

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

**NOTICE OF MOTION NO.1211 OF 2015  
NOTICE OF MOTION NO.675 OF 2013  
NOTICE OF MOTION NO.1211 OF 2015  
CHAMBER SUMMONS NO.518 OF 2012  
CHAMBER SUMMONS NO.518 OF 2012  
NOTICE OF MOTION NO.675 OF 2013**

**IN  
SUIT NO.3813 OF 2000  
WITH  
CONTEMPT PETITION NO.57 OF 2011  
IN  
SUIT NO.3813 OF 2000**

Atcom Technologies Ltd. ....Plaintiff

V/s.

Y.A.Chunawala & Co. and Ors. ....Defendants

**WITH**

**SUMMARY SUIT NO.4870/1999  
SUIT NO.305/2001  
CONTEMPT PETITION NO.59/2012**

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Mr.Mayur Khandeparkar a/w Mr.Reshant Shah i/by Lex Conseiller for plaintiffs and for petitioners in Contempt petitions.

Mr.Ali Abbas Delhiwala a/w Mr.Johan A.Chokshi a/w Mr.Niraj Patit for defendant no.2 and for applicants in Notice of Motion 1211/2015.

Mr.Samir A.Vaidya for respondent in Contempt Petition No.57/2011 & Contempt Petition No.59/2011.

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**CORAM : K.R.SHRIRAM,J  
DATE : 15.3.2016**

**P.C.:-**

1 Between the parties, there are 3 suits which are pending in this court viz. Summary Suit No.4870 of 1999, the present suit, i.e., Suit No.3813 of 2000 and Suit No.305 of 2001. Summary Suit

No.4870 of 1999 has been filed by the sister concern of the plaintiff in the present suit against the defendants and the Suit No.305 of 2001 is filed by the defendants against the plaintiff in the present suit and also against the plaintiff in Summary Suit No.4870 of 1999.

2           The dispute between the parties in all the 3 suits are as under :-

          According to the plaintiff an amount of Rs.14,28,15,000 was advanced as loan by the plaintiff to the defendants. Thereafter there was a tripartite agreement between plaintiff, defendants and one Saral Disha Investment Limited whose name was changed to Kimaya Wellness Limited. Atcom & Kimaya are sister concerns. As a result of this tripartite agreement, an amount of Rs.7,11,50,000/- was to be treated as a loan advanced by the plaintiff to the defendants and identical amount was to be treated as a loan advanced to the defendants' sister concern. According to the plaintiff, therefore, an amount of Rs.7,11,50,000/- was payable by the defendants to the plaintiff. The plaintiff alleges that they had paid some more money to the defendants and hence the prayer clause reflects the figure of Rs.7,88,90,000/-.

          According to the defendants the transaction was not a simple transaction of loan. According to the defendants, they were in need of funds and the plaintiff agreed to advance the loan on the

condition that the defendants would subscribe to the shares of the plaintiff. A modus operandi was adopted by the plaintiff to show that an amount of Rs.14 crores was advanced to the plaintiff and out of that amount Rs.10 crores was utilized for purchasing the shares of the plaintiff company. According to the defendants the net result was only an amount of Rs.25 lakhs was utilized for showing purchase of shares of Rs.10 crores. The defendants have filed Suit No.305 of 2001 claiming a declaration that the defendants have discharged their liability towards the plaintiff and its sister concern by paying amount of Rs.4,23,50,000/-. The suit is also for return of the shares. This is the background of the dispute between the parties.

3           The defendant no.2 has taken out the present Notice of Motion for condoning the delay of 5 years and 54 days in filing the written statement declared by the defendant no.2 on 3.7.2015. According to the applicant, there were various applications filed by the plaintiff against the defendant no.2 which the defendant no.2 resisted from time to time. It is also stated that the defendant no.2 was travelling for business purposes and for other social obligations and hence was unable to keep track of the matter and he appointed his son to attend to the litigation by executing power of attorney dated 19.7.2007 and 2.1.2008 to follow up with the Advocates from time to time, his son initially followed up but later failed to keep track of all

the matters and he relied on his son. It is also stated that the delay in filing the written statement was unintentional and that he has a good case on merits. It is also averred that the defence that has been taken in the written statement is identical to the case made out in the plaint in Suit No.305 of 2001. The counsel submitted that if this written statement is not taken on record, it would create an anomalous situation because the Suit No.305 of 2001 is on identical facts. The counsel also submitted that this court while disposing of Summons for Judgment No.1062 of 1999 in Summary Suit No.487 of 1999 by its order dated 16.3.2002, has by consent of the parties, directed that all the 3 suits be tried together as the suits are between the same parties and the issues that are likely to arise in the suit are also similar. Mr.Delhiwalla Counsel for the applicant also submitted that the suit actually was dismissed for default by an order dated 23.7.2008 and it was restored on 24.8.2009 and by an order dated 3.11.2009 the plaintiffs were granted 4 weeks time for serving the writ of summons on the defendants. The counsel submitted that even the plaintiffs have not been diligent in prosecuting the suit and when they had not served the writ of summons for more than 9 years after the suit has been lodged, how can the plaintiff complain about the delay by the defendants in filing the written statement. Counsel submitted the delay in filing the written statement be condoned and the written statement be taken on file.

4           The counsel for the plaintiff Mr.Khandeparkar strongly opposed the Notice of Motion. At the outset, he submitted that the writ of summons was actually served first on 17.11.2000 and therefore, there was a delay of 14 years and 6 months. Mr.Khandeparkar also submitted that the explanation given by the applicants in their affidavit in support is identical to the explanation that was given by the applicants in Notice of Motion No.1212 of 2015 in Summary Suit No.4870 of 1999 and the single Judge of this court refused to accept the explanation and rejected the Notice of Motion. The counsel also submitted that the applicants had carried that order in appeal and the division bench dismissed that appeal. The counsel also submitted that a Special Leave Petition was filed in the Supreme Court against that order of the division bench and the same is pending. Mr.Khandeparkar also submitted that in <sup>1</sup>***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and ors.***, the Apex Court has set down the 13 principles to be considered while considering the application for condonation of delay. Paragraph-21 of the said judgment reads as under :-

“21. From the aforesaid authorities the principles that can broadly be culled out are:

*(i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.*

*(ii) The terms “sufficient cause” should be understood in their*

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1 2013(12) SCC 649

*proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.*

*(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*

*(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.*

*(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant Fact.*

*(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

*(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

*(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

*(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

*(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

*(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of Limitation.*

*(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

*(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."*

The counsel submitted that points (v), (vi), (viii) and (ix) are relevant for the present matter. The counsel submitted that the court has to keep in mind the distinction between inordinate delay and delay of short duration of few days, the conduct, behaviour and attitude of the parties and the bonafides of the parties seeking condonation of delay. The counsel submitted that defendant no.2 is a habitual litigant and there are almost 49 matters involving the applicant. The counsel also submitted that the applicant has been signing agreements creating 3<sup>rd</sup> party rights on properties in 2008, 2009 and 2010 when he claims to be travelling, which was a reason for not filing the written statement. The counsel also submitted that this applicant has been defending almost 9 proceedings in this court. Therefore, the reason given in the affidavit in support should not be accepted.

5 As regards serving writ of summons on 17.11.2000, the plaintiff has annexed a copy of the writ of summons on which there is an endorsement as under :-

“Service accepted on behalf of Defendant No.2  
Nitin N.Mehta

17-11-2000  
Divya Shah  
Partner Desai & Diwanji”

There is no affidavit of service of serving the writ of summons filed.

Mr.Khandeparkar stated that in paragraph-3 of the additional affidavit in reply filed by the plaintiff Vikram Anantraj Doshi, director of the plaintiff-company it is stated as under :-

*"3) Notwithstanding my contention in the affidavit file dated 16/01/2016 I say that on going thru the past records we have come across writ of summons serviced to the other side on dated 17/11/2000 duly signed by the advocate of the defendant No.2. Exhibit I. I further say that as per that fact, delay as claimed by the defendants is false and actual number of days of delays in filing the written statements is 14 years and 166 days number of days instead of 5 years and 54 days."*

As against this, in the affidavit in reply that was filed, paragraph-3 reads as under :-

*"3) I say that the present Notice of Motion has been filed for condonation of delay of 5 years and 54 days in filing the written statement and for taking on file the written statement dated 3<sup>rd</sup> July, 2015 of the Defendant No.2. I say that the Hon'ble Court vide its order dated 29<sup>th</sup> January, 2015 was pleased to direct the suit to be listed for ex-parte decree. I say that in the present application there is no relief claimed for setting aside the order dated 29<sup>th</sup> January, 2015. I say that unless the order dated 29<sup>th</sup> January, 2015 is set aside by the Hon'ble Court, the delay of 5 years and 54 days cannot be condoned by this Hon'ble Court and the written statement cannot be taken on record. I say that on this ground alone the Notice of Motion deserves to be dismissed with costs."*

6           It is also to be noted that Vikram A.Doshi who has affirmed the additional affidavit has not stated that he personally went to serve the writ of summons on Desai & Diwanji. In addition to that as mentioned in the order dated 3.11.2009, the plaintiff had sought 4 weeks time for serving writ of summons on the defendants. Therefore, I cannot accept that the plaintiff had served the writ of summons on 17.11.2000. On the contrary, it appears that writ of

summons itself has been served almost 9 years after filing the suit.

7           Let us therefore, proceed now on the basis that the delay was of 5 years and 54 days.

While considering an application for condonation of delay, we have to consider the overall facts of the matter. The suit has been filed in the year 2000. I am not satisfied that the plaintiff has also diligently pursued the suit in having the writ of summons served immediately. Moreover, the rules and procedure are handmaid of justice and the object of prescribing procedure is to advance the cause of justice. No party should ordinarily be denied the opportunity of participating in the process of justice dispensation. It is true that this principle cannot be stretched to assist a grossly negligent litigant. In this case I feel even the plaintiff was not very diligent in prosecuting the action. There are 3 suits which are to be heard together as directed by this court in the order dated 16.3.2002. The defence as stated by the counsel for the applicant is similar to the case made out in Suit No.305 of 2001.

8           The counsel for the applicant on instructions from the Constituted Attorney of the applicant who is present in court stated that the applicant be put to terms and agreed to pay sum of Rs.5,00,000/- as costs to the plaintiff within two weeks from today for

the delay in filing the written statement.

9           Taking overall view of the matter and in view of the fact that the defendant no.2 offered to pay cost of Rs.5,00,000/- to the plaintiff, interest of justice will be met if the delay is condoned. The written statement affirmed on 3.7.2015 to be accepted and taken on record by the Registry subject to removal of office objections. The defendants to file the written statement in the registry and serve copy thereof upon the plaintiff on or before 16.3.2016. The amount of Rs.5,00,000/- as cost to be paid not later than 29.3.2016 by way of cheque drawn in favour of the Advocate on record for the plaintiff. It is made clear that if this amount is not paid, the defence of the defendant no.2 will be struck off and the matter will proceed ex-parte.

10          Before 5.4.2016, the plaintiff and the defendants to (a) file their respective affidavit of documents with details of documents together with compilation of documents; (b) give inspection of documents to each other and (c) file and exchange their statement of admission and denial and give reasons for denial. If these directions are not strictly complied with, the parties will be put to terms.

Stand over to 5.4.2016 for issues.

**(K.R.SHRIRAM,J)**