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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 ORDINARY ORIGINAL CIVIL JURISDICTION
 IN ITS COMMERCIAL DIVISION**

NOTICE OF MOTION COMMERCIAL DIVISION NO. 196 OF 2018

IN

COMMERCIAL SUIT NO. 159 OF 2017

Smt. Mira Gehani,	)	
An Adult Indian Inhabitant,	)	
Residing at 163, Maker Tower A, Cuffe Parade	)	
Mumbai - 400 005	)	Applicant
		(Org.Def. No.1)

IN THE MATTER BETWEEN :

Axis Bank Limited	)	
(Formerly known as UTI Bank Limited)	)	
A public limited company registered under the	)	
provisions of the Companies Act, 1956 and having its	)	
registered office at Trishul, 3rd Floor, Opp.	)	
Samartheswar Temple, Near Law Garden, Ellis Bridge)	)	
Ahmedabad - 380 006 and corporate office at Axis	)	
House, C-2 Wadia International Centre, Pandurang	)	
Budhkar Marg, Worli, Mumbai - 400 018	)	Plaintiff

Versus

1. Smt. Mira Gehani,	)	
An Adult Indian Inhabitant,	)	
Residing at 163, Maker Tower A, Cuffe Parade	)	
Mumbai - 400 005	)	
2. (a) Mr.Sham Manghnani Bai	)	
(b) Mr.Raghu Sajan Manghnani	)	
Adult Indian Inhabitants,	)	
Legal heirs of Mrs.Bhagwanti Sajan Manghnani	)	
having their address at 31, Elcid 13-A	)	

Ridge Road, Mumbai - 400 006)
Also residing at 401, Nikhil Apartments, Adarsh Nagar)
Jaipur)

3.Mr.Ravi Rathanchand Gehani)
An Adult Indian Inhabitant,)
Residing at 8A, Ajanta Apartments,)
Carmichael Road, Mumbai - 400 006)

4. Smt. Devi Hariram Gehani,)
An Adult Indian Inhabitant,)
Residing at 102, Rambha Petit Hall)
Napeansea Road, Mumbai - 400 006)

5.Mrs. Kamala Jethanand Gehani)
An Adult Indian Inhabitant)
Residing at 8A, Ajanta Apartments,)
Carmichael Road, Mumbai - 400 026)

6.Shri Ashok G. Aswani)
in capacity of a trustee of R & H Family Trust,)
having their address at 31, Elcid 13-A Ridge Road,)
Mumbai - 400 06)

7.(a) Shri Ramesh Hotchand Gehani)
(b) Smt. Rani Ramesh Gehani)
in capacity of Trustees of RAS Family Trust)
having their address at 102, Rambha Petit)
Hall Napeansea Road, Mumbai - 400 006)

8. Mr.Ramesh Hotchand Gehani,)
in capacity of Constituted Attorney of Def. Nos. 1 to 7)
having his office at G 005/6, Atlanta Nariman Point,)
Mumbai - 400 021)

9.Atlanta Premises Co-operative Society Limited)
having their office at Atlanta, Nariman Point,)
Mumbai - 400 021)

Defendants

ALONG WITH
COMERCIAL SUIT NO. 306 OF 2015

Rabo India Finance Limited)
 a public limited company registered)
 under the Companies Act, 1956, having)
 their office at Forbes Building,)
 3rd floor, Charanjit Rai Marg, Fort)
 Mumbai 400 001) **Plaintiff**

Versus

1. Jupiter Biosciences Limited)
 a public limited company registered)
 under the Companies Act, 1956,)
 having their office at Golden Galaxy)
 H.No. 10-3-120, Plot No. 52,)
 Teachers Colony, East Maredpally,)
 Secunderabad-500 026 and other)
 offices at Plot No. 24, Kolhar, IDA)
 Bidar- 585 401, Karnataka and No.)
 10-2-71, 10-2-72/1, Road No.3,)
 West Marredapally,)
 Secunderabad 500 026, A.P.)

2.Venkat R. Kalvakolanu)
 residing at Plot No. 71)
 Dhanalaxmi Society)
 Mahendra Hills)
 Secunderabad - 500 026)

3. IDBI Bank Limited)
 a Banking Institution Established)
 under the Banking Regulations Act,)
 having their office at)
 Specialised Corporate Branch)
 5-9-89/1 & 2,)
 Chapel Road, Near L.B. Stadium)
 Hyderabad - 500 095)

4. ING Vysya Bank)
 having its office at R.O.3-6-438/5 & 6)
 5th Floor, Naspur House, Naspur House)
 Himayat Nagar,)
 Hyderabad - 500 029)

5. Karur Vysya Bank Limited)
 a Banking Institution Established)
 under the Banking Regulations Act,)
 having their office at 6549, R.P. Road,)
 Secunderabad - 500 003)

6. IFCI Limited,)
 a public limited company registered)
 under the Companies Act, 1956,)
 having their office at # 5-9-13)
 Taramandal Complex, 8th Floor,)
 Saifabad Hyderabad - 500 004)

7. Central Bank of India,)
 a Banking Institution Established)
 under the Banking Regulations Act,)
 having their office at Corporate)
 Finance Branch Bank Street, Koti)
 Hyderabad - 500 095)

8. PNB International Limited,)
 having their office at # 87, Greesham)
 Street, London (UK), EC2VF7NQ)

9. State Bank of Mysore,)
 a Banking Institution established)
 under the Banking Regulations Act)
 having their office at Industrial)
 Finance Branch, # 6-3-865,)
 'My Home Jupally' Lal Bungalow)
 Ameerpet, Hyderabad - 500 016)

10. Catholic Syrian Bank Limited,)
 a Banking Institution Established)
 under the Banking Regulations Act)
 having their office at 1st floor)
 Diamond Towers, S.D. Road,)
 Secunderabad - 500 003)

11. UCO Bank,)

a Banking Institution Established)
 under the Banking Regulations Act,)
 having their office at Opp. Ram Gopal)
 Pet Police Station, M.G.Road)
 Secunderabad - 500 003)

12. Indian Bank,)
 a Banking Institution Established)
 under the Banking Regulations Act,)
 having their office at # 5-1-679,)
 Surabhi Arcade, Bank Street Branch,)
 Koti, Hyderabad - 500 095)

13. Srinivas S.)
 adult Indian Inhabitant residing at C-9,)
 IFCI Staff Quarters, 3-6-15,)
 Himayath Nagar, Hyderabad - 500 029)

14. M/s. Reddy Pharmaceuticals)
 Limited having its Registered)
 office at B-7, Patparganj Industrial)
 Area, New Delhi, 110 092)
 Represented by its Managing)
 Director, Shri Konda Raghurami Reddy)

Defendants

WITH

COMMERCIAL SUIT NO. 727 OF 2017

Latin Media Corporation)
 A company incorporated under the laws of)
 Miami, Florida, USA.)
 Having its registered office at :)
 8725 NW 18th TR, Suite 105, Miami,)
 Florida - 33172, USA.)
 Represented by its director and authorized)
 signatory, Jose Escalante.)

... Plaintiff

Versus

Zee Entertainment Enterprises Limited)
 A company incorporated under Companies)

Act, 2013. Having its registered office at :)
18th Floor, A – Wing, Marathon Futurex,)
N.M. Joshi Marg, Lower Parel,)
Mumbai – 400 013) Defendant

WITH

COMMERCIAL SUIT NO. 316 OF 2018

Bharat Bhogilal Patel)
Hindu, Indian Inhabitant of Bombay,)
aged about 51 years, residing at 1/43, Juhu)
Gold Mist, Gulmohar Road, JVPD Scheme,)
Vileparle (W), Mumbai – 400 049)
And carrying on business from B/118, Gambhir)
Industrial Estate, Off Aarey Road, Behind)
Pravasi Industrial Estate, Goregaon (East),)
Mumbai – 400 063.) Plaintiff

Versus

Leitz Tooling Systems India Private)
Limited, Carrying on business as)
Company, having its registered office at)
No.486/C, IV Phase, 14th Cross, Peenya)
Indul Area, Bangalore – 560 058.)
And also at Plot No.R-324, 1st Floor,)
T.T.C. Industrial Area, Behind IPCL,)
MIDC, Rabale, Thane-Belapur Road,)
Navi Mumbai – 400 701.) Defendant

WITH

CHAMBER SUMMONS COMMERCIAL DIVISION No. 643 of 2018

IN

COMMERCIAL SUIT NO. 445 OF 2017

Piramal Enterprises Limited)
Piramal Ananta, Agastya Corporate Park,)
Opposite Fire Brigade, Kamani Junction,)
LBS Marg, Kurla West, Mumbai – 400 070.) Applicant
(Orig. Deft.)

IN THE MATTER OF :

Baader Schulz Laboratories,)
Shantivilla, Shantivan Tower Compound,)
Devidas Lane, Near Club Aqueria,)
Borivali (West), Mumbai – 400 103.) Plaintiff

Versus

Piramal Enterprises Limited)
Piramal Ananta, Agastya Corporate Park,)
Opposite Fire Brigade, Kamani Junction,)
LBS Marg, Kurla West, Mumbai – 400 070.) Defendant

WITH

NOTICE OF MOTION COMMERCIAL DIVISION NO. 1093 OF 2018

IN

COMMERCIAL SUIT NO. 118 OF 2017

Indian Oil Corporation Limited)
Indian Oil Bhavan, G-9, Ali Yavar Jung Marg,)
Bandra (East), Mumbai – 400 051.) Applicant
(Orig. Deft.)

IN THE MATTER OF :

Spacotech Equipment & Structural Private)
Limited,)
A Company incorporated under the provisions)
of the Companies Act, 1956, having its office)
at A-17, Additional Ambernath, MIDC, Anand)
Nagar, Ambernath (East), Dist. Thane,)
Maharashtra – 421 506.) Plaintiff

Versus

1. Indian Oil Corporation Limited,)
Indian Oil Bhavan, G-9, Ali Yavar Jung)
Marg, Bandra (East), Mumbai-400 051.)

2. Union of India,)

Aaikar Bhavan, Mumbai.

)

Defendants

WITH

COMMERCIAL SUIT NO. 659 OF 2017

Sony Music Entertainment India Pvt. Ltd.

)

a company incorporated under the Companies

)

Act, 1956, having its registered office at Raheja

)

Centre, 92, Main Avenue, Santacruz West,

)

Mumbai 400 054

)

Plaintiff

Versus

1. Mobimedia International Pte. Ltd.

)

a company incorporated under the laws of

)

Singapore, having its office at 51 Goldhill

)

Plaza, # 07-10/11, Singapore 308900

)

AND

)

28C Stanley Street, Singapore

)

2. Mobimedia (Bangladesh) Limited

)

South Breeze Centre, 3rd floor, House 5,

)

Block G, Road-11, Banani Dhaka -1213,

)

Bangladesh

)

Defendants

WITH

COMMERCIAL SUIT NO. 861 OF 2017

Citicorp International Limited, a company

)

incorporated under the laws of Hong Kong, having

)

its registered office at 50th floor, Champion Tower,

)

Three Garden Road, Central Hong Kong

)

Plaintiff

Versus

GTL Infrastructure Limited,

)

a company limited by shares incorporated under the

)

provisions of the Companies Act, 1956, having its head

)

office / corporate office at 412, Janmabhoomi Chambers,

)

29, Walchand Hirachand Marg, Ballard Estate,

)

Mumbai - 400 001, India.

)

And

)

its registered office at 3rd Floor, Electronic Sadan

)

No. II, MIDC, TTC Industrial Area, Mahape,)
Navi Mumbai - 400 710, India.) Defendant

WITH
NOTICE OF MOTION COMMERCIAL DIVISION NO. 561 OF 2018
IN
COMMERCIAL SUIT NO. 29 OF 2013

Colonial Life Insurance Company (Trinidad) Ltd. & Anr.) Applicants /
(Org. Defendants)

IN THE MATTER BETWEEN :

Reliance General Insurance Company Ltd.)
as Insurance Company duly registered under the)
Companies Act, 1956 having its registered office at)
Reliance Centre, 19, Walchand Hirachand Marg,)
Ballard Estate, Mumbai - 400 001)
And Corporate Office located at 1st Floor,)
Rectifier House, Next to Industrial Estate, Wadala)
Mumbai - 400 032) Plaintiff

Versus

1. Colonial Life Insurance)
Company (Trinidad) Limited)
an insurance company having its registered office at)
29, St. Vincent Street, Port of Spain, Republic of)
Trinidad W.I.)
2. K.M.Dastur Reinsurance)
Brokers Private Limited, a broker having its)
registered address at Cambata Building, 42,)
Maharshi Karve Road, Mumbai - 400 020) ... Defendants

Mr. Nausher Kohli a/w. Mr. Harsh Gokhale, Mr. Samit Shukla, Ms. Raveena Dhawan, Mr. Parth Jasani and Mr. Nimoy Kher i/b. DSK Legal for the Plaintiff in COMS No. 159 of 2017.

Mr.Siddharth Ranade a/w. Ms. Lizum Wangdi and Mr. Prakash Jain i/b. TriLegal for the Plaintiff in COMS No. 727 of 2017.

Mr. Akshay Vasishtha a/w Ms. Kamya Sanghvi i/b Tuli & Co. for the Plaintiff in COMS No. 29 of 2013.

Ms. Nisha Rajput i/b Lawfin & Associate for the Plaintiff in COMS No. 118 of 2017

Mr.Bharat Gandhi i/b. Mr.Swapnil Newaskar for Plaintiff in COMS No. 445 of 2017.

Mr.Abhishek Khare i/b. Khare Legal Chambers for the Plaintiff in COMS No. 316 of 2018.

Ms.Vatsala Pant i/b. Argus Partners for the Plaintiff in COMS No. 306 of 2015.

Mr.A. Mehta a/w. Mr.Srinivas Chahi, Ms.Dhvani Shah, Ms.Durga Agarwal i/b. Cyril Amarchand Mangaldas for the Plaintiff in COMS No. 861 of 2017.

Mr.Amit Jamsandekar a/w Mr. Dhiraj Mhetre, Ms.Smiti Tewari, Mr.Satyasrikant Vutha and i/b Khaitan Legal Associate for the Plaintiff in COMS No. 659 of 2017

Mr.J.P.Sen, Sr.Adv. a/w. Mr. Farhan Dubash, Mr.Murtuza Federal, Mr. Vishesh Valviya i/b. M/s.Federal and Rashmikan for Defendant No. 1 in COMS No. 159 of 2017.

Mr.Hemant Prabhulkar a/w. Mr.Yogesh Bhoge i/b. Jurisperitus Mumbai for Defendant No. 1 in COMS No. 118 of 2017.

Mr.Vyom Shah a/w. Mr. Aziz Khan i/b. M/s.Divya Shah and Associates for Defendant Nos. 2A and 2B.

Mr.Rashmin Khandekar a/w. Ms. Sita Kapadia, Ms.Ritika Gadoya, Mr.Shashwat Rai i/b. Keystone Partners for the Defendant No. in COMS No. 316 of 2018.

Mr.Sharan Jagtiani a/w. Ms.Brigitta Johan i/b. AZB and Partners for Defendant No. 1 in COMS No. 29 of 2013.

Mr.Zal Andhyarujina a/w. Mr.S.V.Mehta, Ms.Akanksha Agarwal i/b. Malvi Ranchoddas and Company for Defendants in COMS No. 659 of 2017.

Mr.Chirag Mody a/w. Mr.Hemant Prabhulkar, Mr. Yogesh Bhoge i/b. Jurisperitus Mumbai for Defendant No. 1 in COMS No. 118 of 2017.

Mr.Pushkal Mishra a/w. Mr. Kunal Chheda i/b. M.V. Kini and Company for Defendant Nos. 10 in COMS No. 316 of 2015.

Mr.Shardul Pendse i/b. Divya Shah Associates for Defendant Nos. 2A and 2B.

Mr.Firdosh Pooniwalla a/w. Ms.Melenie D'souza, Mr.Rishit Badiani i/b. A.S.Dayal and Associates for the Applicant in CHSCD No. 643 of 2018.

Mr.V.Anturkar, Sr. Adv. a/w. Mr. Prathamesh Bhargude, Mr.Ranjit Shinde, Mr. Yatin Malvankar, Mr.Ajinkya Udane - Advocates.

Mr.Rohan Kelkar - Advocate.

Mr.Rahul Tanwani i/b. Mr.Asim Vidyarthi - Advocates.

Ms. Deepa Ahuja - Advocate.
 Mr. Sandeep Jalav - Advocate.

CORAM : S.J. KATHAWALLA, J.
RESERVED ON 31ST OCTOBER, 2018
PRONOUNCED ON 27TH FEBRUARY, 2019

JUDGMENT :

N D E X

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I. **QUESTION OF LAW:**

1. The present Order deals *inter alia* with the interpretation of an amendment to Order VIII of the CPC introduced by the Commercial Courts Act, 2015 (“**Commercial Courts Act**”). The amended Order VIII Rule 1 is in respect of taking on record a written statement of the Defendant in a Commercial Suit after the expiry of 120 days from the date of service of summons. Order VIII Rule 1 as amended by the Commercial Courts Act is reproduced hereunder :

“1.Written Statement. —

The Defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

[Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the 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.] ”

2. In the various Commercial Suits filed before the Commercial Division of this Court, various Defendants failed to file their written statement(s) within the

stipulated period of 120 days. Subsequently, these Defendants have taken out various Notice(s) of Motion seeking condonation of delay in filing their respective written statements. At the hearing of these motions, Counsel appearing for the Plaintiffs opposed the taking on record of any written statement in view of *inter alia* the newly introduced proviso to Order VIII Rule 1 by the Commercial Courts Act.

3. Consequently, an open court notice was published by this Court on 28th August, 2018, framing the following question of law in order to settle the controversy in all such matters :

“ Whether in view of the amendment to the Code of Civil Procedure, 1908 by ‘The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016)’ , the Defendant/s can be allowed to file the Written Statement/s after 120 days from the date of service of the Writ of Summons in a Commercial Suit?”

4. Pursuant to the aforesaid notice, extensive arguments were advanced by various Counsel appearing on behalf of the Applicants/ Defendants and the Plaintiffs in their various matters where this question of law had arisen. Several Advocates have taken out the time to address this Court on the aforesaid question even though they did not have a matter where this question had arisen.

5. Various arguments were advanced on behalf of the Applicants/ Defendants in support of the Notice(s) of Motion seeking condonation of delay. I have heard Senior Advocate Mr. Anturkar, Senior Advocate Mr. J.P. Sen, Mr. Firdosh Pooniwala, Mr. Zal Andhyarujina, Mr. Rashmin Khandekar, Mr. Rohan Kelkar, Mr. Mr.Chirag Mody, Mr. Sandeep Pendse, Ms. Deepa Ahuja, Mr.Pushkal Mishra and Mr. Rohit Gupta appearing for the Applicants/Defendants.

6. As opposed to these arguments, Counsel appearing on behalf of the Plaintiffs argued that a written statement cannot be taken on record after the expiry of 120 days from the date of service of the writ of summons in a Commercial Suit. These arguments were primarily advanced by Mr. Nausher Kohli appearing for the Plaintiff in Notice of Motion Commercial Division No 196 of 2018. Mr.Amit Jamsandekar, Mr. Abhishek Khare, Mr. Harsh Gokhale, Ms.Lizum Wangdi, Mr.Bharat Gandhi, Mr.Sandeep Jalav, Mr.Ankoosh Mehta, and Mr. Rahul Tanwani adopted the arguments of Mr. Kohli.

7. I have considered the various arguments canvassed before me. Prior to dealing with these arguments, it is necessary to set-out the legislative background to the Commercial Courts Act.

II. THE COMMERCIAL COURTS ACT :

8. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 was promulgated on 23rd October, 2015. Subsequently, the Commercial Courts Act, 2015 was enacted on 31st December, 2015 and was deemed to have come into force on 23rd October, 2015.

9. The Commercial Courts Act came to be enacted pursuant to the recommendations made by the Law Commission of India in its 188th Report (“**the 188th Report**”) and 253rd Report (“**the 253rd Report**”).

10. The purpose for enacting the Commercial Courts Act finds place in the 188th Report wherein the Law Commission recorded :

"The purpose of the proposals in this report is to expedite commercial cases of high pecuniary value and create confidence in the commercial circles, within India and outside, that our Courts are quite fast, if not faster than Courts elsewhere.

The overall benefits that may accrue to the economy of the country as a whole by the establishment of the Commercial Division will, in our opinion, be in several hundreds of crores of Rupees. In view of the present era of globalisation and

liberalization, investment in India, both domestic and foreign is bound to increase tremendously once the investors of the world know with certainty and assurance that the Commercial Division in the High Courts in India will dispose of the matters within a maximum period of two years which is comparable to the period of pendency in USA or UK. The expense involved in establishment of the Commercial Division will, in our view, be a small fraction of the overall benefits that will accrue to the economy of the country. Investors will make freely investment in business ventures without fear of blocking their substantial business capital in undue prolonged litigation in courts. The proposed changes are likely to render the overall market friendly change in investment in business scenario.”

11. As can be seen from the above quoted passage, in the 188th Report, way back in 2003, it had been recognised that in order to inspire confidence of foreign as well as domestic investors in India, there was a need for Parliament to evolve a mechanism for expeditious disposal of high value commercial disputes in order to bring India's judiciary at par with other developed economies such as the United States of America, the United Kingdom, Singapore, etc.

12. The Law Commission of India, in its 253rd Report stated that there were as on 31st December, 2013, more than 32,656 civil disputes pending in the five Courts

having ordinary original jurisdiction viz. the High Courts of Bombay, Delhi, Madras, Calcutta and Himachal Pradesh, out of which more than half were commercial disputes. The Law Commission feared that the high pendency of cases would deter investors from investing in India and suggested the following in response to this problem:

“4.2 The Commercial Courts, the Commercial Divisions and the Commercial Appellate Divisions of High Courts that have been recommended are intended to serve as a pilot project in the larger goal of reforming the civil justice system in India. The goal is to ensure that cases are disposed of expeditiously, fairly and at reasonable cost to the litigant. Not only does this benefit the litigant, other potential litigants (especially those engaged in trade and commerce) are also advantaged by the reduction in backlog caused by the quick resolution of commercial disputes. In turn, this will further economic growth, increase foreign investment, and make India an attractive place to do business. Further, it also benefits the economy as a whole given that a robust dispute resolution mechanism is a sine qua non for the all-round development of an economy.”

13. The primary aim and object of the Commercial Courts Act, as can be discerned from its Statement of Objects and Reasons, was to provide speedy disposal of high value commercial disputes in order to reduce the pendency of cases. The

relevant portion of the Statement of Objects and Reasons reads:

"The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and questions of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system."

14. A holistic reading of the Statement of Objects and Reasons for the Commercial Courts Act as also the Law Commission's 188th Report and the 253rd Report, throw immense light on why the Commercial Courts Act was in fact enacted. The Parliament sought to revamp the commercial dispute resolution mechanism system by separating it from other civil disputes in order to effectuate its primary aim i.e. to ensure the speedy disposal of commercial disputes in India.

15. The Commercial Courts Act establishes Commercial Courts at the District level and Commercial Divisions in the various High Courts (including those having ordinary original civil jurisdiction) across India, to deal with Commercial Disputes of a Specified Value, as may be notified by the Central Government. The Specified Value, as defined by the Commercial Courts Act, stood at Rupees One Crore. Therefore, the

Commercial Courts Act originally contemplated that only those matters wherein the subject matter of a commercial dispute exceeded Rupees One Crore would fall within the purview of the Commercial Courts Act. However, the Commercial Courts Act came to be amended in 2018 by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018. Amongst other amendments, the Specified Value stood reduced to Rupees Three Lakhs as against the earlier Rupees One Crore.

16. Accordingly, I have perused the 188th Report, 253rd Report, the recommendations therein and the Statement of Objects and Reasons of the Commercial Courts Act. In so far as the Commercial Courts Act is concerned, there can be no manner of doubt that the paramount intent of the legislature was to reduce delay in commercial cases and improve our country's image from the perspective of ease of doing business in India. This intent stands further reemphasized by Section 17 of the Commercial Courts Act, which reads as under :

"17.Collection and disclosure of data by Commercial Courts, Commercial Divisions and Commercial Appellate Divisions. The statistical data regarding the number of suits, applications, appeals or writ petitions filed before the Commercial Court, Commercial Appellate Courts, Commercial Division, or Commercial Appellate Division, as the case may be, the pendency of such cases, the status of

each case, and the number of cases disposed of, shall be maintained and updated every month by each Commercial Courts, Commercial Appellate Courts, Commercial Division, Commercial Appellate Division and shall be published on the website of the relevant High Court.”

17. In line with Section 17, the Central Government has also published Commercial Courts (Statistical Data) Rules, 2018. Under Rule 3 of these rules, every Commercial Court, Commercial Appellate Court, Commercial Division and Commercial Appellate Division of all High Courts in India is required to publish statistical data, as required by Section 17 of the Act, by the tenth day of every month in the following manner on the concerned High Court’s website:

Sr. No.	Name of the Court	No. of cases pending (on the 1 st day of month of.....)	No. of new cases instituted (during the month as per column 3)	Total cases pending in the court (on the last day of the month as per column 3)	No. of cases disposed (during the month as per column 3)	Average no of days taken to decide the case
(1)	(2)	(3)	(4)	(5)	(6)	(17)

18. In my opinion, the aforesaid Section 17 and Commercial Courts (Statistical Data) Rules, 2018 provide for a telling argument as to the intent, object and purpose of the Commercial Courts Act. These enactments are important instances as to how the legislature continues to monitor the application of the Commercial Courts Act. As per the statistical data published by this Court for the month of October, 2018,

there were 3,220 cases pending before the Commercial Division of this High Court.

19. Further thereto, during the pendency of this Order, a Ld. Single Judge of the Delhi High Court in *Roland Corporation vs. Sandeep Jain* [2019 SCC OnLine Del 6557] imposed time limits for conclusion of oral arguments in a Commercial Suit at its first Case Management Hearing. This provides for ample persuasion as to the prevailing mind-set regarding the interpretation and implementation of the Commercial Courts Act.

III. THE APEX COURT'S DECISION IN M/S SCG CONTRACTS INDIA PVT. LTD. VS. K.S. CHAMANKAR INFRASTRUCTURE PVT. LTD. & ORS. [CIVIL APPEAL NO. 1638 OF 2019] AND OTHER DECISIONS ON THE COMMERCIAL COURTS ACT:

20. During the intervening period that arguments concluded and the date of this order, the Apex Court has, in *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors. Civil Appeal No. 1638 of 2019* considered the subject provision of Order VIII Rule 1 and laid down as under :

"5) Learned counsel appearing on behalf of the petitioner has taken us through the recent amendments made in the Code of Civil Procedure and argued, laying great emphasis on State of Bihar and Others vs. Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472 as well as Canara Bank vs. N.G. Subbaraya Setty and Anr. AIR 2018 SC 3395 for the proposition that the

amendments so made now provide for the consequence of nonfiling of written statement, and as this is so, the provisions of Order VIII Rules 1 and 10 can no longer be said to be directory but can only be said to be mandatory. In this view of the matter, since a statutory prohibition now exists, the doctrine of res judicata cannot be availed.

6) As against this, learned counsel appearing on behalf of the respondents has argued, basing himself on the decisions in Bhanu Kumar Jain vs. Archana Kumar and Another, (2005) 1 SCC 787 and Shaikh Salim Haji Abdul Khayumsab vs. Kumar and Others, (2006) 1 SCC 46 that the vital difference between res judicata in a subsequent suit and res judicata in two different stages of the same proceeding must be kept in view. He stated that as the 05.12.2017 order had attained finality and could only now be challenged after the decree in the Suit is passed, clearly, the order of 24.09.2018 is correct. He also stated that by now the order dated 05.12.2017 had been acted upon and a wrongful act of the Court therefore, cannot prejudice him. He also argued citing the judgment of R.K. Roja vs. U.S. Rayudu and Another, (2016) 14 SCC 275 that as an Order VII Rule 11 application had been filed and that had to be answered before trial of the Suit could commence, it was clear that a written statement could not be filed. He then relied upon Section 151 of the Code of Civil Procedure which preserves the inherent power of the court, more particularly, that of a Court of record - the High Court, and can be invoked in cases like the present where grossly unjust consequences

would otherwise ensue.

7) Having heard learned counsel for both parties, it is important to first set out the statutory provisions.

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

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

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

“Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing

and on payment of such costs as the Court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

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

“Procedure when party fails to present written statement called for by Court.- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgment a decree shall be drawn up. Provided further that no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.”

A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to

file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.

9) In Bihar Rajya Bhumi Vikas Bank Samiti (supra), a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to Kailash vs. Nanhku, (2005) 4 SCC 480 referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred to the Salem Advocate Bar Association vs. Union of India, (2005) 6 SCC 344, which, like the Kailash judgment, held that the mere expression “shall” in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 State vs. N.S. Ganeswaran, (2013) 3 SCC 594 in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the Section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under:

“23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly

provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences.”

10) Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku Tech Private Limited vs. Sangeet Agarwal & Ors. by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No. 3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics vs. Oasis Commercial Pvt. Ltd. 2018 SCC Online Del 6698.

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

19) The appeal is allowed, with the consequence that the written statement of Defendant No.1 must be taken off the record.”

21. In addition to the aforesaid decision of the Apex Court, the Delhi High Court has also, on various occasions, interpreted the language introduced by the Commercial Courts Act to leave no discretion with a Commercial Division to take on record a written statement after the stipulated period of 120 days. To demonstrate this view of the Delhi High Court, the following decisions were cited by Mr. Kohli:

21.1. Gulf DTH FZ LLC vs Dish TV Limited & Ors. [2016 SCC OnLine Del 5005]:

“11. The question then arises whether it was open to Defendant No. 1 to await the disposal of the said application and to expect that time for filing the written statement would get extended till such time the application under Order VII Rules 10 & 11 of the CPC was not disposed of?

12. In the considered view of the Court, given the very object of the Commercial Courts Act and the amendments brought about in the CPC for strict adherence of the timeline for the various stages in a commercial suit, the above proposition put forth by Defendant No. 1 is not legally tenable.

15. What the above decisions emphasize is only that the remedy under Order VII Rule 11 of the CPC is an independent one which does not have to await the filing of the written statement. The decisions further emphasize that an application under Order VII Rule 11 CPC would have to be decided even where a written statement has not been filed. None of the above decisions were dealing with a special statute

like the Commercial Courts Act which has amended the relevant provisions of the CPC for the time limit for filing of a written statement. By no stretch of imagination can it be construed that either of the above decisions have held that the time for filing written statement in a commercial suit in terms of the Commercial Courts Act gets postponed till the disposal of the application under Order VII Rule 11 CPC.

16. In the context of the Commercial Courts Act which prescribes a mandatory time schedule for completion of various stages in commercial suits, the submission that the time for filing the written statement in a commercial suit will, notwithstanding the amendment to the proviso to Order V Rule 1 and the proviso to Order VIII Rule 1 of the CPC, get extended beyond the disposal of the application under Order VII Rules 10 & 11 CPC is not legally tenable and is rejected as such.

17. What makes it difficult for Defendant No. 1 is the further fact that there is no automatic presumption that the time for filing the written statement in a commercial suit is extended up to 120 days even if the Defendant No. 1 had filed an application before the Court seeking extension of time beyond 30 days. The normal time period for filing written statement even in a commercial suit is 30 days from the date of service of summons. It is only upon filing an application before a Court furnishing valid reasons can the Commercial Court extend the time for filing written statement beyond 30 days. What the proviso to both Order V Rule 1 as well as the Order VIII Rule 1

CPC, as amended by the Commercial Courts Act, does is to curb the discretion available with the Court to extend the time beyond 120 days.

18. In the present case, Defendant No. 1 has not filed an application before the Court seeking extension of time to file the written statement beyond 30 days. Secondly, since in any event no written statement has been filed before the expiry of 120 days, the question of a Court further extending the time beyond 18th April, 2016 - the date on which 120 days expired - as if such an application had been filed before it does not arise. The order dated 19th April, 2016 of this Court simply notes that fact the right of Defendant No. 1 to file a written statement stands closed. Consequently, there is no error apparent on the face of the said order warranting its recall.

19. This application is accordingly dismissed.”

21.2. Saregama India Limited vs Jai Manjit Singh 2017 [SCC Online Del 12169]:

"2.Learned counsel for the defendants No. 2 and 3 prays for four weeks further time to file a written statement.

3.Since more than 120 days have been lapsed, this Court is powerless to extend the time for filing the written statement. A Coordinate Bench of this Court in Oku Tech Private Limited v. Sangeet Agarwal, CS(OS) 3390/2015 has held as under :—

“8. The amendments to the CPC brought out by the Schedule to the Act seek to fill the above gap, as it were, in the CPC. The substituted second proviso to Order V Rule 1 and the

substituted proviso to Order VIII Rule 1 place an outer limit of 120 days from the date of service of summons up to which the Court can grant time to file written statement. It categorically states that “on expiry of 120 days from the date of service of summons, the Defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.” This is re-emphasised by inserting a proviso to Order VIII Rule 10 CPC, which after such insertion, reads as under:

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

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

9. Therefore, it is plain that the above amendment reflects the legislative intent to take away the discretion of the Court in extending the time for filing the written statement.”

4. In view thereof, the right of the defendants No. 2 and 3 to file a written statement is closed.”

21.3. AIS Glass Solutions Limited vs Moser Baer Solar

Limited & Ors[2017 SCC Online Del 11467]:

“10. Admittedly, after thirty days, extendable upto ninety days period of limitation prescribed for filing of written statement, the defendant no. 1 filed the present application on 16th March, 2017 being I.A 5923/2017 seeking extension of time by two weeks to file the written statement. It is pertinent to mention that a Coordinate Bench of this Court in OKU Tech Private Limited v. Sangeet Agarwal, CS(OS) 3390/2015 has held that a Court in a commercial suit cannot extend the time for filing the written statement beyond one hundred twenty days after service of summons.

11. In fact, the written statement was filed on 7th July, 2017, i.e, more than eight months after the protection under Section 22 of SICA had ceased to apply and ninety eight days after the time of two weeks sought had expired.

12. This Court is also of the opinion that if the defendant no. 1's submission is accepted, it would mean that a defendant in an ordinary suit who has not filed its written statement for three to four years, would get a right to file the written statement after coming into force of the Act, 2015.

13. The intention of the Legislature while passing the Act, 2015 was to expedite the hearing and disposal of the commercial suits. If the submission advanced by learned counsel for the defendant no. 1 is accepted it would negate the very intent behind the passing of the Act, 2015.

14. This Court is also of the view that filing an application

seeking extension of time to file a written statement does not stop the clock.

15. Since in the present case the written statement has been filed eight months after the protection under Section 22 of SICA had lapsed, this Court is of the view that the defendant no. 1's written statement cannot be taken on record.

16. Consequently, present application for extension of time to file written statement is dismissed and the Registry is directed to return the written statement to defendant no. 1."

21.4. System Air India Private Limited vs ETA Engineering Private Limited [CS (COMM) 56/2016 at pages 5 and 6]:

"Having heard the learned counsel on both sides and having gone through the amended provisions of CPC, this court finds the observations of the learned single Judge in the above mentioned two cases to be the appropriate view which deserve to be followed. After the amendment was carried out to CPC, for purposes of trial of commercial disputes before the Commercial Courts Act, the discretion to grant any condonation beyond the maximum period of 120 days has been taken away.

In these circumstances, the Commercial court cannot either look into the grounds on which the delay is being explained or take a discretionary view so as to permit any extension beyond the maximum period of 120 days.

Thus, the application for condonation of delay which is (IA 8751/2016) of the defendant is dismissed."

*21.5 Oku Tech Private Limited vs Sangeet Agarwal & Ors.
[CS(OS) 3390/2015]:*

“8. The amendments to the CPC brought out by the Schedule to the Act seek to fill the above gap, as it were, in the CPC. The substituted second proviso to Order V Rule 1 and the substituted proviso to Order VIII Rule 1 place an outer limit of 120 days from the date of service of summons up to which the Court can grant time to file written statement. It categorically states that “on expiry of 120 days from the date of service of summons, the Defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.” This is re-emphasised by inserting a proviso to Order VIII Rule 10 CPC, which after such insertion, reads as under:

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

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

9. Therefore, it is plain that the above amendment reflects the

legislative intent to take away the discretion of the Court in extending the time for filing the written statement.

12. Mr. Mason appearing for Defendants 1, 3 and 5 pointed out that the parties were seeking to arrive at a settlement and, therefore, the failure to file written statement was for bona fide reasons and that the Court should exercise its discretion to condone the delay of 14 days, which according to him is insubstantial. The Court is unable to accept the above plea for the simple reason that the discretion of the Court to extend the time for filing written statement beyond 120 days after service of summons no longer survives in view of the amendments to the CPC brought about by the Schedule to the Act. The outer limit for filing written statement is now 120 days from the date of service of the summons.

13. For the aforementioned reasons, the Court declines the prayer for condonation of delay in Defendants 1, 3 and 5 filing their written statement.”

21.6. Maja Cosmetics vs Oasis Commercial Pvt. Ltd. [2018 SCC online Del 6698]:

“27. Once the appeal is found to be maintainable, there is no iota of doubt that the view taken by the learned Joint Registrar (Judicial) is contrary to Oku Tech Private Limited (supra) which has been followed by other single Judges and reference may be made to Saregama India Limited v. Jai Manjit Singh 2017 SCC OnLine Del 12169 and AIS Glass Solutions Limited v. Moser Baer Solar Limited 2017 SCC OnLine Del 11467.

30. The order dated 9th January, 2017 of the Joint Registrar allowing the application of the defendant for condonation of delay in filing the written statement is set aside. Resultantly, IA no. 15044/2016 of the defendant is dismissed.”

22. In addition to the aforesaid decision of the Delhi High Court, Mr. Kohli also placed reliance on the matter of *Rayco Engineering Services Vs. R.K. Hoteliers And Developers Pvt Ltd [CS (Comm) 321/2017]*. In this matter, by an order dated 30th November, 2017, the Delhi High Court refused to take on record a written statement filed after the expiry of 120 days relying on a co-ordinate bench's decision in *Oku Tech Private Limited vs. Sangeet Agarwal & Ors. CS(OS) No.3390/2015*. Thereafter, the Defendant preferred a review petition being Review Petition No.162/2018 against the aforesaid order. By another order dated 19th April, 2018, the Delhi High Court dismissed the Review Petition reaffirming its earlier view. Being aggrieved by both the aforesaid decisions, the Defendant preferred a Special Leave Petition being SLP (C) Diary No. 16781/2018 before the Apex Court. At the hearing of this SLP, by an order dated 4th July, 2018, the Apex Court was pleased to order:

“On the facts of this case, we are not inclined to interfere with the impugned judgment and order passed by the High Court.

The special leave petitions are accordingly dismissed.”

23. Hence, relying upon the Apex Court's decision, Mr. Kohli argued that

the view taken by the Delhi High Court as far back as August, 2016 and consistently thereafter, still holds the field and a challenge to the said view has not been altered by the Apex Court till date.

24. Following from the above argument, Mr. Kohli concluded that this Court ought not to interpret Order VIII Rule 1 as discretionary, as such interpretation would render the entire scheme, object, intent and purpose of the Commercial Courts Act otiose. In support of his arguments, Mr. Kohli relied upon the aforesaid decisions of the Delhi High Court where this question of law had arisen. The relevant paragraphs of these decisions cited by Mr. Kohli have already been set-out hereinabove. With support of the aforesaid case-law and mandatory language of the Commercial Courts Act, he argued that a written statement cannot be taken on record after the stipulated period of 120 days. In addition to the above, Mr. Kohli sought to draw a parallel from this Court's decisions whilst construing limitation periods prescribed under '*special acts*'. He relied upon this Court's decisions in *Hetal Alpesh Muchhala v. Adityesh Educational Insitute*[2009 SCC OnLine Bom 1454] and *Zapp India Ltd. v. Maheshwar Textiles* [2013(2) Mh.L.J. 103] which were in context of Section 10F of the Companies Act, 1956 and Section 34 of the Arbitration & Conciliation Act, 1996 respectively.

25. In addition to the aforesaid, Mr. Kohli argued that for a true and correct interpretation of the Commercial Courts Act, this Court ought to use the '*Mischief*'

Rule’ of interpretation of a statute as laid down in the *Heydon’s case (1584) 3 Co. Rep. 7a, p. 7b : 76 ER 637* decided in the year 1589. The Heydon’s case has now acquired the status of a classic rule as recorded by the Apex Court in the matter of *Kanai Lal Sur vs. Paramnidhi Sadhukhan AIR 1957 SC 907*. According to the ‘*Mischief Rule*’, courts are required to consider four criteria for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law. The four criteria are:

- i. What was the common law before the making of the Act?
- ii. What was the mischief and defect for which the common law did not provide?
- iii. What remedy has the Parliament resolved and appointed to cure the mischief;
and
- iv. The true reason of the remedy.

26. According to Mr. Kohli, the duty cast upon a Court whilst considering the aforesaid four criteria is always to ensure interpretation that (i) suppresses the mischief; (ii) advances the remedy; and (iii) suppresses subtle inventions and evasions for continuance of the mischief. According to Mr. Kohli, in the present case, the law prior to the Commercial Courts Act was that the proviso to Order VIII Rule 1 was held to be discretionary; the consequence for the mischief under the un-amended Order VIII Rule 1 was not provided for and neither was the power of the Court to take on record a written statement curtailed. However, the Commercial Courts Act in its present form seeks to cure exactly this mischief by providing for consequences on a

Defendant who fails to file its written statement within the stipulated period of 120 days and also divests this Court from taking on record a written statement. Mr. Kohli thus contended that this Court ought to interpret Order VIII in its application to Commercial Suits in context of the '*Mischief Rule*' and thereby suppress the mischief of delay in filing of written statements whilst advancing the remedy of expeditious disposal of Commercial Suits.

27. I have considered the aforesaid rulings on the Commercial Courts Act reproduced hereinabove. As can be seen from paragraph nos. 10 and 11 of *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.* (supra), the Delhi High Court's view has been expressly reaffirmed by the Apex Court on February 12, 2019. This view has thus held the field since the introduction of the Commercial Courts Act, till today.

28. The Apex Court's pronouncement, in my opinion, concludes the interpretation of the newly introduced amendments to Order V Rule 1 and Order VIII Rules 1 and 10 in so far as they are applicable to Commercial Suits. The Apex Court, whilst reaffirming the view of the Delhi High Court has held that in Commercial Suits, a written statement cannot be taken on record after the expiry of 120 days from the date of service of the summons. In addition to the Apex Court and Delhi High Court's view, even a literal reading of the amended provisions of Order VIII Rule 1 suggest that not only are penal consequences provided for upon the Defendant failing to file its written statement; but the discretion of the Commercial Court / Commercial Division

to take on record a written statement thereafter has also been taken away. In so far as the interpretation of the mandatory language introduced by the Commercial Courts Act is concerned, I seek reliance on the following findings of the Apex Court in *Union of India v. Popular Construction Co.*, [(2001) 8 SCC 470]:

“12.As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are “but not thereafter” used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase “but not thereafter” wholly otiose. No principle of interpretation would justify such a result. ”

29. In addition to the above literal interpretation of the mandatory language as has been introduced by the Commercial Courts Act, even if I were to construe Order VIII Rule 1 using the *Mischief Rule* as argued by Mr. Kohli, I would be required to (i) suppress the mischief; (ii) advance the remedy; and (iii) suppress subtle intentions and evasions for continuance of the mischief. Admittedly, the mischief prior to the Commercial Courts Act was belated filings of written statements on flimsy and frivolous grounds. It is for this reason that penal consequences have now been provided and the discretion of the court taken away. In this backdrop, I agree with the

submissions of Mr. Kohli that the proviso to Order VIII Rule 1 introduced by the Commercial Courts Act, is mandatory. In this respect, I am bound by the view of the Apex Court supra. I therefore reiterate that the amendments introduced by the Commercial Courts Act to Order V Rule 1 and Order VIII Rules 1 and 10 are mandatory in nature.

30. Whilst I am bound by the view taken by the Apex Court, there remain two other arguments to be considered, which are :

i. *That this Court has the power under its Letters Patent and the Bombay High Court (Original Side) Rules, 1980 to take on record a written statement even after the expiry of 120 days; and*

ii. *That this Court has discretion under Order VIII Rule 9 to take on record a written statement even after the expiry of 120 days.*

IV. **ARGUMENTS ON THE COMMERCIAL COURTS ACT VIS-À-VIS THE BOMBAY HIGH COURT (ORIGINAL SIDE) RULES, 1980:**

31. In support of the first argument, Mr. Sen, Ld. Senior Advocate argued that even in Commercial Suits, the Bombay High Court (Original Side) Rules would empower this Court to condone the delay and take on record a written statement after the expiry of 120 days. In support of his argument, he placed great emphasis on the judgment of the Apex Court in *Iridium India Telecom Ltd vs Motorola INC [(2005) 2 SCC 145]* (“*Iridium*”). Relying on *Iridium*, Mr. Sen argued that the controversy

regarding the inter-play between the CPC and Bombay High Court (Original Side) Rules was expressly settled by the Apex Court. He argued that in *Iridium*, the Apex Court held that the provisions of Order VIII Rule 1 as amended by the Civil Procedure (Amendment) Act of 2002, would not apply to this Court. Relying on this ratio, Mr. Sen argued that even the recent amendments to the CPC brought forth by the Commercial Courts Act would not apply to Commercial Suits as this Court would continue to be governed by the rules of procedure in the Bombay High Court (Original Side) Rules. In order to consider this argument of Mr. Sen, it is important to set-out the following from *Iridium* :

“Contentions

5.The learned counsel for the appellant contends thus: the view taken by the High Court that the proceedings on the original side of the High Court would be governed by the Original Side Rules and not by the amended provisions of Order 8 Rule 1 CPC, is contrary to the legislative intendment; the High Court (Original Side) Rules were framed under the delegated rule-making power under Section 129 CPC and they could not override the provisions of the amended Order 8 Rule 1, which is a part and parcel of the substantive statute itself; this is particularly so, when the intention of Parliament in making the amendment is clear, namely, to shorten the time period of endlessly long and protracted course of litigation and to discourage dishonest defendants from interminably seeking adjournments. Hence, Parliament has

now made a tight schedule within which written statements have to be filed, failing which the legal consequences contemplated under CPC, including the one as to making of an ex-parte decree should follow; rules framed by the High Court under the delegated rule-making power conferred by Section 129 CPC could not be treated as “a stand-alone body of rules outside CPC”, as erroneously done by the High Court in the impugned judgment; that Section 129 CPC must be so interpreted as not to defeat the substantive vested rights created in favour of a litigant under the Amendment Act of 2002. Since the written statement had not been filed within the time prescribed therein, by reason of the amended provisions of Order 8 Rule 1, the plaintiff-appellant had a vested right to have his suit decided ex-parte.

6.The learned counsel for the respondent supported the impugned judgment and reiterated the arguments which have appealed to the High Court.”

The statutory scheme

7.The Code of Civil Procedure, 1908 is an Act to consolidate and amend the laws relating to the procedure of the courts of civil judicature. It would, therefore, govern all actions of a civil nature, unless otherwise provided for in CPC. Some of the provisions of CPC, however, do make some exceptions, and it is necessary to notice them.

8.Section 4(1) provides as follows:

“4.Savings.—(1) In the absence of any specific provision to

the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.”

9. Apart from this section, Part IX CPC contains the fasciculus of Section 116 to Section 120 delineating the manner of application of CPC to the High Courts. Section 116 declares that Part IX applies only to High Courts not being the Court of a Judicial Commissioner. Section 117 provides that save as provided in Part IX or X or in the rules, the provisions of the Code would apply to such High Courts. Section 120 provides that Sections 16, 17 and 20, which deal with the pecuniary and territorial jurisdictions, shall not apply to the High Court in the exercise of its original civil jurisdiction.

10. Then comes Part X, which deals with the rule-making power. By Section 121 the rules prescribed in the First Schedule, being rules prescribed by the legislature itself, have been declared to have the same effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part X. Section 122 confers power on a High Court, other than the Court of a Judicial Commissioner, to annul, alter or add to all or any of the rules in the First Schedule. This power is conferred with regard to rules regulating their own procedure and the procedure of the civil courts subject to their superintendence, but is subject to the

condition of previous publication. Section 123 contemplates the constitution of Rule Committees in each of the High Courts as prescribed therein. Such a committee makes its report to the High Court under Section 124 formulating and forwarding proposals with regard to annulment, alteration or addition in the First Schedule or for making new rules. Section 126 requires that the rules made by the High Court shall be subject to the previous approval of the State Government concerned. Section 127 requires previous publication of the rules so made in the Official Gazette. Section 128 enumerates a number of matters with regard to which rules may be framed by the High Courts. Then comes Section 129, which is crucial for the present discussion.

11. Section 129 reads as under:

“129. Power of High Courts to make rules as to their original civil procedure. —Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.”

12. Mr Ram Jethmalani, learned counsel for the appellant, strenuously urged that the power of the High Court to frame rules governing the procedure on its original side is a delegated legislative power, and can in no event override or be

independent of the parent legislation, namely, CPC. According to him, Parliament has, by prescription of rules in the First Schedule to CPC, declared that the said rules would have the same status as if enacted in the body of the Code itself. No doubt, power has been given to the High Courts to amend these rules, subject to the condition of the report of the Rule Committee, previous approval of the State Government and publication of the rules. He contends that Section 129 CPC does not invest any independent power in the High Courts to make rules, but must be read harmoniously with the High Courts' power under Section 122 CPC, if not as subordinate and subject thereto.

13. Section 129 begins with a non obstante clause and seems to suggest something to the contrary. At least as far as chartered High Courts are concerned, Section 129 seems to invest them with the power to make rules with regard to the regulation of their own procedure, which may be inconsistent with CPC itself, as long as such rules are consistent with the Letters Patent establishing the High Courts. The section also ends with the words "nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code".

(emphasis ours)

14. CPC has been amended from time to time in order to meet the changing situations. The historical developments as to the application of CPC to the proceedings in the chartered High Courts are illuminating. In order to appreciate the merit of

the contention so strongly urged by the learned counsel for the appellant, it would be necessary to take a chronological perspective of the law.

Chronological perspective

15. Prior to the establishing of the chartered High Courts by the British Government in 1862, the civil courts in the Presidency of Bombay were governed by the Code of Civil Procedure, 1859 (Act 8 of 1859, which received the assent of the Governor General on 22-3-1859). This Act, as its preamble suggests, was “an Act for simplifying the procedure of the courts of civil judicature not established by Royal Charter” and was not intended to apply to High Courts established by Royal Charter.

16. The First Letters Patent or Charter establishing High Courts was accompanied by a dispatch from the Secretary of State on 14-5-1862, and was in force till revoked by a further Letters Patent on 28-12-1865. The learned counsel drew our attention to para 36 of the dispatch, which explains the purpose of clause 37 in the First Letters Patent. The said para 36 of the dispatch reads as under:

“36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the legislature of India for the court,

not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment.”

17.It is therefore seen that clause 37 of the Letters Patent was intended to extend to the High Courts the Code of Civil Procedure enacted by the legislature of India for the courts other than the courts established by Royal Charter. The intention was to substitute one simple Code of Procedure for the various systems which had been in operation in the Supreme Court since the date of its establishment.

18.Clause 37 of the Letters Patent of 1865, which deals with “civil procedure and regulation of proceedings”, reads as follows:

“37. And we do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its admiralty, vice-admiralty, testamentary, intestate and matrimonial jurisdictions, respectively:

Provided that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the

Governor-General-in-Council, and being Act 8 of 1859, and the provisions of any law which has been made amending or altering the same, by competent legislative authority for India.”

(Letters Patents of the three High Courts, namely, Calcutta, Bombay and Madras are identically worded.)

19. The Code of Civil Procedure, 1877 (Act 10 of 1877), which received the assent of the Governor General on 30-3-1877, and was thereafter brought into force with effect from 1-10-1877, was “an Act to consolidate and amend the laws relating to the procedure of the court of civil judicature”. Part IX of this Act contained special rules relating to the chartered High Courts. Chapter XLVIII of the Act applied only to the chartered High Courts. Section 632 of the Civil Procedure Code of 1877, in express words, provided “except as provided in this chapter the provisions of this Code apply to such High Courts”. Section 638 was the exception to the general rule and provided as under:

“The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, Sections 16 and 17, Sections 54 clauses (a) and (b), 57, 119, 160, 182 to 185 (both inclusive), 187, 189, 190, 191, 192 (so far as relates to the manner of taking evidence), 198 to 206 (both inclusive), 261, and so much of Section 409 as relates to the making of a memorandum; and Section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Nothing in this Code shall extend or apply to any High Court in the exercise of its jurisdiction as an Insolvency Court.”

20.The legislature recognised the special role assigned to the chartered High Courts and exempted them from the application of several provisions of the Code in the exercise of their ordinary or extraordinary civil jurisdiction for the simple reason that those jurisdictions were governed by the procedure prescribed by the rules made in exercise of the powers of the chartered High Courts under clause 37 of the Letters Patent. Interestingly, Section 652 of this Act itself empowered the High Courts to make rules “consistent with this Code to regulate any matter connected with the procedure of the courts of civil judicature subject to its superintendence”, suggesting that consistency with the Code was a sine qua non only when making rules for the subordinate courts.

21.The Code of Civil Procedure, 1882 (Act 14 of 1882) received the assent of the Governor General on 17-3-1882. It also contained Part IX dealing with special rules relating to the chartered High Courts. Section 638 of this Code also exempted the chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction from the application of the Code. Section 652 invested the High Courts with power to make rules “consistent with this Code to regulate any matter connected with its own procedure or the procedure of the courts of civil judicature subject to its

superintendence”.

(emphasis ours)

22.By an amendment made by Act 13 of 1895, Sections 632 and 652 of the Code of Civil Procedure, 1882 were amended. Section 632, as amended by this Act, reads as under :

“Except as provided in this chapter and in Section 652 the provisions of this Code apply to such High Courts.”

The amendment made in Section 652 provides an aperçu to the controversy. Section 652 was amended by adding the following :

“Notwithstanding anything in this Code contained, any High Court established under the said Act for establishing High Courts of Judicature in India may make such rules consistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit.

All such rules shall be published in the local Official Gazette, and shall thereupon have the force of law.”

23.The reason for making this amendment is clarified in the Statement of Objects and Reasons accompanying the relevant Bill 13 of 1895 in the following words:

“Section 652 of the Code of Civil Procedure, as it now stands, purports to require that any rules to regulate its own procedure made by a High Court, even although it be established by Royal Charter, shall be consistent with that

Code. The Letters Patents of the High Courts at Fort William, Madras and Bombay, appear, however, to recognise the practical expediency of leaving such High Courts some latitude in the direction of adapting the provisions of the ordinary law to meet their requirements. It has been found by experience that these provisions are not in all respects convenient in the case of original proceedings in those courts, and the object of this Bill is, by an amendment of Section 652 and, an ancillary amendment of Section 632, to bring the Code into perfect harmony with the provisions of those Letters Patents and to enable the High Courts referred to, to regulate the exercise of their original civil jurisdiction accordingly.”

24. Then we come to the 1908 Act, which made a drastic departure from the hitherto pattern of the Code. The Code was now divided into a fascicle of substantive sections and a schedule containing rules, which by force of Section 121 were declared to have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part X CPC.

25. Despite the sweeping change made by the 1908 Act, interestingly, the amendment introduced in the Code of Civil Procedure, 1882 by Act 13 of 1895, which we have quoted above, was retained in a slightly modified form in Section 129.

The arguments

26. Learned counsel for the appellant emphasised the fact

that the High Court's power of making rules and orders for regulation of civil proceedings before it, conferred by clause 37 of the Letters Patent, is subject to the proviso that the High Court shall be guided in making such rules and orders as far as possible by the provisions of the Civil Procedure Code of 1859, and any provision of law amending or altering the same by a competent legislative authority in India. It is urged that the powers of the chartered High Courts to make rules to govern civil proceedings of its original side is itself derived from clause 37 of the Letters Patent; clause 37 of the Letters Patent requires the rules to be in conformity with the provisions of CPC. Ergo, the rules are overridden by CPC to the extent of conflict, goes the argument.

27.The learned counsel for the respondent, however, justifiably contends that the purpose of retaining Section 129 in the present form is exactly the purpose for which it was inserted, in the first place, in CPC of 1882 by amending Act 13 of 1895, namely, "to recognise the practical expediency of leaving such High Courts some latitude in the direction of adapting the provisions of the ordinary law to meet their requirements", and further, "it had been found by experience that these provisions were not in all respects convenient in the case of original proceedings in those courts". The amendment, therefore, became necessary "to bring the Code into perfect harmony with the provisions of the Letters Patent and to enable the High Courts referred to, to regulate the exercise of their original civil jurisdiction accordingly".

28. It appears to us that this was the real reason why a distinction was drawn between the proceedings in original jurisdiction before the chartered High Courts and those in other courts. For historical reasons this distinction was maintained right from the time the Letters Patent was issued, and has not been disturbed by the Code of Civil Procedure, 1908, despite the amendments made in CPC from 1976 to 2002.

29. The learned counsel for the appellant referred to the speech of the Law Member while introducing the Code of Civil Procedure Bill, 1907, which ultimately resulted in the Code of 1908. Our attention was drawn to the proceedings of the Council of the Governor General of India (published in the Gazette of India dated 7-9-1907, pp. 134 to 143). The only relevant portion is the portion at p. 141 where the Law Member, who introduced the Bill, referring to clauses 145 and 148 to 150 contained in Parts X and XI of the Bill, explained the need as under:

“I have already explained the nature of the rule-making power which is dealt with in Part X of the Bill and in regard to Part XI (miscellaneous), I would only call attention to clauses 145 and 148 to 150, which widen the discretion of courts. They confer powers to enlarge time and to amend written proceedings, and they recognise the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In these ways greater elasticity will, it is hoped, be of benefit.”

30. Far from advancing the case of the appellant, the speech of the Law Member, while introducing the Bill, suggests that it was thought necessary that the inherent powers of the Court to make appropriate orders, as may be necessary for the ends of justice or to prevent abuse of the process of the Court, was retained for the purpose of greater elasticity.

31. It is next contended for the appellant that merely because Section 129 CPC begins with the non obstante clause “notwithstanding anything in this Code”, the section cannot be construed as a departure from the entire body of CPC so as to render the rules made by the High Courts to regulate its own procedure in the exercise of its original civil jurisdiction into a “stand-alone body of rules”. Our attention was drawn by the learned counsel to pp. 318-20 of Justice G.P. Singh’s Principles of Statutory Interpretation (9th Edn.), and it was contended that

“the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment”.

Reliance was placed on the observations of this Court in Aswini Kumar Ghosh v. Arabinda Bose [1953 SCR 1, p. 24 : AIR 1952 SC 369, p. 377] where it was said:

“The enacting part of a statute must, where it is clear, be

taken to control the non obstante clause where both cannot be read harmoniously;”

32.The observations of this Court in Venkataramana Devaru v. State of Mysore[1958 SCR 895 : AIR 1958 SC 255, para 29], R.S. Raghunath v. State of Karnataka [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81], Krishan Kumar v. State of Rajasthan [(1991) 4 SCC 258, para 11 : AIR 1992 SC 1789, para 11] , Sultana Begum v. Prem Chand Jain [(1997) 1 SCC 373, paras 12 to 15 : AIR 1997 SC 1006, para 12] and Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth[(1984) 4 SCC 27, para 20 : AIR 1984 SC 1543, para 20] were also relied upon to contend that when there is an apparent conflict between different provisions of a statute, the court must give effect to all of them by adopting the principle of harmonious construction.

33.There cannot be any doubt about the principle of harmonious construction. However, what confronts us is not a mere question of two independent provisions of CPC being in conflict. The provisions of CPC, which we have extracted, and the historical development of the different sections to which we have referred, do not suggest a situation of mere conflict. They seem to suggest that, throughout, the legislature had made a distinction between the proceedings in other civil courts and the proceedings on the original side of the chartered High Courts. This distinction was made for good historical reasons and it had continued unabated, as we

have noticed, through the consolidating Acts, and continued unaffected even through the last amendment of CPC in the year 2002. In the face of this body of evidence, it is difficult to accede to the contention of the appellant that the force of the non obstante clause is merely declaratory and not intended to operate as a declared exception to the general body of CPC.

34. After noticing the observations made in Aswini Kumar Ghosh [1953 SCR 1, p. 24 : AIR 1952 SC 369, p. 377] and Dominion of India v. Shrinbai A. Irani [(1955) 1 SCR 206 : AIR 1954 SC 596] this Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Guram [(1986) 4 SCC 447, pp. 477-78, paras 67-68] observed thus, in the context of construction of a non obstante clause:

“67. A clause beginning with the expression ‘notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract’ is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this

Court in South India Corpn. (P) Ltd. v. Secy., Board of Revenue, Trivandrum [(1964) 4 SCR 280 : AIR 1964 SC 207].

68. It is well settled that the expression ‘notwithstanding’ is in contradistinction to the phrase ‘subject to’, the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. This will be clarified in the instant case by comparison of sub-section (1) of Section 15 with sub-section (1) of Section 15-A. We are therefore unable to accept, with respect, the view expressed by the Full Bench of the Bombay High Court as relied on by the learned Single Judge in the judgment under appeal.”

35. Again in Parayankandiyal Eravath Kanapraavan Kalliani Amma v. K. Devi[(1996) 4 SCC 76, p. 102, para 77] this Court observed:

“77. ‘Non obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment.’ (See Union of India v. G.M. Kokil [1984 Supp SCC 196 : 1984 SCC (L&S) 631] , Chandavarkar Sita Ratna

Rao v. Ashalata S. Guram [(1986) 4 SCC 447, pp. 477-78, paras 67-68], R.S. Raghunath v. State of Karnataka [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] , G.P. Singh's Principles of Statutory Interpretation.)”

36. Reference was made to A.G. Varadarajulu v. State of T.N. [(1998) 4 SCC 231 : AIR 1998 SC 1388] at para 16. This judgment merely followed the observations made in Aswini Kumar [1953 SCR 1, p. 24 : AIR 1952 SC 369, p. 377] and Madhav Rao Scindia v. Union of India [(1971) 1 SCC 85 at p. 139]. There is no doubt that where the non obstante clause is widely worded, “a search has, therefore, to be made with a view to determining which provision answers the description and which does not”. The historical development of the law suggests that the non obstante clause in Section 129 is intended to bypass the entire body of the Code so far as the rules made by the chartered High Court for regulating the procedure on its original side are concerned.

37. The observations of this Court in R.S. Raghunath [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] in paras 11 and 12 (SCC and AIR) were pressed into service. These paragraphs merely reiterate and follow the observations made in Aswini Kumar Ghosh [1953 SCR 1, p. 24 : AIR 1952 SC 369, p. 377] , Dominion of India [(1955) 1 SCR 206 : AIR 1954 SC 596] , Union of India v. G.M. Kokil [1984 Supp SCC 196 : 1984 SCC (L&S) 631] as well as the observations made in Chandavarkar Sita Ratna Rao [(1986) 4

SCC 447, pp. 477-78, paras 67-68] . Finally, in R.S. Raghunath [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] at SCC p. 347 in para 12, the words of Chinnappa Reddy, J. [Ed.: As per his observations in Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424 at p. 450, para 33.] were quoted:

“33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

38. Application of this principle clearly supports the view taken by the High Court.

39. Taking into account the extrinsic evidence i.e. the historical circumstances in which the precursor of Section 129 was introduced into the 1882 Code by a specific amendment made in 1895, we are of the view that the non obstante clause used in Section 129 is not merely declaratory, but indicative of Parliament's intention to prevent the application of CPC in respect of civil proceedings on the original side of the High Courts.

40. The High Court noticed that the interpretation put on Section 129 had been uniformly followed in the several judgments of High Courts, including the judgments of two Full Benches of the Delhi and Calcutta High Courts. (See in this connection Printpak Machinery Ltd. v. Jay Kay Paper Congeters [AIR 1979 Del 217 : ILR (1979) 2 Del 28 (FB)] , Newab Behram Jung v. Haji Sultan Ali Shustry [ILR (1913) 37 Bom 572 : 14 Bom LR 1106] , Virupaksha Rao Naidu v. M. Ranganayaki Ammal [AIR 1925 Mad 1132] , Umeshchandra Banerji v. Kunjilal Biswas [AIR 1930 Cal 685 : ILR 57 Cal 676] , Gopal Das Sidany v. Luchmi Chand Jhawar [AIR 1930 Cal 324 : ILR 57 Cal 106] , Manickchand Durgaprasad v. Pratabmull Rameswar [AIR 1961 Cal 483 (FB)] and Mool Chand v. Kamta Prasad [AIR 1961 All 595].)

41. In Mishri Lal v. Dharendra Nath [(1999) 4 SCC 11, paras 14-22] this Court referred to its earlier decision in Maktul v.

Manbhari [1959 SCR 1099 : AIR 1958 SC 918] on the scope of the doctrine of stare decisis with reference to Halsbury's Laws of England and Corpus Juris Secundum and held (at SCC p. 18, para 14) that

a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority other than the court establishing the rule, even though the court before whom the matter arises afterwards might be of a different view.

42. In our judgment, the principle of stare decisis squarely applies to the case on hand. In the first place, we are not satisfied that all the aforesaid judgments of the High Courts have been wrongly decided. Secondly, even assuming that it is possible to take a different view, as long as the principle has been consistently followed by the majority of the High Courts in this country, as observed in Mishri Lal[(1999) 4 SCC 11, paras 14-22], even if the High Courts consistently have taken an erroneous view (though we do not see that the view is erroneous), it would be worthwhile to let the matter rest, since a large number of parties have modulated and continue to modulate their legal relationships based on the settled law. On this principle also the view taken by the Division Bench of the High Court of Judicature at Bombay commends itself to us.

43. Learned counsel for the appellant next contends that even clause 37 of the Letters Patent establishing the High Court of Bombay, which empowers the High Court to make rules and orders on its original side, is subject to the proviso “that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure ...”. He contends that the words “as far as possible” are words of limitation and must be interpreted to mean that the rules made should be consistent with the provisions of CPC as amended from time to time.

44. The Full Bench of the High Court of Calcutta in Manickchand Durgaprasad v. Pratabmull Rameswar [AIR 1961 Cal 483 (FB)] had occasion to consider this very contention with regard to clause 37 of the Letters Patent and observed: (AIR p. 489, para 13)

“The restriction upon the power of the Court as contained in the proviso to clause 37 of the Letters Patent is that the rules framed under that clause should, ‘as far as possible’ be in conformity with the provisions of the Code of Civil Procedure. This restriction as the phrase ‘as far as possible’ indicates is merely directory. The provisions of the Code of Civil Procedure are intended for the purpose of guidance of this Court in framing rules under clause 37 of the Letters Patent. Consequently, if any rule framed by the High Court under clause 37 be inconsistent with or confers any additional power besides what is granted by the Code of Civil Procedure, the rule framed under clause 37 will prevail over the

corresponding provisions of the Code of Civil Procedure.”

This we think is the correct view to be taken in interpreting the words “as far as possible” in clause 37 of the Letters Patent. This interpretation would be consistent with the amplitude of the words used in Section 129 CPC by which the High Court is empowered to make rules “not inconsistent with the Letters Patent to regulate its own procedure in the exercise of its original jurisdiction as it shall think fit”.

45. Mr Ram Jethmalani then put forth what he submits is the legal effect of Section 16 of the amending Act, 2002. In his submission, the legal effect of this provision is to sweep away anything that is inconsistent therewith. He placed strong reliance on the judgments of this Court in Ganpat Giri v. Second ADJ [(1986) 1 SCC 615] and Kulwant Kaur v. Gurdial Singh Mann [(2001) 4 SCC 262] to canvass his argument.

46. In Ganpat Giri [(1986) 1 SCC 615] the question considered was with regard to the overriding provision contained in Section 97(1) of the Code of Civil Procedure (Amendment) Act of 1976 (Act 104 of 1976). The said provision reads thus :

“97. (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.”

It is obvious that what was done by Section 97(1) of the amending Act was to sweep away amendments made or provisions inserted in the principal Act by the State Legislature, or the High Court in exercise of its delegated powers of legislation, and to declare that all such amendments inconsistent with the provisions of the Code would stand repealed. We are afraid that Section 129 is neither an amendment made by the State Legislature, nor by the High Court, and as such, it does not get overridden by Section 97(1) of the amending Act of 1976. Though, both the sections, Sections 122 and 129 were noticed in this judgment, it does not hold that the impact of Section 129 was, in any way, watered down by Section 122. The following observations in para 5 of the judgment were relied upon: (SCC p. 618)

“The object of Section 97 of the amending Act appears to be that on and after 1-2-1977 throughout India wherever the Code was in force there should be same procedural law in operation in all the civil courts subject of course to any future local amendment that may be made either by the State Legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the amending Act alone should govern the procedure in civil courts which are governed by the Code. We are emphasising this in view of the decision of the Allahabad High Court which is now under appeal before us.”

In our view, Section 97 of the amending Act does not, in any way, affect the special hierarchical status given to the

proceedings before the chartered High Courts on its original side. It was merely intended to standardise and make uniform the law as to civil procedure in other civil courts.

47.Kulwant Kaur [(2001) 4 SCC 262] was concerned with a situation where the Punjab Courts Act, 1918 had a special right of appeal and the question was whether the amended provisions in Section 100 CPC, as amended by Act 104 of 1976, would exclude appeals under Section 41 of the Punjab Courts Act, 1918. The view taken was that there was inconsistency between the provisions of the Punjab Courts Act and the provisions of Section 97(1) CPC. By reason of Article 254, Section 97(1) CPC, being the Central Act, was held to prevail. It was pointed out in the judgment that though Section 4 of the Civil Procedure Code, 1908 saved special or local laws in the absence of any specific provision to the contrary, Section 97(1) was such a provision to the contrary, and, therefore, the saving under Section 4 would no longer be available to the local Act. Consequently, it was held: (SCC p. 276, para 28)

“[L]anguage of Section 97(1) of the Amendment Act clearly spells out that any local law which can be termed to be inconsistent perishes, but if it is not so, the local law would continue to occupy its field.”

We do not think that this decision carries forward the argument.

48.Finally, it was argued by Mr Jethmalani that the Letters

*Patent, and the rules made thereunder by the High Court for regulating its procedure on the original side, were subordinate legislation and, therefore, must give way to the superior legislation, namely, the substantive provisions of the Code of Civil Procedure. There are two difficulties in accepting this argument. In the first place, Section 2(18) CPC defines “rules” to mean “rules and forms contained in the First Schedule or made under Section 122 or Section 125”. The conspicuous absence of reference to the rules regulating the procedure to be followed on the original side of a chartered High Court makes it clear that those rules are not “rules” as defined in the Code of Civil Procedure, 1908. Secondly, it is not possible to accept the contention that the Letters Patent and rules made thereunder, which are recognised and specifically protected by Section 129, are relegated to a subordinate status, as contended by the learned counsel. We might usefully refer to the observations of the Constitutional Bench of this Court in *P.S. Sathappan v. Andhra Bank Ltd.* [(2004) 11 SCC 672 : JT (2004) 8 SC 464] With reference to Letters Patent, this is what the Constitution Bench said: (SCC p. 709, para 32)*

“32[148]. It was next submitted that clause 44 of the Letters Patent showed that Letters Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, clause 44 permits amendment or alteration of Letters Patent, but then which legislation is not subject to

amendment or alteration? CPC is also subject to amendments and alterations. In fact it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in Vinita Khanolkar case [Vinita M. Khanolkar v. Pragna M. Pai, (1998) 1 SCC 500 : JT (1997) 9 SC 490] and Sharda Devi case [Sharda Devi v. State of Bihar, (2002) 3 SCC 705 : JT (2002) 3 SC 43] a Letters Patent is the charter of the High Court. As held in Shah Babulal Khimji case [Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8 : (1982) 1 SCR 187] a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the High Court concerned. The Civil Procedure Code is a general law applicable to all courts. It is well-settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between the Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of the Letters Patent would always

prevail unless there was a specific exclusion. This is also clear from Section 4 of the Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 CPC only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100-A.”

49.Far from doing away with the Letters Patent, the amending Act of 2002 has left unscathed the provisions of Section 129 and what follows therefrom. The contention must, therefore, fail.

50.In the result, we are of the view that no fault can be found with the impugned judgment of the High Court under appeal. There is no merit in the appeal and it is hereby dismissed. However, there shall be no order as to costs.”

32. Mr. Sen, whilst relying upon the aforesaid ratio from *Iridium*, argued that Section 16 of the Commercial Courts Act uses the phrase “**Rule** of the *jurisdictional High Court*”. According to him, the word “Rule” has not been defined under the Commercial Courts Act. In this situation, he relies upon Section 2 (2) of the Commercial Courts Act which provides that words used and not defined in the Commercial Courts Act but defined in the CPC, shall have the same meaning as assigned to them in the CPC. He then placed reliance on Section 2(18) of the CPC where “**rules**” has been defined. Section 2(18) of the CPC has been interpreted by the Apex Court in *Iridium* to exclude the Bombay High Court (Original Side) Rules. He

hence argued that the phrase “*Rule of the jurisdictional High Court*” in Section 16 of the Commercial Courts Act does not include the Bombay High Court (Original Side) Rules. Mr. Sen hence argued that notwithstanding the amendments introduced by the Commercial Courts Act, this Court will continue to be governed by the Bombay High Court (Original Side) Rules even in the adjudication of Commercial Suits.

33. Ld. Counsel Mr. Andhyarujina whilst adopting the submissions of Mr. Sen also placed reliance on *Iridium* and argued that this Court is not bound by the provisions of the CPC by virtue of its Letters Patent. Mr. Andhyarujina argued that there need not be any further deliberation on the non-applicability of the CPC even to Commercial Suits in view of the Apex Court’s finding in *Iridium*. Mr. Andhyarujina thus argued that this Court can always take on record a written statement by enlarging the time under Rule 265 of the Bombay High Court (Original Side) Rules.

34. Subsequent to the above arguments, Mr. Anturkar, Ld. Senior Advocate addressed this Court and canvassed his arguments on behalf of the Applicants/Defendants. Mr. Anturkar argued that the Letters Patent of this Court and the rules made thereunder would continue to over-ride the provisions of the CPC even as amended by the Commercial Courts Act. Therefore according to him, this Court is vested with the power to condone the delay and take on record a written statement even after the expiry of 120 days. According to Mr. Anturkar, it was never the intention of the legislature, when the Commercial Courts Act was enacted, to override the Letters Patent and rules made thereunder. In support of this argument, he relied

on a comparative construction of Sections 11, 13(2), 16 and 21 of the Commercial Courts Act. Sections 11, 13(2), 16 and 21 of the Commercial Courts Act read as under:

“11.Bar of jurisdiction of Commercial Courts and Commercial Divisions. Notwithstanding anything contained in this Act, a Commercial Court or a Commercial Division shall not entertain or decide any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

13.Appeals from decrees of Commercial Courts and Commercial Divisions. (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996.

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.

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 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, as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.*

(3) *Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908, as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.*

21. Act to have overriding effect. *Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.”*

35. Mr. Anturkar argued that Section 21 begins with the words "*Save as otherwise provided*" which, in his view, is indicative of the legislature's intention that Section 21 will yield to some other existing provision. Mr. Anturkar then juxtaposed

Section 21 with the language of Section 11 of the Commercial Courts Act which instead begins with the words "*Notwithstanding anything contained in this Act*". He thus argued that Section 21 of the Commercial Courts Act contains no such sweeping language. This, in his view, is indicative of an existing provision which creates an exception to the non-obstante clause found in Section 21 of the Commercial Courts Act. Supplementing this proposition, Mr. Anturkar placed reliance on Section 20(3) read with Section 70 of the Goa Daman and Diu Reorganization Act, 1987 ("**Act of 1987**") to illustrate an example of the exception which Section 21 of the Commercial Courts Act refers to. In his view, Section 20(3) of the Act of 1987 re-confers whatever jurisdiction, power and authority this Court had prior to 1987. Mr. Anturkar argued that the Act of 1987 contains a non-obstante clause under Section 70 which would overrule the provisions of the Commercial Courts Act. Section 20(3) and Section 70 of the Act of 1987 are reproduced hereunder :

"20. Common High Court for Maharashtra, Goa, Dadra and Nagar Haveli and Daman and Diu. —(1) On and from the appointed day,— ...

(3) On and from the appointed day, the common High Court shall have, in respect of the territories comprised in the States of Maharashtra and Goa and the Union territories of Dadra and Nagar Haveli and Daman and Diu, all such jurisdiction, powers and authority as, under the law in force immediately before the appointed day, are exercisable in respect of those territories by the High Court of Bombay.

70. Effect of provisions of Act inconsistent with other laws.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law.”

36. Relying on the aforesaid provisions, Mr. Anturkar then tied up this argument with a reading of Clause 37 of the Letter Patent which requires this Court to be merely guided by the provisions of the CPC and not be bound by the same whilst promulgating its rules i.e. the Bombay High Court (Original Side) Rules. He then argued that the provisions of the Letters Patent cannot be excluded by implication and are instead, required to be excluded expressly as was done in Section 100 A of the CPC or Section 13(2) of the Commercial Courts Act, both of which, specifically exclude an appeal under the Letters Patent. Section 13(2) of the Commercial Courts Act has been reproduced hereinabove and Section 100 A of the CPC reads as under:

“100A. No further appeal in certain cases.- Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court no further appeal shall lie from the judgment and decree of such Single Judge. ”

Mr. Anturkar to substantiate his argument that the Letters Patent is required to be excluded by an express provision, relied upon two judgements of the Apex Court -

Sharda Devi v State of Bihar [(2002) 3 SCC 705] and *P.S. Sathapan (Dead) by Lrs. v. Andhra Bank Ltd. & Ors. [(2004) 11 SCC 672]*.

37. Thus, it was contended by Mr. Anturkar that the legislature being aware of this legal position, never intended to override the provisions of the Letters Patent except as provided under Section 13(2) of the Commercial Courts Act. Hence, Mr. Anturkar canvassed a proposition that Section 16(3) and Section 21 of the Commercial Courts Act do not in fact exclude the Letters Patent and hence, the legislature never intended that the Bombay High Court (Original Side) Rules be superseded by the CPC as amended by the Commercial Courts Act.

38. Lastly, Mr. Anturkar reiterated the submissions of Mr. Sen namely that Section 16(3) of the Commercial Courts Act do not exclude the Bombay High Court (Original Side) Rules promulgated under Section 129 of the CPC. He asserted that even if Section 16(3) was not introduced in the Commercial Courts Act, the word 'Rule' therein refers only to the rules formed under Section 122 or 125 of the CPC and not the rules framed under Section 129. He argued that the presence of Section 16(3) in the Commercial Courts Act is inconsequential to this Court as Section 16(3) does not include the rules promulgated by Chartered High Courts under Section 129. He thus concluded that at the most, Section 16(3) may affect the other High Courts which are not Chartered High Courts, or other Chartered High Courts which do not have a protective umbrella like Section 70 of the Act of 1987.

39. Mr. Sen, Mr. Anturkar and Mr. Andhyarujina thus argued that this

Court can still exercise its powers under the Bombay High Court (Original Side) Rules notwithstanding the Commercial Courts Act to condone the delay and take on record a written statement in a Commercial Suit even after the expiry of 120 days.

40. As opposed to the aforesaid arguments, Mr. Kohli appearing on behalf of the Plaintiffs sought to argue otherwise. To begin with, Mr. Kohli argued that the object, intent and purpose of the Commercial Courts Act and consequential amendments thereby to the CPC was to reduce judicial delay and to provide for speedy disposal of commercial cases. In order to do so, Mr. Kohli argued that the Commercial Courts Act seeks to lay down clear and unambiguous timelines for the disposal of commercial cases. He argued that the legislative intent is unmistakable from the Statement of Objects and Reasons of the Commercial Courts Act. Specifically, he relied upon Sr. No. 6 (v) of the Statement of Objects and Reasons of the Commercial Courts Act which provides:

*“(v) to amend the Code of Civil Procedure, 1908 as applicable to the Commercial Courts and Commercial Divisions which **shall prevail over the existing High Courts Rules and other provisions of the Code of Civil Procedure, 1908** so as to improve the efficiency and reduce delays in disposal of commercial cases.”* (emphasis supplied)

41. Mr. Kohli thus argued that not only does the statute seek to reduce delays in the disposal of commercial cases, it seeks to do so by overriding the rules framed by this High Court, and those provisions of the CPC that may be in conflict

with the provisions introduced by the Commercial Courts Act. Mr. Kohli argued that the amendments introduced by the Commercial Court Act to the CPC must be juxtaposed in context of the Statements and Objects of the Commercial Courts Act. According to him, viewed thus; the clear conclusion that emerges is that the amended provisos to both; Order V Rule 1, Order VIII Rule 1 and Order VIII Rule 10 clearly intend to establish absolute and non-discretionary timelines with respect to a Defendant filing its written statement viz. 120 days. According to Mr. Kohli, the prescribed mandatory language can be found in both; Order V Rule 1 and Order VIII Rule 1 which unequivocally prescribe : -

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

(emphasis supplied)

This conclusion is further buttressed, according to Mr. Kohli, by Order VIII Rule 10, which now contains the following proviso:

“Provided that *no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.*” (emphasis supplied)

42. Thus, Mr. Kohli emphasised that the Commercial Courts Act, on three occasions states (*in mandatory language*) that the timelines therein are absolute. According to Mr. Kohli, the legislature could not have contemplated that a Commercial Division constituted by a Judge having experience in dealing with commercial disputes hears applications for condonation of delay in filing written statements and applies his/her mind on the facts of each case rather than decreeing the commercial suit.

43. In response to the argument that the Bombay High Court (Original Side) Rules override the amendments introduced to the CPC by the Commercial Courts Act, Mr. Kohli argued that this contention fails to stand scrutiny when read with the explicit provisions of the Commercial Court Act. In support of the argument, he placed reliance on Section 16 of the Commercial Courts Act. He argued that Section 16 (2) specifically provides that a Commercial Division of this Court **shall follow** the provisions of the CPC as amended by the Commercial Courts Act. According to him, this specific stipulation, must be read to imply that the amendments introduced to the CPC by the Commercial Courts Act, prevail over the Bombay High Court (Original Side) Rules in case of a conflict. The Commercial Courts Act according to him, goes one step further and explicitly states this. Section 16 (3) clarifies that in case of a

conflict between any rule of a High Court and the CPC, as amended by the Commercial Courts Act, **the CPC as amended by the Commercial Courts Act shall prevail**. It is noteworthy according to him that Section 16 of the Commercial Courts Act is explicit and specifically excludes the applicability of any and all rules of the jurisdictional High Court where a Commercial Division has been constituted, which according to Mr. Kohli would also include this Court. He argued that admittedly, the present matter is being decided by a ‘*Commercial Division*’ of this Court. In addition to the aforesaid, he also placed reliance on Section 21 of the Commercial Courts Act. In support of this submission, he placed reliance on a decision of this Court in the matter of *Dashrath B. Rathod & Ors. v. Fox Star Studios India Pvt. Ltd. & Ors.* [2017 SCC OnLine Bom 345]. The relevant extract sought to be relied upon is as under :

*“33. There is another reason to award costs. This is the Commercial Courts Act. This suit must compulsorily be registered in the Commercial Division of this Court. The statute says so. It is not the Plaintiffs’ choice, and the monetary value is inconsequential in an intellectual property rights action. The sections quoted earlier make this clear. Now the Commercial Courts Act also made important amendments to the Code of Civil Procedure, 1908 (“**the CPC**”). Section 16 of the Commercial Courts Act says this :*

CHAPTER VI

AMENDMENTS TO THE PROVISIONS OF THE

CODE OF CIVIL PROCEDURE, 1908

16.(1) The provisions of the Code of Civil Procedure, 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, as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

*(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908, as amended by this Act, **the provisions of the Code of Civil Procedure as amended by this Act shall prevail.***

(Emphasis added)

34. The Commercial Courts Act's amendments to the CPC and to the High Court (Original Side) Rule prevail over the CPC and the Rules."

44. Mr. Kohli also relied upon a decision of the High Court of Calcutta which has also taken a similar view in the matter of *RDB Textiles Limited vs. Union of India & Ors. C.S. 214 of 2016*. He thus submitted that consequently, the Defendant's submission that the amended mandatory provisions of the CPC as introduced by the Commercial Courts Act do not apply to courts set up under the Letters Patent Charter

is an erroneous proposition in law.

45. Mr. Kohli, during the course of his arguments, whilst admitting that the Bombay High Court (Original Side) Rules are indeed ‘*special law*’, however contended that the broad non-obstante clause under Section 21 of the Commercial Courts Act, clearly seeks to override the provisions thereof. In any case, he argued, that it is settled law that in the event of a conflict between two ‘*special acts*’, the later in time prevails. In support of this submission, he relied upon the Apex Court’s decision in the case of *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*, [(2001) 3 SCC 71] and specifically the following paragraph:

“9.It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] ; Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750 : (1977) 2 SCR 421] ; Allahabad Bank v. Canara Bank [(2000) 4 SCC 406] and Ram Narain v. Simla Banking & Industrial Co. Ltd. [AIR 1956 SC 614 : 1956 SCR 603]”

46. Thus, he argued that the amendments brought forth by the Commercial Courts Act to the CPC, ought to prevail over the Letters Patent, the Bombay High Court (Original Side) Rules and the Act of 1987 in instances where the provisions of these earlier enactments are in conflict with the provisions of the CPC as amended by

the Commercial Courts Act.

47. In so far as the submissions in respect to *Iridium* are concerned, Mr. Kohli argued that the ratio therein would not be applicable to the present controversy for the following reasons:

47.1. That the ratio as laid down in *Iridium* would continue to hold field in non-commercial suits before this Court. Moreover, even in Commercial Suits, the holding in *Iridium* would apply save and except for situations of a conflict between the Bombay High Court (Original Side) Rules and the provisions introduced by the Commercial Courts Act. In that conflict, the latter shall prevail in view of Sections 16 and 21 of the Commercial Courts Act. According to him, when there is a conflict between the Bombay High Court (Original Side) Rules, and the provisions of the CPC as amended by the Commercial Court Act, the provisions as introduced by the Commercial Courts Act, shall prevail.

47.2 According to Mr. Kohli, in *Iridium*, the question before the Apex Court was that of the interplay between the Civil Procedure (Amendment) Act, 2002, the Letters Patent, and the Bombay High Court (Original Side) Rules. It is in this backdrop that the Apex Court held that the Civil Procedure (Amendment) Act, 2002 did not intend to touch the special status accorded to the Letters Patent and the Bombay High Court (Original Side) Rules. However, the Commercial Courts Act, and the Civil Procedure (Amendment) Act, 2002 are fundamentally different in this respect. The 2002 amendment merely stated that the CPC as amended by it, would

prevail over any State/High Court Amendments to the CPC. This is clear from the Repeal and Savings Clause of the 2002 Amendment Act:

*“ 16. Repeal and savings.- (1) **Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court** before the commencement of this Act shall, except in so far as such amendment or provisions are consistent with the principal Act as amended by this Act, stand repealed.” (emphasis supplied)*

47.3 However, the Commercial Courts Act specifically overrides the provision of any other law, which conflict with the amended provisions of the Commercial Courts Act. This is clear from Section 16, which has already been reproduced above, but is reproduced here once again for convenience:

“ 16.(1) The provisions of the Code of Civil Procedure, 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, as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

*(3) Where any provision of **any Rule of the jurisdictional High Court** or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908, as amended by this Act, **the provisions of the Code of Civil***

Procedure as amended by this Act shall prevail”

(emphasis supplied)

47.4. According to Mr. Kohli, there is a stark contrast between the limited non-obstante clause contained in the 2002 Act and the Commercial Courts Act. According to him, the Commercial Courts Act goes much farther than the 2002 amendment in seeking to override all that is in conflict with it.

47.5. That any reliance on *Iridium* would in fact be that certain provisions introduced by the Commercial Courts Act do not in fact apply to Commercial Divisions merely because they have been constituted in Chartered High Courts. This is evident from a reading of the decision of the Division Bench of this Court in *Iridium India Telecom Ltd. Versus Motorola Inc. & Anr.* [(2004) 1 Mah LJ 532] which was later upheld by the Apex Court. In this context, Mr. Kohli placed reliance on the following finding of the Division Bench:

“18. In view of the foregoing discussion, we hold that the amended provisions of Order VIII, Rule 1 would not apply to suits on the Original Side and such suits will continue to be governed by the Original Side Rules. Therefore, we do not see any reason to interfere with the order under appeal. Appeal fails and the same is dismissed with no order as to cost.”

(emphasis supplied)

48. Mr. Kohli thus sought to distinguish *Iridium* as aforesaid.

49. According to Mr. Kohli, the Commercial Courts Act seeks to lay down a uniform system for the resolution of commercial disputes in the Commercial Division of all High Courts and Commercial Courts across the Country. However, the Applicants/ Defendants expect that even Commercial Suits be treated as if the same are filed as non-commercial suits on the original side of this Court. If the Defendant's contention is accepted, it would imply that all the High Courts in India barring Chartered High Courts, would follow the Commercial Courts Act. In other words, there would be incongruity in the application of the Commercial Courts Act in Chartered High Courts and other High Courts. The intent and object of the legislature behind the Commercial Courts Act would be rendered redundant, if the Bombay High Court (Original Side) Rules are given primacy over the provisions of the CPC as amended by the Commercial Courts Act.

V. FINDINGS ON THE COMMERCIAL COURTS ACT VIS-À-VIS THE BOMBAY HIGH COURT (ORIGINAL SIDE) RULES, 1980:

50. I have considered the aforesaid arguments on the interplay between the Bombay High Court (Original Side) Rules and the Commercial Courts Act.

51. In so far as the first submission is concerned, the leading authority in this respect is the judgment of the Apex Court in *Iridium*. Whilst the Apex Court has concluded the controversy between the interplay of the CPC as it stood amended by

the then Civil Procedure (Amendment) Act, 2002 and the Bombay High Court (Original Side) Rules, it would be necessary to keep in mind two distinguishing aspects: (i) that the Apex Court was dealing with a conflict between the changes brought forth by an amendment *simplicitor* to the CPC and the Bombay High Court (Original Side) Rules- one being a general act while the other being a special act; and (ii) this interpretation will continue to hold field in non-commercial suits. However, in the present matter, I am concerned with a dispute between 2 special acts, *viz.* the Bombay High Court (Original Side) Rules and the Commercial Courts Act. Since, the Commercial Courts Act is a special act there can be little quarrel with the fact that in the event of a conflict between two special acts, the provisions of the later act would supersede the provisions of an earlier special act. This proposition has been reiterated by the Apex Court in *Solidaire* (supra) and the same principle would apply to not just resolve the conflict between Commercial Courts Act vis-à-vis the Bombay High Court (Original Side) Rules but also the conflict between the Commercial Courts Act and the Act of 1987 as relied upon by Mr. Anturkar. Therefore, in my view, both the arguments can be tested on the touchstone of decisions when the courts had to deal with conflicting provisions between two special laws. Admittedly, the Act of 1987 as well as the Letters Patent and rules made thereunder would be subject to the law laid down by the legislature. In this respect, admittedly, the Commercial Courts Act is a special act promulgated several decades after the Bombay High Court (Original Side) Rules and would trump the provisions of the former in the event of a conflict.

52. Another argument of the Applicants/Defendants is that Section 16 of the Commercial Courts Act uses the phrase “***Rule of the jurisdictional High Court***”. According to them, the word “Rule” has not been defined under the Commercial Courts Act. In this situation, they rely on Section 2 (2) of the Commercial Courts Act which provides that words used and not defined in the Commercial Courts Act but defined in the CPC, shall have the same meaning as assigned to them in the CPC. They then place reliance on Section 2(18) of the CPC where “***rules***” has been defined. Section 2(18) of the CPC has been interpreted by the Apex Court in *Iridium* to exclude the rules of this High Court on its Original Side. They hence argued that the phrase “*Rule of the jurisdictional High Court*” in Section 16 of the Commercial Courts Act does not include the Bombay High Court (Original Side) Rules. In so far as this submission is concerned, I have noted that Section 16(3) in fact uses the word “***Rule***” as opposed to “***rules***” in Section 2(18) of the CPC. In fact, the term “*rule*” finds reference under Section 3(51) of the General Clauses Act, 1897 which reads:

“(51) “rule” shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment;”

Hence, I do not agree with the Ld. Counsel appearing for the Applicants/Defendants that the word “Rule” as used in Section 16(3) is the same as defined under Section 2(18) of the CPC and does not therefore include this Court’s Original Side Rules. On

the contrary, given the scheme of the Commercial Courts Act and especially Section 16, it would appear that Section 16(3) in fact covers the Bombay High Court (Original Side) Rules.

53. It is Mr. Anturkar's argument that since the words "*Letters Patent*" were specifically excluded only in Section 13(2) of the Commercial Courts Act and because the words "*Letters Patent*" have not been mentioned in Section 16, it must be held that the provisions of Section 16 cannot overrule the provisions of the Letters Patent and the rules framed thereunder by implication. Hence, he argued that Section 16 does not denude a Chartered High Court from exercising its powers under its rules to *inter alia* condone the delay and take on record a written statement. In so far as this argument is concerned, it is pertinent to note that Clause 15 of the Letters Patent in fact provides for a substantive right *viz.* an intra-court appeal. It is this substantive right which has been expressly barred by Section 13(2) of the Commercial Courts Act as also Section 100 A of the CPC. Hence, the express mention of the words "*Letters Patent*" in both provisions. If we see the CPC closely, Section 129 has been specifically inserted in the CPC to allow for the High Courts vested with original jurisdiction to make rules pertaining to original proceedings initiated at the said High Courts **so long as these rules are not inconsistent with the Letters Patent/any other law establishing the said High Court.** However, since the Letters Patent of the High Court of Madras, Bombay and Calcutta allows these Chartered High Courts to regulate their own procedure *via* Clause 37, the same merely requires the High Court

to *be guided by the CPC as far as possible*. As can be seen on a reading of the Letters Patent, the rules of procedure are not in fact contained in the Letters Patent. Only the power to make such rules is contained therein. The Letters Patent merely empowers these Chartered High Courts to make rules of procedure for regulating their procedure on the original side. This is the reason why the legislature refers to “*Rule of the jurisdictional High Court*” in Section 16(3) and not the words “*Letters Patent*” as Mr. Anturkar seeks to suggest. Unlike Section 13(2) of the Commercial Courts Act and Section 100 A of the CPC, wherein it was required to use the words “*Letters Patent*” to exclude a substantive right of an intra-court appeal under Clause 15 of the Letters Patent, I find it sufficient that the legislature has used the words “*Rule of the jurisdictional High Court*” as has been done in Section 16 to include the Bombay High Court (Original Side) Rules.

54. Therefore, in summation, with the introduction of Section 16(3) of the Commercial Courts Act, if any amendment brought forth to the CPC by the Commercial Courts Act is in conflict with any rule of the Bombay High Court (Original Side) Rules, then and only then, will the provisions as introduced by the Commercial Courts Act prevail. In other words, only those rules of the Bombay High Court (Original Side) Rules which are in conflict with the provisions introduced by the Commercial Courts Act, will stand superseded by the introduction of the Commercial Courts Act. All other rules (*which are not in conflict with the provisions introduced by the Commercial Courts Act*) will continue to apply to Commercial as well as non-

commercial suits.

55. Rule 265 of the Bombay High Court (Original Side) Rules is clearly in conflict with the amended proviso to Order VIII Rule 1 of the CPC as introduced by the Commercial Courts Act. In light of Section 16(3) of the Commercial Courts Act, I hold that the amendments made to Order VIII by the Commercial Courts Act cannot be circumvented to condone delay and take on record a belated written statement by resorting to another rule in the Bombay High Court (Original Side) Rules *viz.* Rule 265.

56. I must state here for clarity that a Commercial Division and Commercial Appellate Division has been admittedly constituted in this Court. Hence, it would be apposite that such Commercial Division and Commercial Appellate Division adhere to the provisions of the CPC as amended by the Commercial Courts Act whilst continuing to adjudicate Commercial Suits of a Specified Value, as mandated by the Commercial Courts Act. This will ensure unanimity across the country. In this regard, I find support in the Order dated 25th September, 2018 passed by a Division Bench of this Court in *Shailendra Bhaduria & Ors v. Matrix Partners India Investment Holdings LLC & Ors (Comm. Appeal No. 327 of 2018)* cited by Mr. Kohli. The Division Bench, in unequivocal and categorical terms, held that the Commercial Courts Act was a self-contained code in so far as resolution of commercial disputes of a specified value are concerned. It further held that the adjudication of commercial disputes of a specified value has to be within the four corners of the Commercial

Courts Act. Admittedly, the Commercial Courts Act has created a distinct species of suits, now called Commercial Suits as opposed to non-commercial suits and therefore, it would follow suit that there must necessarily be a differentiating factor between the two species of suits and that difference, *inter alia*, is set out in the procedure applicable to the said Commercial Suits.

57. As can be seen from the decision of the Division Bench of this Court in *Iridium India Telecom Ltd. Versus Motorola Inc. & Anr.* [(2004) 1 Mah LJ 532] cited by Mr. Kohli, which was upheld by the Apex Court, in the case of *Iridium*, the Division Bench of this Court had in fact held that the provisions of Order VIII Rule 1 would have no application to suits on the original side of our Court. Thus, in the event, I am to seek support of the ratio in *Iridium* as argued by Mr. Sen and Mr. Andhyarujina, I would have to hold that despite sitting in a Commercial Division, this Court would not be bound by the Commercial Courts Act and the consequent amendments introduced by the Commercial Courts Act to the CPC.

58. I do not thus believe that the legislature intended for the Commercial Courts Act not to apply uniformly within the country. It is difficult to hold that the legislature would enact a legislation which will apply uniformly to all High Courts and Commercial Courts barring this Commercial Division, (and perhaps by extension- the two commercial divisions of the High Courts of Madras and Calcutta), especially since the said enactment is intended to aid in efficient disposal of commercial cases. On the contrary, it is this Court which bears the burden of pendency of Commercial Disputes

more so than other courts.

59. From the aforesaid discussion, I hold that this Court, in its Commercial Division, ought to interpret and apply the provisions of the Commercial Courts Act in complete letter and spirit whilst adjudicating Commercial Disputes. I further hold that in the event of a conflict between any of the provisions of the Commercial Courts Act and the Bombay High Court (Original Side) Rules, the procedure stipulated in the CPC as amended by the Commercial Courts Act ought to be given primacy in respect of commercial suits. This can be seen from a plain reading of Section 16 of the Commercial Courts Act. As argued by Mr. Kohli, Section 16 (2) specifically provides that a Commercial Division of this Court **shall follow** the provisions of the CPC as amended by the Commercial Courts Act. This specific stipulation, must be read to imply that the amendments introduced to the CPC by the Commercial Courts Act, prevail over the Bombay High Court (Original Side) Rules in case of a conflict. The Commercial Courts Act goes one step further and explicitly states this. Section 16 (3) clarifies that in case of a conflict between any rule of a High Court and the CPC, as amended by the Commercial Courts Act, **the CPC as amended by the Commercial Courts Act shall prevail**. Thus, this Court cannot exercise its powers under the Bombay High Court (Original Side) Rules to condone the delay in filing of a written statement over and above the statutorily mandated period of 120 days.

VI. ARGUMENTS ON ORDER VIII RULES 9 & 10:

60. In addition to the aforesaid argument, Mr. Khandekar, Mr. Pooniwala

and Mr. Kelkar argued that it is only the right of the Defendant to file a written statement that is forfeited under Order VIII Rule 1, whereas Order VIII Rules 9 and 10 do not circumscribe the power of this Court to take on record a belated written statement despite the amendments introduced by the Commercial Courts Act. Thus, the argument flows that this Court can exercise its discretion under Order VIII Rule 9 of the CPC to take on record a belated written statement.

61. In order to deal with this argument, it is important to reproduce the provisions of Order VIII Rules 9 and 10 which read as under:

“9. Subsequent pleadings— *No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.*

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

[Provided that no Court shall make an order to extend the

time provided under Rule 1 of this Order for filing of the written statement.]”

62. Relying on the aforesaid provisions, Ld. Counsel Mr. Khandekar appearing on behalf of the Defendant in Commercial Suit No.316 of 2018 sought to advance an argument that this Court has the discretion to take on record a written statement even after the period of 120 days. In support of this argument, he placed reliance on a conjoint reading of Order VIII Rules 1, 9 and 10 of the CPC to submit that the power of this Court has been preserved to condone any delay in taking on record a written statement. It was further submitted by the Ld. Counsel that it is only the right of the Defendant to file a written statement that is forfeited under Order VIII Rule 1, whereas Order VIII Rules 9 and 10 do not circumscribe the power of this Court to take on record a written statement. According to the Ld. Counsel, the preservation of this discretion is readily seen from Rule 9 of Order VIII which in emphatic terms provides that the Court is vested with discretion to take "a written statement or additional written statement" on record, from "any" of the parties, "at any time", and fix a period of not more than 30 days for the said purpose. Therefore, the widest possible discretion is vested in this Court to take a written statement on record on such terms as the Court deems fit, at any point in time before the judgment is pronounced. According to him, Rule 10 of Order VIII gets triggered when a party, "*from whom a written statement is required under rule 1 or rule 9*" does not present the same within the time permitted by the Court. In such a case, the Court is entitled

to either pronounce judgment against such a Defendant or *"make such order in relation to the suit as it thinks fit"*. However, by virtue of the newly added proviso to this Rule, no Court shall make an order to extend the time provided under Order VIII Rule 1 for filing of the written statement therein contemplated. Therefore, the said proviso only operates to supplement/effectuate the limitation and/or impairment and/or curtailment of the Defendant's right, as is provided for by the amended proviso to Rule 1. Both these provisos, therefore, operate to restrict the right of the Defendant to file a written statement. Further, according to him, it is clear that the proviso to Order VIII Rule 10 was not meant to fetter the Court's discretion under Order VIII Rule 9 to call for a written statement. This is evident from a plain reading of the said proviso, which limits itself to the time prescribed *"under rule 1"* and does not even purport to deal with the Court's discretion under Order VIII Rule 9. In support of his argument, Mr. Khandekar relied on the decisions in *Shailaja A. Sawant (Dr.) Vs. Sayajirao G. Patil [2004 (2) Mh. L.J. 419]* ("**Shailaja**") which was later followed by a division bench of this Court in *Chintaman Sukhdeo Vs. Shivaji Bhausahab [2004 (4) Mh L.J. 739]* ("**Chintaman**").

63. The relevant paragraphs of Shailaja relied upon by Mr. Khandekar are reproduced herein below:

"28. This takes me to a consideration of the submission made by Mr. Walawalkar learned counsel, who endeavoured to deal with the question from a different angle. He gave different dimensions to the question involved in these writ petitions. In

his submission, on a combined reading of the provisions of Rules 1, 9 and 10 of Order 8 and Rule 7 of Order 9, Civil Procedure Code, a defendant can in a fit case file his written statement even after expiry of the period prescribed by Order 8, Rule 1.

29. It would be advantageous in order to appreciate the submissions made by the learned counsel, to reproduce the provisions of Rules 1, 9, 10 of Order 8 and Rule 7 of Order 9 better. The provisions read thus:

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

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

“9. Subsequent pleadings. — No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same”.

“10. Procedure when party fails to present written statement

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

31. Keeping in mind the canons of interpretation laid down by the Supreme Court, as noted above, I would like to analyse the provisions of Order 8, Rule 1 Civil Procedure Code. The text is noticed above. The context is to avoid wherever possible delays that can occur in a civil litigation. Delay must be avoided as far as possible but not at the cost of the cardinal principle of jurisprudence that no one shall be condemned unheard.

32. A plain reading of Rule 9 and Rule 10 of Order 8, Civil Procedure Code would show that notwithstanding anything contained in the provisions of Order 8, Rule 1, the wide discretion is vested in the trial Court. Rule 9 of Order 8 lays down, inter-alia, that no pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit. Under this rule, either party may, with leave of the Court, file a supplementary statement. No supplementary statement however can be filed after plaintiff's case is closed. Rule 9, therefore, invests the Court with the widest possible

discretion and enables it to accept the written statement filed at subsequent stages upon such terms as the Court thinks fit. The only difference between the recent amendment and unamended provisions of Rule 9 is that no time limit was fixed in the old Code and discretion is given to the Court to fix the time for presenting the written statement. After the recent amendment, the Court may permit filing of a written statement or additional written statement from any of the parties but the Court must fix the outer limit of not more than 30 days for presenting the same. In other words, once the time is fixed by the Court and the written statement is not filed within that time, the defendant loses his right to file his written statement.

33. The Karnataka High Court while dealing with the provisions of Order 8, Rule 1, Rule 9 and Rule 10 in Shri Prasanna Parvathamba v. Shri M.S. Radhakrishna Dixit, AIR 2003 Karnataka 345, has observed that a harmonious reading of Rules 1, 9 and 10 of Order 8 would indicate that Rule 9 in extraordinary cases gives the Court judicial discretion to permit the defendant to file a written statement within the outer span of 30 days from the date of passing the order for reasons to be recorded in writing. Another learned Single Judge of the Karnataka High Court in Smt. Gupte v. Smt. Nagatha, AIR 2003 Karnataka 426, however has taken a different view that time cannot be extended under Order 8, Rule 9 as filing of a written statement is governed exclusively by Order 8 Rule 1. I am unable to agree with the view

expressed in the judgment. Patna High Court in Kalipado Sharma v. Surendra Mohta, AIR 1975 Patna 34 while dealing with the provisions of Rule 9 of Order 8 held that it invests the Court with widest possible discretion and enable it to accept written statement filed subsequently after the settlement of issues upon such terms as the Court thinks fit.

34. A careful reading of Rules 1, 9 and 10 of Order 8 and Rule 7 of Order 9 would make the scheme in relation to the right of the defendant to file a written statement clear. Rule 1 confers right on the defendant to file a written statement within 30 days and having failed to file a written statement within the said period of 30 days, he is allowed to file written statement on such other day, as may be specified by the Court for the reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. In other words, the provisions of Order 8, Rule 1 provides that “The defendant shall present a written statement”. Then, it provides “he shall be allowed to file the same on such other day”. The time to do so has to be granted not as a matter of course but it has to be “for reasons to be recorded in writing”. Then it is provided that it should not be more than 90 days from service.

35. Rule 9 of Order 8 provides that no pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require “written

statement” or “additional written statement” from “any of the parties” and fix a time of not more than 30 days for presenting the same. A careful reading of this provision shows that there is no time limit fixed for filing subsequent pleadings which also consists of written statement. The expression “written statement” in the later part of the provision is not with reference to the plaintiff who has a right to file his written statement in the counter claim. The expression “any of the parties”, therefore, indicates that even defendant may at any time file written statement if so permitted by the Court within 30 days from the date of granting such permission. There is no time fixed for the Court to permit the defendant to file his written statement except that it should be filed within thirty days from the date of order allowing him to do so. It is thus clear that Rule 9 of Order 8 invests the Court with the widest possible discretion and enables it to accept a written statement at a later stage upon such terms as the Court thinks fit. In other words, the Court has got extraordinary power to examine in rare circumstances to require at any time a written or additional written statement to be filed in a case within the outer limit of 30 days to be fixed by the Court. A perusal of Rule 9, in my opinion, shows that it is not restricted to only the subsequent pleadings in relation to the set off or counter-claim. Rule 10 of Order 8 also makes reference to Rules 1 and 9 of Order 8. When such is the position, obviously, Rule 9 is not confined only to set off or counterclaim. Otherwise, there would not be a reference to Rules 1 and 9 in Rule 10 of Order 8.

36. Rule 10 of Order 8 was deleted in the 1999 Amendment. However, Parliament decided to reintroduce it by the recent amendment which, in my opinion, would show that Order 8, Rule 1 as amended recently cannot be interpreted in the strict terms. In other words, it cannot be said to be mandatory. Further to my mind, Rule 1, and Rule 10 of Order 8 together would show that a defendant is required to file a written statement within 30 days after receipt of summons and though the Court can extend the time till 90 days, the Court is not divested of the power to fix further time for filing written statement. The very fact that Rule 10 is re-introduced by the recent amendment by Parliament would show that Parliament never intended the Civil Court to pronounce the judgment immediately after failure on the part of the defendant to file a written statement within 90 days. The A.P. High Court in Nachipeddy Ramasawamy v. P. Buchi Reddy, AIR 2003 A.P. 409 has also taken the similar view holding that the Court has power to condone delay and extend period beyond 90 days if the written statement is not filed within the period prescribed under Order 8, Rule 1.

37. Rule 7, Order 9 confers power on the trial Court that if at an adjourned hearing, where the Court has, for non-appearance of a defendant, adjourned the hearing of the suit ex parte against him, the defendant appears and assigns good cause for his 'previous appearance' he can be heard in answer to the suit, as if he had appeared on the day fixed for his appearance, 'upon such terms as the Court directs as to costs

or otherwise'. This cannot be read to mean that he cannot be allowed to appear at all if he does not show good cause. All that it means is that he cannot be relegated to the position he would have occupied if he had appeared. Rule 7, Order 9 covers the case of the defendant who did not appear at all on the first hearing date and the suit was adjourned after declaring him ex parte as also the defendant who absented after filing written statement. Thus, it invests the Court with the widest possible 'discretion and enables it to accept a written statement, even where the defendant, who has not appeared previously and the suit has been adjourned for ex parte hearing against him, appears on the day of adjourned hearing and assigns good cause for previous non-appearance, 'upon such terms as the Court directs as to costs or otherwise'.

38. Rule 10 of Order 8 provides consequence of non-filing of written statement as required under Rule 1 or Rule 9 and further empowers the Court to make such order in relation to the suit as it thinks fit. The Supreme Court in Sangram Singh case (supra) while dealing with Rule 10 of Order 8 and Order 9, Rule 7 in paragraph 33 made the following observations:—

“33. We have seen that if the defendant does not appear at the first hearing, the Court can proceed 'ex parte', which means that it can proceed without a written statement; and O. 9, R. 7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared. That means that he cannot put

in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement should have been put in the consequences entailed by O. 8, R. 10 must be suffered.

What those consequences should be in a given case is for the Court in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases an order awarding costs to the plaintiff would meet the ends of justice; an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic action.”

40.It is thus clear that under Rule 10 of Order 8 on the defendant's failure to file written statement of his defence, when so required, the Court has the power either to pronounce the judgment against him or make such other order in relation to the suit as it thinks fit depending upon whether the suit was for the final disposal or for the settlement of the issues only. In the later case, the Court has ample discretion to grant more time for filing the written statement or to proceed to hearing of the suit without such written statement. Order 9, Rule 7 does not tie the hands of the Court from passing an appropriate order under Rule 10 of Order 8. The Supreme Court in Balaraj Tanreja's case (supra) has further made it clear that rule 10 governs both situations where the written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations if a written statement has not been filed by the

defendant, it will be open for the Court to pronounce the judgment against him or make such order in relation to the suit as it thinks fit under Rule 10, Order 8. It is to be noticed that if a written statement is not filed, the Court is required to pronounce the judgment against him. The words “against him” are to be found in Rule 10 of Order 8 which, obviously means that the judgment will be pronounced against the defendant. This also gives discretion either to pronounce the judgment or “make such order in relation to the suit as it thinks fit”. These words are of immense significance inasmuch as they give discretion to the Court not to pronounce the judgment against the defendant and still pass such order as it may think fit in relation to the suit. In other words, it is open for the Court to allow the defendant to file a written statement even at that stage. These provisions cannot be overlooked while deciding the question involved in the present writ petitions. The Supreme Court in India Handicraft Emporium case (supra) has made it absolutely clear that the intention of the legislature or the purport of the statute depends on the text and the context. They are the basis of the interpretation. One may well say that if the text is texture, the context is what gives the colour. Neither can be ignored. Both are important. Statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. It is, therefore, necessary to examine every word, every section and every provision together to know the “intention” of the legislature or the “purport” of the statute. I am of the considered opinion that

Rule 9 and 10 of Order 8 give discretion to the trial Court to allow the defendant to file a written statement at any stage prior to the pronouncement of the judgment.

41. The above reasoning does not mean that the order extending time to file reply may be passed repeatedly unmindful of and totally ignoring the provisions that the extension may not exceed 90 days. It has to be done keeping in view the recent amendment and the Statement of Objects and Reasons. The discretion that is conferred on the trial Court under Rule 9 and Rule 10 of Order 8 of the Civil Procedure Code, as also Rule 1 cannot be exercised arbitrarily. The Supreme Court in Topline Shoes Ltd. has sounded a word of caution. The provisions, of Rule 1 and the Statement of Objects and Reasons must be kept in mind while passing an order extending the time to file a written statement. The powers under Rules 1, 9 and 10 of Order 8 should be used only in exceptional cases and that too for the reasons to be recorded in writing and cannot be exercised by a defendant as a matter of right. Such exercise of discretion must be judicial and not capricious and in keeping with the spirit of the recent amendment. In my opinion, there could be variety of situations where the Court may have to exercise the power vested in it, such as circumstance or events beyond the control of the defendant. For instance, an illness whether natural or accidental which does not permit the defendant to move from the bed for a long time and such illness is proved by the defendant, or negligence or carelessness of the

advocate inviting the complaint for disciplinary action. However, as to the circumstances in which the discretion vested in the Court should be exercised no hard and fast rule can be laid down. It all depends on the particular facts of each case. The reasons recorded should reflect the circumstances in which the discretion vested is exercised. An endeavour should be to avoid ‘snap decision’. The grounds, such as the advocate was not available, ignorance of law, the relevant documents were not available or any such ground, which could be termed as frivolous, cannot be a ground for the Court to exercise powers vested in it under the provisions of Rules 1, 9 and 10 of Order 8 for extending time for filing a written statement beyond the period prescribed under Rule 1 of Order 8, Civil Procedure Code.”

64. The relevant paragraphs of Chintaman relied upon by Mr. Khandekar are reproduced herein below:

“26. It is thus cardinal rule of our jurisprudence that procedural provisions are not meant to thwart justice, but to advance it. Keeping those objectives in mind, we will have to consider whether and to what extent the provisions of the amended Civil Procedure Code, insofar as the filing of the written statement is concerned, have to be read as mandatory or directory. It appears to us that the intention to provide time frame to file the written statement is meant to expedite the hearing of the suits and to avoid unnecessary protraction of the proceedings and discourage parties from applying for adjournments for filing written statement any length of time.

The intention is not to penalize the defendant who does not submit the defence in the prescribed period or to take away the discretion that prior to amendment vested with the Court. The changes effected by the amendment are aimed at curtailing the delays and not the defences. Various provisions, including the provisions of Rules 9 and 10, Order 8 vesting the discretion with the Courts are kept intact, enabling the Court to grant appropriate extension of time. It is pertinent to note that Rules 9 and 10 were omitted by Act 44 of 1999 but again they were reintroduced after Act 22 of 2002. It is the trite principle of interpretation of law that the enactment has to be read as a whole and one Rule or one section in the enactment cannot be a guiding factor for ascertaining the intendment of the Legislature. The very fact that Rules 9 and 10 are reintroduced by Act 22 of 2002 by the Parliament shows that the Parliament never intended to impose penal consequences on account of non-compliance of the provisions of Order 8, Rule 1 of Civil Procedure Code.

27. In this background, if we look at the entire scheme of these provisions and the law prior to the amendment and after the amendment, the conclusion is inescapable that upon the expiry of the time of 90 days stipulated under Rule 1, Order 8, the Court has power to permit the defendant to file the written statement in exceptional and extra ordinary circumstances. Rule 10, Order 8 provides that where a party from whom written statement is required either under Rule 1 or Rule 9 of Order 8, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce

the judgment against him or make such order in relation to the suit as it thinks fit. Rule 10 governs both the situations where a written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the written statement has not been filed by the defendant it will be open to the Court to pronounce the judgment against him or make such order in relation to the suit as it thinks fit. The Rule gives discretion either to pronounce the judgment against the defendant or “make such order in relation to the suit as it thinks fit”. These words are of immense significance inasmuch as they give discretion to the Court not to pronounce the judgment against the defendant and instead pass such order as it may think fit in relation to the suit. There are two leading decisions of the Supreme Court under Order 8, Rules 1, 5 and 10 of the Code.

32. In pursuance to the amended Order 8, Rule 9, the Court has got power under extraordinary and in rare circumstances to require at any time written statement or additional written statement to be filed in a case within the outer limit of 30 days to be fixed by the Court. The only difference between the old Code and the new Code as far as Order 8, Rule 9 is concerned, is that no time limit is fixed in old Code and discretion is given to the Court to fix the time for presenting the written statement. In the amended Code, the Court may permit filing of the written statement or additional written statement from any of the parties, but the Court must fix an outer limit of not more than 30 days for presenting the same.

Of course the power under Order 8, Rule 9 should be used only in exceptional cases and for reasons recorded in writing and cannot be exercised by the defendant as a matter of right. Such exercise of discretion must be judicial and not capricious and such right must be keeping with the spirit of the amended Code.

33. In our opinion, harmonious reading of Rules 1, 5, 9 and 10 of Order 8 of Civil Procedure Code would indicate that in exceptional and extraordinary cases the Court has discretion to permit the defendant to file the written statement beyond the period of 90 days stipulated under Rule 1, Order 8 of Civil Procedure Code.

34. The aforesaid view of ours is supported by the decisions in Nachipeddy Ramaswamy v. P. Buchi Reddy, AIR 2003 A.P. 409, Dr. Sukhdev Singh Gambhir v. Amrit Pal Singh, AIR 2003 Del. 280 and Ponnamma v. Subburaman, 2003 (11) I.L.D. 90. In Prasanna Paravathamba v. M.S. Radhakrishna Dixit, AIR 2003 Kant. 345 a learned Single Judge of Karnataka High Court also took a view that the provisions of Order 8, Rule 1 are directory. This decision of the learned Single Judge, was, however, overruled in A. Sathyapal v. Yasmin Banu Ansari, AIR 2004 Kant. 246. We have gone through the decision in A. Sathyapal's case. We are unable to agree with the view taken by the Division Bench that the Court trying a civil suit does not have any power to extend time for filing written statement beyond what is stipulated in Order 8, Rule 1 of the Civil Procedure Code.

37. In view of the foregoing discussion we hold that Rules 9 and 10 of Order 8 of Civil Procedure Code give discretion to the trial Court to allow the defendant to file written statement even after the expiry of a period of 90 days as contemplated by Order 8, Rule 1. We hasten to add that this does not mean that the order of extending time to file written statement can be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of Order 8, Rule 1 always be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional and special circumstances.”

65. Relying on the aforesaid rulings, it was submitted by Mr. Khandekar that the legislature intended to preserve, save and augment the discretion vested in this Court to take a written statement on record beyond the period of 120 days as stipulated under Order VIII Rule 1. Thereafter, Mr. Khandekar sought to rely on the ratio as laid down by the Apex Court in *Kailash vs. Nankhu* [2005 (4) SCC 480] (“**Nankhu**”). In Nankhu, the Apex Court whilst relying on the provisions of Rules 9 and 10 of Order VIII, laid down that in order to render substantial justice, a Court can always take on record a written statement even after the expiry of the time period of 90 days (*as it was under Order VIII Rule 1 prior to the introduction of the Commercial Courts Act*). The Ld. Counsel pleaded that Nankhu lays down that the nature of Order VIII Rule 1 is procedural in nature and that it is not part of substantive law and

that the object of such a provision is to expedite justice and not to scuttle the same. Ld. Counsel relying on *Raza Buland Sugar Co. Ltd vs Municipal Board, Rampur [AIR 1965 SC 895]* further submitted that the CPC is in itself directory and not mandatory in nature. It was further submitted that the CPC despite its amendment by the Commercial Courts Act, still continues to be procedural in design and the legislature in its wisdom thought it fit to continue to vest discretion in this Court to take on record a written statement as the amendment to Order VIII Rule 1 is merely a bar on the Defendant's right and not a bar on the discretion of this Court. The Ld. Counsel relied upon the following paragraphs of Nankhu to support his argument:

“27.Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent

prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)

“The mortality of justice at the hands of law troubles a judge’s conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. ... Justice is the goal of jurisprudence — processual, as much as

substantive.”

34. Justice G.P. Singh notes in his celebrated work Principles of Statutory Interpretation (9th Edn., 2004) while dealing with mandatory and directory provisions :

“The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: ‘No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.’ ” (p. 338)

“ ‘For ascertaining the real intention of the legislature’, points out Subbarao, J. ‘the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow

therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory.” (pp. 339-40)

39. It was submitted by the learned Senior Counsel for the appellant that there may be cases and cases which cannot be foretold or thought of precisely when grave injustice may result if the time-limit of days prescribed by Order 8 Rule 1 was rigidly followed as an insurmountable barrier. The defendant may have fallen sick, unable to move; maybe he is lying unconscious. Also, the person entrusted with the job of presenting a written statement, complete in all respects and on his way to the court, may meet with an accident. The illustrations can be multiplied. If the schedule of time as prescribed was to be followed as a rule of thumb, failure of justice may be occasioned, though for the delay, the defendant and his counsel may not be to blame at all. However, the learned counsel for Respondent 1 submitted that if the court was to take a liberal view of the provision and introduce elasticity into the apparent rigidity of the language, the whole purpose behind enacting Order 8 Rule 1 in the present form may be lost. It will be undoing the amendment and restoring the pre-amendment position, submitted the learned counsel.

40. We find some merit in the submissions made by the

learned counsel for both the parties. In our opinion, the solution — and the correct position of law — lie somewhere midway and that is what we propose to do placing a reasonable construction on the language of Order 8 Rule 1.

41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact — the entire life and vigour — of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidate may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement

on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception

and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for the asking, and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.

46. We sum up and briefly state our conclusions as under:

(i) The trial of an election petition commences from the date of the receipt of the election petition by the court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition, affording opportunity to the defendant to file a written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and rules

made for purposes of that Act and a resort to the provisions of CPC is not called for.

(ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the rules of procedure contained in CPC on the other hand, the former shall prevail over the latter.

(iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.”

66. The intention of the legislature according to Mr. Khandekar, in seeking to preserve, save and augment the discretion vested in the Court to take a written statement on record beyond the period of 120 days as stipulated under Order VIII Rule 1 is also evident from other provisions of the CPC, which have been introduced by the Commercial Courts Act itself. Particularly, he placed reliance on the relevant

provisions of Order XV - A of the Commercial Courts Act. According to him, Order XV -A, vests further powers in this Court to call for pleadings relevant and necessary for framing issues. "Pleading" is defined under Order VI Rule 1 to mean "plaint or written statement". The stage at which the Court may choose to exercise its power under Order XV-A may or may not be within the outer limit of 120 days stipulated under Order VIII Rule 1. Further, the Court is empowered under this Order to further issue directions or pass any order for furthering the overriding objective of ensuring the efficient disposal of the suit. All these are incidents showing either the vesting of additional powers or; at the very least, a considered legislative judgment to preserve discretion in the Court to do all that may be necessary and appropriate to meet or sub serve the ends of justice.

67. In conclusion, Mr. Khandekar, the Ld. Counsel argued that a Commercial Court/ Commercial Division may exercise its discretion under Order VIII Rule 9 and Order XV-A, to permit a written statement to be taken on record in exceptional cases, where the Court is satisfied that there exists substantial cause to do so. Even otherwise, this Court may exercise its authority and discretion under Order VIII Rule 9 and Order XV-A, to permit a written statement to be taken on record in exceptional cases, where the court is satisfied that there exists substantial cause so to do. Circumstances which may weigh with the Courts in that behalf have already been judicially recognised, and there is no straight jacket formula which either can, or ought to be applied in every case.

68. In addition to Mr. Khandekar, Mr. Pooniwala, Ld. Counsel also addressed this Court on similar lines of arguments relying *on Nankhu*. He argued that even after the amendment of the provisions of Order VIII Rule 1, the provisions therein are still directory and not mandatory. He thus argued that this Court can allow the filing of the written statement after 120 days from the date of service of the Writ of Summons in a Commercial Suit. The Ld. Counsel relied on *Nankhu* and its conclusion that all rules of procedure are the handmaid of justice as the basis of his arguments. However, in light of the Apex Court's decision in *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.* (supra), Mr. Pooniwala's argument cannot be sustained.

69. Prior to recording Mr. Kohli's arguments in response to the aforesaid arguments of Mr. Khandekar, it is important to note that Ld. Sr. Counsel Mr. Anturkar stated that he does not adopt the arguments put forth by Mr. Khandekar and Mr. Kelkar relying on Order VIII Rules 9 and 10 of the CPC for in his opinion, the newly added proviso to Order VIII Rule 10 will bar such exercise of discretion.

70. In response to the arguments on Order VIII Rule 9 put forth by Mr. Khandekar, Mr. Kohli argued that the arguments put forth by the Defendants would result in absurdity or an anomalous situation. He argued that such interpretation ought to be rejected. Illustratively, Order VIII and its rules prior to their substitution by the Commercial Courts Act permitted a Defendant to file a written statement within a

period of 30 days which period was further extendable to 90 days. The Defendants contend that this period could thereafter be further extended by at least another 30 days under Order VIII Rule 9. Thus, according to the Defendants, they would be entitled to a maximum period of at least **120 days** to file the written statement in a non-commercial suit. If the aforesaid reasoning is to be made applicable to Commercial Suits, the Defendants would now be entitled to **120 days** under Order VIII Rule 1 and thereafter at least another **30 days** under Order VIII Rule 9. Thus, according to the Defendants, they would now be entitled to a period of **150 days** to file the written statement to a Commercial Suit i.e. **30 days** over and above the entitlement of a Defendant in a non-commercial suit. He thus argued that if Order VIII is given the same wide and unbridled interpretation as has been sought to be canvassed by the Defendants, the distinction if any between a Commercial Suit and non-commercial suit would only lie in their respective cause titles. According to Mr. Kohli, the Defendants' wide and discretionary interpretation of Order VIII is in conflict with, and converse to the written mandate of the Commercial Courts Act. The Defendants are requesting this Court to read down the provisions of a special act viz. the Commercial Courts Act despite its over-riding and non-obstante provisions. Mr. Kohli further submitted that the Defendants' remedy, if any, would be to challenge the provisions of the Commercial Courts Act as in its present form, its provisions cannot be read down to be discretionary. The Defendant cannot be allowed to do indirectly what has been prohibited in law to do directly. Placing any reliance on

Order VIII Rule 9 as contended by the Defendants, would render the substituted proviso to Order VIII Rule 1 wholly otiose. He further argued that in view of the substituted and added proviso to Order VIII Rule 1 and Order VIII Rule 10, this Court ought to read-down the provisions of Order VIII Rule 9 so as to yield to the intent, object and purpose of the Commercial Courts Act. He further argued that extending the time to file a written statement by placing reliance on Order VIII Rule 9 will be in the teeth of the amendments introduced by the Commercial Courts Act. This, according to Mr. Kohli, would be in contravention of the legislative mandate of the Commercial Courts Act as also the non-obstante clause contained therein. Taking on record a written statement under Order VIII Rule 9 despite the expiry of the stipulated period of 120 days under Order VIII Rule 1, would effectively negate the scheme, object, intent and purpose of the Commercial Courts Act.

71. In support of his submissions, Mr. Kohli placed reliance on the Apex Court's decision in *J.K. Cotton Spinning & Weaving Mills Co. Ltd. vs. State of U.P.*, AIR 1961 SC 1170 wherein it was held that a general provision must yield to the more specific provision. Hence, the argument flows that by virtue of the Commercial Courts Act being a special act, the general procedural provision under Order VIII Rule 9 must yield to the Commercial Courts Act or read down to the extent that it is consistent with the Commercial Courts Act.

72. In so far as the judgments in *Nankhu*, *Chintaman* and *Shailaja* are concerned, Mr. Kohli argued that the Defendants' reliance on the aforesaid judgments

is wholly misplaced. He argued that the aforesaid judgments were passed in context of the provisions of the CPC prior to their substitution by the Commercial Courts Act. The aforesaid judgments were based on findings that the proviso to Order VIII Rule 1 prior to its substitution by the Commercial Courts Acts did not (i) provide for any consequences on not filing the written statement within the stipulated period; and (ii) specifically take away the power of the court to take on record the written statement [See paragraph no. 46(iv) of the judgment in *Nankhu*]. Whereas, in its current form, the substituted proviso to Order VIII Rule 1 seeks to remedy exactly this lacunae by providing for both (i) consequences of forfeiture on the Defendant's non-compliance; and (ii) specifically takes away the power of this Court to take on record the written statement. Thus, Mr. Kohli submits that the aforesaid judgments have been made inapplicable to Commercial Suits and any reliance on the same is misplaced. He further argued that the judgement of this Court in *Shailaja* was passed over 15 years ago on 19th December, 2003 i.e. prior to the coming in force of the Commercial Courts Act. According to him, admittedly, the aforesaid judgment was passed in context of the provisions of the CPC prior to their amendment by the Commercial Courts Act, and therefore, the reliance of Mr. Khandekar on *Shailaja*, in the context of commercial suits is wholly misplaced and ill advised. According to Mr. Kohli, the legislature by the promulgation of the Commercial Courts Act has created two classes of suits viz. Commercial Suits and non-commercial suits and the rules of procedure for both classes of suits are at variance to each other. He thus submitted that the distinction

between the two types of suits would be diluted if the ratio as held in *Shailaja* is made applicable to Commercial Suits as well. According to him, the ratio as laid down in the aforesaid judgment cannot be applied to Commercial Suits, as the basis of the ratio in the aforesaid matter was premised upon Order VIII as it stood prior to its amendment by the Commercial Courts Act i.e. where the Court's powers to take on record a written statement were not circumscribed. However, since the Court's power, by virtue of the amended proviso(s) to Order VIII Rule 1 and Order VIII Rule 10, has now been circumscribed, reliance on this judgment would be completely out of place. Illustratively, he placed reliance on paragraphs 9 and 10 of *Shailaja*, wherein it was argued as follows :

"9. On the other hand, Mr. Kumbhakoni, learned counsel for the respondent-defendant in Writ Petition No. 2169 of 2003, submitted that the intention of the legislature in introducing the amended provisions of Order 8, Rule 1 is not to penalise the defendant who does not submit his defence within the stipulated period or to take away the discretion that was vested in the Court prior to the amendment. In his submission, procedural rules are normally not to be considered mandatory in nature. Procedure is something designed to facilitate justice. The procedural code is not a penal enactment for punishment and penalties. Penal consequences for not putting in the defence in time are not provided in the provisions in issue. ..."

“10. ...According to Mr. Walawalkar, Rule 9 of Order 8 empowers the Court in extra ordinary cases to use judicial discretion to permit the defendant to file a written statement within the outer span of 30 days from the date of passing the order for reasons to be recorded in writing. Insofar as Rule 10 of Order 8 is concerned, he submitted that the provisions of Rule 10 show that though the defendant is required to file a written statement within 30 days after receipt of summons and though the Court can extend time till 90 days, the Court is not divested of the power to give further time for filing a written statement. In his submission, the very fact that Rule 10 is reintroduced by the recent amendment by Parliament would show that Parliament never intended the Civil Court to pronounce judgment immediately after the failure on the part of the defendant to file a written statement within 90 days. ...”

(emphasis supplied)

73. He thus argued that juxtaposed to the CPC, as applicable to non-commercial suits, the overall scheme of the Commercial Courts Act leans in favour of expeditious disposal of Commercial Suits and if Order VIII Rule 9 could only be invoked in rare and exceptional circumstances, as per the ratio laid down in the aforesaid judgment, the application of Order VIII Rule 9 in relation to Commercial Suits would be further circumscribed and the same would have to be read down.

Further, this Court in *Shailaja*, proceeded on the footing that the Court had not been divested of its power under Order VIII Rule 10 of the CPC to make such orders as it deems fit. The relevant paragraphs in relation to Order VIII Rule 10 of the CPC from *Shailaja* relied upon by Mr. Kohli are reproduced hereinbelow:

*“28. Rule 10 of Order 8 was deleted in the 1999 Amendment. However, Parliament decided to reintroduce it by the recent amendment which, in my opinion, would show that Order 8, Rule 1 as amended recently cannot be interpreted in the strict terms. In other words, it cannot be said to be mandatory. Further to my mind, Rule 1, and Rule 10 of Order 8 together would show that a defendant is required to file a written statement within 30 days after receipt of summons and though the Court can extend the time till 90 days, the Court is not divested of the power to fix further time for filing written statement. The very fact that Rule 10 is re-introduced by the recent amendment by Parliament would show that Parliament never intended the Civil Court to pronounce the judgment immediately after failure on the part of the defendant to file a written statement within 90 days. The A.P. High Court in *Nachipeddy Ramasawamy v. P. Buchi Reddy*, AIR 2003 A.P. 409 has also taken the similar view holding that the Court has power to condone delay and extend period beyond 90 days if the written statement is not filed within the period prescribed under Order 8, Rule 1.”*

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30. ...It is thus clear that under Rule 10 of Order 8 on the defendant's failure to file written statement of his defence, when so required, the Court has the power either to pronounce the judgment against him or make such other order in relation to the suit as it thinks fit depending upon whether the suit was for the final disposal or for the settlement of the issues only. In the later case, the Court has ample discretion to grant more time for filing the written statement or to proceed to hearing of the suit without such written statement. Order 9, Rule 7 does not tie the hands of the Court from passing an appropriate order under Rule 10 of Order 8. The Supreme Court in Balaraj Tanreja's case (supra) has further made it clear that rule 10 governs both situations where the written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations if a written statement has not been filed by the defendant, it will be open for the Court to pronounce the judgment against him or make such order in relation to the suit as it thinks fit under Rule 10, Order 8. It is to be noticed that if a written statement is not filed, the Court is required to pronounce the judgment against him. The words "against him" are to be found in Rule 10 of Order 8 which, obviously means that the judgment will be pronounced against the defendant. This also gives discretion either to pronounce the judgment or "make such order in relation to the suit as it thinks fit". These words are of immense significance inasmuch as they give discretion to the Court not to pronounce

the judgment against the defendant and still pass such order as it may think fit in relation to the suit. In other words, it is open for the Court to allow the defendant to file a written statement even at that stage. These provisions cannot be overlooked while deciding the question involved in the present writ petitions. The Supreme Court in *India Handicraft Emporium case (supra)* has made it absolutely clear that the intention of the legislature or the purport of the statute depends on the text and the context. They are the basis of the interpretation. One may well say that if the text is texture, the context is what gives the colour. Neither can be ignored. Both are important. Statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. It is, therefore, necessary to examine every word, every section and every provision together to know the “intention” of the legislature or the “purport” of the statute. **I am of the considered opinion that Rule 9 and 10 of Order 8 give discretion to the trial Court to allow the defendant to file a written statement at any stage prior to the pronouncement of the judgment.**

(emphasis supplied)

74. Thus, according to Mr. Kohli, the entire premise of *Shailaja* was that the un-amended provisions of Order VIII Rule 1 of the CPC did not prescribe any penal consequences against a Defendant for not filing a written statement within the said

period of 90 days, however, presently, the language of the amended Order VIII Rule 1 of the CPC, insofar as it relates to a commercial dispute, is couched in mandatory language that a Defendant would forfeit its right to file a written statement after 120 days as well as it divests the Court from taking such delayed written statements on record. Further, the un-amended Order VIII Rule 10 of the CPC gave sweeping powers to the Court to pass such orders as it thinks fit, however, pursuant to the amendment to the CPC by the Act, the powers under Order VIII Rule 10 have been expressly curtailed and as a result thereof; this Court cannot extend the time to file a written statement beyond 120 days. Similarly, in the judgment of this Court in *Chintaman*, this Court proceeded on a footing that the Courts have unbridled power by virtue of Order VIII Rule 10 of the CPC (*as it stood before being amended by the Commercial Courts Act*). The relevant paragraphs of the abovementioned judgment in the context is reproduced hereinbelow :

“23. In this background, if we look at the entire scheme of these provisions and the law prior to the amendment and after the amendment, the conclusion is inescapable that upon the expiry of the time of 90 days stipulated under Rule 1, Order 8, the Court has power to permit the defendant to file the written statement in exceptional and extra ordinary circumstances. Rule 10, Order 8 provides that where a party from whom written statement is required either under Rule 1 or Rule 9 of Order 8, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce

the judgment against him or make such order in relation to the suit as it thinks fit. Rule 10 governs both the situations where a written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the written statement has not been filed by the defendant it will be open to the Court to pronounce the judgment against him or make such order in relation to the suit as it thinks fit. The Rule gives discretion either to pronounce the judgment against the defendant or “make such order in relation to the suit as it thinks fit”. These words are of immense significance inasmuch as they give discretion to the Court not to pronounce the judgment against the defendant and instead pass such order as it may think fit in relation to the suit. There are two leading decisions of the Supreme Court under Order 8, Rules 1, 5 and 10 of the Code.”

“26. In light of the above decisions of the Supreme Court it is clear that there is no penal consequences for not filing the written statement within the time stipulated. Rule 10, Order 8 gives power to the Court to make such order in relation to the suit as it thinks fit...”

(emphasis supplied)

75. In view of the above, Mr. Kohli submitted that reliance on the abovementioned judgments by Mr. Khandekar is misplaced as the same were passed in a different context i.e. when (i) the CPC did not provide for penal consequences on

the Defendant for not filing its written statement within the time prescribed; and (ii) Order VIII Rule 10 gave unrestrained powers to the Court to pass such orders as it deemed fit in relation to a suit. However, as stated hereinabove, the legislature, by virtue of the Commercial Courts Act, has not only provided for penal consequences for a Defendant's failure to file a written statement within the stipulated period by the Act *viz.* forfeiture of a Defendant's right to file a written statement, but also divested the Court of its power to take such a written statement on record. Additionally, the Court's powers under Order VIII Rule 10 of the CPC have also been curtailed. Order VIII Rule 1, as amended by the Commercial Courts Act, not only mandates that a Defendant forfeits its right to file a written statement pursuant to the expiry of 120 days from the service of the writ of summons, but also prohibits the Court from taking a written statement on record thereafter. The language of the amendment is couched in unequivocal and obligatory terms and leaves no discretion with the Court to take on record a written statement. In other words, prior to the amendment a Court's powers to take a written statement on record even after expiry of 90 days was not circumscribed. Therefore, Courts, in extremely rare and exceptional circumstances, would be able to invoke powers under Order VIII Rule 9 to call for written statements even after the expiry of the 90 days. However, pursuant to the amendment to the CPC by the Commercial Courts Act, and insofar as the matter pertains to commercial disputes, a Commercial Division, by virtue of the proviso(s) to Order VIII Rule 1 and Order VIII Rule 10, has been divested of its powers to take on record a written

statement pursuant to the expiry of 120 days. Mr. Kohli thus argues that the amended Order VIII Rule 1 and Order VIII Rule 10, having being inserted by a special act, would override Order VIII Rule 9 and thus, Order VIII Rule 9 would have no application in Commercial Suits to extend the time for filing written statements post the expiry of 120 days .

76. On this proposition, lastly, Mr. Rohan Kelkar on behalf on the Applicants/ Defendants submitted that there is a distinction in the written statement envisaged under Order VIII Rule 1, as amended by the Commercial Courts Act and the written statement envisaged under Order VIII Rules 9 and 10 of the CPC. The distinction Mr. Kelkar sought to emphasize upon is that Order VIII Rule 1 refers to '*the*' written statement while Order VIII Rules 9 and 10 refers to '*a*' written statement and '*the*' written statement respectively. He thus argued that '*the*' written statement is the written statement which is the right of a Defendant to file in response to a plaint and it is only the right of that defendant vis-à-vis '*the*' written statement which is barred from being taken on record under Order VIII Rule 1 and Order VIII Rule 10, as amended by the Commercial Courts Act. On the other hand, Mr. Kelkar submitted that '*a*' written statement as envisaged under Order VIII Rule 9 refers to a written statement separate from '*the*' written statement under Order VIII Rule 1 and Rule 10 and thus; the bar under Order VIII Rule 1, if mandatory, applies only to '*the*' written statement and not '*a*' written statement under Order VIII Rule 9 and hence, the discretion of this Court to allow for a written statement is kept alive even after the

right of the Defendant is closed under Order VIII Rule 1 and Rule 10.

77. In response to the aforesaid argument, Mr. Kohli argued that what the legislature had taken away with one hand i.e. the Court's power to take on record a written statement after the expiry of 120 days, could not have been given back by another. A construction that reduces one of the provisions, especially the one introduced by a recent special act, to a '*useless lumber*' would have to be avoided. In this case the proviso to Order VIII Rule 1 would be rendered otiose if the written statement of a Defendant is brought on record in another way i.e. through invocation of Order VIII Rule 9. Thus, he argued that it is trite law that what cannot be done directly ought not to be permitted indirectly. According to him, such construction would render the entire legislative process introducing the Commercial Courts Act nugatory. In support of this argument, he relied upon a decision of the Apex Court in *J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P.* reported in [AIR 1961 SC 1170] which explained that in case of a conflict between two provisions in the same enactment, a general provision must yield to the more specific provision.

“7. To remove this incongruity, says the learned Attorney-General, apply the rule of harmonious construction and hold that clause 23 of the order has no application when an order is made on an application under clause 5(a). On the assumption that under clause 5(a) an employer can raise a dispute sought to be created by his own proposed order of dismissal of workmen there is clearly this disharmony as pointed out above between two provisions viz. clause 5(a) and clause 23;

and undoubtedly we have to apply the rule of harmonious construction. In applying the rule, however, we have to remember that to harmonise is not to destroy. In the interpretation of statutes the court, always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of rule-making authority also. On the construction suggested by the learned Attorney-General it is obvious that by merely making an application under clause (5) on the allegation that a dispute has arisen about the proposed action to dismiss workmen the employer can in every case escape the requirements of clause 23 and if for one reason or other every employer when proposing a dismissal prefers to proceed under clause 5(a) instead of making an application under clause 23, clause 23 will be a dead letter. A construction like this which defeats the intention of the rule-making authority in clause 23 must, if possible, be avoided.

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9. There will be complete harmony however if we hold instead that clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of clause 23. We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the

*conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty v. Solly* (quoted in *Craies on Statute Law* at p.m. 206, 6th Edn.) Romilly, M.R., mentioned the rule thus: “The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply”. The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: *De Winton v. Brecon* [28 LJ Ch 598], *Churchill v. Crease* [5 Bing 177], *United States v. Chase* [135 US 255] and *Carroll v. Greenwich Ins. Co.* [199 US 401].*

(emphasis supplied)

78. The argument thus made by Mr. Kohli is that this Court ought to read down Order VIII Rule 9 insofar as it may be in conflict with the provisions introduced by the Commercial Courts Act. According to him, any other interpretation would defeat the scheme, object, intent and purpose of the Commercial Courts Act.

VII. FINDINGS ON ORDER VIII RULES 9 & 10:

79. I have considered the aforesaid arguments advanced by Mr. Khandekar, Mr. Pooniwala and Mr. Kelkar on Order VIII Rules 9 and 10 as also the per contra arguments of Mr. Kohli.

80. In so far as Order VIII Rule 9 is concerned, the leading authority in this respect is the Apex Court's decision in *Nankhu*. At this stage, it is pertinent to note that the Apex Court in paragraph no. 9 of *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.* (supra), has noted that *Nankhu* was passed in context of the provisions of the CPC prior to their substitution by the Commercial Courts Act. *Nankhu* was based on findings that the proviso to Order VIII Rule 1 prior to its substitution by the Commercial Courts Acts did not (i) provide for any consequences on not filing the written statement within the stipulated period; and (ii) specifically take away the power of the court to take on record the written statement. Whereas, the substituted proviso to Order VIII Rule 1 by the Commercial Courts Act seeks to remedy exactly this lacunae recognized in *Nankhu* by providing for both (i) consequences of forfeiture on the Defendant's non-compliance; and (ii) specifically

takes away the power of this Court to take on record the written statement. I therefore, do not agree with the Applicants/Defendants' interpretation of Nankhu being applicable to the amended Order VIII Rule 1 introduced by the Commercial Courts Act. Mr. Khandekar, Mr. Pooniwala and Mr. Kelkar in different ways sought to impress upon this court that even if the Defendant has forfeited its right to file 'the' written statement under Order VIII Rule 1, the court has the discretion under Order VIII Rule 9 to bring on record 'a' written statement. While an ingenious argument has been canvassed, if I were to allow it, I would find that my decision would be directly in the teeth of the legislative mandate of the Commercial Courts Act, its provisions and legislative intent. I would have to agree with Mr. Kohli that what has been prohibited from being done directly, cannot be allowed to be done indirectly. If this Court has been expressly divested of its powers to take on record 'the' written statement after the expiry of 120 days, allowing the same to be taken on record in another way i.e. under the cover of it being 'a' written statement would be a travesty of procedure as well as a mockery of the legislative mandate. It would be ridiculous to imagine that, what the legislature prohibited in one rule, would be allowed to be circumvented via another rule in the same order of the CPC. I also find support in the decision of the Apex Court in *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.*(supra), wherein the Apex Court held :

“16) Learned counsel for the respondents then strongly relied upon the inherent powers of the Court to state that, in any

case, a procedural provision such as contained in the amendment, which may lead to unjust consequences can always, in the facts of a given case, be ignored where such unjust consequences follow, as in the facts of the present case. We are again of the view that this argument has also no legs to stand on, given the judgment of this Court in Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, [1962] Suppl 1 SCR 450. In this judgment, the Court held:

“The suit at Indore which had been instituted later, could be stayed in view of s.10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers under s.151 is not justified...”

(at page 470)

Clearly, the clear, definite and mandatory provisions of Order V read with Order VIII Rule 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 to do the opposite of what is stated therein.”

(emphasis supplied)

81. As can be seen from the aforesaid decision of the Apex Court, the

legislative mandate of the Commercial Courts Act cannot be circumvented by resorting to this Court's inherent powers much less another procedural rule within the same order and/or another procedural provision such as Order XV-A. This would violate all settled principles of statutory interpretation and would render the provisions of the Commercial Courts Act as well as the legislative intent otiose.

82. It is also pertinent to note that the legislature has in fact extended the maximum time period for filing of a written statement from 90 days (*prior to the introduction of the Commercial Courts Act and applicable to non-commercial suits*) to 120 days. It could not have been the intention of the legislature that the time to file a written statement in a commercial suit is extended and also that the relaxation provided under Order VIII Rules 9 and 10 be also applicable. The period of 120 days is akin to one quarter of a year and in my view, the intention of the legislature in extending the time to 120 days from 90 days was to ensure that sufficient time is provided to a Defendant and its' advocate to file a written statement in response to a commercial plaint and yet, balance the requirement of speeding up justice, especially in commercial causes.

83. Whilst it is not difficult to fathom that there may be certain circumstances resulting in delay in filing a written statement, it is important to note that the Commercial Courts Act, in fact, provides for 120 days to file a written statement in comparison with 90 days available in a non-commercial suit. If after the passage of 120 days, a Defendant is unable to file its written statement, the hands of

the court, including this Commercial Division, would be tied by the ropes of the legislative mandate. It would also be skewed to imagine that the legislature increased the maximum period to take on record the written statement to 120 days from 90 days (as applicable to non-commercial suits) and over and above that extended time period, retained the discretion in the courts to condone the delay under Order VIII Rules 9 and 10.

84. The question which has arisen before me is that, if the CPC, as it stood prior to its amendment and as applicable to non-commercial suits, provided for stringent measures on a Defendant vis-à-vis filing of a written statement, then what purpose does it serve for the legislature to introduce a further time limit of 120 days by way of 3 amendments to the CPC viz. to Order V Rule 1, Order VIII Rule 1 and Order VIII Rule 10. I am afraid that if the courts hold in even one instance that a written statement can be taken on record after the period of 120 days, this would lead to a slippery slope and would eventually result in a situation where written statements will be taken on record on frivolous and ingenious grounds and that to only in the Commercial Division of Chartered High Courts. It is also pertinent to note that Justice Bhosale (*as he then was*), in *Shailaja*, has held that powers under Rule 9 of Order VIII should be used only in exceptional cases and that too for reasons to be recorded in writing and cannot be exercised by a Defendant as a matter of right. Today, I am being asked to render the same finding to the CPC as amended by the Commercial Courts Act and if I were to do so, I would render the promulgation of the

Commercial Courts Act completely otiose as there would remain no difference between non-commercial suits and commercial suits.

85. I am of the view that the interpretation of Order VIII Rule 9 of the CPC as canvassed by the Defendants relying upon the ratio in *Shailaja* and *Chintaman* cannot be harmonised with the provisions of Order VIII Rule 1 as introduced by the Commercial Courts Act i.e. whilst the former vests this Court with discretion to take on record a written statement, the latter expressly divests this Court of such powers. In these circumstances, since the amendment to the CPC as applicable to Commercial Suits has been brought about by a special act, a general rule under Order VIII Rule 9 would have to yield to it. Whilst on this argument, I also note that as argued by Mr. Kohli; *Shailaja*, *Chintaman* and *Nankhu* were delivered on a holistic reading of Order VIII as it stood prior to its amendment by the Commercial Courts Act. In so far as these judgements are concerned, the same are admittedly in respect of a period prior to the coming in force of the Commercial Courts Act and would still be applicable to non-commercial suits. In so far as the submissions of Mr. Pooniwalla are concerned, I am unable to agree with the submissions that the provisions of Order VIII Rule 1 subsequent to its amendment by the Commercial Courts Act, are still discretionary, for the reasons set out hereinabove, I am of the considered opinion that the newly introduced provisions are indeed mandatory in nature and cannot be extended. In this respect, I am bound by the decision of the Apex Court in *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.* (supra).

86. However, I must clarify that Order VIII Rules 9 and 10 would continue to be discretionary powers in non-commercial suits to condone the delay in filing of a belated written statement as the provisions introduced by the Commercial Courts Act will not apply to non-commercial suits.

87. In addition to the above, Mr. Kelkar, on behalf of the Applicants/Defendants submitted that eventually this Court is one of equity and that it cannot ignore emergent circumstances that a Defendant may undergo due to which it would be unable to file its written statement. In response to the argument, Mr. Harsh Gokhale submitted that no broad or general consideration of equity, fairness and justice would enable a Commercial Division to allow filing of written statements beyond 120 days, even if it so desires, as the same would be in the teeth of the legislative mandate of the Act. In support of his submission, he relied upon the following decisions: *[Raghunath Rai Bareja & Anr vs Punjab National Bank & Ors, (2007) 2 SCC 230, B. Banerjee v. Anita Pan, (1975) 1 SCC 166, Martin Burn Ltd. v. Corpn. of Calcutta [AIR 1966 SC 529], Basawaraj & Anr v. Special Land Acquisition Officer, (2013) 14 SCC 81 and, Lacchhman Das Arora v. Ganesh Lal & Ors, (1999) 8 SCC 532]*. Mr. Gokhale submitted that the Court would be bound to disregard the provisions of Order VIII Rule 9, if found to be applicable, even though it might lead to some outlier cases with unkind consequences as the Courts are bound by legislative mandate and hard cases do not make bad laws. Mr. Gokhale further submitted that if a

written statement is allowed to be taken on record after the expiry of 120 days either through the usage of Order VIII Rule 9 of the CPC or by holding that the Bombay High Court (Original Side) Rules supersede the provisions of the CPC as amended by the Commercial Courts Act, the result would be stark unequal treatment being meted out to equals within a sub-class and that it would be against the principles enshrined in the Constitution. By way of illustration, it may be possible that a Defendant was undergoing a sickness for a temporary period and during which period, he or she was unable to affirm its written statement. However, this situation could have always been remedied by appointing a Power of Attorney, on behalf of the Defendant.

88. In order to deal with the aforesaid argument on equity, I would refer to decision of the Apex Court in the case of *Raghunath Rai Bareja & Anr vs Punjab National Bank & Ors*, [(2007) 2 SCC 230]. In this judgment, the Apex Court, referring to various judgments of the Apex Court, held as follows :

“29. Learned Counsel for the respondent-Bank submitted that it will be very unfair if the appellant who is a guarantor of the loan, and director of the Company which took the loan, avoids paying the debt. While we fully agree with the learned Counsel that equity is wholly in favour of the respondent-Bank, since obviously a Bank should be allowed to recover its debts, we must, however, state that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim ‘dura lex sed lex’, which means ‘the law is hard, but it is the law’. Equity

can only supplement the law, but it cannot supplant or override it.

30. *Thus, in Madamanchi Ramappa and Anr. v. Muthaluru Bojjappa (vide AIR p. 1637, para 12) this Court observed:*

“[W]hat is administered in Courts is justice according to law, and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law.”

31. *In Council for Indian School Certificate Examination v. Isha Mittal and Anr. (vide SCC p. 522, para 4) this Court observed:*

“Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law.”

32. *Similarly in P.M. Latha v. State of Kerala (vide SCC p. 546, para 13) this Court observed:*

“13. Equity and law are twin brothers and law should be applied and interpreted equitably, but equity cannot override written or settled law.”

(emphasis supplied)

33. *In Laxminarayan R. Bhattad v. State of Maharashtra (vide SCC p. 436, para 73) this Court observed:*

“73. It is now well settled that when there is a conflict between law and equity the former shall prevail.”

(emphasis supplied)

34. Similarly in Nasiruddin v. Sita Ram Agarwal (vide SCC p. 588, para 35) this Court observed:

“35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.”

35. Similarly in E. Palanisamy v. Palanisamy (vide SCC p. 127, para 5) this Court observed:

Equitable considerations have no place where the statute contained express provisions.

36. In India House v. Kishan N. Lalwani (vide SCC p. 398, para 7) this Court held that:

“The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from by equitable considerations.”

(emphasis supplied)”

89. The Apex Court in a catena of decisions has held that considerations of equity cannot be grounds/ reasons/ justifications to not follow the law as laid down by the legislature. As can be seen from the decision of the Apex Court in *B. Banerjee v. Anita Pan*, [(1975) 1 SCC 166], the Apex Court while deciding the question of ultra vires to the amendments made to the West Bengal Premises Tenancy Act, 1956, which created a bar on a certain class of litigants to sue after a certain period of time, held :

“16. Since the argument, dressed differently, has been urged

before us again we will briefly deal with it, agreeing as we do with the High Court. All plaintiffs whose transfers are twenty years ago or two years before the Act, are lugged together and subjected to the same ban if their suits were instituted within three years of the transfer. This blanket ban regardless of the varying periods which have elapsed after the transfer and before the Act was passed, was urged to be unequal treatment or rather harshly equal subjection to restriction of unequally situated transferees. There is seeming attractiveness in this presentation. But courts are concerned not how best to hammer out equal justice but to oversee whether the classification is without rational basis unrelated to the object of the Act. That is why we are confined to check whether the reasoning on this aspect adopted by the High Court is not tenable. We may or may not disagree with the wisdom of the legislature in the grouping adopted or hold views about fairer ways of treatment. But our powers are judicial, not legislative and arbitrariness and irrationality are not writ large in the method of differentiation the legislature has here chosen. In the words of A.K. Mukherji, J.:

In the instant case, suits of the affected transferee-landlords may be regarded as sub-class, within a class and, if within the said sub-class, the suits are not differently treated, they will not be hit by Article 14. The persons affected are transferee-landlords who instituted their suits within three years of their purchase and they form a separate class, and, among the suits of that 'affected class', there is no discrimination. The law applied equally with respect to the pending suits with regard to this affected class.

Some hardship is bound to occur peripherally in any mode of classification and a few hard cases (we have not been shown whether many have been struck by this pattern of grouping) cannot guide the Court in upsetting legislative

compartmentalization.”

90. Similarly, in *Martin Burn Ltd. v. Corpn. of Calcutta*, [AIR 1966 SC 529]

the Apex Court has held as follows:

“14. We can now deal with the reasoning on which the High Court in the present case justified its order of remand. It realised that by making the order it was depriving the appellant of one of its chances to object to the valuation, namely, the chance under Section 139, but it felt that by upholding that right of the appellant it would be depriving the Corporation of its rates wholly as the time-limit prescribed by Section 131(2)(b) had expired. It thought that it was faced with two evils and that it would be choosing the lesser of the two if it allowed the Corporation a chance to collect its rates. With great respect, we find this line of reasoning altogether unsupportable. A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not. When the High Court found that Section 131(2)(b) had been attracted to the case, it had no power to set that provision at nought”.

91. The aforesaid judgments clearly indicate that no matter how harsh the result, if a statute stipulates that an act must be performed within a certain period of

time and provides for no exceptions, then the Courts must not allow such an act to be performed after the expiry of the time mandated by the statute, directly or indirectly. In this regard, I place reliance on the Apex Court's decision in *Basawaraj & Anr v. Special Land Acquisition Officer*, [(2013) 14 SCC 81] cited by Mr. Gokhale :

"12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute."

92. Similarly, the Apex Court *Lacchhman Das Arora v. Ganesh Lal & Ors*, [(1999) 8 SCC 532] held as follows:

"13.... There is no quarrel with the proposition that it is the duty of the courts to maintain the purity of the election process but at the same time there is no gainsaying that the law of limitation may harshly affect a particular party, but it

has to be applied with all its vigour when the statute so prescribes. The courts cannot extend the period of limitation on equitable grounds more particularly in the matter of filing of election petitions under the Act...”

93. As can be discerned from the Commercial Courts Act, a separate class of suits known as Commercial Suits has now been created. In my opinion, all litigants in this new class of suits would be expected to be treated equally all across the country. However, if the arguments of the Applicant/ Defendants are given any credence, there would be unequal treatment at two levels- firstly, the litigants at the Commercial Division in other High Courts would be treated separately from litigants in this Commercial Division and secondly, the litigants in Commercial Courts would be treated unequally from this Commercial Division merely because the litigant's quantum of claim did not meet the pecuniary limits of this Commercial Division. This Court in its Commercial Division would have given itself the power to condone the delay to file a written statement after the expiry of 120 days but the Commercial Courts in all districts and Commercial Divisions of the other High Courts, would not be able to do so. To my mind, this would result in stark injustice as litigants before Commercial Courts and other Commercial Divisions, would not be able to apply for condonation of delay to file their written statement, a remedy which a Defendant would otherwise be entitled to when before this Commercial Division. This would lead to unjustly prejudicing a Plaintiff on the original side of this Court. In this respect,

I find support in the findings of the Apex Court in paragraph no. 16 of *M/s SCG Contracts India Pvt. Ltd. Vs. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors. (supra)* which reads as under :

“16) Learned counsel for the respondents then strongly relied upon the inherent powers of the Court to state that, in any case, a procedural provision such as contained in the amendment, which may lead to unjust consequences can always, in the facts of a given case, be ignored where such unjust consequences follow, as in the facts of the present case. We are again of the view that this argument has also no legs to stand on, given the judgment of this Court in Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, [1962] Suppl 1 SCR 450. In this judgment, the Court held:

“The suit at Indore which had been instituted later, could be stayed in view of s.10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers 10 under s.151 is not justified...”

(at page 470)

Clearly, the clear, definite and mandatory provisions of Order V read with Order VIII Rule 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 to do the

opposite of what is stated therein.”

94. In this respect I also find support in the decisions (referred above) of the Apex Court cited by Mr. Gokhale with regard to the maxim *dura lex sed lex*, which means the law is hard, but it is the law and merely because there are outlier cases which are harsh, the law cannot be bent to accommodate those outlier cases.

95. One last argument canvassed by Mr. Sen was that in the event a Plaintiff fails to produce all the documents in its power, possession, control or custody pertaining to the Suit along with the Commercial Complaint as mandated under Order XI, Rule 1 of the CPC (as substituted by the Commercial Courts Act), such Commercial Complaint shall be rejected under Order VII, Rule 11 (d) of the CPC in view of it being 'barred by any law'. However, this argument fails to stand scrutiny when read in context with the very same provisions sought to be relied upon by Mr.Sen. Illustratively, the consequences for such non-disclosure of documents finds place in Order XI of the CPC itself which provides :

“

ORDER XI

DISCLOSURE, DISCOVERY AND INSPECTION OF DOCUMENTS IN SUITS BEFORE THE COMMERCIAL DIVISION OF A HIGH COURT OR A COMMERCIAL COURT

1. Disclosure and discovery of documents.

(1) Plaintiff shall file a list of all documents and photocopies of all documents, in its power, possession, control or custody, pertaining to the suit, along with the complaint, including—

- (a) documents referred to and relied on by the plaintiff in the plaint;
- (b) documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case;
- (c) nothing in this Rule shall apply to documents produced by plaintiffs and relevant only—
- (i) for the cross-examination of the defendant's witnesses, or
- (ii) in answer to any case set up by the defendant subsequent to the filing of the plaint, or
- (iii) handed over to a witness merely to refresh his memory

.....

(5) The plaintiff shall not be allowed to rely on documents, which were in the plaintiff's power, possession, control or custody and not disclosed along with plaint or within the extended period set out above, save and except by leave of Court and such leave shall be granted only upon the plaintiff establishing reasonable cause for non-disclosure along with the plaint.

(emphasis supplied)

”

Thus, as is evident from the aforesaid provision, in the event a Commercial Plaint has been filed without annexing all the documents in the Plaintiff's power, possession, control or custody, the Plaintiff shall suffer the consequences as provided for under Order XI. However, such consequences do not amount to a 'bar in law' as has been sought to be contended by the Defendants.

VIII. CONCLUSION:

96. In view of my findings as above, I decide the question of law framed by this Court as under :

In Commercial Suits, a written statement by the Defendant cannot be taken on record after the expiry of 120 days from the date of service of the Writ of Summons.

97. During arguments, Mr. Kohli also informed this Court that the Delhi High Court has proceeded to revise its Original Side Rules in 2018 to harmonize the provisions of its rules and the Commercial Courts Act. In these circumstances, he recommended that it will be advisable that our Court follows suit as such revision in our rules will aid in the implementation of the Commercial Courts Act and the adjudication of Commercial Suits, thereby furthering the intent of the legislature *viz.* expeditious disposal of Commercial Suits.

98. What is pertinent to note is that the Delhi High Court (Original Side) Rules, 2018 were notified pursuant to directions of the Apex Court in *Suo Motu Writ Petition (Civil) No. 8/2017 Re: Case Management of Original Suits*. There have been various hearings before the Apex Court wherein the proposed rules were furnished so as to satisfy the Apex Court that steps were being taken to expeditiously dispose of Commercial Suits. The aforesaid rules were in fact placed before a bench constituted by the Hon'ble Chief Justice of India. In its order dated 1st February, 2019, the Apex

Court has recorded its satisfaction that the progress of hearing of cases has improved post notification of the Delhi High Court (Original Side) Rules, 2018.

99. I find that ever since its introduction, the Commercial Courts Act has already instilled a sense of urgency amongst the legal fraternity. Litigants alike, are now conscious that they are required to move in an expeditious and vigilant manner as their earlier available remedy of filing applications for condonation of delay, has now been taken away. In light of the aforesaid and in view of the stand currently being taken by the Apex Court and Delhi High Court, I see no reason as to why our Court should fall behind merely because it is a Chartered High Court. Our Court must also commence all necessary steps to ensure that Commercial Suits are disposed of expeditiously in line with the statutory mandate of the Commercial Courts Act. To begin with, furthering the intent and object of the Commercial Courts Act *viz.* expeditious disposal of commercial cases would be the need of the hour. I believe that whilst on this, there is another aspect that requires consideration. This Court has seen innumerable instances where a Plaintiff has filed a suit in this Court and the same continues to remain under objections for several months. Obviously, the office of the Ld. Prothonotary & Senior Master of this Court does not proceed to issue the summons unless and until the Plaintiff removes all office objections. This conduct is deplorable and will only increase the pendency of Commercial Suits in this Court. Keeping in view the scheme, object and purpose of the Commercial Courts Act, I am of the considered opinion that the provisions of the Commercial Courts Act will be

given full credence, only in the event strict timelines are imposed not only on Defendants but also on Plaintiffs invoking the Commercial Courts Act. If a Defendant's right to file its Written Statement stands forfeited after the expiry of 120 days, the Plaintiff too ought to adhere to strict timelines. Hence, it is recommended that such provisions and rules are introduced so as to ensure that in a Commercial Suit filed before a Commercial Court / Commercial Division, the Plaintiffs are directed to remove all office objections and have the Commercial Plaint numbered within the time limit so prescribed. Further, the office of every Commercial Court / Commercial Division ought to be directed to render all possible assistance to the Plaintiffs' advocates to ensure that all office objections are removed and intimated to the advocates for the Plaintiffs'. Thereafter, upon due registration of the Plaint, it ought to be necessary for the Plaintiff to forthwith take steps to serve upon the Defendant(s) the writ of summons. In the event the Plaintiff is unable to serve the summons within the time limit so prescribed, all steps should be taken including those of substituted service etc. so as to effect due service expeditiously. In the event the Plaintiff and its Advocates fail to adhere to these timelines, the Commercial Suits so filed and belatedly numbered/served ought to be dismissed without any further reference to the Commercial Court / Commercial Division.

100. Having answered the question of law as above, I also clarify that there may be instances wherein the Plaintiff is ready and willing for a belated written statement to be taken on record subject to payment of costs. However, it is important

to note that parties cannot by consent, vest the court with discretion/ jurisdiction/ powers which it otherwise is barred from exercising under statute. Jurisdiction can be vested only by statute and not by consent and acquiescence. It is well settled that jurisdiction cannot be conferred on a court by consent, acquiescence or waiver where there is none, nor can it be ousted where there is.

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

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

102. In view of the above notification, it may be argued that in Commercial Suits before this Court, where the Defendant enters its appearance prior to receipt of the summons, the period of 120 days ought to commence from such earlier date viz. the date a Defendant enters its appearance. However, as has been recorded above, this Court is mandated to follow the provisions of the CPC as amended by the Commercial Courts Act whilst adjudicating Commercial Disputes. Hence, as the amendments to Order V Rule 1 and Order VIII Rule 1 now state “...but which shall not be later than

one hundred twenty days from the date of service of summons...” the period of 120 days ought to be calculated from the date of service of summons and not the date on which a Defendant enters its appearance as provided for in the above notification. This will not only ensure that the provisions of the Commercial Courts Act are implemented uniformly but also that a Defendant will be made aware of the case it has to meet after being served with the Plaint duly registered with this Court after the removal of all office objections etc. In fact, the Writ of Summons now being served by our Court have the following endorsement:

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

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

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

104. The question of law is decided as above.

105. 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.

(S.J.KATHAWALLA, J.)