

* **HIGH COURT OF DELHI : NEW DELHI**

+ **C.M. (M) No. 241/2008 & CMs No.2817-18/2008**

% 25.02.2008

M/s Bata India Ltd.

Through: Petitioner
Mr.Rajiv Nayar, Sr.Advocate
with Mr. Sudhir Nandrajog,
Advocate

versus

Mr. Kapil Bhagat

Through: Respondent
Mr. Anuj Sehgal, Advocate

***CORAM:**
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest?

VIPIN SANGHI, J.(ORAL)

CM No.2818/2008 in CM(M) No. 241/2008

1. Allowed, subject to all just exceptions.

CM(M) No. 241/2008

2. This petition has been preferred to impugn the order dated 10.12.2007 passed by the Additional Senior Civil Judge in MCA

No.17/2007 whereby the learned Additional Senior Civil Judge has dismissed the appeal filed by the petitioner against the order dated 16.1.2007 passed by the Civil Judge. Learned Civil Judge had by the order dated 16.1.2007, dismissed the application seeking interim injunction, filed by the petitioner (who was the plaintiff in the suit) under Order XXXIX Rule 1 & 2 CPC and had allowed the application filed by the respondent/defendant seeking interim injunction against the petitioner/plaintiff.

3. The petitioner had filed the suit for permanent injunction to restrain the respondent/defendant from interfering with its peaceful possession of premises bearing No.16-B, Connaught Place, New Delhi. The petitioner is a well-known manufacturer and marketeer of footwear and other allied products. The respondent, admittedly is the tenant in respect of the suit premises i.e. the shop situated at 16-B Connaught Place, New Delhi under one Rashida Begum on a monthly rent of Rs.500/-. The case of the petitioner was that parties had entered into a joint retail venture agreement dated 28.3.1989, which was renewed in the year 2001. This agreement was entered into to run a retail showroom to sell the goods of the petitioner from the aforesaid premises. The petitioner pleaded that irrespective of the arrangement

disclosed in the documents, since the inception, the plaintiff was in complete possession and control of the suit premises and the lock and keys of the premises were also with the plaintiff through its Store Manager. The plaintiff claimed that it was running its retail showroom in the suit premises. It was further claimed that the plaintiff always posted its employee at the suit premises to run, manage and operate the showroom of the plaintiff and cash proceeds of the sales recorded in the suit premises were also handled by the employees of the plaintiff. These proceeds were deposited in a bank account maintained and operated jointly by the parties. The shop was also opened by closed by the plaintiff. It was further claimed by the plaintiff that it had spent several lakhs of rupees in renovation of the suit premises and the defendant was being paid the agreed percentage of retail price turnover for the use of the premises. The plaintiff claimed the right to occupy and possess of the suit premises as a sublessee and claimed protection of its rights and privileges as available to a sublessee. The suit was filed in December 2005 when the defendant sent a letter dated 27.6.2005 requiring the plaintiff to vacate the premises. Along with the suit the plaintiff filed the application under Order XXXIX Rule 1 & 2 CPC to restrain the defendant from disturbing its peaceful use and occupation of the suit premises or from interfering with the display and

sale of the products of the plaintiff in the suit premises. Other ancillary reliefs were also sought by the petitioner.

4. The defendant/respondent filed his written statement and also made a counter claim. The defendant contested the maintainability of the suit and also relied upon the decision in a former suit No.425/1997 titled “Smt. Rashida Begum Kapil Bhagat vs. Sh. Kapil Bhagat & Bata India Ltd.”, decided on 5.1.2002 by Additional District Judge, Delhi.

5. The case of the defendant was that the defendant is the exclusive tenant of Smt. Rashida Begum at a rental of Rs.500/- per month, and the goods of the plaintiff were being sold by the defendant on commission basis as per the terms and condition incorporated in the original agreement and the renewal letter.

6. The learned Civil Judge while holding that the plaintiff had failed to establish a prima facie case, and that the balance of convenience was in favour of the defendant allowed the application of the defendant and restrained the officials of the plaintiff from entering in the shop of the defendant and disturbing the peaceful possession of the defendant. By the impugned order, the appeal preferred filed by the petitioner against the order of the Civil Judge has been rejected.

7. The learned Additional Senior Civil Judge while disposing of the appeal has taken note of the submissions of the petitioner. The relevant extract from the impugned order reads as follows:

“12. Vide detailed order dated 16.01.2007, the Id. trial court had dismissed the application of the plaintiff, U/O 39 Rules 1 and 2 CPC, whereas it had allowed the application U/O 39 Rule 1 & 2 CPC of the defendant, with the following observations:

“I have given my thoughtful consideration to the submissions and have perused the pleadings of both the parties and the documents filed by the parties. I have also perused the pleadings of the earlier suit and the submissions of Sh. V. S. Khosla made in the earlier suit and the Judgment. Admittedly, the defendant is a tenant in the suit premises and the Judgment delivered by Ld. ADJ Sunil Gaur, clearly shows that the plaintiff has no right title or interest in the suit premises. Admittedly defendant had entered into an Agency Agreement with the plaintiff and the terms of the Agency are incorporated in the letter dated 28/03/89 and the said agreement was extended on 03/5/01. The Agency Agreement has been terminated by letter dated 27.6.05. The terms of the letter dated 28/03/89, letter dated 03/5/01, pleadings filed in the earlier suit makes it clear that employees of the plaintiff were selling the goods from the suit premises and defendant was receiving the commission for allowing the sale of goods. Under the agreement physical possession of the shop remained with the defendant and defendant has only allowed the officials/employees of

the plaintiff to sell the goods under the Agency Agreement. The Agency Agreement has been terminated, employees of the plaintiff has no right to enter into the premises, defendant has every right to enjoy the suit property as a tenant of the shop. As the Agency Agreement is admitted between the parties, therefore, plaintiff has stopped from denying the contents of the Agency Agreement. The plaintiff has further assorted from denying the stand taken in the earlier suit. The judgment passed by Ld. ADJ Sh. Sunil Gaur clinches the issue clearly in favour of the defendant. Plaintiff does not have any prima facie case and his officials have no right to enter into the suit premises. Balance of convenience is also not in favour of the plaintiff. On the other hand defendant has good prima facie case as he has entered in the suit premises and after termination of the Agency Agreement employees of the plaintiff have no right to enter into the premises. Balance of convenience is also in favour of the defendant and if injunction is not granted defendant will suffer irreparable loss. Accordingly, the application of the defendant is allowed and officials of the plaintiff are restrained from entering into the shop of the defendant and disturbing the peaceful possession of the defendant. Application of the plaintiff for grant of interim injunction is rejected."

13. I have heard Id. counsel for appellant, Id. counsel for respondent and have gone through the trial court record, impugned order and of appeal. The main arguments, as addressed by the counsel for the appellant are; firstly, the issue, whether there was an agency agreement, which was

not terminable before 2011, was not a matter in issue before the court of Id. ADJ, where the only controversy was, whether there was any subletting in favour of the present plaintiff or not. Secondly, that the status of the written statement filed by the present plaintiff in that suit was only that of an admission and the admissions can always be explained as per the settled law due to the changed circumstances. Thirdly, that various terms of the agreement itself shows, that the plaintiff had various rights, privileges and interest in the suit premises akin to that a sublessee, which was evident from the huge amount spend by the appellant in renovating the showroom and further the plaintiff was in occupation and possession of the showroom as sublessee and was entitled to all rights and defendant had no right to dispossess the plaintiff from the suit premises, especially, when the defendant has no control or say in any matter.

14. On the other hand, Id. counsel for the defendant has argued that the plaintiff had made certain categorical admissions in suit no.425/97, which was a suit for permanent injunction filed by one Smt. Rashida Begum against the present defendant and in which the plaintiff was defendant no.2 and defendant herein was defendant no.1, wherein the plaintiff had categorically admitted that the present defendant was a tenant of afore Smt. Rasheeda Begum and the defendant was in physical possession and control of the premises and was in fact selling the products on commission basis of the plaintiff. It was denied that the defendant No.1 was negotiating to sublet, part with possession of the disputed premises to the defendant no.2 as alleged or at all. It was stated that on 28.3.89, prior to the filing of the suit and prior to the injunction order dated 6.4.89, the defendant no.2 and defendant no.1 had already entered into an arrangement for selling the products of the defendant no.2 on a commission basis from the disputed premises. The terms and conditions of the said arrangement are clearly spelt out in the letter dated 28.3.1989 from the defendant No.2 to defendant no.1 which has been signed by defendant no.1 and defendant no.2. This arrangement between the

parties is an arrangement whereby the defendant no.1 is an agent of the defendant no.2 and would sell the products of defendant no.2 from the disputed premises. It is denied that the said arrangement/agreement is to defeat the provisions of Delhi Rent Control Act as alleged or at all. The terms of the agreement are very clear. They do not spell out any relations of subtenancy between the defendant. Therefore, it has been argued that in view of afore categorical admission, plaintiff is estopped from taking any contrary stand here.

15. Ld. counsel for the appellant has further argued that the said suit has already been decided, whereby the suit of the landlord Smt. Rashida Begum has been dismissed. Therefore, the said issue cannot be raised again by the plaintiff in the present suit and further counsel for the respondent has argued that one witness on behalf of plaintiff Sh. V. S. Khosla has appeared as DW2 in said suit and he had made certain categorical admissions in his evidence that the defendant was selling the goods of the plaintiff on commission basis and only the defendant was in possession of suit premises and the plaintiff had no right, title or interest in the suit premises. Counsel for the respondent has further argued that the plaintiff has not approached the court with clean hands as this very factum of the filing of the previous suit has been concealed by the plaintiff in the plaint. Therefore, the conduct of the plaintiff is so, that is not entitled to any discretionary relief from the court.

16. Ld. counsel for the appellant has relied upon the judgment reported as AIR 1983 Patna 132. Ld. counsel for the respondent has relied upon the judgment reported as 1999 (51)DRJ (DB), 66 (1997) DLT 506(DB), AIR 1994 SC 853, AIR 1996 SC 1087, AIR 1996 SC 2222.

17. It is admitted case of the parties that an agency agreement dated 28.3.1989 was entered into between the parties, which was renewed vide letter dated 3.5.2001, and as per the agency agreement dated 28.3.1989, it was agreed between the parties that the defendant will sell the

goods of the plaintiff at the suit premises belonging to the defendant on commission basis as stipulated in Para 2 & 3 of the said agreement, and as per para 5 of the said agreement the defendant was required to fix such fittings/fixtures/furnitures and air conditioners necessary to covert the shop premises into a showroom for the display and sale of products of the plaintiff. Further as per Clause 7 & 8, it was agreed by the parties as under:

“7. You will bear the rent, water and other normal charges payable in respect of the said shop premises.

8. However, it is made absolutely clear that we shall not have any right title or interest as assignee, subtenant or otherwise of the said shop premises.”

18. In view of the aforesaid Clause(s) in the agreement the defendant was to bear the rent, water and other normal charges and it was also agreed by the plaintiff that they will have no right, title or interest as assignee, sub tenant or otherwise in the suit premises and it was also agreed that this arrangement could be terminated by either side at any time by giving six months prior written notice. Thereafter, it is the admitted case of the parties, that the said agreement was renewed for another 10 years vide letter dated 3.5.2001. It is also the admitted case of the parties, that the said agreement was terminated vide notice dated 27.6.2005 and reply thereto was also sent by the plaintiff.

19. Further in a suit filed by the landlord of the defendant one Smt. Rashida Begum i.e suit no. 435/97, the plaintiff, who was the defendant no.2 there, had filed a written statement, where in para 11 of the same it was stated by plaintiff as under:

“It is denied that Defendant No.1 has sublet or parted with possession of the disputed premises by any means or under

any agreement such as the agency agreement. The agency agreement between the Defendant No.1 and Defendant No.2 does not constitute any subletting or parting with the possession. The Defendant No.1 continues to be in physical possession and control of the disputed premises and has in fact started selling the products of Defendant No.2 on a commission basis from the disputed premises with effect from May, 1989. The defendant No.2 is neither a subtenant nor the disputed premises had been parted with possession in favour of Defendant No.2 by Defendant No.1”.

20. Further one Sh. V. S. Khosla who was the Business Development Manager of plaintiff (Bata India Ltd.) appeared as DW2 in the said case and he made certain categorical admissions in his examination in chief which is as under:

“I am well conversant with the facts of the case. Defdt.no.1 never negotiated with Bata India Ltd. with regard to subletting of suit property. Defdt.No.1 is selling the goods of defdt.No.2 on commission basis. The arrangement between the defedt.No.1 and defedt.No.2 came into existence vide agreement dt.28.3.89. Copy of which has already been exhibited as Ex.DW1/1.

He further stated that **“Kapil Bhagat, defdt.No.1 is in possession of suit property. Kapil Bhagat defdt. No.1 is carrying on business from the suit premises . Defdt. No.2 has no right, title or interest in the suit premises”**

He has further admitted in his cross examination, which is as under:

“The only agreement which was executed between defdt.No.1 & 2 is dt.28.3.89 which is Ex.DW1/1 and except for this there is absolutely no agreement between the parties till today. The employees of M/s Bata are working in the suit premises to help the defdt.No.1 to do the business efficiently.

He further admitted that **“The sale tax amount on the sales is all paid by Kapil Bhagat and not by us. We have got absolutely no right, title or interest in the suit property except that we are working in the said suit property”.**

21. In view of the terms of the agreement afore reproduced namely, Clause 7 &8 and in view of certain admissions made by the plaintiff, who was the defendant no.2 in the said suit reproduced above and also in view of the categorical admissions made by the witness of the plaintiff company as reproduced above, it is clear that the case of the plaintiff, in the said suit was, that it was only an agency agreement and defendant was selling the products of the plaintiff on the commission basis and the said arrangement between the defendant and the plaintiff came into existence vide agreement dated 28.3.1989 and the defendant was in possession of the suit premises and he was carrying on the business from the suit premises and defendant had no right, title or interest in the suit premises and that the employees of the plaintiff (M/s Bata India Ltd) had been working in the premises to help the defendant(respondent here) to do the business efficiently, and it was further admitted that the sale tax amount on the sales was paid by the Kapil Bhagat (respondent here) and not by the plaintiff and they had got absolutely no right, title or interest in the suit property . It is settled law that as held in judgment reported as **AIR 1960 SC 100** that **“An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless**

successfully withdrawn or proved erroneous.” In view of the above judgment and discussion, the said admissions are very much binding upon the plaintiff, and plaintiff (appellant) has failed to give any mitigating circumstances and have also failed to explain 17 that said admissions were made erroneously.

22. Regarding the arguments of the counsel for the appellant that the admissions can always be explained as the subject matter in issue in the said suit was whether there was any sub tenancy or not and the dispute of agency agreement was not in issue. This argument of the counsel for the appellant is fallacious, as the matter, whether the said agency agreement created a sub tenancy, was a fact in issue in said suit also and it was rather most intrinsic central issue in said suit. Since the said issue has already been finally adjudicated and decided between the parties in an earlier suit between the parties in which plaintiff had made categorical admissions, that they had no right, title or interest in the suit premises. Consequently, the defendant cannot be allowed to take a totally different stand here by blowing hot & cold at the same time, as doing so would be an abuse of process of law.

23. Counsel for the plaintiff has further argued that the counter claim filed by the defendant was not maintainable, as it is beyond the pecuniary jurisdiction of the trial court and even otherwise no counter claim could have been filed in a suit for injunction. For this he has relied upon a judgment AIR 1983 Patna 132 that a counter claim can only be filed in a money suit. On the other hand counsel for the defendant has relied upon a judgment **AIR 18 1996 SC 2222** wherein it has been held that **“Counter claim Suit for injunction Counter claim for injunction in respect of same or different property Maintainable.”** He has also relied upon judgment **AIR 1996 SC 1087** wherein it has been held that **“Suit for injunction Counter claim for possession by defendant. Also can be entertained by virtue of O.8 R.6(A)(1).”** The said judgments are squarely applicable to the facts of the

present case. In view of the afore settled proposition of law laid down in the said judgments, this contention of the counsel for the appellant, that the counter claim could not have been filed in the suit filed by the plaintiff in the trial court is not tenable.

24. Regarding the next argument of the counsel for the plaintiff that the subject matter of the goods lying in the premises in question are more than the pecuniary jurisdiction of the trial court. The said argument is also fallacious, as the defendant has filed counter claim claiming reliefs of permanent injunction restraining the plaintiff or its employees from causing any hindrance in the conduct of business activities being carried out by the defendant in the suit premises and further with the directions to the plaintiff to remove all its left over goods from the suit premises alongwith the relief of damages. Since this question, whether the left over goods of the plaintiff in the suit premises exceeds the value of Rs.1.5 lakhs, as stated by the plaintiff can only be discerned after the parties have lead evidence and trial and no prima facie opinion can be given regarding the same at this stage.”

8. From the aforesaid it appears that the courts below have exhaustively dealt with the aspect of grant of interim relief to both the parties by exercising the jurisdiction vested in them. There is no failure to exercise jurisdiction and no excess of jurisdiction by the courts below. Even otherwise, upon a reading of the aforesaid extract it is clear that petitioner was seeking to blow hot and cold at the same time. The case of the plaintiff, when it was faced with the charge of being a sub-tenant of the respondent/defendant, was

that it is the respondent herein who is in possession of the suit premises, and is carrying on the business of selling the products of the petitioner on a commission basis. On the basis of the said stand, the suit of landlady was successfully defended. However, the petitioner has now done a complete volte face and is seeking to contend that it was in physical possession of the premises and was running the show room. The stand of the petitioner, prima facie, was not only against the stand taken by it in the earlier proceedings, but also contrary to the terms of the agreement on which it seeks to rely. For the aforesaid reasons, in my view the impugned orders do not call for any interference by this Court in exercise of jurisdiction under Article 227 of the Constitution of India.

9. It goes without saying that observations made by me in this order would not prejudice to the rights and contentions of either party and it shall be open to the parties to raise all submissions which they are entitled to raise in law before the trial Court.

Dismissed.

February 25, 2008
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VIPIN SANGHI, J.