* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RFA No. 147/2014**

% ***10th December, 2018***

BATA INDIA LIMITED ..... Appellant

Through: Mr. H.L. Tiku, Senior Advocate with Mr. T.K. Ganju, Advocate (M. No.9899875487).

versus

ANUPAM TOWERS PRIVATE LIMITED & ORS. ..... Respondents

Through: Mr. Manish Sharma, Advocate with Mr. Pranay Raj Singh, Advocate, Mr. Ninad Dogra, Advocate and Ms. Jigyasa Sharma, Advocate (M. No.98101052206).

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No. 2429/2015 (under Order XLI Rule 27 CPC)

1. This is an application on behalf of the appellant/defendant to place additional evidence on record. This application is misconceived because the issue of additional evidence arises when there is already some evidence of a party in the trial court and since the appellant/defendant was *ex parte* in the trial court and it

led no evidence, therefore there does not arise the issue of granting any opportunity to the appellant/defendant to lead additional evidence.

This application is therefore dismissed.

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2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908(CPC) is filed by the defendant in the suit impugning the Judgment of the trial court dated 06.06.2012 whereby trial court has passed a money decree in favour of the respondents/plaintiffs and against the appellant/defendant for *mesne* profits for the period from 01.11.2000 to 30.05.2011. Arrears of rent have also been awarded from 01.04.2000 to 31.10.2000. The respondents/plaintiffs have also been awarded interest @ 10% per annum. The relief para of the impugned judgment being its operative para reads as under:-

> "42. Therefore, the suit of the plaintiff is decreed as under:-
>
> **i) The suit of the plaintiffs is decreed in the sum of Rs.53,500/- against the defendant for the arrears of rent from 01.04.2000 to 31.10.2000.**
>
> **ii) The plaintiffs are awarded damages for use and occupation/mesne profits against defendant in respect to the suit property bearing no.23-A, Najafgarh Road, New Delhi-110015, at second floor having an area of 3825 sq. ft. approximately as under:-**

(a). From 01.11.2000 to 31.10.2003 use and occupation charges to be Rs.1,00,000/- per month in respect of the suit property; and

(b). From 01.11.2003 to 31.10.2006 use and occupation charges to be Rs.1,15,000/- per month in respect of the suit property; and

(c). From 01.11.2006 to 31.10.2009 use and occupation charges to be Rs.1,30,000/- per month in respect of the suit property; and

(d) From 01.11.2009 to 30.05.2011 use and occupation charges to be Rs.1,45,000/- per month in respect of the suit property.

iii) The plaintiff shall adjust any amount paid towards rent/damages by the defendant during the above said period from the total damages/use and occupation charges awarded.

iv) The plaintiff is also awarded pendente lite and future interest @ 10% per annum on the above arrears of rent as well as mesne profits/damages for use and occupation from the date of institution of suit till the date of realization. The interest shall be calculated for various payments of use and occupation charges/mesne profits from the date of each amount becoming due respectively till the realization of the amount."

3. In this appeal, the only issue that has to be considered is as to what should be the quantum of *mesne* profits which should be awarded to the respondents/plaintiffs/landlords and against the appellant/defendant/ tenant with respect to the suit property being 23-A, Najafgarh Road, New Delhi-110015 having an area of 3825 sq. ft. for the period from 01.11.2000 to 30.05.2011.

4. It is also required to be noted that admittedly the appellant/defendant was proceeded *ex parte* in the trial court. The appellant/defendant did not cross-examine the second witness who

appeared as PW-1 after earlier witness who was examined as PW-1, namely Mr. Kabul Chawla was given up by the respondent/plaintiff, although, when appellant/defendant was not proceeded *ex parte*, the trial court had earlier directed that the deposition of PW-1 Mr. Kabul Chawla cannot be substituted, with deposition of another witness Mr. Kishan Kumar and who was subsequently examined as PW-1. The second witness who was examined as PW-1 and his deposition is the only deposition which this court has to consider to determine the *mesne* profits as this witness filed and proved on record lease agreement Ex. PW1/3 in order to prove the rate of rent. This lease agreement is a lease agreement for the first floor of the premises at 20A, Shivaji Marg, New Delhi. The area of the premises under the lease agreement/Ex. PW-1/3 is 6508 sq. ft. with monthly rent being Rs. 37/- per sq. ft per month inclusive of maintenance charges and the rental charges commencing from 25.04.2001. The rent was thereafter to be increased as per Ex. PW-1/3 by 15% every three years. As per the terms of the lease deed Ex. PW1/3 for an area of 6508 sq. ft. and with the per sq. ft. per month rent being Rs. 37/- per sq. ft. per month, the monthly rate of rent for the suit premises having an area of 3825 sq. ft. was calculated approximately at Rs.1,34,820/-. This rate of Ex. PW-1/3 included maintenance charges and was for a premises on the first floor, whereas the suit premises are situated on the second floor without the issue pertaining to payment of maintenance charges. The trial court has given this reasoning in para 37 whereby using the rate of rent in Ex. PW1/3, for the suit premises the rate of rent has been brought down from Rs. 37/- per sq. ft. per month to Rs.26.64/- per sq. ft. per month and the monthly rent figure has so arrived at Rs. 1,01,898/- and which has been rounded off to Rs. 1,00,000/- per month by the trial court. This para 37 reads as under:-

> "37. Though there is no concrete material available on record, as a rule of thumb 10% of the monthly rental can be a reasonable deduction on account of maintenance charges as a rule of thumb. Thus the rental value of Rs.37/- per square feet stands reduced to Rs.33.30/- per month. Similarly the rental of Second Floor, as a rule of thumb, might be at a discount of 20% to the rental of the First Floor. Giving adjustment for the same rental for the suit property can be adjudicated @ Rs.26.64 per square feet. Considering the area of the suit property which is 3825 sq. ft. and applying the per sq. ft. rental @ Rs.26.64 per month, the monthly rental of the suit property comes to Rs.1,01,898/- say approximately Rs.1,00,000/- (Rupees One Lakhs Only) per month during the period November 2000 around."

5. Ld. Senior Counsel for the appellant/defendant firstly argued that the impugned judgment wrongly relies upon Ex. PW-1/3 inasmuch as there are admissions made by the earlier witness who was examined as PW-1/Mr. Kabul Chawla who admitted to an agreement

between the parties whereby the rent was agreed to be Rs.6,220/- per month in the year 2000. On behalf of the appellant/defendant the following portion of the cross-examination of the earlier PW-1/Mr. Kabul Chawla is relied upon, the relevant portion of this cross-examination reads as under:-

> "xxx xxx xxx
>
> As per the mutual agreement the rent was to increase from September, 2000, for Najfegarh Road property Rs.6220/- p.m. and for the other property Rs.9144.80 p.m. These rents were to remain for about another year I think and the lease had to go for another 15 years as per the terms of lease and after every year I think there was to be a 10% increase. It is correct that the deft. has been paying the rent as per the mutual agreements, (Vol. for one property i.e. 23-A, Najfegarh Road till March, 2000 and for the other property No.52-B, Rama Road until 30th September, 2000. After the said dates we issued a letter for termination of the lease. Again said, a notice for termination was sent. It is correct that we did not issue any letter asking for rent, thereafter.
>
> Q. I put it you that you did not issue any letter asking for rent because the deft. was regularly sending the cheques for rent as before to you. What do you have to say?
>
> Ans. Basically, what happened, the lease being on month to month basis beginning to Ist day of month and ending on last day month. We issued them a notice dtd. 3.10.2000 so as to terminate the lease, for both the properties w.e.f. 1.11.2000.
>
> xxx xxx xxx"

6. Ld. Senior Counsel for the appellant/defendant in the alternative argued that the rationale contained in para 37 of the impugned judgment is erroneous in taking the rent at Rs. 26.64/- per sq. ft. per month inasmuch as firstly the Lease Deed Ex. PW1/3 is

dated 25.04.2001 whereas in the present case *mesne* profits have to be calculated from an earlier date as commencing from 01.11.2000 i.e. around six months prior, and therefore, this rate of Rs. 26.64/- per sq. ft. per month has to be brought down by around at least 10% to 15 % per year. It is also argued that whereas the suit premises are situated in Najafgarh Industrial Area, the premises which are subject matter of the lease deed Ex. PW1/3 are at Shivaji Marg, and this area is not the same area where the suit premises are situated, though the lease Ex. PW1/3 pertains to a nearby area to the suit premises.

7. In my opinion, the first argument urged on behalf of the appellant/defendant has to be rejected for various reasons. Firstly, deposition of a witness who has been dropped cannot be looked into. Secondly, even if we look at the cross-examination of Mr. Kabul Chawla the rent of Rs. 6,220/- per month deposed by him will not be evidence of rent, because unless and until there is an actual written lease agreement between the parties, an oral mutual agreement cannot bind the respondents/plaintiffs/landlords for only claiming *mesne* profits at Rs. 6,220/- per month. The rate of Rs. 6,220/- per month as *mesne* profits could have been awarded against the

appellant/defendant and in favour of the respondents/plaintiffs only if the lease agreement which is mentioned by Mr. Kabul Chawla in his statement was actually reduced in the form of a duly registered lease deed. Admittedly there is no duly registered lease deed noting that the period referred to by Mr. Kabul Chawla was for lease of over one year. In my opinion, therefore any admission made by Mr. Kabul Chawla and which talks of a mutual agreement for rate of rent cannot help the appellant/plaintiff for determination of the *mesne* profits issue w.e.f 01.11.2000. This argument of the appellant/defendant is therefore rejected.

8. So far as the second argument urged on behalf of the appellant/defendant that the rate of rent of Rs. 26.64/- per sq. ft. per month calculated by the trial court has to be reduced, not only because the *mesne* profits in the present case have to be calculated from an earlier date of 01.11.2000 and not from 25.04.2001 which is the date of the Lease Deed Ex. PW1/3, with the fact that the two premises are in different localities. I agree with this argument that the rate of rent per sq. ft. should not be taken at Rs. 26.64/- per sq. ft. per month, in view of the arguments of the appellant/defendant, but the rate has to

be at 10% lesser i.e. about Rs. 2.64/- lesser, and therefore, the lease rate would become Rs. 24/- per sq. ft. per month. Since both the premises, one which is the subject matter of the lease Ex. PW1/3 and the second being the suit premises, are commercial premises and let out for commercial purposes, some parity of rent can be taken but since the suit premises are in a different area than the subject matter of the lease deed Ex. PW1/3, and since the premises which are the subject matter of Ex. PW1/3 is in adjoining commercial locality, therefore in my opinion, the interest of justice will be served if the rate of rent for the purpose of calculation of *mesne* profits is taken at Rs. 23/- per sq. ft. per month and not Rs. 26.64/- per sq. ft. per month which has been awarded by the trial court. Impugned judgment and decree will therefore stand modified whereby the monthly rent from 01.11.2000 till 31.10.2003 would be taken at rounded figure of Rs. 80,000/- per month. After every three years thereafter the *mesne* profits will be increased by 15% cumulatively over the last payable rate of *mesne* profits and till the possession of the suit premises was handed over by the appellant/defendant to the respondents/plaintiffs on 30.05.2011. Rest of the impugned judgment will stand as it is, further clarifying that interest due to the respondents/plaintiffs as regards *mesne* profits payable will be calculated from the end of the month for which the *mesne* profits are payable in law.

9. Ld. Senior Counsel for the appellant/defendant sought to argue that the rate of interest granted by the trial court on *mesne* profits at 10% is excessive, however, I cannot agree with this argument. It is noted that definition of *mesne* profits under Section 2(12) CPC includes interest to be granted on *mesne* profits, and if during the relevant years from 2000 to 2011, if any loan was to be taken by the respondents/plaintiffs from a bank, then, surely the respondents/plaintiffs would have had to pay to the bank an interest which would have at least been @ 10% per annum. This argument of the appellant/defendant is therefore rejected.

10. In view of the aforesaid discussion, this appeal is partially allowed. Impugned judgment of the trial court is modified by reducing the rate of rent per sq. ft. per month to Rs. 23/- per sq. ft. per month w.e.f 01.11.2000 but rounded off to Rs. 80,000/- per month, and rate to be increased by 15% every three years with cumulative effect till 30.05.2011. I may also note that the appellant/defendant does not

dispute that the appellant/defendant is liable to pay admitted rate of rent of Rs. 6,620/- per month from 01.04.2000 till 31.10.2000 and as awarded by the impugned judgment and decree. Decree sheet be prepared. Parties are left to bear their own costs.

11. The appellant/defendant has deposited certain amount in this court in terms of the Order passed by this court on 23.04.2014. This amount is earning interest as this amount is lying in a fixed deposit. This amount lying in fixed deposit will now be encashed and whatever amount is now payable to the respondents/plaintiffs in terms of the today's judgment will be paid to the respondents/plaintiffs and the balance amount would be released back to the appellant/defendant. I may clarify that the date of deposit of the amount by the appellant/defendant in this Court will be taken as the date of the principal amount due under the present judgment and decree to the respondents/plaintiffs and against the appellant/defendant i.e. whatever amount is payable in terms of the today's judgment to the respondents/plaintiffs as on the date of deposit by the appellant/defendant in this Court, any interest accrued on such amount thereafter, will be to the benefit of the respondents/plaintiffs and the

balance principal amount available as on date of deposit in this court by the appellant/defendant will be taken as the principal amount in favour of the appellant/defendant and any interest accrued thereon will be for the benefit of the appellant/defendant.

DECEMBER 10, 2018 **VALMIKI J. MEHTA, J**
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