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

+ **CS(OS) 171/2022**

COL ASHISH KHANNA SM RETD Plaintiff

Through: Mr. Sanyam Khetarpal, Mr. Nitesh Goyal, Mr. Zaffar, Ms. Vishakha Panchal and Ms. Prakriti Anand, Advocates with Col. A. Khanna SM Retd.

versus

DELHI GYMKHANA CLUB AND ORS. Defendants

Through: Mr. Prateek Kumar and Ms. Raveena Rai, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER
05.09.2023

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The matter has been put up on an office note due to some typographical errors which had crept in the Judgment dated 21.08.2023, wherein, in paragraph 19, 20 and 21, inadvertently the word '*Division Bench*' in place of '*Co-ordinate Bench*' has been typed out. Rectifying the said errors, the judgment dated 21.08.2023 shall now be read as under:-

“O.A. 37/2022

1. Defendant No. 1 has preferred the captioned chamber appeal under Chapter II Rule 5 of the Delhi High Court (Original Side) Rules, 2018 (hereinafter '*the DHC Rules*') read with Section 151 CPC against order dated 01.09.2022 passed by the Joint Registrar in I.A. 14014/2022 filed by the plaintiff, thereby closing the right of defendant No.1 to file the written



statement.

2. Before delving into the merits of the contentions raised by the learned counsels for the parties, the factual matrix of the case is noted. The plaintiff, claiming himself to be a former secretary of defendant No.1, has preferred the present suit for declaration, specific performance, mandatory injunction, recovery, permanent injunction and damages.

3. The suit came to be listed for the first time on 25.03.2022, when summons were directed to be issued to the defendants. On the said date, defendant No.1, on advance notice, was duly represented through its counsel, who accepted the summons and sought leave to file written statement. The matter was listed before the Joint Registrar for completion of pleadings, admission/denial of the documents and marking of exhibits on 04.05.2022. Simultaneously, notice in the accompanying application being I.A. 4679/2022, filed under Order XXXIX Rules 1 and 2 CPC, was also issued. The notice of the application was accepted by the learned counsel for defendant No.1, who sought time to file reply.

4. The suit, as directed, was listed before the Joint Registrar on 04.05.2022, when defendant No.1 remained unrepresented. On the next date of hearing i.e., 31.05.2022, learned counsel for the defendant No.1 stated that pursuant to an order dated 01.04.2022, in the proceedings pending before NCLT, New Delhi, 15 persons have been nominated by the Central Govt., to manage the affairs of defendant No.1. It was also informed that the nominated members had not yet taken charge.

5. The suit next came to be listed before Joint Registrar on 12.07.2022, when it was observed that no written statement had been filed by defendant No.1. On the next date of hearing i.e., 01.09.2022, an application preferred



by the plaintiff under Order VIII Rules 1 and 10 CPC, was listed before the Joint Registrar, stating that the statutory time period of 120 days for filing written statement was already over. Though learned counsel for defendant No.1 opposed the application and informed that the written statement, along with application for condonation of delay stood filed on 24.08.2022, the impugned order was passed and right of defendant No.1 to file written statement was closed.

6. Calling into question the legality and correctness of the impugned order, defendant No.1 contended that not only was the order passed against the mandate of Rule 4 of Chapter VII; Rules 14 and 16 of Chapter I of the DHC Rules, but also by incorrectly recording that written statement and application for condonation of delay were not on record. It is stated that defects were notified in written statement on 29.08.2022, which were rectified and the same was re-filed on 30.08.2022. It is further stated that defects were notified in the condonation application on 25.08.2022, 30.08.2022 and 31.08.2022.

7. Learned counsel for defendant No.1 has referred to proviso 2 of Rule 1, Order VIII of CPC, while arguing that the written statement was filed after delay of 120 days beyond the statutory limit of 30 days, beginning from 26.03.2022. The delay was sought to be explained by stating that the new General Committee, after taking control, received summons on 06.04.2022 and 07.04.2022, and thereafter became aware of the present suit. The plaintiff had made several representations dated 18.04.2022, 26.04.2022, 29.04.2022 and 17.05.2022. When the matter came to be listed on 31.05.2022, the Court directed defendant No.1, which was represented by the new General Committee, to consider plaintiff's fresh representation



within two months of receiving it. The consolidated representation was received on 08.06.2022, which came to be rejected on 18.07.2022. Apart from being engaged in various administrative works like appointment of auditors, updating of membership records, appointment/continuation of contracts etc., the General Committee also faced issues owing to the voluminous nature of the record, leading to the delay in filing written statement.

8. Additionally, it was contended that this Court is clothed with inherent powers under Rule 16 of Chapter I of the DHC Rules, to condone the delay. It was also urged that the provisions in CPC prescribing time limit for filing written statement under Order VIII Rule 1 as well as Rule 4 of Chapter VII of the DHC Rules, are only procedural and therefore, directory.

9. Learned counsel has placed reliance on the decision in Kailash v. Nanhku & Ors.¹, Bharat Kalra v. Raj Kishan Chabra², Deshraj v. Balkishan (Dead) Through Proposed Legal Representative Ms. Rohini³, Esha Gupta v. Rohit Vig⁴, Jamaluddin v. Nawabuddin & Ors.⁵, Tushar Bansal & Anr. v. Jai Ambey Traders & Ors.⁶, Amrendra Dhari Singh v. R.C. Nursery Pvt. Ltd.⁷, and Harish Bajaj v. HDFC Bank & Ors.⁸.

10. The submissions canvassed, on behalf of defendant No.1, are vehemently contested by Mr. Aryaman Sundaram, learned Senior Counsel for the plaintiff, who contends that Rule 4 of Chapter VII of the DHC Rules

¹ (2005) 4 SCC 480

² 2022 SCC OnLine SC 613

³ (2020) 2 SCC 708

⁴ FAO(OS) 2/2020

⁵ 2023 SCC OnLine Del 974

⁶ FAO(OS) 55/2020

⁷ MANU/DE/0111/2023

⁸ CS(OS) 245/2019



proscribes filing of written statement beyond the statutory time period of 30 days, unless the defendant is able to show sufficient cause i.e., that he was prevented from filing the same due to some exceptional or unavoidable reason. The power of Court is limited to condoning the delay for an extended period of 90 days, but not beyond that. The limitation on Court's inherent power results from the use of expression 'but not thereafter' in Rule 4.

11. In support of his submissions, learned Senior Counsel has referred to the decisions in Ram Swarup Lugani & Anr. v. Nirmal Lugani & Ors.⁹ and Harjyot Singh v. Mrs. Manpreet Singh¹⁰. It was submitted that the decisions cited by the defendant No.1 were distinguishable, on ground that either the same didn't involve appreciation and consideration of Rule 4 of the DHC Rules or that the said Rule was not brought to the notice of the Court. The remaining were orders based on 'no objection' by the plaintiff.

12. Admittedly, the present case is a non-commercial suit. Rule 1 Order VIII CPC deals with the time period for filing of written statement. It prescribes that defendant shall file written statement within 30 days from the date of service of summons on him. Proviso to the said Rule prescribes that in case the defendant fails to file written statement within the stipulated period of 30 days, the Court is empowered to allow the same to be filed upto a maximum further period of 90 days, subject to reasons being recorded in writing. The second proviso relates to a commercial suit only. Chapter VII of the DHC Rules, which came into force on 01.03.2018, deals with the

⁹ 2020 SCC OnLine Del 1353

¹⁰ 2021 SCC OnLine Del 2629



procedure for appearance by defendant, written statement, set off, counter-claim and replication. Rule 4 specially vests power with the Court to extend time for filing written statement. It provides that, in case written statement is not filed within 30 days, subject to defendant satisfying the Court that there was sufficient cause i.e., that he was prevented from filing the same due to some exceptional or unavoidable reason, the Court may extend the time by a further period not exceeding 90 days, but not thereafter. The Rule additionally provides that the defendant be burdened with appropriate cost, and only upon the payment of such cost, would the written statement be taken on record. Another departure from Rule 1 Order VIII is the use of expression 'but not thereafter', to which I would advert later.

13. The controversy raised as to whether filing of the written statement and condonation of delay in filing the same, would be governed by Order VIII Rule 1 CPC or Rule 4 of the DHC Rules has surfaced in many cases.

14. In Kailash (Supra), Supreme Court, while considering the object and purpose behind enacting Rule 1 of Order VIII, opined that the provision is to be construed as directory and not mandatory, and at the same time it was cautioned that only in exceptional cases, the Court may extend the time for filing written statement, though the period of 30 days and 90 days had expired. Again in R.N. Jadi & Brothers & Ors v. Subhashchandra¹¹, Supreme Court, while referring to its earlier decision in Kailash (Supra), held that extension of time beyond 90 days was not automatic and satisfaction of the Court has to be recorded, as to the existence of sufficient justification, for departing from the time limit fixed by the Court. The Court

¹¹ (2007) 6 SCC 420



again cautioned that the decision in Kailash (Supra) should not be considered as an authority for receiving written statement after the expiry of period permitted by the law, in a routine manner. The decision in Kailash (Supra) was again referred to by the Supreme Court in Bharat Kalra (Supra), while condoning a delay of 193 days in filing of the written statement.

15. Recently, in Desh Raj (Supra), a decision rendered by a three Judge Bench, the provision again came up for consideration before the Supreme Court. The defendant had failed to file the written statement within the period of 120 days of notice, resulting in closure of opportunity to file the same and his defence being struck off. While considering the effect of Commercial Courts Act, 2015, it was held that after the coming into force of the said Act, two regimes of civil procedure came into existence. While commercial disputes, as defined under Section 2(c) of the Commercial Courts Act, were governed by Section 16 of the said Act, all other non-commercial disputes fell within the ambit of the unamended (or original) provisions of CPC. It was held that the unamended Order VIII Rule 1 CPC would continue to be directory, and thus would not come in the way of inherent jurisdiction of the Court, to condone certain delays. Notably, in this case, the effect of Rule 4 and 5 of the DHC Rules was not the matter for court's consideration.

16. The interpretation of Order VIII Rule 1 CPC vis-à-vis Rule 4 and 5 of the DHC Rules first came up before this Court in Gautam Gambhir & Ors. v. Jai Ambey Traders & Ors.¹² and connected matter being Ram Swarup Lugani v. Nirmal Lugani & Ors., wherein the Court dealt with a Chamber

¹² 2020 SCC OnLine Del 2621



Appeal against an order of Joint Registrar rejecting the application for condonation of delay. The Court taking note of the fact that the DHC Rules came into effect in 2018 i.e., after the Commercial Courts Act was notified, opined that use of expression ‘but not thereafter’ in Rule 4 would mean that a total 120 days (30 + 90) was granted for filing written statement. Further, both Rules 4 and 5 were held to be mandatory.

17. Ram Swarup Lugani laid a challenge to the aforesaid decision by filing an appeal. A Division Bench of this Court, while considering the scope and object of Chapter VII of the DHC Rules, especially Rules 4 and 5 as well as Rules 14 and 16 of Chapter I, concluded that the use of ‘but not thereafter’ in Rule 5 indicated the intention of the rule-making authority to make the provision mandatory and not directory. While coming to the aforesaid conclusion, the Division Bench also relied upon the decision of this Court in DDA v. K.R. Builders¹³ and HTIL Corporation BV v. Ajay Kohli & Ors.¹⁴. The relevant extract of the decision is as below:-

“21. A conspectus of the decisions referred to above leaves no manner of doubt that where ever the phrase “but not thereafter” has been used in a provision for setting a deadline, the intention of the legislature is to treat the same as a preemptory provision. Thus, if Rule 15 of the DHC Rules mandates filing of a replication within a period of 30 days reckoned from the date of receipt of the written statement, with an additional period of 15 days provided and that too only if the court is satisfied that the plaintiff has been able to demonstrate that it was prevented to do so by sufficient cause or for exceptional and unavoidable reasons, can the time for filing the replication be extended for a further period not exceeding 15 days in any event, with costs imposed on the

¹³ (2005) 81 DRJ 708

¹⁴ (2006) 90 DRJ 410



plaintiff. The critical phrase “but not thereafter” used in Rule 15 must be understood to mean that even the court cannot extend the period for filing the replication beyond the outer limit of 45 days provided in the DHC Rules. Upon expiry of the said period, the plaintiff’s right to file the replication would stand extinguished. Any other meaning sought to be bestowed on the above provision, would make the words “but not thereafter”, inconsequential.

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27. Since the language of Rule 5 shows that the intention of the Rule making Authority was to exclude the provisions of the Limitation Act, 1963, giving no power to the court to condone any delay beyond the period of 45 days for accepting the replication, learned counsel for the appellants/plaintiffs cannot be heard to state that Rule 16 could have been very well invoked by the learned Single Judge to take on record the belatedly filed replication. The sanctity of the period of 30 days, extendable by another period of 15 days cannot be diluted by giving such an interpretation. In view of the specific provision and the timeline stated in Rule 5 of Chapter VII, that precludes the court from extending the timeline beyond 45 days for accepting the replication, the argument advanced by Mr. Mehta, learned counsel for the appellants/plaintiffs that notwithstanding Rule 5, provisions of Rule 16 and Rule 14 of Chapter I of the DHC Rules empower the court to take on record, the replication even beyond the period of 45 days and ought to have been resorted to by the learned Single Judge, cannot be accepted.

28. In our opinion, reliance placed by Mr. Mehta on Desh Raj (supra), is also misplaced. No doubt, the Supreme Court has held that a reading of proviso 2 appended to Rule 1 of Order VIII would show that the said Rule is only directory and not mandatory, ultimately the Supreme Court has refused to condone the delay in that case. In fact, the said decision is not applicable to the facts of this case for the reason that in the



said judgment, there was no occasion to deal with the scope and effect of Rule 5 of Chapter VII of the DHC Rules. In any event, the DHC Rules will have an overriding effect on the CPC. Notably the Code does not provide for filing of any replication. Order VI, Rule 1 describes “pleadings” to mean plaint or written statement. It is the Delhi High Court (Original Side) Rules, 2018 that provides a time limit for filing the replication and since the said Rules regulate the procedure, the same will have to prevail over the Code. We are in complete agreement with the view taken by the Division Bench of this court in DDA Vs. K.R. Builders (P) Ltd., reported as (2005) 81 DRJ 708 and relied on in HTIL Corporation, B.V. & Ors. v. Ajay Kohli, reported as (2006) 90 DRJ 410, where it was observed as under:

“6. The question as to whether the CPC or the Original Side Rules will apply was considered by a Division Bench of this court in the recent case of DDA v. K.R. Builders P. Ltd., (2005) 81 DRJ 708 (DB). The finding of the Division Bench supported the view of the learned defence counsel that suits filed on the original side of this court would be governed by the rules framed by the High Court to the exclusion of the provisions of the CPC wherever the field is occupied by these Rules and that this court has the power to extend the time for filing the written statement even beyond 90 days. However, the Division Bench also clarified that Rule 3, as it then stood, of Chapter IV of the Delhi High Court (Original Side Rules) does not contemplate unending extensions to be granted on the asking. Rule 3 provided as under:

“3. Extension of time for filing written statement.— Ordinarily, not more than one extension of time shall be granted to the defendant for filing a written statement provided that a second or any further extension may be granted only on an application made in writing setting forth sufficient grounds for such extension and



supported, if so required, by an affidavit.”

7. The Division Bench pointed out that as per the rule quoted above, only one extension of time was to be granted for filing written statement and that the second or further extension may be granted only on an application made in writing setting forth sufficient grounds. It was also pointed out that the expression ‘any further extension’ in this proviso does not contemplate unending extensions on the asking and that ‘any further extension’ should receive a restricted interpretation. The situation has now changed since the Delhi High Court (Original Side Rules) have also been amended. The amendment which has taken effect on 9.1.2006 is now as under:

“3. Extension of time for filing written statement.— Where the defendant fails to file written statement within the period of 30 days as stated in Rule 2(ii) he shall be allowed to file the same on such other day as may be specified by the Court on an application made in writing setting forth sufficient ground for such extension and supported, if so required, by an affidavit but such day shall not be later than 90 days from the service of summons.”

8. In view of this amendment, the Delhi High Court (Original Side Rules) give the same time schedule for filing a written statement. Written statement, therefore, can be filed within 30 days and thereafter on sufficient ground for such extension being shown on an affidavit but such extension shall not be later than 90 days from the date of service.”

(emphasis supplied)

18. Rule 4 of the DHC Rules came up for interpretation in a non-commercial suit before a Single Judge of this Court in Amrendra Dhari



(Supra). The court drew a distinction between the discretionary powers of condonation of delay envisaged under Rule 4 and Rule 5 for filing of the written statement and replication, respectively. Court was of the considered view that the construct of the two Rules has different outcomes, even though textually they are perceived to be the same merely because of the use of the expression “not thereafter” in the two Rules. The court held that (not necessarily in the same words) while Rule 5 circumscribes the courts discretion to 45 days -and not a day beyond- in permitting the filing of replication, no such hard stop date is envisaged to apply to Rule 4, as far as written statements filed beyond 120 days are concerned. The court found a nuanced distinction in the two Rules, because of the use of words “may” in Rule 4 and “shall” in Rule 5, the Court was of the view that “may” signifies existence of discretion unlike “shall” used in Rule 5. The court was also persuaded by the dictum of law that a party should not be condemned unheard. Closing the right to file written statement was considered to be a serious consequence that could not be undermined due to a procedural breach.

19. The ruling in Amrendra Dhari (Supra) was scrutinised in Charu Agrawal v. Alok Kalia & Ors.¹⁵, wherein a Co-ordinate Bench of this Court examined the width of Rule 4. While traversing the entire case law on the subject and agreeing with the conclusion in earlier decision of the Division Bench in Ram Swarup Lugani (Supra) and of the Co-ordinate Bench in Harjyot Singh (Supra), it was held as under:-

“35. It must with due respect be observed that neither Order VIII as originally standing in the Code nor its provisions as

¹⁵ 2023 SCC OnLine Del 1238



adopted by the 2015 Act employ the phrase “but not thereafter”. The said expression stands enshrined in both Rules 4 and 5 of 2018 Rules. It was the adoption of the aforesaid phrase which was understood by the Division Bench in Ram Sarup Lugani to be of critical and vital significance. The Court is further constrained to observe that once the Division Bench had on an extensive review of Rule 5 come to conclude that the usage of the expression was indicative of a terminal point having been constructed, it would have been impermissible to take a contrary view. Ram Sarup Lugani had tested the provisions of Rule 5 based on a textual interpretation, the adoption of a special period of limitation, the recognition of the Order VIII principles not being applicable and even the inherent power not being liable to be invoked in light of the emphatic language of the provision itself. Ram Sarup Lugani had also noticed the earlier Division Bench judgments in DDA vs K.R. Builders Pvt Ltd. , HTIL Corporation B.V vs Ajay Kohli as well as in Print Pak Machinery Ltd. v. Jay Kay Papers Converters . all of which had consistently upheld and recognised the primacy of the Rules over the provisions of the Code. The Court in Ram Sarup Lugani had also duly noticed the judgment of the Supreme Court in Desh Raj. The former decision thus constituted a binding precedent on the scope of the Rules, the mandatory nature of the timelines prescribed thereunder and that neither Order VIII nor the inherent powers of the Court being liable to be invoked to extend the period of limitation as stipulated in Rule 5.

36. While the aforesaid discussion would have been sufficient to lay the controversy at rest, since Amarendra Dhari Singh also proceeds on a perceived distinction between Rules 4 and 5, the Court deems it apposite to observe as follows. As was noticed in the preceding parts of this decision, both Rules employ the phrase “but not thereafter”. Both the phrases “not exceeding” and “but not thereafter” must clearly be accorded due weight and consideration. This was an aspect which was duly noticed in Ram Sarup Lugani.



37. Regard must also be had to the fact that while the penultimate part of Rule 4 is not replicated in Rule 5, that too would be of little significance when one holistically reads Rule 4. It becomes pertinent to note that the obligation to file a written statement in 30 days is originally placed by Rule 2 falling in Chapter VII. Rule 4 deals with the extension of time for filing a written statement. As is manifest from a plain reading of that provision, it confers a power on the Court to condone the delay that may have been caused and a written statement having not being filed within 30 days if it be satisfied that the Defendant was prevented by sufficient cause and for exceptional and unavoidable reasons to file the same within the prescribed period. Rule 4 then and upon such satisfaction being arrived at empowers the Court to extend the time for filing a written statement by a further period not exceeding 90 days but not thereafter.

38. The penultimate part of Rule 4 talks of the power of the Registrar to close the right of a Defendant to file a written statement if it be found that the same has not been tendered within the extended time. The use of the phrase “extended time” cannot possibly run beyond the maximum period of 120 days. In any case, the said provision as made in Rule 4 cannot possibly be countenanced or interpreted to recognise the Registrar being empowered to additionally extend time beyond the period of 120 days. The reliance which has been placed on various decisions noticed above and delivered in the context of Order VIII as found in the Code would have to be duly understood bearing in mind what had been held by the earlier Division Benches of our Court in *K.R. Builders Pvt Ltd*, *HTIL Corporation* as well as in *Print Pak*. The said judgments had consistently held that the Rules as adopted by the Court would clearly prevail over and above those which may find place in the Code. All the four decisions noticed above, had been rendered prior in point of time to *Esha Gupta* and had neither been noticed nor considered in the said judgment. *Ram Sarup Lugani* while relying on the aforementioned decisions, had drawn



sustenance from those decisions in support of its ultimate conclusion that Order VIII and the principles underlying the same would not apply to Rule 5.

39. The Court also deems it necessary to observe that the Rules directly fell for consideration of the Division Bench in Ram Sarup Lugani as well as the learned Judges who authored Gautam Gambhir and Harjyot Singh. The facial distinction between Rules 4 and 5 which appears to have weighed with the Court in Amarendra Dhari Singh would, in any case, not justify taking a contrary view. The Court notes that both Gautam Gambhir and Harjyot Singh were decisions rendered directly in the context of Rules 4 and 5 as enshrined in Chapter VII. This Court thus finds itself unable to accord an interpretation upon Rule 4 or 5 which would run contrary to what had been held in the earlier decisions and which necessarily bind this Court.

40. In conclusion, this Court is of the considered opinion that Gautam Gambhir, Ram Sarup Lugani and Harjyot Singh are binding precedents on the scope of Rules 4 and 5 as falling in Chapter VII of the Rules. The mere fact that the argument of a perceived discretion vesting in the Registrar in Rule 4 was not specifically raised or addressed would not justify the judgment of the Division Bench being either ignored or doubted. The Court has already noticed the issues that arise out of the judgment of the Division Bench in Esha Gupta. The earlier decisions of the Division Benches of the Court in K.R. Builders, HTIL Corporation, and Print Pak do not appear to have been cited for the consideration of the Bench. Ram Sarup Lugani was a judgment which came to be rendered upon an exhaustive analysis of the earlier precedents rendered in the context of the Rules and the Code, the peremptory language in which Rule 5 stood couched, of how the creation of a special rule relating to limitation would exclude the permissibility of condonation or extensions being granted. While the order of the Division Bench in Tushar Bansal was based on a concession that was made, the judgment in Jamaluddin came



to be pronounced with neither side having drawn the attention of the Court to the decision in Ram Sarup Lugani. The said decision proceeded on the principles which underlie Order VIII of the Code and the judgments of the Supreme Court in Kailash and Bharat Kalra rendered in the context of that provision. The Court notes that the adoption of Order VIII principles already stood negated by the earlier Division Benches in K.R. Builders, HTIL Corporation, Ajay Kohli and Print Pak. Those decisions too do not appear to have been cited for the consideration of the Court in Jamaluddin.”

20. In Charu (Supra), the Co-ordinate Bench has very emphatically held the inviolability of the hard stop period of 120 days prescribed in Rule 4 for filing the written statement. Court re-stated the principles laid down in Gautam Gambhir (Supra) and Harjyot Singh (Supra), and declared that they act as binding precedents on the issue.

As of now, Charu (Supra) has laid to rest the debate on the ability of courts to condone delay in filing of written statement beyond 120 days in a non-commercial suit. Rule 4 circumscribes the power of court to condone the delay beyond the maximum permissible time of 120 days.

21. Resultantly, this Court has no hesitation in holding that that the decision of Registrar is in conformity with the law as it stands and the exhaustive decisions of Co-ordinate Bench of this Court.

22. The chamber appeal merits dismissal and is accordingly rejected.

23. As a necessary sequitur, the application filed by defendant No.1 being I.A. 14512/2022 seeking condonation of delay of 120 days in filing of written statement is also dismissed.”

The order passed today in the present matter be placed with the Judgement passed on 21.08.2023.



SEPTEMBER 5, 2023/na

MANOJ KUMAR OHRI, J