

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Writ Petition No. 4839 of 2016

M/s Bata India Ltd.

Vs.

Anand S/o Madhav Palsodkar and one another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr.S.D. Dewani, Advocate for petitioners.
Mr. R.L. Khapre, Advocate for respondents.

CORAM : MANISH PITALE, J.

DATED : MAY 2, 2019

By this writ petition, petitioners have challenged order dated 15/03/2016, passed by the 7th Jt. Civil Judge (Jr. Dn.), Amvatati (Trial Court), whereby an application for condonation of delay in preferring an appeal for setting aside ex-parte decree, has been rejected.

2. The respondents herein had filed a suit for recovery of possession and damages in respect of suit shop against the petitioners herein. The said suit was decreed by Judgment and order dated 22/09/2008, passed by the Trial Court. Aggrieved by the same, the petitioners filed an appeal before the Court of District Judge, Amravati (Appellate Court). The respondents in their reply filed reply in the application for stay in the

aforesaid appeal opposed the contentions raised on behalf of the petitioners and further stated as follows.

“4. Without prejudice to the submission hereinabove if this Hon'ble Court decides to grant stay then in that event following conditions may be imposed:-

a) That the respondents have already filed an application under Order 20 Rule 12 of Civil Procedure Code which is registered as MPMJC No.5/2008, wherein the respondents have claimed the mesne profit of Rs.18,20,000/- for the period from 01.09.2006 upto 24.10.2008 and these mesne profit are bound to be increase by passing of time and may reach upto Rs.25 lacs and hence the appellants be directed to furnish bank guarantee of Rs.25 lacs.

b) That during the pendency of the appeal the respondents be directed to pay Rs. 70,000/- per month from 1.9.2006 upto decision of the appeal.

c) The appellant should directed to deposit of Rs.6,000/- already granted by the lower court.

d) The appeal be fixed for final hearing by giving a fixed date.

e) That as the appellants have shifted their shop it is likely that they may create third party interest and hence it is necessary to restrain the appellants from creating any third party interest of any nature whatsoever in any manner whatsoever including by franchise, outsourcing, agency and commission during the pendency of the appeal.

Hence application be rejected.”

3. Thus, it becomes evident that during pendency of the appeal the respondents had filed an application under Order 20 Rule 12 of the Code of Civil Procedure, 1908 for mesne profit and details of the same were also placed on record in the aforesaid reply. It is relevant that the Manager of the petitioners appeared through counsel in the said application and on 20/03/2010, submitted an application seeking time to file reply.

4. Thereafter, on 11/06/2010, the Trial Court dismissed the appeal filed by the petitioners and confirmed the decree passed by the Trial Court. The said decree attained finality. In this backdrop, upon culmination of proceedings in the application seeking mesne profit, the Trial Court passed its decree on 17/03/2012. The Court had proceeded *ex-parte* against the petitioners due to their failure to appear and contest the said application. The said decree was put to execution by the respondents.

5. On 16/09/2014, the petitioners filed an application for setting aside the *ex-parte* decree under Order 9 Rule 13 of CPC, alongwith the aforesaid application for condonation of delay. As noted above, despite the fact that the respondents had placed on record filing of the aforesaid application for mesne

profit before the Appellate Court and time was also sought on behalf of the petitioners in the said Court for filing reply to the said application, in paragraph 5 in the application for condonation of delay, the petitioners stated as under:-

“5. It is worthwhile to mention here that the non applicants it seems are habituated in committed frauds one after the other. They have further played fraud upon the Applicants which is apparent from the records of M.P.M.J.C. No.5/2008, proceedings. It is submitted that the non-applicants have also concealed that they have filed an application for the determination of *mesne profit* under Order 20 Rule 12 of Civil Procedure Code vide M.P.M.J.C. 5/2008 proceeding on 24.10.2008 which was registered on 18.11.2008 i.e. during the pendency of the appeal. That the malafide intent of the non-applicant is evident from the fact that they have never mentioned about filing of the aforesaid proceedings during the pendency of the appeal. The said fact was also concealed from the appellant court.”

6. It was further stated on behalf of the petitioners in the said application for condonation of delay that the application of the respondents for mesne profit was not bonafide because they ought to have disclosed the fact of filing such an application before the Appellate Court where they were strenuously contesting the appeal. In other words, it was boldly claimed on behalf of the petitioners that the fact of filing of said application of mesne profit was

suppressed throughout and the petitioners were completely unaware about pendency of such proceeding. Further in paragraph No. 7 of the said application for condonation of delay the petitioners stated that they first became aware about the *ex-parte* decree passed in favour of the respondents dated 17/03/2012 on 30/06/2014 when they were served with notice from the Executing Court of Regular Darkhast No.17/2012, filed by respondents. Thereafter, certain other grounds were raised seeking condonation of delay.

7. By the impugned order, the Trial Court rejected the application for condonation of delay filed on behalf of the petitioners, noting the fact that the respondents had indeed specifically stated about filing of the application for granting mesne profit in their reply to application for stay before the Appellate Court. Therefore, the theory put forth on behalf of the petitioners that they first became aware about the *ex-parte* decree passed against them on 30/06/2014 was not believable. There was some reference made to other grounds raised by the petitioners which were found to be without any substance and the application stood rejected.

8. It is the said order passed by the Trial Court which is the subject matter of the present writ petition. This Court issued notice on 21/03/2017 in the writ

petition, granting *ad-interim* order in favour of the petitioners on condition that they will deposit 50% of the decretal amount in this Court. The petitioner deposited some amounts but according to the respondents it did not amount to 50% of the decretal amount.

9. The learned counsel appearing for the petitioners sought to raise ground on merits and contended that the material on record did not show that there was service of notice on the petitioners and that, therefore, the Trial Court ought to have allowed the application for condonation of delay so that the petitioners would get an opportunity to demonstrate that the respondents did not deserve to be granted mesne profit, at least to the extent to which mesne profit was granted in their favour.

10. In response thereto, the leaned counsel for the respondents pointed out that the documents on record, particularly, the reply to the stay application filed on behalf of the respondents before the Appellate Court, demonstrated the fact that statements made in the application for condonation of delay about the petitioners being unaware of the pendency of the application for granting mesne profit, were false to the knowledge of the petitioners. On this basis, the learned counsel contended that a party which made a false statement before the Court in order to get rid of

bar of limitation, ought not to be heard and the application for condonation of delay deserved to be rejected on that short ground itself. Reliance was placed by the learned counsel on Judgments of the Hon'ble Supreme Court in the cases of **Binod Bihari Singh Vs. Union of India (1993) 1 Supreme Court Cases 572**; **Pundlik Jalam Patil (deceased by Lrs.) Vs. Exe. Eng. Jalgaon Medium Project and Anr., AIR 2008 SC (Supp) 1025** and **Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation and Anr., 2010 AIR SCW 1788**. It was further contended by the learned counsel that when there was suppression of facts and false statements made on behalf of the petitioners even before this Court, there was no reason why writ jurisdiction could be exercised in favour of the petitioners. For the said proposition the learned counsel relied upon Judgment of the Hon'ble Supreme Court in the case of **The Chancellor and another Vs. Dr. Bijaynand Kar and others, AIR 1994 Supreme Court 579**.

11. Heard the counsel for the parties. Perused the material on record. The above quoted paras from the reply filed on behalf of the respondents to the application for stay before the Appellate Court and the statements made in the application for condonation of delay filed on behalf of the petitioners in the Trial Court show that the statements made in the application for condonation of delay were false and the petitioners

were aware about the pendency of the application for grant of mesne profit filed by the respondents. The documents placed on record further show that not only had the petitioners appeared in the said application but specific applications were filed seeking time to file reply before the concerned Court. Despite these facts, which were clearly in the knowledge of the petitioners, above quoted statements were made in the application for condonation of delay before the Trial Court and it was stated in paragraph 7 of the application for condonation of delay that the petitioners first became aware about the fact that an *ex-parte* decree had been passed against them on 30/06/2014, when they were served with the notices issued by the Executing Court. This shows that the petitioners falsely claimed about being unaware of the proceedings in the application for mesne profits filed by the respondents.

12. Considering the position of law laid down by the Hon'ble Supreme Court, upon which reliance has been placed on behalf of the respondents, it becomes clear that a party which makes a false statement before the Court should not be encouraged to get any premium on the falsehood on its part. The Hon'ble Supreme Court has laid down that the Court will not come to the aid of a party which consciously makes false representations before the Court in order to seek condonation of delay. Applying the said position of law to the facts of the present case, it

becomes clear that the Trial Court did not commit any error in rejecting the application for condonation of delay. In fact, the moment the petitioners made the above quoted false statement before the Court, they gave up their right to consideration of their ground for condonation of delay on merits by the Court. A party which blatantly makes false and wrong statements before the Court while seeking condonation of delay cannot be permitted to claim that injustice was caused as its case was not considered on merits when an *ex-parte* decree was passed against it.

13. The learned counsel appearing for the respondents was justified in relying upon the law laid down upon in the above quoted cases that when there is suppression of facts by a party approaching the Writ Court, the Writ Court ought not to exercise its discretionary jurisdiction. In the present case, the petitioners did not place on record the entire facts before this Court and, as noted above, even before this Court false and wrong statements were boldly made while seeking condonation of delay. It was only after the respondents filed their reply before this Court, along with documents showing that not only were the petitioners aware about filing of the application for mesne profits but they participated in the proceedings, that the entire picture became clear to this Court. Therefore, on this short ground the present writ petition cannot be entertained.

14. A specific contention is also raised on behalf of the respondents that contempt proceeding was required to be initiated against the petitioners, but, this Court is of the opinion that appropriate directions can be given to take care of the inconvenience caused to the respondents as the petitioners are enjoying interim order from this Court from 21/03/2017 onwards. The respondents deserve to be compensated with costs for the interim order which has been operating against them due to above noted conduct of the petitioners.

15. In view of the above, the present writ petition is dismissed. The respondents are permitted to withdraw the amount deposited with interest accrued thereon. This Court is not expressing any opinion on the question whether the said amount was 50% of the decretal amount or not. The respondents would be at liberty to pursue the execution proceedings for the balance amount. In view of the observations made in this order, for the inconvenience caused to the respondents, the petitioners are directed to pay costs of Rs.1,00,000/- (Rs. One Lac) to the respondents within four weeks from today.

16. The learned counsel appearing for the petitioners made prayer for continuing the interim order passed by this Court, but, in the light of

observations made hereinabove and looking to the conduct of the petitioners, the said request is rejected.

JUDGE

MP Deshpande