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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 3rd January, 2022

+ C.R.P. 231/2019 & CM APPLs. 45392/2019 & 2947/2020

HDFC LTD

..... Petitioner

Through: Mr. Karnail Singh, Advocate
versus

ANUKARAN MALIK

..... Respondent

Through: Mr. Subey Singh Panwar, Advocate

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through video conferencing.
2. The present petition challenges two impugned orders dated 10th April, 2019 and 2nd July, 2019 passed by the Trial Court in **CS No.55486/16** titled ***Anukaran Malik v. Housing Development Finance Corporation Ltd.***
3. The background of this matter, is that the Respondent/Plaintiff (*hereinafter* “Plaintiff”) filed a suit for recovery against the Petitioner/Defendant (*hereinafter* “Defendant”) in 2013, seeking recovery of a sum of Rs. 16,80,000/- along with interest. The said suit was at the stage of trial and the Defendant, which is an NBFC, sought to lead evidence of a witness, i.e., DW-2-Ms. Geetika Vaish. Though her evidence by way of an affidavit was filed, DW-2 was not present before the Trial Court for tendering of the affidavit and for cross examination. An adjournment was sought on the ground that she had to urgently leave for Mumbai due to



official work. This adjournment was refused and the evidence of the Defendant was closed vide order dated 10th April, 2019. An application was thereafter preferred by the Defendant under Order XVIII Rule 17 CPC, seeking reopening of evidence of DW-2 and recall of the said order dated 10th April, 2019, which was also rejected. In effect therefore, the evidence of the Defendant stood closed. Hence this petition.

4. Mr. Karnail Singh, Id. Counsel appearing for the Defendant, submits that only one witness is to be produced by the Defendant before the Trial Court, therefore an opportunity may be granted to the Defendant to produce DW-2, on the terms and conditions that this Court deems fit. He submits that the reason for non-production of DW2 was genuine as she had to travel for official work to Mumbai.

5. On the other hand, Mr. Panwar, Id. Counsel appearing for the Plaintiff submits that since inception of the suit, the conduct of the Defendant has been to delay the trial of the suit and adjudication thereof. Ld. counsel has taken the Court through the relevant order sheets of the Trial Court to argue that the Defendant's conduct does not deserve any indulgence and costs have been repeatedly imposed on it for such conduct. Ld. counsel further submits that the revision is not maintainable under Section 115 CPC against an order closing evidence, as per the judgment of the Supreme Court in ***Shiv Shakti Co-operative Society, Nagpur v. M/s. Swaraj Developers, (2003) AIR SCW 2445***. He further urges that two orders being challenged in one revision petition is also not permissible. The application under Order XVIII Rule 17 CPC was also beyond limitation, having been filed beyond the 30 day period. Hence, he submits that on maintainability and on merits, this revision petition is liable to be dismissed.



6. This Court has primarily perused the relevant order sheets in the suit, since inception. This shows that undoubtedly, the Defendant has been repeatedly taking adjournments. The suit was filed in 2013 and issues were framed by the Trial Court way back on 18th September, 2015 and since then, the Defendant has delayed the cross-examination of the Plaintiff's witness, made incorrect submissions concerning DW-1, the Defendant was also proceeded against *ex parte*, costs were imposed on the Defendant, the Defendant's opportunity to cross-examine was also closed, and finally the Defendant's evidence has been closed. The order sheet is replete with orders wherein either the Defendant is not appearing or a proxy counsel is appearing who is unable to conduct the proceedings and seeks adjournments. A perusal of the order dated 16th October, 2018 also shows that even the list of witnesses was only filed in 2019, upon the Trial Court directing the Defendant to do so. In respect of non-production of DW-2 in this background of the Defendant's conduct, the Trial Court, has finally, without having any other option, directed the closing of the Defendant's evidence.

7. Even in the present petition, since beginning, it is noticed that after the Trial Court's proceedings were directed to be adjourned by this Court on 16th October, 2019, the representation on behalf of the Defendant has been completely erratic. On the last date, i.e., on 27th October, 2021, costs of Rs. 15,000/- were imposed on the Defendant for non-appearance. In this petition, the Defendant has appeared only twice and thereafter has not appeared at all.

8. There is no doubt that the Defendant's conduct is clearly one to delay the proceedings in this matter. The suit being more than 8 years old, the adjudication of the same ought to be expeditious. However, considering the



fact that the endeavour of the Court is always to get disputes adjudicated on merits, this Court is of the opinion that the Defendant be given one last and final opportunity to lead the evidence of his witness, subject to stringent terms.

9. This position was also confirmed by the Supreme Court in ***K.K. Velusamy v. N. Palanisamy (2011)11 SCC 275***, and reiterated in ***Ram Rati v. Mange Ram & Ors., AIR 2016 SC 1343***. In ***K.K. Veluswamy(supra)*** the Court's responsibility to ensure just and effective adjudication, even by allowing reopening of evidence in certain cases, on specific terms and conditions, was emphasized. The relevant extract is as below:

“9. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. 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. 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 such question to elicit any clarifications.

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13. *The learned Counsel for Respondent contended that once arguments are commenced, there could be no re-opening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under Section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments.*

14. *Neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.*



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16. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

10. Accordingly, in the facts and circumstances of this case and to ensure



proper and effective adjudication of the dispute on merits, considering that the recovery sought is of a substantial sum, the following directions are issued:

- a. Since both parties agree that the cross-examination ought to take place physically, for the said purpose, the Trial Court will fix a specific date for recording evidence of DW-2, upon resumption of physical courts. Only one opportunity shall be given to the Defendant for producing its witness DW-2. Both parties have consented to this arrangement.
- b. The said opportunity is being given to the Defendant subject to a sum of Rs. 1.5 lakhs being paid by the Defendant to the Plaintiff on or before 27th January, 2022 towards the earlier costs imposed in this petition, as also towards further costs for permitting the Defendant to produce its witness for cross-examination. Out of the said amount, a sum of Rs. 75,000/- would be adjustable in the final decree, if any, passed in favour of the Plaintiff and the same shall be subject to the final orders to be passed in the suit. However, it is made clear that the balance Rs. 75,000/- shall be liable to be retained by the Plaintiff as costs for allowing this revision petition.
- c. The said sum shall be paid on or before 25th January, 2022. Subject to the above payment being made and the witness appearing on the date as directed by the Trial Court, the impugned order shall stand set aside. However, if on the date fixed by the Trial Court, the witness does not appear, the present order shall be peremptory and no further opportunity



shall be granted to the Defendant to produce its witness for cross-examination. The suit shall then proceed for final arguments and be disposed of expeditiously.

11. Matter to be listed before Trial Court on 27th January, 2022. The present petition along with all the pending applications is disposed of in the above terms.

12. A copy of this order be sent to the Court of the Ld. ADJ, Patiala House Court, New Delhi in ***CS No.55486/2016*** titled ***Anukaran Malik v. Housing Development Finance Corporation Ltd.***

**PRATHIBA M. SINGH
JUDGE**

JANUARY 3, 2022/Aman/MS

