



LAW ON LIMITATION FOR FILING
OF WRITTEN STATEMENT:
EXPLAINED!

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LAW ON LIMITATION FOR FILING OF WRITTEN STATEMENT

I. Introduction.

It is rightly said that not only must a legal action pass muster on merits, but it also must do so in accordance with prescribed procedure. Due Process is the anathema of arbitrariness, and therefore the strict ascription to prescribed procedure is the foundation of any and every suit. This article concerns itself with one such procedure as enshrined in the Civil Procedure Code, 1908 (Act 5 of 1908)¹ (hereinafter referred to as the “CPC”); which under Order V Rule 1, 2 and Order VIII Rule 1, lays down the procedure for filing a written statement in court. It also states that a defendant, within thirty days from the date of service of summons must file a written statement. This time can be extended at the discretion of the court up to ninety days in a non-commercial civil suit, and 120 days in a commercial suit of a specific value. The ninety days period in a non-commercial suit has been held to be directory,² whereas the 120 day period in commercial suits has been deemed mandatory.³

If a litigant approaches the court seeking to defend his rights on a date which is beyond the limitation date prescribed as per the concerned laws, he foregoes his right to enforce his claims. Hence, the limitation period which the defendant must ascribe to, becomes an extremely crucial issue in civil actions. Furthermore, a litigant should not only be aware of the period of limitation but also the point from which such a limitation period is to be calculated. As per the Civil Procedure Code, a defendant is required to file a written statement within thirty days from the date of service of summons, meaning thereby, the time to file a written statement commences from the date of service summons in a civil suit.

¹ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. V R. 1, 2; O. VIII R. 1

² *Desh Raj v. Balkishan (Dead) through proposed legal representative Ms. Rohini* (2020) 2 SCC 708

³ *SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd.* (2019) 12 SCC 210

'The time to file a written statement commences from the date of service of summons'. A few questions that arise in our minds on reading this statement are: What is the purpose of serving summons on a defendant? What is the requisite standard in law by which summons is deemed to be duly served? Does this statement mean that unless a summons is served the limitation for filing a written statement will not reckon? Does a summons need to be served even in instances where the defendant is either on caveat or has incidentally entered appearance before the court, for the limitation to reckon? Is there any alternate procedure than the service of summons for the limitation period to commence? Through this article, I endeavour to answer the forestated questions, amongst others, concerning the date of commencement of limitation for filing a written statement in a civil suit by a defendant.

In the first part, this article endeavours to discuss the existing regime of statutorily mandated time limits for filing written statements under the Code of Civil Procedure; in the latter half, this article weighs in on the instances in which the limitation shall reckon otherwise, rather than the date of service of summons.

II. The law as it stands today.

The Civil Procedure Code, 1908 governs the procedure for institution of a civil suit. A suit is instituted by the presentation of plaint before the court.⁴ First, the court has to be satisfied that there exists a cause of action against the defendant.⁵ The Id. Judge hearing the matter then, issues summons to the defendants in accordance with Order V Rule 1 and 2 of CPC towards the objective of ensuring the presence of the defendant,⁶ in case he has not already appeared and admitted the claim of the

⁴ The Code of Civil Procedure, 1908 (Act 5 of 1908), s. 26. and O. IV R. 1

⁵ *Ibid.*, s. 27

⁶ Delhi High Court Rules, 2018, Chapter IV R. 7

plaintiff.⁷ The defendant is then granted the opportunity to file a written statement which is a response to the plaintiff's claims, within thirty days from the date of service of summons on him.⁸ As stated above, the limitation reckons from the date of service of summons.⁹ It flows from the above, that unless there is a valid service of summons, the time period for filing a written statement would not begin.

Order V Rule 1, 2 and Order VIII Rule 1 of CPC lay down the procedure for service of summons and filing of a written statement. Order V Rule 1 and 2 of CPC talk about the 'Service of Summons' and Order VIII Rule 1 talks about the written statement specifically. Order V Rule 1(1) prescribes that when a suit is duly instituted,¹⁰ and the defendant has not appeared on the presentation of the plaint and admitted the claim of the plaintiff,¹¹ a summon may be issued to the defendant. It also impresses a duty on the defendant to file his written statement of defence within thirty days from the date of service of summons.

The proviso to Order V lays down the procedure in case the defendant fails to file the written statement within thirty days from the date of service of summons. If a defendant fails to file the written statement within such time then he can, on the discretion of the court, be allowed to file a written statement on such other day as specified by the court, for reasons to be recorded in writing,¹² and such date cannot be later than ninety days from the date of service of summons. The court may allow the defendant to file a written statement even after the period of limitation has expired as this provision has been held to be directory and not mandatory.¹³

⁷ The Code of Civil Procedure, 1908 (Act 5 of 1908), Proviso to O. V R. 1(1); Sri Nath Agarwal v. Sri Nath AIR 1981 All 400; Chittanku Ranjan Das v. Swati Das (2015) 1 Cal LJ 505

⁸ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. VIII R. 1.

⁹ Jetage Construction Pvt. Ltd. v. M/s Abdul Khaliq & Sons Restaurant (2015) 2 Cal LT 206

¹⁰ Kailash v. Nankhu (2005) 4 SCC 480

¹¹ The Code of Civil Procedure, 1908 (Act 5 of 1908), Proviso to Order V Rule 1(1)

¹² Sukhdev Singh Gambhir v. Amrit Pal Singh AIR 2003 Del 280

¹³ Desh Raj v. Balkishan (Dead) through proposed legal representative Ms. Rohini (2020) 2 SCC 708

As of 2015, a separate law has been enacted for commercial suits of a specified value by section 16¹⁴ of the Commercial Courts Act, 2015 (Act 28 of 2018). A 'Commercial Dispute' is defined under section 2(c) of the Commercial Courts Act as a dispute arising out of one of the 22 transactions mentioned under the section.¹⁵ A commercial

¹⁴ The Commercial Courts Act, 2015 (Act 28 of 2018), s. 16, '16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes. – (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule. (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.'

'(A) in the Order V, in Rule 1, in sub-rule (1), for the second proviso, the following proviso shall be substituted, 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."; 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.'

¹⁵ The Commercial Courts Act, 2015 (Act 28 of 2018), s. 2, 'Definitions. – (1) In this Act, unless the context otherwise requires,-- (c) "commercial dispute" means a dispute arising out of-- (i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; (ii) export or import of merchandise or services; (iii) issues relating to admiralty and maritime law; (iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same; (v) carriage of goods; (vi) construction and infrastructure contracts, including tenders; (vii) agreements relating to immovable property used exclusively in trade or commerce; (viii) franchising agreements; (ix) distribution and licensing agreements; (x) management and consultancy agreements; (xi) joint venture agreements; (xii) shareholders agreements; (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; (xiv) mercantile agency and mercantile usage; (xv) partnership agreements; (xvi) technology development agreements; (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; (xviii) agreements for sale of goods or provision of services; (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; (xx) insurance and re-insurance; (xxi) contracts of agency relating to any of the above; and (xxii) such other commercial disputes as may be notified by the Central Government. Explanation.--A commercial dispute shall not cease to be a commercial dispute merely because – (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions.'

transaction that falls under one of the 22 transactions mentioned in the section is characterised as a 'Commercial Dispute' under the Commercial Courts Act.¹⁶ When the value of the subject matter of such a commercial dispute, is rupees one crore or such higher value as specified by the Central Government from time to time,¹⁷ then the commercial dispute is termed as a 'Commercial Dispute of a Specified Value'.¹⁸ A non-commercial dispute, on the other hand, is any dispute which does not fall under the scope of 'Commercial Dispute of a Specified Value'.

If a defendant fails to file a written statement within thirty days from the date of service of summons in a commercial suit of a specified value, then on the discretion of the court, he can be allowed to file the same on a date specified by the court and such date cannot be beyond 120 days from the date of service of summons. This discretion can be exercised by recording reasons in writing and on payment of such cost as the court deems fit. On the expiry of 120 days from the date of service of summons, the defendant is said to have forfeited his right to file a written statement and the court does not have the discretion to allow the written statement to be taken on record. Thus, making the provision enunciating the time to file a written statement mandatory in commercial suits of a specified value.¹⁹ Hence, it is rightly observed in *Desh Raj v. Balkishan (Dead) through proposed legal representative Ms. Rohini*²⁰, post the 2015 Amendment to CPC, there are two regimes of civil procedure.

III. Tracing the history of law as it stands today.

The legislature has time and again brought amendments to the law regulating limitation for filing a written statement. The original provision of the 1908 code, in

¹⁶ *Qatar Airways v. Airport Authority of India*, (2017) 240 DLT 731

¹⁷ The Commercial Courts Act, 2015 (Act 28 of 2018), s. 12

¹⁸ The Commercial Courts Act, 2015 (Act 28 of 2018), s. 2(i)

¹⁹ *SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd.* (2019) 12 SCC 210

²⁰ (2020) 2 SCC 708

practice, was exploited by the dishonest defendants. They often used dilatory tactics by not filing the written statement on the date specified by the court or within a reasonable time. It was further becoming a common practice to request for long and frequent adjournments to file the same,²¹ which in turn led to an unnecessary delay in the delivery of justice. It is rightly said that dissatisfaction amongst the general public stems from an unmanageable backlog of cases and inordinate delay in disposal of cases in courts.²² Thus, the legislature has through amendments in the years 1976, 2002 and recently in 2015, gradually narrowed down the scope of discretion available with the judges and the litigants alike with the objective of curtailing the mischief of dilatory tactics by Defendants and ensuring early and expeditious disposal of civil suits and proceeding.

An examination of the original 1908 provision as reproduced hereunder would reveal that the Code gave a wide timeline to the litigants to file a written statement. A litigant was allowed to file a written statement either before the date of the first hearing of the suit or on the date of the hearing of the suit. It also provided discretion to the courts to specify any particular date by which the litigant was supposed to file a written statement. It is to be noted that no maximum time was provided to the courts for fixing the date of filing a written statement. The large degree of discretion granted to the courts in the matter and the lack of a statutory period of limitation is in step with the *Common Law* system, which was emulated in India at the time of the enactment of the CPC in 1908.

The Defendant may, and if so required by the court, shall at or before the first hearing or within such time as the court may permit, present a written statement of his defence.

²¹ Kailash v. Nankhu (2005) 4 SCC 480

²² Dean Roscoe Pound in his speech in 1906

After 68 years, the legislature brought in the first amendment to Order V and Order VIII of the Code vide the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976). In the year 1976, the amendment added a second proviso to sub-rule (1) of rule 1 of Order V of CPC²³ which provided that the court may direct the defendant to file his written statement on the date of his appearance. Order VIII Rule 1²⁴ was amended to the effect that it mandated the defendant to file a written statement at or before the first hearing or within such time as permitted by the court. This amendment was brought to ensure early disposal of cases without sacrificing the principles of natural justice and fairness of trial.²⁵ However, it failed to solve the issue of undue delay caused by the practical implication of the concerned procedure.

The Civil Procedure Code (Amendment) Bill, 1997 was brought in by the legislature on the recommendation of the Malimath Committee,²⁶ 129th Report of the Law Commission of India and the recommendations of the Committee on Subordinate Legislation (11th Lok Sabha), and the resolution adopted in the Law Minister's Conference held in New Delhi on 30 June 1997 and 1 July 1997. The bill was passed by both the houses of the parliament and The Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999) (hereinafter referred to as the "**Amendment Act of 1999**") was enacted and assented to by the President on 30 December 1999.²⁷ The objective of the amendment was to, *inter alia*, attain the objective of speedy and effective justice.²⁸

²³ 'Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons.'

²⁴ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. VIII R. 1, '1. Written statement- The defendant shall at or before the first hearing or within such time as the court may permit, present a written statement of his defence.'

²⁵ The Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), Statement of Objects and Reasons; Kailash v. Nankhu (2005) 4 SCC 480

²⁶ S.C.Sarkar and P.C.Sarkar, *Sarkar on Code of Civil Procedure, 1908* (11th Edn, Lexis Nexis 2006)

²⁷ Published in the gazette of India, extra-ordinary Part II, s. 1, dt. 30 December 1999; Government of India, "18th Report on The Code of Civil Procedure (Amendment) Bill, 2000" (Rajya Sabha, Department-Related Parliamentary, Standing Committee on Home Affairs)

²⁸ Law Commission of India, '163rd Report on the Code of Civil Procedure (Amendment) Bill, 1997' (November 1998), Justice B.P. Jeevan Reddy, Chairman, Law Commission of India

However, due to strong opposition to the Act from members of the bar, it was not brought into force.²⁹

The Amendment Act of 1999 introduced a fixed timeline of thirty days from the date of service of summons to file a written statement.³⁰ It also rigorously restricted the discretion available with courts to grant time to file a written statement or to condone any delay in the same. As per the Amendment Act of 1999, if the defendant failed to submit his written statement on such date as fixed by the court, then he shall be allowed to file a written statement on such other day as directed by the court which is not beyond thirty days from the date of service of summons.³¹

As the Amendment Act of 1999 could not be brought into force, the legislature brought changes to the concerned provisions vide the Civil Procedure Code (Amendment) Act, 2000 (Act 22 of 2002) which came into effect on 01.07.2002. This amendment aimed to ensure access to justice by providing speedy justice to the litigants.³² The statement of Objects and Reasons specifically stated its purpose as, '*to reduce delay in the disposal of civil cases*'. It restricted the limitation for filing a written statement as thirty days from the date of service of summons after the institution of the suit.³³

²⁹ Government of India, '18th Report on The Code of Civil Procedure (Amendment) Bill, 2000 (Rajya Sabha, Department-Related Parliamentary, Standing Committee on Home Affairs)

³⁰ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. VIII R., '1. The defendant shall at or before the first hearing or within such time as the court may permit, which shall not be beyond thirty days from the date of service of summons on the defendant, present a written statement of his defence.'

³¹ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. V, 'Provided further that where the defendant fails to file the written statement on the said day, he shall be allowed to file the same on such other day which shall not be beyond thirty days from the date of service of summons on the defendant, as the court may think fit.'

³² Rajya Sabha, Department-Related Parliamentary, Standing Committee on Home Affairs, Eightieth Report on The Code of Civil Procedure (Amendment) Bill, 2000

³³ The Code of Civil Procedure, 1908 (Act 5 of 1908), Order V '(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'

The legislature observed that the Amendment Act of 1999 did not take into consideration the practical problems and realities of the situation in fixing a stringent timeline for filing a written statement. Further, all cases are not similar, there are *n* number of instances that it cannot take into consideration while drafting the provision.³⁴ Hence, the stringent provisions of the Amendment Act of 1999, granting a maximum period of thirty days from the date of service of summons in case the defendant failed to file a written statement was substituted by, such date as the court may specify, which could be extended by the court with reasons to be recorded in writing, to ninety days from the date of service of summons.³⁵

It was in 2015 that the latest amendment to Order V Rule 1, 2 and Order VIII Rule 1 was enacted. This amendment specifically brought changes to the procedure to be followed in commercial suits of a specified value. A defendant is granted a time of thirty days from the date of service of summons to file his written statement. In case he fails to place his written statement on record in such time, then on the discretion of the court, he can be allowed to file the same on a date specified by the court and such date cannot be beyond 120 days from the date of service of summons. This discretion can be exercised by recording reasons in writing and on payment of such cost as the court deems fit. On the expiry of 120 days from the date of service of summons, the defendant is said to have forfeited his right to file a written statement and the court does not have the discretion to allow the written statement to be taken on record. Thus, making the provision enunciating the law on time to file a written statement mandatory in commercial suits of a specified value.³⁶

³⁴ Law Commission of India, '163rd Report on the Code of Civil Procedure (Amendment) Bill, 1997' (November 1998)

³⁵ The Code of Civil Procedure, 1908 (Act 5 of 1908), Order V and VIII, CPC "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'

³⁶ SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. (2019) 12 SCC 210

IV. The date of commencement of the statutorily mandated time limit for filing Written Statements.

The law on the initiation of limitation for filing a written statement as discussed above is clear in theory. However, during its practical implementation, the courts in India have come across complex facts and issues which compelled them to gauge the true intent of legislature behind the original enactment as well as its subsequent amendments; and the Law Commission of India to deliberate upon the failings of the concerned provisions. In the following sections of my article, I will be examining different instances which the courts have dealt with, for deciding the date of commencement of the limitation for filing of a written statement on or before the issuance of summons on the defendant.

A. Suit is duly instituted.

A suit is instituted by the presentation of a plaint in duplicate to the court or such other officer as the court appoints on its behalf.³⁷ It can be said to be duly instituted only when a duly instituted plaint is presented before the right authority, and such plaint complies with the rules contained in Orders VI and VII of CPC.³⁸ It is settled law that when the suit has been duly instituted, only then summons may be issued to the defendant.³⁹

The question that arises here is, if prior to the service of summons, the defendant files an Order VII Rule 11 Application⁴⁰ praying the court to reject the plaint of the plaintiff

³⁷ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. IV R. 1(1)

³⁸ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. IV R. 1(1) and (2); *Bright Enterprises Pvt. Ltd. v. MJ Bizcraft LLP* 2017 (69) PTC 596 (Del) (DB)

³⁹ The Code of Civil Procedure, 1908 (Act 5 of 1908), s. 27; *Bright Enterprises Private Ltd. v. MJ Bizcraft LLP* 2017 (69) PTC 596 (Del) (DB); *Shri Balaji Industrial Products Ltd. v. AIA Engineering Ltd.* 2018 SCC OnLine Raj 2315; *Red Bull AG v. PepsiCo India Holdings Pvt. Ltd.* 2019 SCC OnLine Del 9901

⁴⁰ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. VII R. 11, '11. Rejection of plaint. – The plaint shall be rejected in the following cases: – (a) where it does not disclose a cause of action; (b) where the

at the outset as it is not a duly instituted plaint, would such appearance constitute as a deemed waiver of his right to service of summons?

The Hon'ble Supreme Court in *Salem Bhai v. State of Maharashtra*⁴¹, observed that the Court cannot direct the Defendant to file a written statement before the Order VII Rule 11 Application is decided by it. Moreover, while deciding such an Application only averments in the plaint need to be considered and not the contents of the written statement.⁴² Thus, a direction to file the written statement cannot be made without deciding the Application under Order VII Rule 11 CPC.

This view was reiterated by Kurian Joseph and Rohinton Fali Nariman, JJ. of the Hon'ble Supreme Court in *R.K. Roja v. U.S. Rayudu*⁴³. The said decision relied on the reasoning on *Salem Bhai (Supra)* to the effect that there appears to be no reasonable basis for conducting the entire trial, prior to deciding an application under Order VII R. 11 because the plaint itself might get rejected at outset; the Court was, however, quick to caution that '*the liberty to file an application for rejection under Order VII Rule 11 of the Code of Civil Procedure cannot be made as a ruse for retrieving the lost opportunity to file the written statement....*'.

relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so; (d) where the suit appears from the statement in the plaint to be barred by any law; 1 [(e) where it is not filed in duplicate;] 2 [(f) where the plaintiff fails to comply with the provisions of rule 9: Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause great injustice to the plaintiff.'

⁴¹ (2003) 1 SCC 557

⁴² *Sopan Sukhdeo Sable v. Assistant Charity Commissioner* (2004) 3 SCC 137

⁴³ (2016) 14 SCC 275

Thus, the law unambiguously indicates that unless the suit is duly instituted, a direction to file a written statement cannot be made to the defendant in a civil suit. The inescapable logical corollary to the same then is that the incidental appearance of a defendant before the service of summons, cannot be said to abrogate his right to place his written statement on the record at later period of time, and in the case of an Application under Order VII R. 11, wherein the suit is not duly instituted, such period of time cannot reckon before a decision is made on the application seeking rejection of the plaint. Further discussion on the allied issue of incidental appearance in circumstances where the suit is duly instituted shall be taken up in a subsequent portion of this article.⁴⁴

B. Summons to be accompanied with the plaint and the document relied upon therein.

As discussed above, for any suit to be duly instituted certain conditions mentioned under Order V Rule 1 of CPC need to be fulfilled. In addition to the same, it is mandatory that every summons is accompanied by a copy of the plaint,⁴⁵ and the documents relied upon therein.⁴⁶

The Indian judiciary has time and again observed that a summons not accompanied by a copy of a plaint is not due service of summons under the CPC, as the same does not give the defendant an opportunity to meet the averments preferred against him.⁴⁷ The question that consequently arises is whether the plaintiff is required to serve copies of the documents relied upon in the plaint along with the summons. The Hon'ble Gauhati High Court in 2006 in *Sreenivas Basudev v. Vineet Kumar Kotharai*⁴⁸

⁴⁴ Refer to part 'c': *Defendant entered appearance before service of summons*

⁴⁵ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. V R. 2

⁴⁶ *Nahar Enterprises v. Hyderabad Allwyn Ltd.* (2007) 9 SCC 466

⁴⁷ *Shevaram Thandaram Jaisinghani v. Indian Oil Corporation Ltd.* AIR 1969 Bom 117; *M/s. General Auto Agencies v. Hazari Singh* AIR 1977 Raj 180; *Laxminarayan S. Sharma v. Rameshwar R. Khandelwal* AIR 1990 MP 155; *Bimla Watii Sharma v. S.B. Patiala* AIR 1992 P&H 101.

⁴⁸ AIR 2007 Gau 5

observed that a document on which a plaintiff relies upon to substantiate his claim need not be served by the plaintiff along with a summons. However, if the court is of the view that furnishing of a document is imperative in the interest of justice, it can direct the service of the document exercising its inherent powers provided u/s 151 of the code.

The Hon'ble Supreme Court, however, took a different view from that of Gauhati High Court in 2007 and settled the law on the issue, stating that the documents relied upon in the plaint also need to be served on the defendant for the limitation period to reckon. In *Nahar Enterprises v. Hyderabad Allwyn Ltd.*⁴⁹, it was observed that it is an obligation on the court or the plaintiff issuing the summons to send a copy of the plaint and other documents appended thereto in compliance with Order V Rule 2 of CPC.

The Hon'ble High Court of Delhi, following the law laid down by the Hon'ble Supreme Court, took a similar view in *Info Edge (India) Ltd. v. Sanjeev Goyal*⁵⁰, while observing that the copies of the plaint, applications and documents have to be served upon the defendant along with the summons.

In the case of *Info Edge (supra)*, the Defendant/Applicant had approached the court seeking condonation of delay in filing the written statement as he had not been served properly till the date of filing of the written statement. Even after repeated requests by him, the Plaintiff/Respondent did not serve him with the entire paper book of the suit. It was contended by the Plaintiff/Respondent that the filing of the written statement is barred by limitation as it was filed one year after the presentation of the suit. He further contended that the Defendant's lawyer after two months of the service of the summons appeared before the court and sought time to file the written statement. To which the Defendant/Applicant responded that the lawyer who

⁴⁹ (2007) 9 SCC 466

⁵⁰ (2007) 10 AD (Delhi) 461

appeared before the court was not the one representing him, and that lawyer failed to place either a vakalatnama or memo of appearance before the court.

The Hon'ble High Court of Delhi in the aforesaid decision observed that:

*for the defendant to file a written statement within time contemplated under Order VIII Rule 1 of the Code of Civil Procedure, it is not only the knowledge of the pendency of the suit which is material but also the fact that the entire copy of the paper book has also been supplied to the defendant and received by him.*⁵¹

The Hon'ble Court further went on to hold that as the Defendant/Applicant was not properly served by any mode, the limitation under Order VIII won't start to run on the appearance of a lawyer who did not file his vakalatnama or memo of appearance who had sought time to file a written statement. While the Hon'ble Court was pleased to grant relaxation to the Defendant/Applicant on the basis of *Rafiq v. Mushilal*⁵², to the effect that a litigant ought not to be prejudiced by the misdemeanor or inaction of a legal counsel, it paved way for the germination of a vested right in the defendant to be supplied not only with the averments raised against him, but also the basis of such averments, in order for him to be granted an effectual opportunity to counter such averments.

Thus, mere knowledge of the filing of the case or the service of a summons is not sufficient for the limitation to begin, it is also important for the plaintiff to serve the copy of the plaint, applications, and documents along with it.

C. Defendant entered appearance before the service of summons.

⁵¹ (2007) 10 AD (Delhi) 461

⁵² (1981) 2 SCC 788

The object of the service of summons by the court or the plaintiff is to ensure the attendance of the defendant.⁵³ It ensures that the defendant has an opportunity to contest the claim of the plaintiff in the furtherance of the principle of *audi alteram partem*.⁵⁴ This means that the defendant not only has the knowledge of the institution of the suit but also has the details of the claim in the form of a plaint and the document relied therein to respond correctly and completely preserving his rights in view of all the facts and allegations raised before the court.

However, what if the defendant appears before the service of summons? The defendant could appear before the court on being informed about the pendency of the matter from sources other than the service of summons. From the foretold situation, the following questions arise for examination:

1. Will the limitation for filing the written statement reckon:
 - a. From the date of appearance of the defendant?; or
 - b. From the date of the service of summons?
2. What then remains the purpose of serving summons?

The Hon'ble Supreme Court in *Siraj Ahmad Siddiqui v. Prem Nath Kapoor*⁵⁵ observed that when the '*when time is fixed by the court for the filing of the written statement and the hearing, these dates bind the defendant, regardless of the service of the summons*'.

To examine and understand the ratio of this decision, it is important to gloss over the facts of the case. In this case, after the institution of the suit, neither summons was issued, nor plaint was supplied to the Defendant. The Defendant got the knowledge of the case when the advocate of the Plaintiff had enquired from him as to how long

⁵³ Flight Center Travels Pvt. Ltd. v. Flight Centre Ltd. 2013 (198) DLT 407 (DB); Kent RO Systems Ltd. v. Mr. Jiten Aggarwal 2017 SCC OnLine Del 11358 (Order dt. 04.08.2017)

⁵⁴ Flight Center Travels Pvt. Ltd. v. Flight Centre Ltd., 2013 (198) DLT 407 (DB); Chittanku Ranjan Das v. Swati Das, (2015) 1 Cal LJ 505

⁵⁵ (1993) 4 SCC 406

will the Defendant miss the hearings of the case. It was then that the Defendant appeared before the Hon'ble Court on 24.02.1984 with an application requesting the court to grant him time to file a written statement. The Hon'ble Court on this hearing, granted a month to the Defendant to place a written statement on record.

The Hon'ble Court to reach its ratio discussed the judgment of the Hon'ble High Court of Uttar Pradesh in the matter of *Sri Nath Agarwal v. Sri Nath*⁵⁶, wherein it was held that if the Defendant appears before the court on the date of registration of the suit or before the service of summons, and he is informed about the nature of the claim and directed to file a written statement on a specific date, it would be too technical to hold that '*service of the summons in the ordinary course was still required and that further proceedings in the suit would take place only thereafter*'.

From an examination of Order V of CPC⁵⁷, it can be said that Order V has two components; first, Notice of the Proceedings or knowledge of ongoing proceedings; and second, direction to file a written statement. In both *Siraj Ahmad Siddiqui (supra)* as well as *Sri Nath Agarwal (supra)*, there was appearance of the Defendant, without the service of summons, which can be said to be a deemed satisfaction of the first criterion, such that it is undeniable that a party appearing before the Hon'ble Court can be reasonably deemed to be aware of the nature of proceedings pending against him. This was followed by an explicit direction by the Hon'ble Court to file a written statement by a specific date as decided by the Hon'ble Court, and this accordingly satisfied the second criterion of Order V of the Code. Thus, unlike the first condition where the Defendants were said to have notice by deeming the fiction, in each of the above cases, the second condition laid down under Order V of the Code for filing a

⁵⁶ AIR 1981 All 400

⁵⁷ The Code of Civil Procedure, 1908 (Act 5 of 1908), '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 [**Emphasis supplied**]'

written statement was satisfied only when an explicit direction was made by the Hon'ble Court to the Defendant to file a written statement.

Adverting to the research questions mentioned at the initiation of this section, in light of the above discussion, we find that while the Hon'ble Supreme Court has relied on the discussion of the Hon'ble High Court of Uttar Pradesh in *Sri Nath Aggarwal (supra)*, the limitation to file a written statement reckons on the date of the explicit direction of the court to file a written statement and not on the date of the mere appearance of the defendant.

With regard to the second question dealing with the purpose of service of summons when the defendant has already appeared before the court, the Hon'ble Supreme Court has not explicitly dispensed with the formality of issuing summons. Where a defendant has entered appearance, the Court has explicitly directed to file his written statement, therefore this must be deemed to be sufficient compliance of due process and does not defeat any substantive right of the defendant, and may accordingly be treated as such by Courts.

D. Whether the conduct of the defendant can determine the date of initiation of limitation.

Keeping in mind the essentials of Order V discussed under the previous heading, this section will examine the role the conduct of the defendant may play in the determination of the date of initiation of the limitation period. Situations might arise before the court, where the defendant had the knowledge about the institution of the suit and he also appeared before the court before the service of summons. In such instances, the issue that arises is whether the time to file a written statement begins on the date of actionable conduct of the parties or would the service of a summons be mandatory for the same? To resolve the foretasted issue, I will be examining two

instances, first, when notice is issued under Order XXXIX Rule 3 of CPC before the service of a summons and second, when out of court settlement procedure is initiated by the court at the behest of the parties. Subsequently, I will be analysing the law laid down in these two instances together, to examine the discrepancy in the current law due to dilution of strict interpretation of law approach.

1. Notice issued under Order XXXIX Rule 3 before the service of summons.

Order XXXIX of CPC regulates the procedure pertaining to temporary injunctions in civil suits. Rule 1 of the Order deals with cases in which a temporary injunction may be granted. Rule 3⁵⁸ of the Order states that before granting of an injunction, the court shall direct notice of the application under Order XXXIX to the opposite party except in certain specified cases.

Illustration: 'A' filed a civil suit against 'B' for infringement of trademark before the High Court of Delhi. On 01.01.20, 'A' presented its duly instituted plaint before the court along with an application for an interim injunction under Order XXXIX of CPC. The court issued a notice of the application filed by the Plaintiff, 'A', to 'B', the Defendant, which was served on him on 03.02.20. The Defendant 'B' appeared before the court and argued against the application for grant of an interim injunction. The application was decided on merits, and an Order on the same was passed by the court on 01.06.2020. The Defendant on 10.06.2020 filed his written statement. The Plaintiff,

⁵⁸ The Code of Civil Procedure, 1908 (Act 5 of 1908), O. XXXIX R. 3, '3. Before granting injunction, Court to direct notice to opposite party. – The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party: 3 [Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant – (a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with – (i) a copy of the affidavit filed in support of the application; (ii) a copy of the plaint; and (iii) copies of documents on which the applicant, relies, and (b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.]

'A', objected to the same and contended that a written statement cannot be filed at a belated stage. 'A' argued that the limitation for filing a written statement reckoned from 03.02.2020 i.e. the date on which the notice of the application under Order XXXIX was served on the Defendant, and hence, the written statement is filed more than 120 days after the date of service of notice.

Here, the issue that arises is whether the service of notice on Defendant, 'B', per Order XXXIX Rule 3 and consequent appearance of the Defendant for the exclusive purpose of responding to the interim application would amount to a deemed waiver by the defendant for his right to service of summons?

To determine whether the contest of an application for an interim injunction by the defendant would amount to a deemed waiver of service, we must test it upon the touchstone of Order V of the Code, and its components, as discussed earlier in this article⁵⁹. A notice to the defendant under Order XXXIX Rule 3, would not only give the defendant notice of an application for grant of interim orders, but also of any proceedings within which such a motion may be initiated. That being the case, such a notice would conclusively satisfy the requirement of being a '*notice of proceedings*'. However, advertent to the second requirement of valid summons under Order V i.e. '*the direction to file a Written Statement*', we find that a notice under Order XXXIX Rule 3 would be conspicuously silent with respect to such a direction.

The Hon'ble High Court of Delhi in *Kent RO Systems Ltd. v. Mr. Jiten Aggarwal*⁶⁰, on this very issue held that the service of notice in compliance with Order XXXIX Rule 3 is not equivalent to the service of summons under Order V of CPC on the Defendant. It was further observed that even though the Defendant appeared before the Court, no direction was issued by the Court to the Defendant granting time to file a written

⁵⁹ Refer to part c: *Defendant entered appearance before the service of summons*

⁶⁰ 2017 SCC OnLine Del 11358 (Order dt. 04.08.2017)

statement. Thus, the limitation had not been deemed to begin from the date of service of notice under Order XXXIX R. 3.

A similar view was taken by the Hon'ble High Court of Calcutta in *Chittanku Ranjan Das v. Swati Das*⁶¹, wherein it was observed that the 'right to file written statement emanates from service of the summons and not otherwise'. The Hon'ble High Court of Calcutta went a step further to hold that the first proviso to Order V Rule 1⁶² which set forth the exceptions to the service of a summons is only applicable where the Defendant *suo moto* appeared at the presentation of the plaint and admitted the plaint.

The law laid down by the Hon'ble High Courts evidently tows the line with respect to the constituent parts of Order V Rule 1, and the inability of a notice under Order XXXIX R. 3 to satisfy the same. They uphold the rule that even if the defendant has knowledge about the suit and has appeared before the court, unless there is an explicit direction to file a written statement, the limitation shall not reckon.

2. Out of court settlement procedure initiated by the parties.

The second scenario where the conduct of the defendant becomes relevant as to the determination of the initiation date of the limitation period, is one where the parties have been directed by the Hon'ble Court to attempt pre-litigation settlement. The Hon'ble High Court of Delhi in *Red Bull AG v. PepsiCo India Holdings Pvt. Ltd.*⁶³ ruled upon the appropriate course of action in cases where the Defendant enters appearance before the Court by receiving information about the suit through sources other than the service of summons. The primary question before the Courts in such a scenario is

⁶¹ (2015) 1 Cal LJ 505

⁶² The Code of Civil Procedure, 1908 (Act 5 of 1908), O. V R. 1, 'Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiffs claim.'

⁶³ 2019 SCC OnLine Del 9901

whether the period of limitation for filing written statement commences from the date of appearance or will it reckon on a formal order passed by the Court directing issue of summons, alternatively, directing the Defendant to file written statement.

The facts of the case that led to the formulation of the said issue are as follows:

1. **28.08.2018** –The Defendant entered appearance on the first hearing on the suit. Both the parties to the suit jointly requested for adjournment on the ground of the possibility of settlement.
2. **24.09.2018** – On the next date of hearing, the parties submitted that they would want to try and settle the matter through Mediation. Parties were accordingly ordered to appear their disputes before the Delhi High Court Mediation and Conciliation Centre.
3. **20.11.2018** – The mediation process failed.
Note: It is to be noted that till this date neither a formal summons was issued to the defendant, nor a direction was made by the court to the defendant for filing a written statement.
4. **05.12.2018** - Plaintiff requested for early hearing of arguments by filing an application u/s 151 of CPC. He pleaded that he would like to argue injunction application as settlement talks had failed.
5. **6.03.2019** – The written statement was filed.

The Id. Counsel for the Plaintiff contended that the Defendant waived his right to be served summons when he entered appearance at the initial stage of the suit, without the formal service of summons. To buttress this argument, reliance was placed upon *Flight Centre Travels Pvt. Ltd. v. Flight Centre Ltd.*⁶⁴. On the other hand, the Id. Counsel for the Defendant while relying upon *Bright Enterprises Pvt. Ltd. v. MJ Bizcraft LLP*⁶⁵ argued that in the absence of the service of formal summons, summons cannot be said

⁶⁴ 2013 (198) DLT 407

⁶⁵ 2017 (69) PTC 596 (Del) (DB)

to be served on the Defendant, in accordance with a strict reading of the provisions of the Code.⁶⁶

The Hon'ble Court observed that, first, only after the suit is duly instituted can the summons be issued to the Defendant. Second, before issuance of summons the Court also has to satisfy itself that the suit is in fact, not barred under Order VII Rule 10 or Order VII Rule 11 CPC.⁶⁷ The Hon'ble Court, therefore, countenanced the stance espoused by the Hon'ble Supreme Court in *Siraj Ahmad Siddiqui (supra)* to the extent that '*when time is fixed by the court for the filing of the written statement and the hearing, these dates bind the defendant, regardless of the service of the summons*'. It noted that from the Orders of the Court in the suit, it is clear, that no direction was given to the Defendant for filing a written statement⁶⁸ Thus, in light of the facts and circumstances of the case, it held that limitation reckons from the date the Defendant enters appearance without the service of official summons on him and not from the date summons are served on him or a formal order directing him to file a written statement.

On merits, the Hon'ble Court ruled that the orders passed by the Court dated 28.02.2018 and 24.09.2018 do not show that the Court came to a finding that the suit has been duly instituted. Neither did these Orders show that any direction was given to the Defendant to answer the claim of the Plaintiff and file a written statement. Further, it observed that a conclusion cannot be reached from the said Orders that the Defendant had by his conduct waived his right to a summons. The Orders, on the other hand, indicate that the parties desired to settle their disputes by the means of alternate dispute resolution mechanisms. It was only when by the consent of parties, the mediation process was terminated on 20.11.2018, that the Defendant can be said to be deemed to be served with summons as he knew that now he had to answer the

⁶⁶ The Code of Civil Procedure, 1908 (Act 5 of 1908), s. 26, 27, O. IV, V R. 1, VII Rule 5; Delhi High Court Rules, 2018, Chapter IV R. 7 and Chapter VI R. 1(f)

⁶⁷ *Bright Enterprises Pvt. Ltd. v. MJ Bizcraft LLP* 2017 (69) PTC 596 (Del) (DB)

⁶⁸ *Flight Center Travels Pvt. Ltd. v. Flight Centre Ltd.* (2013) 198 DLT 407 (DB)

claim in terms of prescribed procedure. Thus the deeming fiction of the Defendant *having notice* under Order V was given another dimension of complexity by the Hon'ble Court, to the effect that it does not suffice to suggest that the Defendant was aware of proceedings against him, but such proceedings must also be ongoing.

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