

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

+ **FAO No. 414/2013 & CM No.18252/2013 (stay)**

% **20th March, 2014**

BATA INDIA LIMITED

..... Appellant

Through: **Mr. H.L.Tiku, Sr. Adv. with Mr.
Sushant Kumar and Ms. Mansi
Sharma, Advocates.**

VERSUS

ANUPAM TOWER (P) LTD. & ORS.

..... Respondents

Through: **Mr. Manish Sharma, Ms. Shivanshi
Gupta and Mr. Nitin Sharma,
Advocates.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Order 43 Rule 1 (d) CPC against the impugned order of the court below dated 24.8.2013 by which the application under Order 9 Rule 13 CPC filed by the appellant-defendant for setting aside the ex parte judgment and decree for mesne profits dated 6.6.2012 was dismissed.

2. The facts of the case are that the appellant was the tenant in the suit premises comprising of an area of 3825 sq. ft. on the second floor of the

property bearing no. 23-A Najafgarh Road, New Delhi. The rate of rent was more than Rs.3500/- and consequently the respondents/landlords filed a suit for possession and mesne profits in the civil court. In this suit two reliefs were claimed. First was of possession and second was of mesne profits and other related monetary reliefs.

3. So far as suit for possession was concerned, the same was decreed after contest, pursuant to an application which was filed by the respondents/landlords under Order 12 Rule 6 CPC. This judgment is dated 30.11.2010 whereby possession was decreed by the trial court in favour of the respondents/landlords against the appellant/tenant. This order was challenged in an appeal by the present appellant/tenant, but that challenge was not successful and the appeal was dismissed as not pressed by this Court on 23.2.2011 in RFA 117/2011. At the time of dismissal of the appeal since the appellant had claimed that it had right under a document for creation of fresh lease deed, and in respect to which a suit for specific performance was already filed, therefore liberty was given to pursue that suit and obtain appropriate orders. In sum and substance, the decree for possession against the appellant became final and the appellant thereafter surrendered possession of the suit premises.

4. Appellant/defendant thereafter stopped appearing in the suit wherein the issue remained of claim of mesne profits payable to the respondents/landlords after termination of the tenancy by means of notice dated 3.10.2000 and till the time the appellant-defendant vacated the possession of the suit premises.

5. Appellant-defendant however did not appear in the suit, and which as per it, was on account of a promise/assurance given by the respondents/landlords that the suit for mesne profits will be withdrawn. Appellant also claims that pursuant to this understanding, appellant also withdrew his suit for specific performance which it had filed whereby it was claiming a right of 31 years tenancy in the suit premises from the year 1985. Since the appellant/defendant stopped appearing in the suit, it was proceeded ex parte and an ex parte judgment dated 6.6.2012 was passed against the appellant/defendant for mesne profits.

6. Learned senior counsel for the appellant very vehemently argued before this Court that the fact that there was an assurance to the appellant from the respondents/landlords that respondent/plaintiff will not pursue the suit for mesne profits becomes clear from the order-sheets of the suit which show that the respondents-plaintiffs have taken adjournments for compromise, I, however, refuse to accept this argument inasmuch as, if

there was an assurance surely, it would be too much to expect that such assurance which would have ramification of over a crore of rupees towards mesne profits would be only by an oral assurance. I also asked learned senior counsel for the appellant that whether the suit filed by the appellant/defendant for specific performance was withdrawn by recording a statement that the said suit is withdrawn because the respondents/landlords are not going to pursue their claim for mesne profits, however, nothing has been pointed out to me that the said suit of the appellant-defendant for specific performance was withdrawn by the appellant-defendant on the ground that there was an agreement /assurance that respondents/landlords would not claim mesne profits in the present suit.

7. The court below has dealt with the relevant aspects in paras 8 to 12 of the impugned order, and which read as under:-

“8. The applicant/defendant is required to show under the provision of u/o 9 R 13 CPC that defendant was prevented by way of sufficient cause from appearing in the original suit. There were cross-cases pending between the parties. The plaintiff M/s Anupam Tower (P) Ltd. filed the suit against the defendant M/s Bata India Ltd. for possession and mesne profits with respect to property 23-A, Najafgarh Road, bearing suit no. 103/08 (65/2000). On the other hand, the defendant filed a suit against the plaintiff bearing no.459/01 (115/08) seeking the relief of declaration and specific performance with respect to the same property. The relationship between the parties has been that of the landlord and tenant. Both the suits were

continuing and in the suit no.103/08, the decree for possession was passed u/o 12 R 6 CPC in favour of the plaintiff and against the defendant. The defendant went in appeal against the said order in RFA No. 117/11, wherein the applicant (defendant) was given opportunity to move the civil court by way of injunction application in his suit for specific performance (459/2001) and the appeal was dismissed as withdrawn.

9. The execution proceedings were also filed by the plaintiff/DH and warrants of possession were issued. It is also evident from the record that parties were negotiating for settlement/compromise but finally no formal settlement or compromise was reported or placed on record.
10. The defendant in suit no.103/08 has been represented till 30.11.2010 but thereafter there had been no appearance. There was no justification for the defendant to have stopped appearing in the suit pending against him particularly when no formal compromise was executed between the parties. It has been the duty of defendant to sincerely prosecute his defence in the suit filed by the plaintiff against him. The ground pleaded by the applicant/defendant in the present application is not logical and strong enough so as to grant the relief to the defendant. The possession of the suit property has already been taken over by the plaintiff and the relief of mesne profits has been properly adjudicated upon and decided vide judgment dated 06.06.2012. It is difficult to believe that defendant despite having knowledge of the proceedings and despite having duly contested the proceedings before the trial court as well as before the appellate court, believed the assurances of opposite party and opted to sit silent. Defendant should have been diligent to keep track of the case pending against it. For the casual approach only defendant is to be blamed. The entire proceedings cannot be started denovo without any sufficient and justified ground.

11. The suit 103/08 was filed in the year 2000 and it was duly contested by the defendant up to the year 2010 before the trial court and even in the year 2011 the appeal was filed before the High Court. The warrants of possession were issued against the defendant on 31.03.2011 and finally the possession was taken over by the plaintiff on 30.05.2011. There is nothing to suggest that possession was taken over by the plaintiff under any compromise or settlement with the defendant. The defendant on his sweet will stopped appearing before the trial court with respect to the remaining relief of mesne profits which was still pending adjudication. The judgment on mesne profits was passed on 06.06.2012. The application u/o 9 R 13 CPC and u/s 5 of Limitation Act have been moved in January 2013.
12. For the aforesaid reasons, the pleas taken by the defendant in the present application are without any merit or substance. There was no sufficient cause with the defendant for non-appearance before the trial court in suit no. 103/08. For the aforesaid reasons also, there is no justification to condone the delay u/s 5 of Limitation Act. The application is liable to be dismissed on account of limitation also.” (underlining added)

8. I completely agree with the aforesaid observations of the court below.

It must be noted that appellant is not an illiterate person or a rustic person.

Appellant is a gargantuan multi-national company. It is not possible that the officials of appellant company, including its legal officials, would act on a so-called oral assurance of the respondents-landlords of not pursuing the suit of mesne profits which would have resulted in a money decree for over a crore of rupees.

9. Though it is not required, I may note that the decree for mesne profits has been passed in terms of the ex parte judgment and decree dated 6.6.2012 by making reference to various lease deeds which were filed and proved on behalf of the respondents-landlords. The relevant paragraphs of the judgment dated 6.6.2012 are not reproduced by me but suffice it to state that lease deeds were proved as Ex.PW1/1 to Ex.PW1/5 and the facts with respect to determination of mesne profits are mentioned in paras 28 to 32 of the judgment dated 6.6.2012. Paras 25 to 40 of the judgment accordingly gave a finding with respect to the mesne profits which would be payable by the appellant-defendant-tenant to the respondents/plaintiffs/landlords.

10. Learned senior counsel for the appellant wanted to urge aspects with respect to merits of the ex parte judgment dated 6.6.2012, however, the same is not permissible before this Court inasmuch as if there is any illegality in the judgment dated 6.6.2012, appellant had to file an appeal under Section 96 of CPC against the said judgment.

11. In view of the above, there is no merit in the appeal, and the same is therefore dismissed, leaving the parties to bear their own costs.

MARCH 20, 2014
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VALMIKI J. MEHTA, J.