



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 15949 OF 2023

Nilesh Suresh Kene & Ors.	Petitioners (Orig. Defendant Nos. 1 to 4)
Versus	
Ashok Durga Pillay & Ors.	.. Respondents

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- Mr. Vijay Killedar, Advocate, for Petitioners
 - Mr. Dnyaneshwar Deshmukh for Respondent Nos. 1 & 2a to 2c
 - Mr. Deepak C. Natu a/w Ms. Gayatri K. Soni i/by M/s. N. Deepak & Co. for Respondent Nos. 5 & 6, Power of Attorney Holder of Respondent Nos. 7 to 13
 - Mr. Akshay Pai, Amicus Curiae
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 02, 2025

J U D G M E N T

1. Heard learned Advocates appearing for the parties.
2. Writ Petition is filed by Petitioners who are Original Defendant Nos. 1 to 4 challenging the impugned common Order dated 13.01.2023, passed below Exhibit "72" and "88A" by District Judge-2, Kalyan in Commercial Suit No. 02 of 2021. Parties are referred to as "Plaintiffs" and "Defendants" for convenience.

3. Application below Exhibit "72" is filed by Plaintiffs seeking condonation of delay in filling their Written Statement to the Counter-claim filed by Defendant Nos. 1 to 4 below Exhibit "63".
4. Application below Exhibit "88A" is filed by Defendant Nos. 5 to 13 seeking condonation of delay in filing their Written Statement to the Counter-claim filed by Defendant Nos. 1 to 4 below Exhibit "63".
5. Defendant Nos. 5 to 13 are supporting the Plaintiffs. Contesting Defendants are Defendant Nos. 1 to 4.
6. By the impugned Order dated 13.01.2013, delay in filing Written Statement to the Counter-claim is condoned with order of costs. Defendant Nos. 1 to 4 have challenged this Order allowing condonation of delay beyond the prescribed period of 120 days, this being a Commercial Suit.
7. Defendant Nos. 1 to 4 claim that Written Statement of Plaintiffs and Defendant Nos. 5 to 13 to the Counter-claim ought to have been filed within 30 days of service of the Counter-claim on them or at the highest within 90 days thereafter with leave of the Court.
8. Both Plaintiffs and Defendant Nos. 5 to 13 have filed their Written Statement after 142 and 155 days respectively from the date of service of Counter-claim on them. This delay is condoned by the Court. Defendant Nos. 1 to 4 are aggrieved and hence the challenge.

9. According to Defendant Nos. 1 to 4, since suit proceeding is a Commercial Suit, strict period of limitation of 120 days i. e. 30 days and the extended grace period of 90 days as prescribed under the Commercial Courts Act, 2015 would apply to Plaintiffs and Defendant Nos. 5 to 13 for filing their Written Statement to the Counter-claim filed by them. Defendant Nos. 1 to 4 would submit that condonation of delay beyond the said period of 120 days is not permissible in law.

10. By Order dated 26.06.2024, I appointed Mr. Akshay Pai as *Amicus Curiae* to assist the Court on the above issue and decide the question of power of Court to condone delay in filing Written Statement to Counter-claim in Commercial Suit proceeding beyond the period of 120 days. Before I advert to the submissions made by learned Advocates, following facts are relevant for consideration:-

10.1 Respondent No. 1 and 2 – Plaintiffs filed Commercial Suit No. 02 of 2021 for declaration and damages in respect of properties bearing Survey/Hissa No. 52/11/1 and 52/2, having area admeasuring 3600 sq. mts. and 950 sq. mts. respectively. Suit is filed seeking entitlement of 45% share i. e. balance carpet area in “A” Wing Building constructed on the suit property i. e. 20,418 sq. ft. along with damages/compensation amounting to Rs. 3,66,85,000/- along with 24% interest to be recovered from Petitioners – Defendant Nos. 1 to 4.

10.2 Defendant Nos. 1 to 4 appeared in the Commercial Suit and filed their Written Statement along with Counter-claim on 31.03.2022 below Exhibit "63". They prayed in their Counter-claim that Plaintiffs and Defendant Nos. 5 to 13 are jointly and severally liable to return excess area admeasuring 5361.70 sq. ft. along with possession to them.

10.3 Counter-claim below Exhibit "63" is filed by Defendant Nos. 1 to 4 along with their Written Statement on 31.03.2022. Service of Counter-claim upon Plaintiffs and the Defendant Nos. 5 to 13 is made on 20.04.2022 and 10.06.2022, respectively. Plaintiffs and Defendant Nos. 5 to 13 did not file their Written Statement to the Counter-claim within 120 days from the date of service of Counter-claim on them.

10.4 In the meanwhile, Plaintiff No. 2 passed away on 09.05.2022, and his legal heirs were brought on record on 12.08.2022. On 20.08.2022, Application below Exhibit 72 is filed by Plaintiffs seeking condonation of delay for 22 days.

10.5 This Application is resisted by Defendant Nos. 1 to 4 under Order VIII Rule 6G, Rule 6A, Rule 1 and Rule 10 of the Code of Civil Procedure, 1908 (for short "CPC") as applicable to commercial disputes under the Commercial Courts Act, 2015.

10.6 Defendant Nos. 5 to 13 also filed an Application below Exhibit "88A" seeking condonation of delay of 35 days in filing their Written Statement to Counter-claim of Defendant Nos. 1 to 4.

10.7 This Application is also resisted by Defendant Nos. 1 to 4 under Order VIII Rule 6G, Rule 6A, Rule 1 and Rule 10 of the CPC.

10.8 Both Applications below Exhibit 72 and 88A are allowed by common Order dated 13.01.2023 passed by Ld. District Judge-2, Kalyan, condoning delay of 22 days and 35 days for filing Written Statement to the Counter-claim by imposing costs of Rs.10,000/- on Plaintiffs and Defendant Nos. 5 to 13.

11. Mr. Killedar, learned Advocate for Petitioners would submit that, the learned Judge erred in holding that there is no time limit fixed for filing of Written Statement to Counter-claim and condoned the delay by observing that sufficient cause was shown for delay in filing Written Statement beyond the statutory period of 120 days.

11.1 He would submit that, rules relating to filing of Written Statement to a plaint by Defendants under CPC & Commercial Courts Act, 2015 are to be held and applied in *pari materia* for filing Written Statement to the Counter-claim under Order VIII Rule 6G, Rule 6A, Rule 1 read with Rule 10 of the CPC. He would submit that Counter-claim is nothing but in the nature of plaint either filed along with or

contained in the Written Statement itself. He would submit that allowing condonation of delay would render proviso to Rule 1 and Rule 6G read with Rule 10 of Order VIII of the CPC completely repugnant.

11.2 He has drawn my attention to the aforesaid statutory provisions.

11.3 He would urge that strict rule of interpretation applies to a commercial suit proceeding and condonation of delay beyond 120 days is therefore impermissible. Hence, according to him, impugned Order deserves to be set aside.

12. Mr. Deshmukh, appears for Plaintiffs. Before the Trial Court, they are Plaintiff Nos. 1 and 2. He would submit that Plaintiff No. 2 expired on 09.05.2022. Trial Court permitted Plaintiffs to bring legal heirs on record on 12.08.2022. Plaintiffs, thereafter, served copy of amended suit plaint (with the newly impleaded Plaintiff Nos. 2a to 2c) along with a copy of Application below Exhibit "72" on the Defendant Nos. 1 to 4. Application below Exhibit "72" sought condonation of delay of 22 days and leave of Trial Court to file their Written Statement to Counter-claim of Defendant Nos. 1 to 4. Hence, according to him, from the date of service of copy of Application below Exhibit 72 seeking condonation of delay and leave to file a Written Statement to the Counter-claim, the period of limitation would begin.

12.1 He would submit that it is mandatory to follow the procedure prescribed under Order VII Rule 9 read with Order VII Rule 11 (f) of CPC failing which plaint/Counter-claim deserves to be rejected. He would submit that on admission of Counter-claim as plaint under Order VII Rule 9, Court has to follow the mandate of Order V Rule 9 of CPC. In this case, Defendant Nos. 1 to 4 did not issue summons on Plaintiffs and Defendant Nos 5 to 13 after filing of their Counter-claim. He would submit that parties i. e. Plaintiffs and Defendant Nos.5 to 13 are residents of Andheri - Bombay, Canada and UAE and some of them do not reside within the area of the Commercial Court, Kalyan, where Suit is filed and therefore, it is obligatory on Defendant Nos. 1 to 4 to have follow the prescribed procedure under Order VIII Rule 6 A (3) of CPC.

12.2 With regards to procedure stated above, he would submit that admittedly, Petitioners did not comply with the same and hence, plaint deserves to be rejected as per provisions of Order VII Rule 11 (f) of CPC. He would submit that Respondent Nos. 1 & 2a to 2c – Plaintiffs have specifically pleaded in their Application below Exhibit 72 in paragraph No.2 that their Application under Order XI Rule 14 of CPC is pending before Trial Court to seek direction to Defendant Nos.1 to 4 for production of relevant documents referred to by them in their Written Statement and the same was not complied till date. Hence,

limitation could not have begun to run and principles of natural justice are to be considered before curtailing right of a party to file Written Statement to Plaintiff or Counter-claim.

12.3 He would submit that, provisions of Order VIII Rule 1 and Order VIII Rule 6 A (3) of CPC are not applicable to filing of Written Statement to Counter-claim. That the limitation starts to run only after compliance of mandatory provisions of Order VII Rule 9 read with Order V Rule 9 of CPC. He would submit that in fact, on the contrary, in the present case, Counter-claim must be rejected for non-compliance of Order VII Rule 11 (f) of CPC. He would contend that, Defendant Nos.1 to 4 cannot take undue advantage of their own wrong/non-compliance and limitation would begin only after compliance by Defendant Nos.1 to 4.

12.4 He would refer to and rely upon the following decisions in support of his submissions (i) *Shalini Nunes Mascarenhas Vs. Trevor Nunes*¹ (ii) *Dattaram Mrishnanath Pednekar Vs. Pandurang K. Pednekar*² (iii) *M/s. CSCO LLC (Supra)* contending that these are cases upholding the procedure and the principles of Natural Justice. He would conclude by submitting that, since service of Counter-claim just like the Plaintiff under Rule 9 read with Rule 11(f) of Order VII of CPC is

1 2009 (1) Goa LR 457

2 2010 (7) Mh.L.J.386

not effected and service is not done, hence the period of limitation i. e. 120 days cannot be said to have begun to run in the present facts.

13. Mr. Natu, learned Advocate for Defendant Nos. 5 to 13 would submit that, as far as Exhibit 63 is concerned, it does not concern them as they filed Application below Exhibit 88A stating that receipt of a copy of Counter-claim by them was only on 10.06.2022 and in view of Arbitration clause in the Development Agreement and Supplementary Agreement, the application to refer the dispute to arbitration was rejected. He would submit that only thereafter, it was necessary to file their Written Statement within 120 days as contemplated under Order VIII Rule 1 of CPC. He would draw my attention to Order VIII Rule 1 of CPC read with the Commercial Courts Act, 2015 which is reproduced below:-

“(i) In Rule 1, for the proviso, the following proviso shall be substituted, 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”;”

13.1 He would submit that from the above, time limit for filing Written Statement to Counter-claim is 120 days from date of receipt of summons and only on the expiry of the same, Defendant forfeits his right to file Written Statement. He would contend that allegation of Defendant Nos.1 to 4 is baseless as they failed to adhere to the provisions of Order VIII Rule 6 A (1) to (4) of CPC read with Schedule I of the Commercial Courts Act, 2015. Therefore, contention raised by the Defendant Nos.1 to 4 that impugned Order is not maintainable is totally contradictory to the settled position in law.

13.2 He would next submit that Exhibit 'G' i. e. the impugned Order records reasons which are legal and proper, in fact, Defendant Nos. 1 to 4 failed to file application for issuance of summons under Section 9-A (1) to (4) read with Order V Rule 10, 11, 12, 12A, 13 (1) & (2) of Schedule I of the Commercial Courts Act, 2015. That admittedly, no steps were taken by Defendant Nos. 1 to 4 to seek issuance of summons and serve summons on the Defendant Nos.5 to 13. He would submit that the statute expressly provides that Counter-claim shall be treated as plaint and governed by rules applicable to plaint. Resultantly, it required Defendant Nos. 1 to 4 to serve summons on Defendant Nos. 5 to 13 for effecting service of their Counter-claim. Non-compliance of the same, led to delay in filing Written Statement to the Counter-claim. Hence, contention of Defendant Nos.1 to 4 that

Trial Court did not follow the mandate stipulated under Order VIII Rule 1 and amended Schedule I of Commercial Courts Act, 2015 is completely frivolous. He would submit that there is clear non-compliance on the part of Defendant Nos.1 to 4 to adhere to statutory procedure and the same cannot be waived of by them.

13.3 He would draw my attention to the Counter-claim and submit that Order VIII Rule 10 of the Commercial Courts Act, 2015, sets out a deadline for filing of Written Statement within a period of 120 days but the procedure of serving of summons on the Plaintiff and Defendant Nos.5 to 33 has to be complied with by Defendant Nos. 1 to 4 after filing of their Counter-claim.

13.4 He would draw my attention to the Judgment of **Single Judge of Madras High Court** in the case of *M/s. CSCO LLC and Anr. Vs. M/s Lakshmi Saraswathi Spintex Limited and Ors.*³ wherein the Court held that amended Order VIII Rule 1 of Schedule I of the Commercial Courts Act, 2015 has a limitation period of 120 days but it necessitates the following of other modes of the CPC. In that particular case, Written Statement to the Counter-claim was rightly taken on record beyond 120 days due to non-adherence to the statutory procedure. According to him, facts and ratio of this Judgment enumerated in

3 Application No. 4791/2021 in C.S. No. 697/2017

paragraph Nos. 3 to 27 are squarely applicable to the facts in the present case.

13.5 Next, he would draw my attention to the Judgment of the Supreme Court in the case of *Prakash Corporates Vs. Dee Vee Projects Limited*⁴ wherein the principal question decided was whether opportunity of filing Written Statement in the subject suit had rightly been declined or whether it could be extended further in view of the Orders passed and issued in the wake of the COVID-19 Pandemic. The Supreme Court answered this question in the affirmative by observing that the alarming scenario due to the second wave of COVID-19 pandemic was taken note of by the High Court of Chhattisgarh and the High Court issued administrative Order dated 05.04.2021 for curtailing functioning of the High Court as also the subordinate Courts and further that the Trial Court dealing with the subject suit was already under containment measures and could not have functioned normally. In view of the Orders passed by the Supreme Court in SMWP No. 3 of 2020, it held that the time limit for filing the Written Statement by Prakash Corporates in the subject suit did not come to an end on 06.05.2021 and allowed the Written Statement to be filed by the party beyond the prescribed period of limitation. Hence, he would

4 (2022) 5 SCC 112

submit that the impugned Order condoning delay deserves to be upheld.

14. Mr. Pai, learned *Amicus Curiae* would refer to and rely upon the following Judgments of the High Courts and Supreme Court in support of his submissions. He would submit that in case of ***Shalini Nunes Mascarenhas (Supra)***, ***Dattaram Mrishnanath Pednekar (Supra)*** both Judgments which are prior to the enactment of the Commercial Courts Act, 2015, it is held that the time period for filing Written Statement to a Counter-claim is not governed by the provisions of Order VIII Rule 1 of CPC, however, it is as per the time period prescribed under Order VIII Rule 6A (3) and until the Court expressly grants time to file Written Statement to the Counter-claim. In the case of ***SCG Contracts (India) Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.***⁵ the Supreme Court held that the period of 120 days from service of summons to file Written Statement to a plaint is mandatory and upon failure to do so, the erring party would forfeit its right to file Written Statement. This Judgment is followed by our Court in the case of ***Mira Gehani Vs. Axis Bank***⁶ wherein it held that Commercial Court did not have jurisdiction to condone the delay to file Written Statement beyond the mandatory period of 120 days and intention of enacting the Commercial Courts Act, 2015 was to prevent delayed filing of

⁵ (2019) 12 SCC 210

⁶ 2019 SCC OnLine Bom 358

Written Statement and ensure expeditious hearing. In the case of *PSA Nitrogen Ltd Vs. Maeda Corporation & Others*⁷ and *Indcon Boiler Ltd Vs. Maeda Corporation & Others*⁸ the Supreme Court has held that 120 days of mandatory period for filing a Written Statement would be applicable for filing Written Statement to a Counter-claim as well and the same would commence from the date of service of summons. Court also held that since summons for Counter-claim were not duly served on the Plaintiff in that case, the prescribed 120 day limitation period had not commenced. Court framed guidelines therein making it mandatory to register all Counter-claims in terms of **Order IV** of CPC. Considering the provisions of Order VIII Rule 6A (4) of CPC. However, the Court held that once service of Counter-claim is accepted and recorded in the Order, the 120 day limitation period would commence from that date.

14.1 He submitted that the decision in the case of *M/s. CSCO LLC (Supra)* wherein Court held that the 120 day mandatory period for filing Written Statement will not be applicable to filing of Written Statement to Counter-claim is overruled by the Division Bench of the Madras High Court in the case of *Maria Albert Stanly Vs. Diamond Hospital Equipments*⁹ holding that the mandatory period of 120 days

7 2019 SCC OnLine Del 10095

8 2019 SCC OnLine Del 10096

9 C.S. (Comm.Div.) No. 14 of 2022

is applicable to filing of Written Statement to Counter-claim as well. The Division Bench framed guidelines thereby making it mandatory to register Counterclaims and serve summons on parties for the said mandatory period of 120 days to commence.

14.2 On the basis of the above citations, he would submit that the view taken by the High Courts and the Apex Court that 120 day mandatory period for filing Written Statement to plaint would also be applicable to filing of Written Statement to Counter-claims. He would submit that any other view taken would make the statutory provisions of the Commercial Courts Act, 2015 completely redundant since because in that case, there will be two different time periods for filing of Written Statement in the same proceedings, one to a plaint and second to a Counter-claim.

14.3 He would submit that Order III Rule 5 of the CPC specifically provides that any process served on a duly appointed pleader shall be presumed to be duly communicated to the party. This provision has been affirmed by the Supreme Court in the case of *Nilkantha Sidramappa Ningashetti Vs. Kashinath Somanna Ningashetti & Others*¹⁰ and *Damodran Pillai & Others Vs. South Indian Bank Ltd.*¹¹. Further in the case of *Womens Indian Association (regd.) Vs. V*

10 AIR 1962 SC 666

11 (2005) 7 SCC 300

Mangudi¹² it is held that since there is no specific provision for service of summons of a Counter-claim under the CPC, service of Counter-claim on the Advocate of Plaintiffs is good service upon Plaintiffs in view of the provisions of Order III Rule 5.

14.4 He would submit that a question would arise whether considering the provisions of Section 141 read with Order VIII Rule 6A of CPC and decision in the aforesaid Judgments, would it be mandatory to serve upon the opposite party a separate suit summons in respect of Counter-claim as per Order V of CPC for the 120 day period to commence if the copy of Counter-claim is not duly served upon and/or communicated to the opposite party in accordance with law. He would submit that this question would not arise in the present case, since service of the Counter-claim of Defendant Nos.1 to 4 was duly accepted and acknowledged by Plaintiffs and Defendant Nos. 5 to 13 through their Advocates. However, Trial Court condoned the delay based on the decision of the Single Judge Bench of the Madras High Court in the case of **M/s. CSCO LLC (Supra)**, the same being held to be incorrect law subsequently and being set aside by the Division Bench in the case of **Maria Albert Stanly (9th supra)** as it held that the time period for filing Written Statement to the Counter-claim would

12 1993 (15) Mad L. J. 483

not be governed by Order VIII Rule 1 but would be governed by Order VIII Rule 6A (3).

14.5 He would submit that, the Supreme Court in *SCG Contracts (Supra)* and our High Court in *Mira Gehani (Supra)* have held 120 days as the mandatory period for filing Written Statement to Counter-claim and that the Commercial Court has no jurisdiction to condone the delay for filing the Written Statement beyond the mandatory period. Therefore, he would submit that applying the said principles to the case in hand, the Trial Court erred in condoning the delay by holding that the mandatory period of 120 days is not applicable to a Written Statement to a Counter-claim.

15. I have perused the above citations. In the present case, it is seen that Written Statement is filed by Defendant Nos. 1 to 4 along with their Counter-claim below Exh. 63 on 31.03.2022. Hence, before I decide the question about condonation of delay beyond 120 days in the facts of the present case, certain dates are required to be noted for consideration. Admittedly, Defendant Nos. 1 to 4 have filed their Written Statement along with their Counter-claim below Exh. 63 in the Court on 31.03.2022.

16. It is seen that on that date, the service of Written Statement/Counter-claim was not effected on the Plaintiffs and

Defendant Nos. 5 to 13. It is seen that Defendant Nos. 1 to 4 served a copy of their Written Statement and Counter-claim on the Plaintiffs/Pleader of Plaintiffs on 20.04.2022. Then it was served on Defendants/Pleader of Defendant Nos. 5 to 13 on 10.06.2022. Insofar as Plaintiffs are concerned, Plaintiff No. 2 expired on 09.05.2022 and thereafter, Plaintiffs took steps to bring his legal heirs on record which was allowed by the Court on 12.08.2022.

17. Thus, insofar as Plaintiffs are concerned, though otherwise served with the Counter-claim on 20.04.2022, the aforesaid subsequent event occurred. Keeping in mind the aforesaid dates, it is seen that though the Counter-claim was filed in the Court on 31.03.2022 by Defendant Nos. 1 to 4, Defendant Nos. 1 to 4 themselves took 20 days to serve it upon Plaintiffs and 71 days to serve it upon Defendant Nos. 5 to 13. In this regard, O. VIII, Rule 6G needs to be seen and applied. Rule 6G reads thus :-

“6G. Rules relating to written statement to apply. -- The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.”

18. The above provision clearly envisages that rules relating to a Written Statement shall apply to a Written Statement filed in answer to a Counter-claim. In this case, Counter-claim is filed by Defendant Nos. 1 to 4. Though copy is served upon Plaintiffs and Defendant Nos.

5 to 13, but if Rule 6G has to apply as it comes into play then Plaintiffs are required to file their Written Statement to the Counter-claim being governed by rules relating to Written Statement filed by Defendants. Question before the Court is whether the rules relating to a Written Statement, as contemplated by Rule 6G have been applied in the present case or otherwise. This is a short point to be decided in the present case.

19. The legal position has been enumerated hereinabove while recording the submissions made by the learned Advocates and learned *Amicus Curiae*. In this regard, provisions of O. VIII, Rule 6A(3) are relevant. This rule states that the Plaintiff shall be at liberty to file a Written Statement in answer to the Counter-claim of the Defendant within such period as may be fixed by the Court. We are concerned with a Commercial Suit in the present case. Strict rules with respect to filing of a Written Statement will, therefore, apply as prescribed subject to following the due process of law. Hence, in this regard, provisions of O. VIII Rule 6A(1)(2)(3)(4) became relevant and applicable. Sub-section (1) of Rule 6A provides that a Defendant may in addition to his Written Statement by way of Counter-claim against the plaintiff plead his claim. Sub-section (2) provides that the Counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final Judgment in the same suit, both on the original

claim and on the Counter-claim. The words “cross-suit” are crucial, since it implies that the Counter-claim shall have the same meaning as that of a suit proceeding. Sub-section (4) of Rule 6A states that the Counter-claim shall be treated as a plaint (*emphasis supplied*) and governed by the rules applicable to plaints. The above provisions clearly answer the question before the Court. Once the legislative intent is that the Counter-claim shall be treated as a plaint and governed by the rules applicable to plaints, all rules relating to plaint shall apply to a Counter-claim (as if it is a plaint). This would expressly mean that when a Counter-claim is filed, it will follow all rules of procedure with respect to filing of plaint and subsequent thereto in the Civil Court. There can be no distinction whether it is a Civil Suit or Commercial Suit in this regard.

20. In the present case, once the Counter-claim is filed on 31.03.2022, Defendant Nos. 1 to 4 would have to then effect service of the said Counter-claim on the Plaintiffs and Defendant Nos. 5 to 13 strictly in accordance with the aforesaid mentioned provisions as would be done in the case of a suit proceedings. This means that Defendant Nos. 1 to 4 will have to take steps to serve a Writ of Summons of the Counter-claim on the Plaintiffs and Defendant Nos. 5 to 13 along with a copy of the Counter-claim on those parties. Defendant Nos. 1 to 4 in the present case have admittedly not served

the Writ of Summons of the Counter-claim on the Plaintiffs and Defendant Nos. 5 to 13. They have merely served a copy of their Written Statement-cum-Counter-claim on the Plaintiffs and Defendant Nos. 5 to 13 or their pleader. Whether mere serving a copy of the Counter-claim on the Plaintiffs and Defendant Nos. 5 to 13 or their Pleader would be good service is the issue argued before me. Mr. Killedar learned Advocate for Defendant Nos. 1 to 4 has vehemently argued that service of the Counter-claim on the Plaintiffs and Defendant Nos. 5 to 13 is equivalent to service of Writ of Summons of Counter-claim as contemplated by the CPC and no separate Writ of Summons is required to be served. He would submit that once a copy of the Counter-claim is served on the Opponent, it is considered as good service and with that the Opponent is put to notice and the limitation period to file the Written Statement to the Counter-claim begins to run from that date. However, I am not in agreement with the submissions made by Mr. Killedar in view of the fact that intent of the legislature in the aforementioned statutory provisions is expressly clear. If I have to accept the proposition advanced by Mr. Killedar then it would lead to an anomalous situation. In the same suit, there will be one set of procedure for effecting service of Writ of Summons on the Defendants by the Plaintiffs for the Suit Plaintiff but in the same suit, that very statutory procedure shall stand

dispensed with in regard to service of Writ Summons on Plaintiffs by the Defendant for the Counter-claim. This cannot be the intent of legislature when it expressly states that the Counter-claim shall be treated as a plaint and governed by the rules applicable to plaints in sub-section (4) of Rule 6A of O. VIII of the CPC.

21. In view of my above observations and findings in the present case, since service of Writ of Summons has admittedly not been effected by Defendant Nos. 1 to 4 on the Plaintiffs and Defendant Nos. 5 to 13, I am of the clear opinion that the period of limitation has not commenced. In that view of the matter, the impugned Order deserves to be sustained. I would also like to refer to the decisions of the Delhi and Madras High Courts reported in *PSA Nitrogen Ltd. vs. Maeda Corporation & Others*¹³, *Indcon Boiler Ltd. vs. Maeda Corporation & Others*¹⁴ and *Maria Albert Stanly vs. Diamond Hospital Equipments*¹⁵ placed on record by the learned *Amicus Curiae*. In those decisions, the respective High Courts have framed guide lines by making it mandatory to register Counter-claim and serve summons on the parties so as to ensure that the mandatory period of limitation to file the Written Statements is commenced. In view of the above, it cannot be argued and therefore, countenanced that there is no specific

¹³ 2019 SCC OnLine Bom 358,

¹⁴ 2019 SCC OnLine Del 10096

¹⁵ C. S. (Comm. Div.) No. 14 of 2022

provision for service of summons in respect of a Counter-claim under the CPC and service of the Counter-claim itself on the Plaintiffs would be deemed to be good service in view of the provisions of the CPC discussed hereinabove. If O. III Rule 5 is read in juxtaposition with O. VIII Rule 6A and more specifically sub-rule (3) and sub-rule (4) thereof, in my opinion, the provisions of O. III Rule 5 cannot prevail because sub-rule (4) of Rule 6A clearly mandates that the Counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. The substantive provision as applicable to Counter-claim in O. VIII Rule 6A is clearly explicit and therefore the procedural provision under O. III, Rule 5 cannot overcome and supercede the substantive provisions under O. VIII, Rule 6A.

22. In view of the above, the impugned common Order dated 13.01.2023, passed below Exhibits “72” and “88A” by the District Judge-2, Kalyan in Commercial Suit No. 02 of 2021 is correctly passed and it calls for no interference in the facts and circumstances of the present case. The Order is upheld. Resultantly, the Writ Petition fails.

23. I would like to record my appreciation for Mr. Akshay Pai, the learned *Amicus Curiae* appointed by the Court to have ably assisted the Court and placed on record all relevant citations on the subject as available to enable the Court to decide the issue in the present Petition.

24. Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

25. After the Judgment is pronounced, Mr. Killedar persuades the Court to continue the ad-interim relief for a period of eight weeks to enable the Petitioners to approach the Supreme Court. His request is granted. The ad-interim relief granted earlier shall continue further for a period of eights weeks from today.

[MILIND N. JADHAV, J.]