NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 4266-4267 OF 2018

ATCOM TECHNOLOGIES LIMITED .....APPELLANT(S)

VERSUS

Y.A. CHUNAWALA AND CO. & ORS. .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

The present appeal is filed impugning the final judgment and order dated November 21, 2016 passed by the High Court of Judicature at Bombay in Commercial Appeal No. 33 of 2016 in Notice of Motion No. 1211 of 2015 in Suit No. 3813 of 2000 with Notice of Motion No. 1706 of 2016 in Appeal No. 420 of 2016 in Notice of Motion No. 1211 of 2015 in Suit No. 3813 of 2000, whereby the High Court has dismissed the appeal filed by the appellant challenging the order dated March 15, 2016 passed by the learned Single Judge in Notice of Motion No. 1211 of 2015 in Suit No. 3813 of 2000.

2. The Notice of Motion filed by the respondents was for condonation of delay in filing the written statement. Delay was of

15 years and 54 days (though according to the appellant it is 14 years and 166 days). The learned Single Judge condoned the delay vide order dated March 15, 2016 with a cost of Rs.5 lakhs which was ordered to be paid by the respondents to the appellant. Aggrieved by the said order condoning such an inordinate delay, the appellant preferred appeal before the Division Bench which has affirmed the order passed by the Single Judge and dismissed the appeal of the appellant.

3. The dispute between the parties is with regard to the dues allegedly payable by the respondents to the appellant of about Rs.11.9 crores with additional interest as per the particulars of claim annexed to the suit. According to the appellant and as per the arrangement between the parties, the respondents have failed and neglected deliberately with ulterior motives and *mala fide* intentions to refund the money or handover possession of certain flats in a building named 'Emerald Court' situated at Andheri (E) in Mumbai in respect of which Agreements for Sale have been executed.

4. The case set up by the appellant is somewhat like this:

(a) It may be mentioned that respondent Nos. 1, 3 and 4 are the owners of a parcel of land admeasuring 30,262 sq. mtrs.

situated at Village Kondivita, Ramkrishna Mandir Marg, Andheri (E), Mumbai (hereinafter referred to as the 'Kondivita Plot'). Respondent No. 1 and respondent No. 2 (partner of M/s. Shree Siddhivinayak Developers Ltd.) entered into an agreement whereby respondent No. 2 was permitted to develop the Kondivita Plot by constructing buildings and sell the premises on ownership basis. Memorandum of Understanding was executed between M/s. Shree Siddhivinayak Developers Ltd. and ATCO Securities and Finance Ltd. (sister concern of the appellant – now known as Kimaya Wellness Ltd.) (hereinafter referred to as the 'appellant's sister concern') pursuant to which appellant's sister concern was granted development and marketing rights of 2,00,000 sq. ft. FSI in a property to be constructed on the piece and parcel of land bearing S. No. 3(P) and 4(P) CST No. 5P and 6 admeasuring 26,033 sq. mtrs. and further S. No. 3(P) CST No. 5(P), 6(P) and 7(P) admeasuring 7,341 sq. mtrs. of the Revenue Village Kopri, Powai Road, Taluka Kurla within Greater Bombay (hereinafter referred to as the 'Kopri Plot') for a consideration of Rs.44,00,00,000/- (Rupees Forty Four Crores) only.

Earlier Kimaya Wellness Ltd. name was ATCO Securities and Finance Ltd. The name was subsequently changed to Saral

Disha Investments Ltd. and again the said name changed to Kimaya Wellness Ltd.

(b) Pursuant to the MOU dated December 20, 1995, appellant's sister concern advanced a sum of Rs.14,23,50,000/- (Rupees Fourteen Crore Twenty Three Lakhs Fifty Thousand) only to M/s. Shree Siddhivinayak Developers Ltd. All the payments are made through proper banking channels. Thereafter, a Tripartite Agreement dated April 1, 1996 was executed between the appellant, appellant's sister concern and M/s. Shree Siddhivinayak Developers Ltd. whereby it was agreed that the development and marketing rights under the MOU dated December 20, 1995 would be shared equally between the appellant's sister concern and the appellant. It was further agreed that out of the sum of Rs.14,23,50,000/- already advanced by appellant's sister concern to M/s. Shree Siddhivinayak Developers Ltd., 50% would be treated as having been advanced by the appellant and the remaining 50% would be treated as having been advanced by the appellant's sister concern. It was followed by MOU dated May 30, 1996 between the appellant and M/s. Shree Siddhivinayak Developers Ltd. regarding the terms of the aforesaid Tripartite Agreement dated April 1, 1996.

(c) As per the appellant, in December 1996, by mutual consent, parties cancelled the said Tripartite Agreement dated April 1, 1996.

(d) Various further documents were executed between the parties and it is not necessary to give detailed narration thereof. Suffice is to state that as per the version of the appellant, it was agreed that out of Rs.7,11,75,000/- advanced by the appellant to M/s. Shree Siddhivinayak Developers Ltd., Rs.3,77,30,000/- would be adjusted towards purchased consideration for 11 flats that would be purchased by the appellant in a building known as 'Emerald Court' at the Kondivita Plot. The balance amount of Rs.3,34,45,000/- was agreed to be refunded by M/s. Shree Siddhivinayak Developers Ltd. to the appellant. This arrangement was on account of M/s. Shree Siddhivinayak Developers Ltd. expressing their inability to repay the appellant entirely. However, even when some additional amounts were paid towards the aforesaid flats, the respondent No. 2 failed to deliver the 11 flats in respect of which agreement was entered into. The appellant and respondent No. 2 has also entered into 12 separate registered Agreements for purchase of 12 more flats. According to the appellant, these flats were also not delivered.

(e) To cut the long story short, it is suffice to note that when the possession of the flats was not delivered, the appellant demanded back the amount paid to respondent No. 2. According to the appellant, the amount paid was not refunded. It led to filing of the following three cases:

(i) Summary Suit No. 4870 of 1999 by the sister concern of the appellant in the High Court of Judicature at Bombay seeking decree of Rs.4,91,60,000/- along with interest @18% p.a.

(ii) Suit No. 3813 of 2000 by the appellant in the High Court of Judicature at Bombay for decree in the sum of Rs.7,88,90,000/- along with interest @18% p.a.

(iii) M/s. Shree Siddhivinayak Developers Ltd. (respondent No. 2) and its all partners also filed suit No. 305/2001 against Saral Disha Investment Limited (sister concern of the appellant).

5. Various developments which took place in these three suits need not be noted except that in Notice of Motion taken out by the appellant in its suit, Court Receiver was appointed to take physical possession of 23 flats in 'Emerald Court'. Further, unconditional leave to defend was granted to the respondents in Suit No. 4870 of 1999 vide order dated March 16, 2002 and the Court also directed that all the three suits shall be tried together.

When these suits were listed for hearing before the Single Judge on January 29, 2015, it was noticed that no written statement was filed in Suit Nos. 4870 of 1999 and 3813 of 2000 filed by the appellant's sister concern and appellant respectively. The Court adjourned the case to February 12, 2015 for ex-parte decree. These cases were again adjourned and came up for hearing on May 06, 2015 on which date order was passed recording that written statement in these two suits was yet to be filed. Cases were adjourned to June 22, 2015. When the things rested at that stage, respondent No. 2 filed Notice of Motion No. 1212 of 2015 in Suit No. 4870 of 1999 on July 24, 2015 seeking setting aside of order dated January 29, 2015 and further sought condonation of delay of 13 years and 41 days in filing the written statement. Likewise, Notice of Motion No. 1211 of 2015 was also filed in Suit No. 3813 of 2000 seeking condonation of delay of 5 years and 54 days in filing the written statement (though as per the appellant, delay was 14 years and 166 days).

6. Notice of Motion No. 1212 of 2015 in Suit No. 4870 of 1999 was taken up for hearing and vide order dated October 28, 2015, it was dismissed by the learned Single Judge who refused to condone the delay with, *inter alia,* following observations:

> "4. It is obvious from the affidavit in support of Notice of Motion that the defendants had completely and knowingly neglected the proceedings.
>
> …….
>
> The facts of the case on hand disclose patent inordinate delay on the part of the defendants and as such attracts the doctrine of prejudice. The delay is to the extent of completely ignoring the proceedings. Taking a liberal view of such gross facts would amount doing injustice to the plaintiff and allowing premium on the negligence of the defendants."

7. Intra-Court appeal was filed by the respondents against the said order before the Division Bench of the High Court which was also dismissed by the Division Bench on January 6, 2016 holding that '*the Defendants had completely and knowingly neglected the proceedings*'. It would be pertinent to mention at this stage that Special Leave Petition was filed challenging the order of the Division Bench dated January 6, 2016 (SLP No. 28775 of 2016) has been dismissed by this Court on September 4, 2017.

8. Insofar as Notice of Motion No. 1211 of 2015 in Suit No. 3813 of 2000 is concerned, it resulted in altogether opposite outcome. The learned Single Judge passed the order dated March 15, 2016 allowing the same thereby condoning the delay in filing the written statement with the imposition of cost of 5 lakhs upon the respondents. The reason given by the learned Single Judge was that till the year 2009, Writ of Summons had not been served

upon the respondents and, therefore, the delay was of 5 years and 54 days and was condoned on the ground that the appellant also took number of years in serving the summons upon the respondent. Appeal against this order filed by the appellant has been dismissed vide impugned order dated April 18, 2016 affirming the order of the learned Single Judge. The entire reasoning in support of this order is contained in para 5 of the judgment of the High Court which reads as under:

> "5 In the impugned order, the learned Judge has assigned reasons. He has found from the record and the affidavits placed, that even the Appellant / Plaintiff did not take any concrete steps. In a suit filed in the year 2000, the writ of summons was not prepared and served till 2009. In paragraph 6 of the impugned order, the explanation that the writ of summons was served promptly has not been accepted. The learned Judge has found that the writ of summons was not served for a period of nine years after institution or filing of the suit. In such circumstances an overall view of the matter was taken and by balancing the rights and equities, the learned Judge has granted the request of the Respondents to allow them to file the Written Statement and defend the suit / claim on merits. In the process, the learned Judge has relied upon well settled principle that all procedural rules are handmaids of justice. So long as there is no irreparable loss or prejudice or a case made out of malafides ordinarily a party should be allowed to defend legal proceedings is the rule invoked and applied, then, we do not think that in the facts and circumstances of the present case, the application of such rule can be faulted. Once the rights and equities have been balanced, then, we do not think that in further appellate jurisdiction such an order deserves interference. The Appeal is devoid of merits and is dismissed. By consent of parties, the time to take inspection of the documents and complete pretrial formalities is extended by eight weeks."

9. As is clear from the above, the circumstance which weighed with the High Court in condoning the delay was that though the suit was filed in the year 2000, summons were served only in the year 2009. Plea of the appellant that summons were actually served in the year 2000 itself was not accepted. On this basis, the High Court came to the conclusion that since appellant itself took time of 9 years after institution or following of the suit, to serve the summons upon the respondents herein, equities were balanced by allowing the respondents to file the written statement, more so, when no irreparable loss or prejudice was caused to the appellant and no case of *mala fides* was made out against the respondents.

10. Notice in the Special Leave Petition was issued on July 18, 2017 which was duly served upon all the five respondents. However, none of the respondents have entered appearance. Accordingly, the Registry processed the matter for listing before the Court and it was listed for hearing on March 26, 2018. On that day also, nobody appeared on behalf of the respondents. Still in order to give one more opportunity, the matter was directed to be listed after three weeks. It again came up for hearing on April 20, 2018. Since respondents failed to appear in spite of all the aforesaid chances given to them, this Court is left with no option but to

proceed ex-parte against the respondents and heard the matter in their absence.

11. Mr. Amar Dave, learned counsel appearing for the appellant submitted that the reason given by the High Court in condoning the delay was totally erroneous inasmuch as Writ of Summons were served upon the respondents immediately after the filing of the suit and not in the year 2009 as mentioned. It was further argued that, in any case, even if when the summons were served in the year 2009, there was no satisfactory explanation submitted by the respondents seeking condonation of delay which was more than 5 years 54 days even on counting the period from the year 2009. He also submitted that the High Court failed to notice that, on identical grounds, Notice of Motion No. 1212 of 2015 in Suit No. 4780 of 1999 for condonation of delay in filing the written statement was filed by the respondents which was dismissed by the learned Single Judge and that order was affirmed by the Division Bench (and now even by this Court). While dealing with the instant matter, the High Court failed to consider those orders passed by the co-ordinate Benches.

12. We find force and due merit in the aforesaid submissions of the learned counsel for the appellant.

13. We shall proceed on the basis that summons in Suit No. 4870 of 1999 were served only in the year 2009. In this behalf, it may be stated that in this suit, unconditional leave to defend was granted by the learned Single Judge on March 16, 2002. By the same order, all three suits were directed to be tried together. Therefore, Vakalatnama in the suit was also filed and on the dates fixed before the Court, respondents were appearing having knowledge about the Suit No. 4870 of 1999 as well. Obviously, this leave to defend was granted after the respondents had put in appearance and filed application for grant of leave to defend. Thus, summons in the suit were served upon the respondents, *albeit*, in Form 4 of Appendix B, as stipulated in Rule 2 of Order XXXVII of the Code of Civil Procedure, 1908. May be, thereafter, Writ of Summons were not served again upon the respondents. However, in any case, these summons were served in the year 2009. Therefore, it was incumbent upon the respondents to show as to in what manner they were prevented from filing the written statement.

14. It has to be borne in mind that as per the provisions of Order VIII Rule 1 of the Code of Civil Procedure, 1908, the defendant is obligated to present a written statement of his defence within thirty days from the date of service of summons. Proviso thereto

enables the Court to extend the period upto ninety days from the date of service of summons for sufficient reasons. Order VIII Rule 1 of the Code of Civil Procedure, 1908 reads as under:

> "**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."

15. This provision has come up for interpretation before this Court in number of cases. No doubt, the words '*shall not be later than ninety days*' do not take away the power of the Court to accept written statement beyond that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from the case of ***Salem Advocate Bar Association, Tamil Nadu*** v. ***Union of India***, (2005) 6 SCC 344:

> "21. ...There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written

> statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1."

16. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that Writ of Summons were not served till 2009?

17. We fail to persuade ourselves with this kind of reasoning given by the High Court in condoning the delay, thereby disregarding the provisions of Order VIII Rule 1 of the Code of Civil Procedure, 1908 and the spirit behind it. This reason of the High Court that delay was condoned '*by balancing the rights and equities*' is far-fetched and, in the process, abnormal delay in filing the written statement is condoned without addressing the relevant factor, viz. whether the respondents had furnished proper and satisfactory explanation for such a delay. The approach of the High Court is clearly erroneous in law and cannot be countenanced. No doubt, the provisions of Order VIII Rule 1 of the Code of Civil Procedure,

1908 are procedural in nature and, therefore, hand maid of justice. However, that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically. It is also to be borne in mind that when the matter was listed on January 29, 2015, it was specifically recorded that no written statement was filed and the two suits were adjourned for ex-parte decree. In other suit i.e. Suit No. 3813 of 2000, similar Notice of Motion seeking condonation of delay was rejected though it contained same kind of explanation and that order has been upheld till this Court. On this ground also, there was no reason to take a contrary view in the instant matter when both the suits were taken up together and proceed simultaneously.

18. We accordingly allow these appeals, set aside the impugned order and dismiss Notice of Motion No. 1212 of 2015.

No cost.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

NEW DELHI;
MAY 07, 2018.