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

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Judgment delivered on: 24.02.2012

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FAO(OS) 80/2012

SUBODH KHANNA & ANR.

..... APPELLANTS

Vs

PROMOD KHANNA & ANR.

..... RESPONDENTS

**Advocates who appeared in this case:**

For the Appellants: Mr G.D. Chopra, Advocate.

For the Respondents: Mr K.A. Singh, Advocate

**CORAM :-**

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL**

**HON'BLE MR JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J**

Caveat No. 189/2012

Learned counsel for the respondents has entered appearance and the caveat stands discharged.

CM No. 3307/2012 (Exemption)

Allowed subject to just exceptions.

FAO(OS) No. 80/2012 & CM No. 3308/2012 (stay)

1. This appeal is directed against the judgment and order dated 18.01.2012 passed by the learned Single Judge in IA No. 6087/2011 preferred in CS(OS) No. 2203/2006. The learned Single Judge while allowing the said application, which was preferred by the respondent/plaintiffs, has issued the following directions in the operative part of the judgment:

“IA No. 6087/2011 (Sec. 151 CPC)

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For the foregoing reasons, it is ordered that written statement filed by the defendants be taken off the record and be returned to the counsel for the defendants, who shall file amended written statement by deleting the “preliminary submissions.”

Application is disposed of in the above terms.

CS(OS) No. 2203/2006

Amended written statement be filed by the defendants within four weeks with an advance copy to the counsel for the plaintiffs, who may file replication, if any, within two weeks thereafter.

Renotify on 9<sup>th</sup> May, 2012.”

2. The appellants, who are defendants in the suit, are aggrieved by the directions issued in the respondent’s/plaintiff’s application. The background, in which, the aforementioned direction came to be issued is as follows.

2.1 The respondent has filed a suit for declaration, permanent and mandatory injunction qua a property bearing no. W-105, Greater Kailash, Part-II, New Delhi. In the suit, it is alleged by the respondents/plaintiffs that, the appellants/defendants had commenced construction on a portion of the suit property which belonged to the respondents/plaintiffs. After summons in the suit were issued, the appellants/defendants, filed a written statement wherein, certain preliminary objections were taken with regard to maintainability of the suit. Averments, apparently, were also made in the written statement disputing the right of the respondents/plaintiffs to the suit property. These allegations apparently were made on the basis of a family settlement; which was accompanied by relinquishment deed, power of attorney and affidavits. It was averred that respondent no.1/plaintiff no. 1 on the one hand and, appellant no. 1/defendant no. 1 on the other, having signed these documents alongwith their sons, the suit was bereft of any cause of action.

2.2 The respondents/plaintiffs filed their replication to the written statement, in which, they adverted to the fact that the family settlement had been forged by the appellants/defendants in collusion and connivance with the mediators.

2.3 As a matter of fact it was averred in the replication that there were two sets of family settlement drawn up between the parties and signatures were obtained on the two sets of the family settlement by the mediators by projecting that the second set was a copy of the first.

2.4 It is in this context, that the respondents/plaintiffs moved an application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (in short the Code). This application was numbered as: IA No. 9765/2008. A single judge of this court by an order dated 10.02.2010, partially allowed the amendments sought by way of this application. The respondents/plaintiffs being aggrieved preferred an appeal, being: FAO(OS) No. 2007/2010. The appellants also filed a cross-appeal being: FAO(OS) No. 340/2010, against that part of the order dated 10.02.2010, which permitted certain amendments to be made in the plaint.

2.5 A division bench of this court vide order dated 12.11.2010, disposed of both these appeals by holding that once the single judge by his order dated 10.02.2010 had allowed amendments by way of additions to paragraphs 9, 10 and 11 of the plaint, then the remaining proposed amendments, (which were disallowed), qua paragraph 17 of the plaint and prayer clause (b) and (c) ought to have been allowed as, these were consequential in nature. With this rationale, the Division Bench passed the following operative directions in paragraph 15 of its judgment.

“The impugned order is, therefore, modified to the extent that the additions in paragraph 17 and prayer clause (b) and (c) sought to be brought by the proposed amendments are allowed. The original

facts stated in the plaint and the replication would continue to be part of the pleadings. The Respondents would be entitled to file Written Statement to the additional facts permitted to be added by way of the amendments and the Appellants may file their Replication thereto. The amended petition be now filed within three weeks.”

2.6 It appears that the appellants/defendants did not adhere to the directions issued by the Division Bench vide order dated 12.11.2010, which in sum and substance, permitted them to file a written statement only qua those additional facts which were permitted to be added by way of amendment. As would be evident from the directions of the Division Bench, extracted above, similar onus was placed on the respondents/plaintiffs vis-à-vis any replication that they may chose to file to such a written statement.

2.7 The appellants/defendants, filed an amended written statement containing several averments which were clubbed under the heading “*preliminary submissions about the amended plaint being mala fide* (in short the “preliminary submissions”). This propelled the respondents/ plaintiffs to file an interlocutory application being: IA No. 6087/2011 to strike out the said assertions made in the written statement on the ground that they were beyond the mandate of the order of the Division Bench dated 12.10.2010.

3. The learned single judge by an order dated 08.08.2011 allowed the application of the respondents/plaintiffs i.e., IA No. 6087/2011. The appellants/defendants carried the matter in appeal once again before a Division Bench comprising of Sanjay Kishan Kaul, J and Rajiv Shakhder, J. This appeal came to be numbered as: FAO(OS) No. 453-54/2011. This appeal was allowed and order dated 08.08.2011 passed by the learned Single Judge in IA No. 6087/2011 was set aside with a direction that the said IA be listed once again before the learned Single Judge on 14.11.2011. The rationale of

the order dated 19.09.2011 is encapsulated in the following observations made in the said order:

“.....On a reading of the impugned order, we are unable to decipher any reasoning which persuaded the learned Single Judge to dismiss the application and to allow the application of the respondents. It has been concluded by learned Single Judge that “most of the pleas” taken in the preliminary objections are regarding factual aspects. It is not known which of the pleas, learned Single Judge finds are permissible as preliminary objections. Learned Single Judge is required to deal with the amendments made in the written statement by the appellant and to come to the conclusion as to what pleas are permissible and what pleas are impermissible. There is absence of any factual finding in this behalf and in fact no discussion at all on this aspect.....”

4. By the impugned judgment, the learned Single Judge has re-examined the matter. On a re-examination of the matter the *lis qua* the issue between the parties, was confined to the inclusion of the averments made under the heading “preliminary submissions” in the amended written statement filed by the appellants/defendants. The learned single this time around correctly appreciated that the scope of the amendments permitted by the Division Bench to the appellants/defendants was restricted to the additional paragraphs incorporated in the plaint pursuant to the permission granted in that regard by the court. The learned single judge also went on to hold that the averments in the written statement must confine itself to material facts and not seek to plead evidence. As regards the appellants/defendants plea that under the heading “preliminary submissions” they had raised defences vis-à-vis the suit with regard to it being bereft of cause of action and, therefore, hit by the provisions of Order 7 Rule 11; which is sought to be denied by respondents opposition to the amendments - the learned Single Judge notes that this aspect already stands covered in preliminary objection no. 12 of the written statement, therefore, repeating the same under para 1 of the preliminary submissions was unnecessary. The learned Single Judge has further observed that the facts

now sought to be incorporated already stand included at page 71 of the written statement albeit in “concise form”. For all these reasons, the learned single judge came to the conclusion that the assertions and/or averments made under the heading “preliminary submissions” were repetitive which, otherwise stand rebutted in the form of replies to the amended paragraphs 9, 9A, 10A to 10H, 11, 11A and 17, of the plaint.

5. Mr Chopra, learned counsel for the appellants, in our view, argued contrary to the record when, he submitted that the even his objection to the suit being barred under Order 7 Rule 11 of the code was not permitted to be agitated, by its inclusion in the amended written statement. Mr Chopra was not able to demonstrate this time around as to how the learned Single Judge, if at all, had erred in directing removal of the averments made by the appellants/defendants under the head “preliminary submissions”.

6. Having perused the order of the learned Single Judge, and on consideration of submissions of Mr Chopra the learned counsel for the appellant, as also Mr Singh, the learned counsel for the caveator, we are not persuaded to hold otherwise. The appeal is, accordingly, dismissed.

**SANJAY KISHAN KAUL, J**

**RAJIV SHAKDHER, J**

**FEBRUARY 24, 2012**

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