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

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Date of Judgment: 11.02.2019

+ FAO(OS) 534/2014 & CM APPLs. 20999/2014, 21002/2014, 6838/2015, 30156/2015, 27512/2017, 22990/2018, 48232/2018, 3136/2019

KOHLI ONE HOUSING & DEVELOPMENT PVT LTD

..... Appellant

Through: Mr.Shailen Bhatia, Ms.Ekta Nayar
and Mr.Gaurav Liberhan, Advocates.

Versus

C S AGARWAL & ORS

..... Respondents

Through: Mr.Gaurav Mitra, Mr. Gorangg Gupta
with Mr. Vineet Gupta, Advocates for
respondent No.1.

Mr.Ajay Bahl, Advocate along with
Mr.Vikash Sharma, Advocate for
respondent No. 2(a)(b)(d).

Mr.T.K. Ganju, Senior Advocate with
Mr.Rohit Gandhi, Advocate for
respondents No. 4 to 13.

+ RFA(OS) 126/2014 & CM APPLs. 12927/2014, 13879/2014, 6961/2015, 30281/2015

KHOLI ONE HOUSING & DEVELOPMENT PVT. LTD

..... Appellant

Through: Mr.A.K. Singla and Mr.Amit Jain,
Advocates.

Versus

SHRI C.S.AGARWAL & ORS

..... Respondents

Through: Mr.Gaurav Mitra, Mr.Gorangg Gupta
with Mr.Vineet Gupta, Advocates for
respondent No. 1.

Mr. T.K. Ganju, Senior Advocate with
Mr.Rohit Gandhi, Advocate for
respondents No. 4 to 13.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. FAO (OS) 534/2014 and RFA (OS) 126/2014 are being decided by a common order with the consent of the parties. Some facts which are required to be noticed for disposal of the appeals are as under:
2. The appellant had instituted a suit for recovery for a sum of Rs.78 crores against 13 respondents. During the pendency of the suit, an application being I.A 6063/2010 was filed by respondent Nos. 4 to 13 under Order VII Rule 11 of Code of Civil Procedure (CPC) for rejection of the plaint qua them. Another application being I.A 2737/2014 was filed under Order VI Rule 17 CPC, by the plaintiff/appellant for amendment of the plaint. When the application under Order VII Rule 11 CPC was being heard, the appellant claims that it was prayed before the learned Single Judge that the application under Order VI Rule 17 CPC be heard at the first instance. However, the judgment was reserved only in I.A 6063/2010 on 28.05.2014. The

respondent Nos. 1 & 3 herein filed FAO (OS) 282/14, which came up before the Vacation Bench on 13.06.2014, when notice was issued in the said FAO. The grievance therein was that the learned Single Judge had wrongly reserved orders in IA No.828/2010 which was for interim relief, while reserving orders in IA No.6063/2010 on 28.05.2014. Another FAO (OS) No.280/2014 was filed by the appellant here in which, the grievance was that by the order dated 28.05.2014 the learned Single Judge had reserved orders only in IA No.6063/2010 where the IA No.2737/14 under Order VI Rule 17 should have been heard first.

3. Both the FAOs were finally decided on 01.07.2014, granting liberty to the appellant herein to approach the learned Single Judge and pray that, based on settled law, the application under Order VI Rule 17 CPC be heard at the first instance. It is submitted that before an application could be moved before the learned Single Judge, the final order was pronounced on 02.07.2014 and the plaint qua respondent Nos. 4 to 13 was rejected. The rejection of the plaint qua respondent Nos. 4 to 13 led to the filing of the RFA(OS) 126/2014 and the dismissal of the application under Order VI Rule 17 CPC has led to the filing of the FAO(OS) 534/2014, which are both listed today.
4. Mr. Bhatia, learned counsel appearing for the appellants submits that reading of the order dated 28.05.2014 would show that judgment was reserved only in IA 6063/2010. He further submits that this is also evident from the fact that when the FAO (OS) 282/2014 was listed before the Vacation Judge, even counsel appearing for respondent Nos. 4 to 13 had submitted that the learned Single Judge had reserved

orders only in IA 6063/2010. Mr. Bhatia further contends that even reading of the impugned order would show that except for observing that the application under Order VI Rule 17 CPC was not bona fide, neither the amendments sought have been noticed nor any reasons except that the application was belated, have been discussed in the impugned order. Additionally, Mr. Bhatia contends that no notice was issued to the respondents, nor reply was filed, nor submissions by either of the parties were noted in the impugned order, which would indicate that in fact no arguments were heard by the learned Single Judge on the merit in respect of the application under Order VI Rule 17 CPC. The only submissions which were made by the counsel appearing for the plaintiff-applicant was, that the application under Order VI Rule 17 CPC should be heard first which is reflected in the impugned order and in fact the learned Single Judge has accepted this proposition which is evident upon reading of paragraphs 14 and 17 of the impugned order. In this backdrop, the counsel for the appellant prays that the impugned order dated 02.07.2014 be set aside and both the applications be heard on merit.

5. Mr. Ganju, learned senior counsel appearing on behalf of respondent Nos. 4 to 13 submits that there is no infirmity in the order passed by learned Single Judge. The learned Single Judge has taken into consideration the correct proposition of law and while so considering, has correctly held that respondent Nos. 4 to 13 were dragged into the litigation when there is no cause of action against them and has rightly allowed the application under Order VII Rule 11 CPC and decided the preliminary issue so framed. He submits that arguments on this

application under Order VI Rule 17 CPC were also addressed which is evident upon reading of the paragraphs 14, 17, 19, 21, 26 and 27. It is also contended that the learned Single Judge has returned a firm finding that the application for amendment was not bona fide and thus no interference is required in the impugned order.

6. We have heard learned counsels for both the parties.
7. Reading of the order 28.05.2014, which we reproduce below would show that in fact the learned Single Judge had only reserved orders in IA 6063/2010, filed by respondent Nos. 4 to 13 under Order VII Rule 11 CPC:

“The arguments have been advanced by the learned senior counsel for the applicant/defendant Nos. 4 to 13 and the learned counsel for the main contesting non-applicant/plaintiff in respect of IA No. 6063/2010 filed on behalf of the defendant Nos. 4 to 13 under Order 7 Rule 11 CPC. The other non-applicants, namely defendant Nos. 1 to 3 want to make their submissions. Since arguments have been advanced for an hour and a half, they cannot go endlessly. The parties are directed to file a synopsis of their submissions along with the list of judgments.

Orders reserved.”

8. The submissions made before the Vacation Judge by learned counsel for the said respondents also points out in the same direction when categorically the learned counsels stated that orders had been reserved only in IA 6063/2010. Order dated 13.06.2014 reads as under:

“CM No. 10123/2014 (Exemption)

Allowed subject to all just exceptions.

FAO(OS) 282/2014

1. *Learned counsel for the appellant points out that in IA No. 882/2010 under Section 151 CPC, an interim order has been passed in favour of the appellants on 25th January, 2010. However, without hearing the arguments on this application, on 28th May, 2014, learned Single Judge while hearing arguments in IA No. 6063/2011 in CS(OS) No. 76/2010, orders have been reserved in IA No. 828/2010 as well.*
2. *Subject to the appellant taking steps within a week, issue notice to the respondents to show cause as to why appeal be not admitted.*
3. *Mr. Shailen Bhatia, learned counsel accepts notice on behalf of respondents No. 1 and 3. Mr. Ajay Bhatt, learned counsel accepts notice behalf of respondent No. 2. Mr. Rohit Gandhi, learned counsel accepts notice on behalf of respondents No. 4 to 12.*
4. *Learned counsel for the appellant shall ensure that copy of the paper-book is furnished to all the respondents.*
5. *List on 1st July, 2014.*

CM No. 10122/2014 (Stay)

1. *Issue notice to the respondents. Mr. Shailen Bhatia, learned counsel accepts notice on behalf of respondents No. 1 and 3. Mr. Ajay Bhatt, learned counsel accepts notice on behalf of respondent No. 2. Mr. Rohit Gandhi, learned counsel accepts notice on behalf of respondents No. 4 to 12.*
2. *It is submitted by learned counsel for respondents No. 4 to 12 that by order dated 28th May, 2014, Learned Single Judge has reserved orders only in IA No. 6063/2011 filed by respondents No. 4 to 12 under Order VII Rule XI of CPC in CS(OS) No. 76/2010 and in no other applications. It is submitted that, therefore, no interim orders are warranted at this stage.*
3. *In view of submissions made above, list this application on 1st July, 2014.*

4. *Learned counsel for the appellant shall ensure that copy of the paper-book is furnished to all the respondents.*

Dasti.

Emphasis added”

9. When the matter was finally disposed of on 01.07.2014, by the Regular Bench, the Division Bench had granted liberty to the appellant to approach the learned Single Judge. Paras 5, 6, 7 and 8 of the order read as under:

“5. However, it is contended by the senior counsel that in fact arguments on 28th May, 2014 were addressed also in I.A. No. 2737/2014 for amendment of the plaint but the learned Single Judge has reserved order only in the application under Order VII Rule 11 of the CPC. It is further contended that pronouncement of the orders on the application under Order VII Rule 11 of the CPC, if against the appellant/plaintiff, would make the application for amendment of the plaint infructuous.

6. Upon our pointing out to the senior counsel, that a perusal of the order dated 28th May, 2014 does not even show that the plaintiff/appellant had contended before the learned Single Judge on 28th May, 2014, that the arguments on the application under Order VII Rule 11 of the CPC can be heard only after the disposal of the application filed under Order VI Rule 17 of the CPC, the senior counsel states that in fact it had so transpired before the learned Single Judge on 28th May, 2014, though not recorded in the order of that date.

7. If that be the position, the remedy of the plaintiff/appellant is to approach the learned Single Judge stating so and not by urging in appeal that something had transpired before the learned Single Judge and which is not recorded in the order.

8. The senior counsel for the plaintiff/appellant in FAO(OS) No. 280/2014 agrees and states that

appropriate application will be moved before the learned Single Judge in this regard, also urging the legal position as is urged in this appeal. He further states that since the plaintiff/appellant will be availing the said remedy, the plaintiff/appellant at this stage is not pressing the appeal.”

10. Although para 5 would show that the counsel appearing for the appellant had submitted that arguments were addressed in IA 2737/2014, but Mr. Bhatia clarifies that it was only limited to urging before the learned Single Judge that this application should be decided first. It is not in dispute that after passing of the order dated 01.07.2014, the observations of the Division Bench could not be brought to the notice of the learned Single Judge as the judgment was pronounced on 02.07.2014.
11. Although we find that in paragraphs 14, 17, 19, 21, 26 and 27 there has been a discussion on the application filed by the plaintiff-appellant seeking amendment to the plaint, but in the backdrop of the earlier orders which we have extracted above and taking into consideration that even notice was not issued, reply was not filed and even submissions of either of the counsels for the parties were not recorded, we are of the view that in fact arguments were not heard. Thus the impugned order is set aside. The learned Single Judge would take up I.A 2737/2014 along with I.A. 6063/2010 under Order VII Rule 11 CPC. It will be open for the learned Single Judge to consider as to whether the application merits notice or not and thereafter proceed to decide both the applications on merits. The application under Order VI Rule 17 CPC being IA 2737/2014 shall be heard at the first instance.

12. We are informed that interim order had been passed against respondent Nos. 4 to 13 which stands automatically vacated as the plaint was rejected. We grant liberty to the appellant to make a fresh application under Order XXXIX Rule 1 and 2 CPC against the respondent Nos. 4 to 13, if so advised. With these observations, both the appeals along with the all pending applications are disposed of.
13. Parties to appear before learned Single Judge on the date fixed i.e. 08.04.2019.
14. Mr. Bahl points that during pendency of the present appeal, an application under Order XXII Rule 4 CPC was filed by the appellant to bring on record the legal heirs of respondent No. 2. He submits that this application has been decided by the Joint Registrar. The order has been pronounced and he has instructions to assail the same. In case an appeal is filed, the same will be listed before the learned Single Judge as an appeal in chamber, as provided in Delhi High Court Original Side Rules, 2018.

Crl. M.A. 3136/2019 (u/s 340 Cr.P.C.)

15. Since we have decided the appeals, it would be open for the respondent to take recourse to such remedies, as are available in accordance with law.

G.S.SISTANI, J

JYOTI SINGH, J

FEBRUARY 11, 2019

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