of the provisions of Order VIII Rule 1 or Rule 10. No act of legislature can be read in this fashion.

*13. The distinction drawn by Mr. Thakkar between those commercial suits which were filed before the commencement of the Commercial Courts Act and where writs of summons were served prior to such commencement and those suits which were filed before the introduction of the Commercial Courts Act, but where writs of summons were not served till the date of commencement of the Commercial Courts Act, has no merit. Chapter V of the Commercial Courts Act, dealing with the subject, is entitled "Transfer of pending suits". Sub-section (1) of Section 15 provides for compulsory transfer of all suits and applications including applications under Arbitration and Conciliation Act, 1996, relating to commercial disputes of specified value **pending** in a High Court where a Commercial Division has been constituted, to such commercial division. The condition for application of this provision is "pendency" of a suit or application. The provisions which follow [Sub-sections (2) to (5)] deal with such pending suits transferred to the commercial division. There is no scope for distinguishing between these suits on the basis of service or want of service of writ of summons. Subsections (2) to (5) of Section 15 apply to all commercial suits irrespective of the date of service of writ of summons.*

14. The learned Single Judge has accordingly correctly interpreted the law and come to a correct conclusion that the mandatory timeline of 120 days for filing of a written statement in a commercial suit is not applicable to suits originally filed as ordinary suits, and which have been transferred as commercial suits to be heard by the commercial division of this Court, under Section 15(1) of the Commercial Courts Act.

15. There is, thus, no merit in the appeal. The Commercial Appeal is dismissed. Costs to be costs in the cause.”

(Emphasis supplied)

38. It is clear that section 15(4) would be applicable to such cases of transferred Suits and that irrespective of whether a writ of summons has been served or not, it is the Commercial Division of this Court which will prescribe timelines under section 15(4) of the Commercial Courts Act. That, fresh timelines have to be prescribed and that there is no binding limit of 120 days. In my view, therefore, no prejudice would be caused to anyone.

39. I, therefore, do not agree with Mr.Vashi, learned Senior Counsel, when he submits that the amended provisions of the CPC would apply to both Suits originally filed as Commercial Suits and even those which were filed as Regular Suits prior to the Commercial Courts Act and subsequently transferred.

40. In the facts of this case, as noted above, copies of the plaint along with exhibits and notice of motion were served on the Defendant No.1 on 20th August 2015. That, on 24th August 2015, the clerk of the Plaintiffs' Attorney had filed the affidavit of service. At the hearing on

24th August 2015 and 28th August 2015, the Defendant No.1 engaged lawyers and was represented by a Senior Advocate. Even at the time of passing of the consent order by this Court on 1st September 2015, the Defendant No.1 was represented by a Senior Advocate instructed by a law firm. It is, therefore, clear that the Defendant No.1 was not only in receipt of the plaint along with all exhibits and notice of motion but had also engaged Attorneys who had filed Vakalatnama and was represented by a Senior Advocate at the interlocutory stage. True that as per Section 15(4) of the Commercial Courts Act which stipulates that in case of transferred Suits it is the Commercial Division of this Court who would fix timelines and to that extent, the orders dated 21st October 2016 and 13th December 2016 would need to be interfered with and that this Court is inclined to do so. However, this being a case of a transferred Suit in which the Defendant No.1 had previously entered an appearance at the interlocutory stage / filed Vakalatanama, there would be no need for the Plaintiffs to serve a writ of summons as the very object and purpose of service of writ of summons has become redundant and needless judicial time in passing directions for such service of writ of summons need not be wasted. There is, therefore, no necessity of formal service of writ of summons in the facts and circumstances of this case.

41. The Defendant No.1 has relied upon the decision in the case of *Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and Another*¹¹ to contend that the provisions of the Commercial Courts Act are to be strictly construed. I am in full agreement with the said submissions, however, as can be seen in the facts of this case, since the Suit is a transferred Suit, the mandatory of timeline of 120 days cannot be imposed as fresh timelines would have to be prescribed by this Court.

42. To summarise, it is quite clear that the captioned Suit was originally filed as a regular Suit, but was subsequently converted to a Commercial Suit, following the enactment of the Commercial Courts Act. The Defendant No.1 as noted above had not only been served with copies of the plaint along with exhibits and the notice of motion, but had also entered appearance and appeared before this Court on 24th August 2015, 28th August 2015 and 1st September 2015. As the Defendant No.1 had entered appearance, filed Vakalatnama and was aware of the nature of Plaintiffs' claim, in my view, there was no requirement for the Plaintiffs to formally serve a writ of summons on the Defendant No.1 in view of the 2008 Notification and the decisions

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of this Court in *Sunil Poddar and Others vs. Union Bank of India (supra)*, *Meena Ramesh Lulla and Others vs. Omprakash A. Alreja and Others (supra)*, *M/s. Prime Builders vs. Suman R. Bagwe & Others (supra)* and *Hikal Limited vs. Paxchem Ltd. (supra)*, the law being that in regular Suits which have been subsequently converted to Commercial Suits, there is no requirement to formally serve a writ of summons, Rule 87 of the Bombay High Court (Original Side) Rules, 1980 therefore is not attracted and the 1st Defendant's reliance on *Atlanta Limited vs. Metso India Pvt. Ltd*¹², in my view, will have no applicability in the facts and circumstances of this case.

43. Ergo the Defendant No.1 cannot seek dismissal of the captioned Suit, despite being notified of the Plaintiffs' claim. In case of transferred Suits, if the Defendant appeared at the interlocutory stage and filed its Vakalatnama, a writ of summons need not be served. The rigours of the amended provisions of the CPC do not apply to transferred Suits and the time period of 120 days also does not apply. It is only the Commercial Division of this Court under section 15(4) of the Commercial Courts Act which can fix the timelines. That being so, no prejudice would be caused to the Defendant No.1.

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44. The other ground on which vacation / recall of the ad-interim order has been sought refers to the purported fact that the agreement dated 16th July 2023 was not signed or executed by the second Plaintiff. That is a ground which has to be decided at the trial after the written statement has been filed and cannot be dealt with at the stage of this application which primarily seeks dismissal of the Suit on the ground of failure to serve the writ of summons.

45. Ergo, no case is made out for reliefs in terms of prayer clauses (a) and (c).

46. In view of the aforesaid discussion, this Court therefore does not deem it necessary to deal with the allegations of malafides that have been levelled by the Plaintiffs against the Defendant No.1 in taking out this Application.

47. However, in view of the aforesaid submissions with respect to prayer clause (b) and in view of the decision in the case of *One Square Investments Ltd. vs. Remedial Resolutions Advisors Pvt. Ltd. (supra)*, I am of the view that orders dated 21st October 2016 and 13th December 2016 would need to be interfered with. Accordingly, the order dated 21st

October 2016 to the extent of directions to file written statement and order dated 13th December 2016 of the Prothonotary & Senior Master are hereby set aside. Since the Suit has been converted to a Commercial Suit and transferred to the Commercial Division of this Court, the Defendants are directed to file written statement within a period of thirty days.

48. However, since objections are yet to be removed and registered number yet to be obtained despite earlier directions of this Court, the aforesaid order is subject to removal of office objections within a period of one week, failing which, the Interim Application as far as the above directions are concerned, to stand dismissed without further reference to this Court.

49. And as Defendant No.1 has failed to make out a case for grant of relief in so far as it relates to prayer clauses (a) and (c), the Interim Application is dismissed.

(ABHAY AHUJA, J.)

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by ARTI VILAS
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