

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

% Judgment reserved on: 28th August, 2015
Judgment delivered on: 07th January, 2016

+ **FAO(OS) 416/2015 & CM No.13475/2015 (stay)**

**INTERNATIONAL PLANNED PARENTHOOD
FEDERATION (IPPF)**

....Appellant

versus

MADHU BALA NATH

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Mudit Sharma and Mr Tanmaya Nirmal, Advocates

For the Respondent : Mr Sanjiv Bahl & Mr Eklavya Bahl, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The present appeal impugns the order dated 02.07.2015 whereby the application of the defendant/appellant under Order XVIII Rules 3 & 4 of the Code of Civil Procedure (hereinafter referred to as the 'Code') for permitting the recording of the statement of a witness through video conferencing was rejected.

2. The application was filed by the appellant for permission to record the testimony of the sole appellant's witness through audio and video link on the ground that the sole witness is based at London and is unable to travel to Delhi for her cross-examination. It was contended that the appellant is a charitable organization and is not in a position to afford the substantial expenditure required to be incurred for travel and stay of the sole witness to Delhi and further the presence of the said witness was necessary for various official commitments as she is the Head of the Human Resource which entails numerous responsibilities and the sole witness being female aged 54 years would have to suffer a lot of inconvenience to travel for her testimony to Delhi. In these circumstances, the application was filed for permission to record the deposition through audio and video conferencing.

3. The learned Single Judge has dismissed the application holding as under:-

“2. I have completely failed to understand the application because the averments in the application leave this Court to believe (that a witness who is a resident of U.K simply feels that witness need not come to India in a judicial proceedings for recording of evidence. This is an unacceptable practice, more so when admittedly the witness as per the statement made today before this Court on behalf of counsel for the defendant is travelling over the world to many countries/locations. Also, no financial

statements of the respondent-organization have been filed before this Court for this Court to appreciate and believe that the respondent-organization does not have monies for travel and stay of its witness to/in India. I may also note that counsel for the plaintiff is partially correct in arguing that the cost of video conferencing itself possibly will be a very substantial cost though the high cost issue is sought to be urged for the witness not to come to Delhi and depose. In any case, in my opinion cost of video conferencing is immaterial once the witness is otherwise travelling to various countries in the world and there is no handicap in any manner in this witness in coming to India and deposing in the case. World is really now a global village.”

4. We are unable to accept the view taken by the learned Single Judge for rejecting the application. The learned Single Judge has erred in not noticing the development of law and technology that has taken place over the years. The Code is a procedural Code and procedures are subservient to justice. With the development of law and technology, the Courts have to use procedure, which facilitates the Courts in dispensing speedier justice. If a facility is available to the Court for the purposes of expediting the trial then every opportunity is to be taken by the Court to make use of such technology so as to further the process of dispensation of justice. The learned Single Judge, in the impugned order, has taken a very narrow view of the matter. Merely because a witness is travelling over the world and/or may have the financial resources to travel to India does not

necessarily imply that the Court must insist upon the witness personally coming to the Court for the purpose of deposing before the Court and/or her cross-examination.

5. There may even be a situation where the witness may be available within the city where the Court is located, however, on account of the nature of work or physical condition of the witness, it may not be possible or viable for the witness to travel to Court. The role of a witness is paramount in the justice system of any country. By deposing in a case, they assist the court in discovering the truth. According to Bentham, "witnesses are the eyes and ears of justice". Witnesses are the real backbone of the proceedings. It is the testimony of the witnesses that enables the Court to arrive at the truth. Witnesses have to be treated with due respect and are not to be put to any inconvenience merely because they agree to testify. It is common knowledge that when a witness travels to Court for the purpose of deposition, a witness has to spend several hours in Court and at times major part of the time spent in Court is in waiting for the case to reach and the proceedings to commence. In these circumstances, to insist on the witness travelling to Court and waiting for hours may not be judicious.

6. The learned Single Judge has erred in not noticing several decisions of this court as well as the Supreme Court. As far back as in the year 2003 in the case of *State of Maharashtra v. Dr Praful B. Desai*: AIR 2003 (4) SCC 601, the Supreme Court in the context of the Criminal Procedure where it is mandated that evidence shall be taken in the presence of the accused, interpreted the term ‘presence’ not to mean actual physical presence in Court. The Supreme Court noticing the technological advancements held that presence could be through video conferencing. The Supreme Court held as under:-

“14. It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled *Statutory Interpretation*, 2nd Edn., p. 617:

“It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

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In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give

effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

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An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.”

15. At this stage the words of Justice Bhagwati in the case of *National Textile Workers' Union v. P.R. Ramakrishnan* [(1983) 1 SCC 228 : 1983 SCC (Tax) 2 : 1983 SCC (L&S) 72] , at SCC p. 255, para 9 need to be set out. They are:

“We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it

will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind.”

16. This Court has approved the principle of updating construction, as enunciated by Francis Bennion, in a number of decisions. These principles were quoted with approval in the case of *CIT v. Podar Cement (P) Ltd.* [(1997) 5 SCC 482] They were also cited with approval in the case of *State v. S.J. Choudhary* [(1996) 2 SCC 428 : 1996 SCC (Cri) 336] . In this case it was held that the Evidence Act was an ongoing Act and the word “handwriting” in Section 45 of that Act was construed to include “typewriting”. These principles were also applied in the case of *SIL Import, USA v. Exim Aides Silk Exporters* [(1999) 4 SCC 567 : 1999 SCC (Cri) 600] . In this case the words “notice in writing”, in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. On the same principle courts have interpreted, over a period of time, various terms and phrases. To take only a few examples: “stage carriage” has been interpreted to include “electric tramcar”; “steam tricycle” to include “locomotive”; “telegraph” to include “telephone”; “banker's books” to include “microfilm”; “to take note” to include “use of tape recorder”; “documents” to include “computer databases”.

17. These principles have also been applied by this Court whilst considering an analogous provision of the

Criminal Procedure Code. In the case of *Basavaraj R. Patil v. State of Karnataka* [(2000) 8 SCC 740 : 2001 SCC (Cri) 87] the question was whether an accused needs to be physically present in court to answer the questions put to him by court whilst recording his statement under Section 313. To be remembered that under Section 313 the words are “for the purpose of enabling the accused *personally* to explain”. (emphasis supplied) The term “personally”, if given a strict and restrictive interpretation would mean that the accused had to be physically present in court. In fact the minority judgment in this case so holds. It has, however, been held by the majority that the section had to be considered in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in facilities for legal aid in the country. It was held, by the majority, that it was not necessary that in all cases the accused must answer by personally remaining present in court.

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19. At this stage we must deal with a submission made by Mr Sundaram. It was submitted that video-conferencing could not be allowed as the rights of an accused, under Article 21 of the Constitution of India, cannot be subjected to a procedure involving “virtual reality”. Such an argument displays ignorance of the concept of virtual reality and also of video-conferencing. Virtual reality is a state where one is made to feel, hear or imagine what does not really exist. In virtual reality, one can be made to feel cold when one is sitting in a hot room, one can be made to hear the sound of the ocean when one is sitting in the mountains, one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one's sofa etc. Video-conferencing has

nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example, today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players. When a person is sitting in his drawing room and watching the match on TV, it cannot be said that he is in the presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both, the person sitting in the stadium and the person in the drawing room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other. The submissions of the respondents' counsel are akin to an argument that a person seeing through binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video-conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of

Section 273 of the Criminal Procedure Code. Recording of such evidence would be as per “procedure established by law”.

20. Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.

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24. In this case we are not required to consider this aspect and therefore express no opinion thereon. The question whether commission can be issued for recording evidence in a country where there is no arrangement, is academic so far as this case is concerned. In this case we are considering whether evidence can be recorded by video-conferencing. Normally, when a commission is

issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a judicial officer) would be required to record the evidence and to ensure/compel attendance. However, new advancement of science and technology permit officials of the court, in the city where video-conferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the court can be deputed to record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The court in Mumbai would be issuing commission to record evidence by video-conferencing in Mumbai. Therefore the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a judicial officer) to proceed to the office of VSNL and record the evidence of Dr Greenberg in the presence of the respondent. The officer shall ensure that the respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr Greenberg. The officers shall also ensure that the respondent has full opportunity to cross-examine Dr Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence.

26. To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of

the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who will know which is the most convenient time for video-conferencing with a person in USA. The respondent and his counsel will have to make it convenient to attend at the time fixed by the officer concerned. If they do not remain present, the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. Undoubtedly, an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read in court. Thus no question arises of the witness insulting the court. If on reading the evidence the court finds that the witness has perjured himself, just like in any other evidence on commission, the court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in court the witness has left the country. There also have been cases where a

foreign witness has given evidence in a court in India and then gone away abroad. In all such cases the court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the court. Even in those cases the court could only ignore or disbelieve the evidence. The officer deputed will ensure that the respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video-conferencing is taking place, any amount of written material. The officer concerned will ensure that once video-conferencing commences, as far as possible, it is proceeded with without any adjournments. Further, if it is found that Dr Greenberg is not attending at the time(s) fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video-conferencing. If the officer finds that Dr Greenberg is not answering questions, the officer will make a memo of the same. Finally, when the evidence is read in court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly, the costs of video-conferencing would have to be borne by the State.”

(underlining supplied)

7. As far back as in the year 2003, the Supreme Court in *Dr Praful B. Desai (supra)* noted the advancement in science and

technology and the fact that the law was ever developing and evolving and was to be utilized for the purposes of quicker dispensation of justice. The Supreme Court has held that advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present. In fact he/she is present before one on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other. The demeanour of the witness can be observed. In fact, the facility to playback would enable better observation of demeanour. The deposition of the witness can be heard and reheard. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court.

8. The judgment of the Supreme Court in **Dr Praful B. Desai** (*supra*) has also been followed by various High Courts. Even our High Court has followed the same in several cases. In fact, the facility of video conferencing has been utilized for the purposes of recording testimony of witnesses and the said facility has shown its

merit. Not only has the evidence being recorded expeditiously, experience has shown that it has facilitated, not only the witnesses but also the lawyers as well as the Court.

9. As far back as the year 2005, a learned Single Judge of this Court in the case of **Tuncay Aluncas v. Central Bureau of Investigation: 2005 (3) AD (Del) 682** relying on the decision of the Supreme Court in **Dr Praful B. Desai (supra)** held that recording of evidence by video conferencing is permissible. The learned Judge further held that the necessary corollary is that the law is deemed to assimilate changes in technology, and progress in society, so as to be in tune with reality of the times. The Constitution and existing laws have to be looked into for discerning challenges thrown up due to emerging technological innovations. They have to be interpreted keeping this dynamic in mind.

10. Another Single Judge of this Court in **Milano Impex Private Ltd. v. Egle Footwear Pvt. Ltd.: 2012 (188) DLT 202** extensively examined the decisions of various High Courts i.e. (i) **Twentieth Century Fox Film v. NRI Film Production, AIR 2003 Karnataka 148**; (ii) **Amitabh Bagchi v. Ena Bagchi, AIR 2005 Cal. 11** (iii) **Mrs. Gurnam Kaur v. Pritam Singh Bhatia, CS(OS) No.1350/1995 order dated 2nd May, 2011** and permitted recording of evidence using the facility of video conferencing.

11. Another Single Judge of this Court in *Zaishu Xie & Anr. vs. The Oriental Insurance Company Ltd.& Ors.*: 2014 (207) DLT 289 following the decision of *Milano Impex Private Ltd. (supra)* permitted recording of video conferencing.

12. A Division Bench of this Court in *Court on its own motion v. State*: 2007 (8) AD (Delhi) 531 laid down guidelines for sensitizing the concerns associated with criminal justice system about their protective role to prevent further victimization of child victims. One such measure directed to be followed by the Trial Court was that wherever possible the Court should resort to recording of statement through video conferencing.

13. The learned Single Judge, in the impugned order, has not noticed the judgments referred to above and several others of this court where evidence has been permitted to be recorded using the facility of video conferencing. The Supreme Court has laid down the need and importance of advancing with technology.

14. Procedures have been laid down to facilitate dispensation of justice. Dispensation of justice entails speedy justice and justice rendered with least inconvenience to the parties as well as to the witnesses. If a facility is available for recording evidence through video conferencing, which avoids any delay or inconvenience to the

parties as well as to the witnesses, such facilities should be resorted to. Merely because a witness is traveling and is in a position to travel does not necessary imply that the witness must be required to come to Court and depose in the physical presence of the court.

15. We are not for a moment laying down that a witness can never be called to Court. There may be circumstances or situations where physical presence of a witness may be necessary and required by the Court, in such situations it would be obligatory on the witness to be present in Court. Where a witness or a party requests that the evidence of a witness may be recorded through video conferencing, the Court should be liberal in granting such a prayer. There may be situations where a witness even though within the city may still want the evidence to be recorded through video conferencing in order to save time or avoid inconvenience, the Court should take a pragmatic view.

16. In the present case, the application was premised on the ground that the witness holds an important position in her organization and has to travel world over. We do not feel that such a request was unreasonable. Furthermore, the appellant/defendant has contended that the expenditure entailed for travel of the witness, who is a lady of over 54 years of age and her stay in Delhi would be a financial burden

on the appellant. This, in our view is a factor that the learned single judge should have taken into account. We are of the view that the learned Single Judge erred in dismissing the application.

17. In view of the above, the impugned order is set aside. The application IA No.7927/2015 is allowed. The Appellant is permitted to record the testimony and cross-examination of its witness Ms Rosalind Miller through audio video conferencing subject to the following conditions:-

(i) Evidence of the witness Ms Rosalind Miller shall be recorded through video conferencing between Delhi, India and London, U.K..

(ii) In Delhi, the video conferencing shall be conducted in the facilities available in the Annexe Block of the Delhi High Court.

(iii) Mr. Girish Sharma, Registrar (Computers) of this court is appointed as the coordinator with regard to the technical aspects of video conferencing in India.

(iv) The Indian High Commissioner at London shall nominate a senior officer not below the rank of Deputy Secretary of India to facilitate video conferencing. The officer nominated by the Indian High Commission shall co-ordinate the video conferencing arrangements in London and shall remain present at the time of recording of the evidence of the witness Ms Rosalind Miller.

(v) The officer nominated by the Indian High Commissioner in terms of the direction at serial no.(iv)

above shall ensure that apart from his own presence, only counsel for the Appellant/Defendant is present at the time of video conferencing. He shall ensure that no manner of prompting by word or signs or by any other mode is permitted.

(vi) The officer nominated by the Indian High Commission shall verify the identity of the witness before commencement of her examination.

(vii) As soon as the identification part is complete, oath will be administered by the Joint Registrar (J.R.) through the media as per Oaths Act, 1969.

(viii) The witness shall be examined during working hours of Indian Courts. The plea of any inconvenience on account of time difference between India and London shall not be allowed. However, the convenience of the Indian High Commission in London shall be taken into consideration in fixing the time and schedule.

(ix) The cross-examination, as far as practicable, be proceeded without any interruption and without granting unnecessary adjournments. However, discretion of the Court (J.R.) shall be respected.

(x) The Court (J.R.) may record any material remarks regarding the demeanor of the witness while on the screen and shall note the objections raised during recording of evidence.

(xi) The deposition of the witness shall be signed immediately in the presence of the nominated officer of the Indian High Commission. The said officer shall certify/attest the signatures of the witness.

(xii) The audio and visual shall be recorded at both the ends and copies thereof shall be provided to the parties at the expense of the Appellant.

(xiii) The appellant shall bear the cost/expenses of the video conferencing. The expenses for the video conferencing to be undertaken in London shall be informed to the appellant through counsel by the Indian High Commissioner. However, in case of any difficulty, the same may be communicated to the Registrar (Computers) of this Court by e-mail, who shall communicate the same to the appellant's lawyer in India.

(xiv) The officer of the Indian High Commission to be nominated by the Indian High Commissioner shall be paid a lump sum amount of Rs. 50,000/- as honorarium.

(xv) The appellant shall deposit an amount of Rs. 10,000/- as cost of preparation of the certified copies with the Registry of this Court in the present case within two weeks from today. The Registry shall thereafter prepare certified copies of the entire record of the case, which shall be sent in separate folders clearly marked as order sheets; pleadings; applications; plaintiff's documents and defendant's documents. The same shall be forwarded to the office of Indian High Commissioner with the assistance of Ministry of External Affairs.

(xvi) This record shall be made available to the officer nominated by the Indian High Commissioner for the purpose of undertaking the video conferencing as it would be necessary for recording the statement and cross examination of the witness.

(xvii) In case, the respondent is desirous of being physically present in London at the time of recording of

the evidence, it shall be open for her to make arrangements on her own cost for appearance and her representation. The respondent shall ensure that prior intimation in this regard is filed in the Registry of this Court giving full particulars of the names of the persons as well as enclosing documents of authority in respect of the persons, who shall be representing them in the proceedings. The intimation in this regard as well as documents shall also be furnished to Indian High Commission in London.

18. The appeal is allowed as above, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

JANUARY 07, 2016
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