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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) No.785/2017, CM No.26366/2017 (for stay) and CM
No.26368/2017 (under Section 151 of the CPC for calling of record).
HIMALAYAN HELI SERVICES PVT LTD & ORS Petitioners
Through: Mr. K. Datta, Mr. Vivek Malik and
Mr. Mukul Thakur, Advs.
versus

HIMACHAL HELICOPTER SKIING PVT LTD Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **26.07.2017**

CM No.26367/2017 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

**CM(M) No.785/2017, CM No.26366/2017 (for stay) and CM
No.26368/2017 (under Section 151 of the CPC for calling of record).**

3. This petition under Article 227 of the Constitution of India impugns the order (dated 17th May, 2017 of the Court of Additional District Judge – 05 (South), Saket Courts, New Delhi) allowing the application of the respondent / plaintiff for recalling of the order closing the evidence of the respondent / plaintiff.
4. The counsel for the petitioner / defendant has been heard.
5. The suit from which this petition arises was instituted in this Court; issues were framed in the suit on 9th September, 2014 and the respondent / plaintiff directed to file affidavits by way of examination-in-chief of its witnesses within six weeks and the matter put up before the Joint Registrar on 17th November, 2014 “for marking exhibits on documents and fixing dates of trial”. The respondent / plaintiff did not file any affidavits and on

17th November, 2014 sought time to file affidavits by way of examination-in-chief.

6. Last and final opportunity was granted to the respondent / plaintiff to file list of witnesses along with affidavit by way of evidence within two weeks and the matter posted to 4th March, 2015.

7. The respondent / plaintiff still did not file affidavits and no witnesses of the respondent / plaintiff was present before the Joint Registrar on 4th March, 2015. On request of the counsel for the respondent / plaintiff which was not opposed, the suit was adjourned to 10th August, 2015 for the respondent / plaintiff's evidence.

8. On 10th August, 2015, though one witness of the respondent / plaintiff was present but the counsel for the respondent / plaintiff sought further time to file his affidavit by way of examination-in-chief; the said request was declined; the evidence of the respondent / plaintiff closed and the suit posted to 9th December, 2015 for evidence of the petitioner / defendant.

9. The counsel for the petitioner / defendant on enquiry states that the petitioner / defendant has already filed affidavit by way of examination-in-chief of one witness.

10. On the next date of hearing i.e. 9th December, 2015, the suit, owing to the enhancement in the minimum pecuniary jurisdiction of this Court, was transferred to the District Judge and the parties directed to appear before the District Judge on 3rd March, 2016.

11. The counsel for the petitioner / defendant on enquiry states that tendering of the affidavit by way of examination-in-chief of the witness of the petitioner / defendant has not taken place as yet.

12. It is at that stage that the respondent / plaintiff filed the application

against order whereon this petition has been preferred.

13. The counsel for the petitioner / defendant firstly contended that the order of the Joint Registrar, when the suit was pending before this Court, closing the evidence was appealable by a Chamber Appeal and which remedy was not availed of and the respondent / plaintiff filed the application for opportunity to lead evidence only after about two orders, when the matter was before the District Judge.

14. In my view, merely because the respondent / plaintiff did not prefer a Chamber Appeal would not disentitle the respondent / plaintiff from making an application in the nature of re-call of the order closing the evidence.

15. Unfortunately in the present suit, no substantial proceedings have taken place after the order of closure of evidence of the respondent / plaintiff. I have perused the issues framed in the suit. It appears that once the respondent / plaintiff had not led any evidence, there was no need for the suit to be posted for evidence of the petitioner / defendant or for the petitioner / defendant to file affidavit by way of examination-in-chief of its witnesses. The suit could, on 9th December, 2015, itself have been posted before the Bench for appropriate orders owing to the respondent / plaintiff having failed to lead evidence. Once the petitioner / defendant has allowed the suit to remain pending, in my view the order impugned being a purely discretionary order, is not interfereable under Article 227.

16. The counsel for the petitioner / defendant has argued that the exercise of discretion has to be inconsonance with the well settled principles and in the present case the respondent / plaintiff had already availed of several opportunities to lead evidence and its evidence had been rightly closed and the opportunity given by the learned Additional District Judge to the

respondent / plaintiff is not in proper exercise of discretion. It is further contended that the respondent / plaintiff neither along with the application nor till now has filed the affidavits by way of examination-in-chief.

17. I have considered the aforesaid contentions.

18. The fact remains that the first date for appearance of the witnesses of the respondent / plaintiff was at best 17th November, 2014 and thereafter 4th March, 2015, on both of which dates the respondent / plaintiff sought adjournment. On the next date i.e. 10th August, 2015 though the witness of the respondent / plaintiff was present but time for filing affidavit by way of examination-in-chief was sought which was not allowed and evidence closed. In this regard the learned Additional District Judge has also taken note of the fact that the adjournment sought by the respondent / plaintiff on 17th November, 2014 as well as 4th March, 2015 was not opposed by the counsel for the petitioner / defendant.

18. In the light of the aforesaid, it cannot be said that the discretion exercised is perverse.

19. The counsel for the petitioner / defendant has also argued that there is no provision under which the application could have been filed.

20. Order 18 Rule 17A of the CPC as it stood prior to deletion vide amendment of the CPC of the year 2002 provided for production of evidence which could not be produced earlier inspite of due diligence.

21. Supreme Court in *K.K. Velusamy vs N. Palaanisamy* (2011) 11 SCC 275 has held that in the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its

limitations, can be invoked in appropriate cases to re- open the evidence and/or recall witnesses for further examination. It was further held that this inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put questions to elicit any clarifications. It was further held that the deletion of Order 18 Rule 17A does not mean that no evidence can be received at all, after a party closes his evidence or after the party's evidence is closed and that it only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. It was reasoned that if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence.

22. It is in this light that I have hereinabove taken note of the fact that no substantial proceedings had taken place in the suit after the order of closure of evidence of the respondent/plaintiff.

23. I record, that though there appears to be no need for the petitioner/defendant to have, after closure of evidence of the respondent/plaintiff, led any evidence but the petitioner/defendant has chosen to do so. Supreme Court, in judgment aforesaid further held that if the Court is satisfied that in the interest of justice and to prevent abuse of process of court, it was necessary to reopen the evidence, the court is

entitled to do so.

24. Reference may also be made to *Paramount Enterprises Limited Vs. S.D. Surie* (2014) 14 SCC 542 where the right of the defendant to file written statement to the amended plaint had been closed and the application for recall of that order was filed. Finding that no progress had taken place in the suit after the amended plaint was filed, it was held that the Suit Court had the jurisdiction to recall the earlier order closing the right to file written statement to the amended plaint by compensating the plaintiff with costs and there was no justification for the Appellate Court to interfere with such an inherent power exercised by the Trial Court in the interest of justice.

25. Recently, in *Ram Rati Vs. Mange Ram* (2016) 11 SCC 296, it was reiterated that Rule 17 of Order 18 does not affect the inherent power of the court to pass the required orders for ends of justice to reopen the evidence for the purpose of further examination or cross examination or even for production of fresh evidence and that the said power can also be exercised at any stage of the suit, even after closure of evidence.

There is thus no merit in the petition.

Dismissed.

RAJIV SAHAI ENDLAW, J

JULY 26, 2017

‘pp’/M..