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

+ FAO(OS)No.55/2017 & CM Nos.7554-55/2017

% Date of decision : 17th January, 2018

CAPT VIKRANT Appellant
Through : Mr. Raj Kumar Rajput and Ms.
Sakshi Sharma, Advs.
versus

ROSETTA WILLIAMS Respondent
Through : Mr. Rohan Thawani and
Ms. Gunjan Ahuja, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CM No.7555/2017 (delay)

1. For the reasons stated in the application, the delay in filing the appeal is condoned.
2. The application is allowed.

FAO(OS)No.55/2017

1. The record of CS(OS)No.2884/2015 has been received.
2. We have heard Mr. Raj Kumar Rajput, ld. counsel for the appellant and Mr. Rohan Thawani, ld. counsel for the respondent.
3. By way of the present appeal, the appellant has assailed the order dated 24th October, 2016 rejecting the I.A.No.1785/2016 (*under*

Order VII Rule 11 of the CPC) which had been filed by the appellant/defendant in CS(OS)No.2884/2015.

4. The facts giving rise to the present appeal to the extent necessary are briefly noted hereafter.

5. Disputes had arisen between the parties in respect of a lease deed dated 1st February, 2009 with regard to the property bearing No NS-1107, D-Block, DLF Phase – I, DLF City, Gurgaon, Haryana.

6. The appellant/landlord relies on a notice dated 10th August, 2011 issued by it for appointment of arbitrator. The respondent/tenant had responded thereto by way of reply dated 30th August, 2011 stating that the arbitrator whose name had been proposed was not acceptable to them.

7. On 31st August, 2011, the appellant/landlord had filed a petition under Section 11(5) of the Arbitration & Conciliation Act, 1996 before the High Court of Punjab and Haryana at Chandigarh.

8. It appears that respondent/tenant had issued a legal notice dated 20th April, 2012 to the appellant to take over possession of the premises. On the 24th August, 2012, the Punjab and Haryana High Court had noted the submissions of the respondent/tenant that it had vacated the said tenanted premises.

9. Claiming the entitlement to recovery of the money spent by her on fitting and fixtures and other interior work for the period between 2008 till 2012, i.e., the date from taking over the possession of the property till the time the possession was handed back to the landlord, the respondent/tenant instituted CS(OS)No.2884/2015 on the Original side of this court for recovery of money.

In the plaint, it was clearly asserted that cause of action had arisen in favour of the plaintiff/respondent on 31st March, 2012 when it had handed over the possession. We have examined the plaint in the present case which also shows that it is the plaintiff/defendant's contention that it was running the school till the date it had handed over the possession.

10. The defendant entered appearance on reply to the summons and filed the written statement in January, 2016. The appellant/defendant has taken on objection that the suit was barred by cause of *res judicata* as well as on the grounds of limitation.

In support of these objections, reference was made to the proceedings under Section 11 of the Arbitration Act and the reply of the plaintiff/tenant to the notice invoking arbitration issued by the landlord.

11. Premised on the above contention, the appellant had filed I.A.No.1785/2016 (*under Order VII Rule 11 of the CPC*) praying for rejection of the plaint on the ground that it was barred by law.

12. This application was rejected by the impugned order dated 24th October, 2016 wherein the court had noted the respondent's reliance on the submissions made in the plaint and held that there was no requirement for the plaintiff to seek leave of the court seized of the petition under Section 11 of the Arbitration Act, 1996, in order to enable him to seek damages against the landlord.

The court had also noted the submissions of the plaintiff made in the plaint that cause of action for filing the suit had arisen when it had vacated the premises, in any case, on 31st August, 2012.

In view of the above, the findings of the Id. Single Judge cannot be faulted on any legally tenable ground and the challenge to the order dated 24th October, 2016 is clearly misconceived.

13. Mr. Rohan Thawani, Id. counsel for the respondent has drawn our attention to the order dated 25th July, 2017 passed by the Id. Single Judge in the suit proceedings framing issues on the pleading of the parties. We find that Id. Single Judge had framed the following issues:

*“1. Whether the defendant is liable to pay to the plaintiff the amount of Rs.1,64,06,000/- along with pendente lite and future interest @ 12% per annum? **OPP.***

*2. Whether the present suit is barred by limitation? **OPD.***

3. Relief.”

In view thereof, the issue of limitation would require to be examined on the evidence which is led by the defendant and the rebuttal evidence led by the plaintiff.

14. For this reason, there is substance in the request of the appellant that the observations made in the impugned order dated 24th October, 2016 ought not to be treated as a final adjudication on the petition of the appellant.

15. It is submitted by Mr. Raj Kumar Rajput, Id. counsel for the appellant that appellant is also pressing the issue of constructive *res judicata*.

16. No issue in this regard appears to have been pressed before the Id. Single Judge on 25th January, 2017.

17. Needless to say, it is always open to the parties to make an

appropriate application, if it seeks framing of additional issues.

18. In view thereof, the present appeal is dismissed.

19. It is however, clarified that observations made in the impugned order dated 24th October, 2016 by the Id. Single Judge shall not be treated as a final view on the matter and the Id. Single Judge shall take a final view on the issues framed.

20. The issues framed by the court would be tested in the light of the evidence led by the parties at the stage of final disposal.

21. Any application made by the parties for framing of issues shall be considered on its own merits and uninfluenced by the observations made in the impugned order.

CM No.7554/2017 (Stay)

In view of the order passed in the appeal, this application does not survive for adjudication and is hereby dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

JANUARY 17, 2018

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