

*HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+CIVIL REVISION PETITION No.337 of 2016

% Dated 19.10.2016

Between:

Sirangai Shoba @ Shoba Munnuri
rep.by her General Power of Attorney,
M.Narayana Rao ... Petitioner

and

\$ Sirangi Muralidhar Rao, rep. by his Power of Attorney
Smt. Sirangi Vijayalakshmi Respondent

! Counsel for the petitioner : Sri Vedula Venkata Ramana,
and Sri Mukheed

^ Counsel for respondent : Sri Gopinath Lakkineni

< GIST : ---

>HEAD NOTE : ---

? Cases referred: :

¹ (1974 CrLJ 784)

² (1999) 4 SCC 567

³ (1996 2 SCC 428)

⁴ 113(2004) DLT 125

⁵ AIR 2004 SC 3566= 2004(2)ALD (Cri) 504

⁶ 2003-CrLJ-2033=2003(4)SCC-601=2003(2)ALT(Cri.)118(SC)

⁷ (Civil appeal No.3173 of 2011 (arising out of SLP (c) No.27071 of 2010), dt.24.10.2013

⁸ 2002 (6) ALD-34(SC)

⁹ 2005 (6) SCC-344

¹⁰ AIR 2003 Karnataka 148=2003(3)ILD-505(Karnataka)

¹¹ 2015(2) MHLJ 801

¹² 2005 CrLJ 2033

¹³ AIR 2005 Calcutta 11

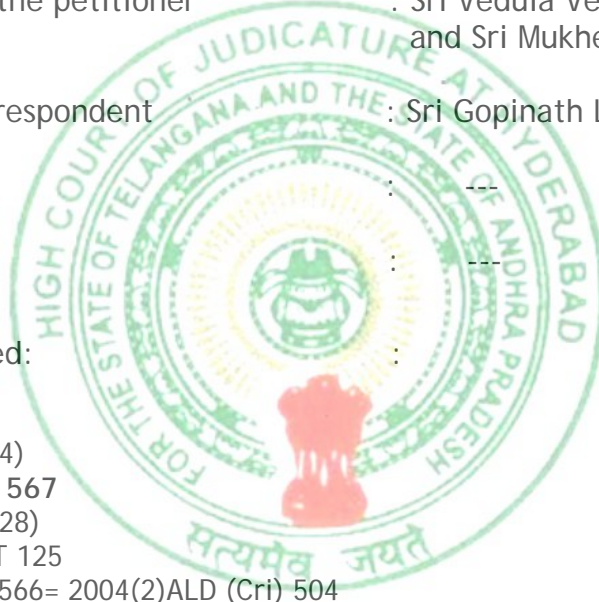
¹⁴ (2013) 9 SCC 611

¹⁵ 2007(2)ALD 72=2007(1)ALT 237

¹⁶ 2015(5) ALT 150

¹⁷ [CrI. Appeal No.1620 of 2015 arising from SLP (Criminal) No.8157/2015],
dated.02.12.2015

¹⁸ FAO(OS) 416/2015, dt.07.01.2016-Delhi HC-DB



HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.337 of 2016

ORDER :

The revision petitioner, who is the unsuccessful respondent-wife in I.A. No.826 of 2015, impugning legality and correctness of the order dated 18.12.2015, allowing examination on 'Skype' technology for recording evidence in the divorce petition of the petitioner-husband in O.P. No.59 of 2015 on the file of Principal Senior Civil Judge, Kothagudem, filed the revision.

2. Coming to the relevant facts, in the divorce petition, after filing chief affidavit and when the matter was coming for cross-examination, the petitioner-husband at USA filed the petition before the trial Court to permit his examination including marking of documents on 'Skype' technology at his expense, in open Court or through Advocate-commissioner, on the ground that he is unable to get leave to attend the Court due to most urgent works of his project at USA.

3. The respondent-revision petitioner in opposing the same contended before the lower court on one among other that only in-order to-avoid facing the criminal case filed against him, the petitioner adopted said procedure for recording his evidence and there is every possibility to prompt

or alert him to give a different answer and prayed to dismiss the petition.

4. As the trial Court after hearing both sides allowed the petition, present revision is filed against it as referred supra.

5. In the revision it is the contention, in support of the grounds by the learned senior counsel for revision petitioner, that the Court below committed error in allowing the petition, instead of dismissing by accepting the contentions of the cross-examination of a witness cannot be allowed to be done by using 'Skype Technology' since the demeanor of the witness cannot be properly observed, identity of the party giving answers is difficult to fix, there is every possibility to prompt or alert him to give a different answer if the technology is used by screening the prompter from visibility, that a party cannot have the luxury of avoiding Court by keeping himself busy and conduct the trial of the case by taking advantage of Skype technology by appointing a G.P.A; besides same is a device to avoid facing the criminal case allegedly filed against him and it defeats the very object of efforts for conciliation without presence and prayed to allow the revision by setting aside the impugned order.

6. Whereas, it is the contention of the learned counsel for revision respondent-husband, while supporting the order of

the lower court that placed reliance on a similar expression of this court, that same is a reasoned one and no way requires interference, any reconciliation if at all can be done by same technology, that demeanor of the witness can be properly observed including identity of the person giving answers and there is no possibility to prompt or alert to give a different answer from use of the technology by observing closely the demeanor of witness with no possibility of any others prompting, there is no any basis even to say same is a device to avoid facing the criminal case allegedly filed against him, that none of the provisions of law, muchless Sections 65A and B of the Indian Evidence Act prohibit such an e-recording of evidence, that law is fairly settled for availing of the technological advancements and thereby sought for dismissal of the revision.

7. Heard both sides with reference to the provisions and propositions and perused the material on record.

8. The facts no way require repetition, in answering the rival contentions, to decide correctness of the order of the lower court and further as to recording of evidence through Skype or Dash or other technological device can be permitted and if so with what precautions and whether the case facts otherwise are impermissible even technology permits with taking care of precautions.

9. Before dealing with the issue as a necessary background, it is to mention the need to avail technological innovations with necessary safeguards and precautions in the justice delivery system for speedy and effective disposal of cases that; after India attained independence, not only there is an explosion of population but the pendency of cases has grown in a multi-dimensional way and the present day statistics is more alarming. It is apt to quote from the erudite words of His Excellency, Hon`ble the President of India Dr.Pranab Mukherjee, on March 14, 2016, that- though the Indian judiciary has many strengths, for we have a long way to go, despite burdened with the pendency of more than three crore cases in various courts, there is every need to fully meet the aspirations of our people for speedy and affordable justice, by use of technology.

10. There is a thin line between access to justice and effective access to justice. No one can dispute on the fact that ICT has virtually paved a new line of thinking in modernizing Indian judicial system for effective access to justice. The task is early disposal without sacrificing the quality of decision making and for that the Courts are bound to use the technological innovations. Our objective should not only be accessible but affordable justice to all.

11. It is also apt in this regard to quote the erudite words of one of the great technocrats, no other than the former President of India-Bharat Ratna, Dr.A.P.J.Abdulkalam that:

“Technology is defined an essential element of change in all spheres of life. The element involved also is an important factor. If technology is properly used, it can bring about tremendous changes for the betterment of life. Any change we contemplate is for speedy justice mechanism keeping in focus the quality, transparency and public accountability”.

12. Thus the only thing to be kept in mind is what precautions can be taken to prevent any possibility of abuse of the process and in furtherance of and to sub serve the ends of justice.

13. From the above, it can be well said that Science and Law, the two distinct professions have increasingly become commingled, for ensuring a fair process and to see that justice is done. On one hand, scientific evidence holds out the tempting possibility of extremely accurate fact-finding and a reduction in the uncertainty that often accompanies legal decision making. At the same time, scientific methodologies often include risks of uncertainty that the legal system is unwilling to tolerate.

14. In *Som Prakash V. State of Delhi*¹ the Apex Court has observed four decades back that:

¹ (1974 CrLJ 784)

“in our technological age nothing more primitive can be conceived of than denying discoveries and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific aids to prove guilt.”

15. Thus statutory changes are generally needed to develop more fully a problem solving approach to trials and to deal with heavy workload on the investigators and judges in so enabling them. However, when existing provisions enables to do so from the purposive interpretation to meet the situations, there is nothing to sit in flaccidly.

16. In another expression in *M/s. SIL IMPORT, USA Vs. Exim Aides Exporters, Bangalore*² the Apex Court held that:

“Technological advancements like facsimile, Internet, e-mail, etc, were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue”.

17. It was also quoted with approval in *M/s. SIL IMPORT supra* of what Francis Bennion on Statutory Interpretation has stressed the need to interpret a statute by giving allowances for any relevant changes that have occurred, since the Acts passing, in law, social conditions, technology, the meaning of words, and other matters. For the need to update legislations, the Courts have the duty to use interpretative process to the fullest extent permissible by the enactment.

² (1999) 4 SCC 567

18. The following passage at page 167 of the above book has been quoted with approval by a three Judge-Bench of this Court in *State Vs. S.J. Chaudhary*³:

“It is presumed that Parliament intends the court to apply to an ongoing Act, a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, 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 current law.”

19. The requirement of law from Sections 273 & 317(2) of the Code of Criminal Procedure, for short 'CrPC' is that the evidence must be recorded in presence of the accused and unless he waives the same and consenting in the presence of his Advocate or special vakalath holder permitted if any. Leave such difficulty does not arise for Court to record Section 164 CrPC Statements or the like during crime investigation or examination of witness during pre-cognizance stage of private complaint or for the like. The term presence in this Section does not mean the actual physical presence of the accused or witness in the Court or before officer of the court like in case Advocate is appointed to record evidence. It is to say, the idea of fair trial is implicit therein. As such, same is the law with all vigor and dynamism for presence of accused in Judicial custody placed in a jail or even on bail or bond could

³ (1996 2 SCC 428)

not physically present either from ill health or elsewhere- (including for Section 313 CrPC examination or pre-trial questioning /examination under Sections 209 or 251 or 238 or 244 & 245 or 228 CrPC or the like, as is in vogue of remand extension under Sections 167 or 309 CrPC or the like or even without need of physical production for compliance of Sections 265 to 267 CrPC or the like or even under any special law from any special provision of similar in nature), from the term presence in this context does not mean the actual physical presence of the witness or accused in the Court.

20. In *Sheeba Abidi Vs. State*⁴ it was held by the Delhi High Court that it can also be used where the Court on facts and circumstances do not want the witness to personally attend the Court and answer. It can happen in cases where the witness (victim) is a child who has been sexually exploited or in case if the child has suffered from unnatural offence against.

21. The Supreme Court in *Sakshi vs. Union of India*⁵ accepted for adopting 'video conferencing' recording of statements /evidence of witness, without physical presence in Court.

22. From the above, there is no manner of doubt to hold that presence of parties and witnesses in civil matters from

⁴ 113(2004) DLT 125

⁵ AIR 2004 SC 3566= 2004(2)ALD (Cri) 504

Orders 26, 18 & 16 of the Code of Civil Procedure, for short 'CPC' does not mean actual physical presence either in the Court or before officer of the court like in case Advocate is appointed to record evidence, particularly in matrimonial matters where one party elsewhere to say abroad and other somewhere within India.

23. It is often quoted across the globe from many walks of life that, the notion that ordinary people want black-robed judges, well dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct. Though such a contention is raised in any case, it is to consider as for sake of contention. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively, as possible. This observation is applicable even in the Indian context where people come to Courts with legal problems and want relief in a speedy manner and application of technologies with e-Courts (video/audio conferencing or internet conferencing) when helps in achieving said objective of speedy and efficient justice to the common man.

24. Recording of evidence by video/audio/teleconferencing or internet conferencing is thus legally permissible in both civil and criminal matters and even in matrimonial matters.

25. In fact to overcome any difficulty of understanding the existing provisions supra of CrPC, a proviso was inserted to sub-section (1) to Section 275 of CrPC by Act 5 of 2009 (the Code of Criminal Procedure (Amendment) Act, 2008) which reads as follows:

'Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.'

It is leave about recording of evidence on commission as per Section 285 CrPC with same analogy, for Commissioner is Officer of Court on being appointed for purpose of recording evidence of such witness.

26. From the aforesaid provision, it is to gather including for civil matters that the evidence of a witness may be recorded by audio-video electronic means to say even by internet technology as once same is statutorily permissible in criminal proceedings, equally and undoubtedly permissible in all civil matters.

27. The core function of digital video recording systems is to convert the audio and video signals from various microphones and cameras into a digital format and store it as a computer file (the video file). On the same lines, the system for video recording of Court proceedings will create a computer file, usually on the computer's hard drive. However, the permanent (archieve) file would be created by

copying the file from the hard drive to some other, often external, medium, usually optical media such as DVDs. Any auto decoding and conversion is from binary language to local language under command.

28. The landmark expression of the Apex Court in 2003 in *State of Maharashtra Vs. Dr. Praful B. Desai*⁶, on the scope of its permissibility and person need not physically present, by considering the scope of Section 273 CrPC, speaks that "in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience, the Court could consider issuing a commission to record evidence by way of video conferencing. Normally a commission would involve recording of evidence at the place where the witness is. However, advancement in science and technology has now made it possible to record such evidence by way of video conferencing in the town/city where the Court is.

29. Referring to the chances of witness abusing the trial Judge during video conferencing, the apex Court in *Dr. Praful B. Desai* supra observed in erudition that, "as a matter of prudence, evidence by video-conferencing in open Court should be accepted only if the witness is in a Country which has an extradition treaty and under whose laws contempt of Court and perjury are punishable."

⁶ 2003-CrLJ-2033=2003(4)SCC-601=2003(2)ALT(CrI.)118(SC)

30. The Apex Court in *Dr. Praful B. Desai* supra then directed the Mumbai Court to set up a commission and take help of VSNL in recording Dr.Greenberg's (Medical witness) statement through video conferencing in the presence of the two accused doctors. It also allowed the two accused to cross-examine the US-based doctor, through video conferencing.

31. The Apex Court in *Dr. Praful B. Desai* supra by rejecting all arguments and objections about inferior video quality, disruption of link and other technical problems and of rights of the accused under Article 21 could not be subjected to a procedure involving 'virtual reality', holding in answer to all the queries that- by now science and technology has progressed enough to not worry about video image/audio interruptions or disruptions and video conferencing has nothing to do with virtual reality and gave the example of the telecast of the cricket World Cup of it could not be said those who watched the World Cup on television were witnessing virtual reality as they were not in the stadium where the match was taking place. *This is not virtual reality, it is actual reality. Video conferencing is an advancement of science and technology which permits one to see, hear and talk with someone far away with the same facility as if he is present before you, that is, in your presence.* Recording of evidence by video conferencing also satisfies the object of providing, in

Section 273 CrPC, that evidence be recorded in the presence of the accused.

32. In fact, in the recent past in the year,2013, the Apex Court in *Dr.Kumar Saha Vs. Dr.Sukumar Mukherjee*⁷ in a medical negligence case, considered the evidence of the foreign expert witnesses by internet/video conferencing in recording of testimonies and cross-examination.

33. It is however depends upon the accuracy of the proceedings, the appreciation depends. Precautions must be taken, both as to the identity of the witnesses and accuracy of the equipment, used for the purpose. Further, if it is not under control of Court or Commissioner appointed as Officer of Court in recording evidence by internet/video coverage, the other end from where witness speaks, the result will not be accurate from any lack of accuracy in evidence. For example, if the witness by internet/video conference from other end while giving evidence is tutoring by some other person outside of coverage spot, it is difficult to find out and such evidence got no value or lesser value in appreciation, subject to detection, so also from any audio pre-recorded tutoring to him with low voice, not traceable from the place of recording, which are the drawbacks. Such draw backs can be curbed and avoided if for the Court internet/video conference and recording evidence, a separate cloud with

⁷ (Civil appeal No.3173 of 2011 (arising out of SLP (c) No.27071 of 2010),dt.24.10.2013

security is developed and adopted through NIC, like the devices of Dash, Skype etc., instead depending upon such social network technological devices.

34. The Apex Court so far as recording of evidence in civil matters particularly through Advocate-Commissioners' concerned, suggested way back in the year,2002 by interpreting the word mechanical process to include even audio/video recording. At Para 12 of its expression in Salem Advocates Bar Association case-I⁸- it was held that recording evidence in civil cases on commission not only at hand or typed to dictation, but also and simultaneously by tape recording/ audio/video recording, so as to obviate any controversies later between parties while recording evidence and Or.18 R.4(3)CPC was interpreted for said conclusion.

35. Further, in its later expression in Salem Advocates Bar Association case-II⁹- for recording evidence in civil cases on commission, it was held at para 6, referring to Or.18 R.4(7) CPC of fees is payable by respective parties for examination of their respective witnesses.

36. Even while recording evidence in civil cases on commission, Commissioner can and *has to observe and record the demeanor of witnesses or such other remarks or*

⁸ 2002 (6) ALD-34(SC)

⁹ 2005 (6) SCC-344

objections in the deposition as per order 18 Rule 4(4) & Rule 12 CPC. Further, from the video or internet recording of evidence and presenting the same in an electronic disk, the Court also can during arguments by going through the recorded deposition, note down the demeanor of witness to the extent required as part of appreciation of evidence.

37. Video recording of proceedings will ensure accuracy of the record. Further, by preserving (and making available) matters which are not apparent from the written record, such as demeanor, voice inflections, body language and the like, the judges can form a better view of the witness and that would lead to better appreciation in evidence for a rationale conclusion. The Judge can also re-examine later the demeanor of the witness from such video recording while they give evidence, by replay and can come to a more accurate conclusion. The Judge can even focus on a close-up of the witnesses face in order to better observe facial expressions. These can be re-run and replay with ease. The Judge thus can replay for himself if necessary the recorded proceedings of any hearing from day one right up to the final arguments, while appreciating the evidence in deciding the lis.

38. It is needless to say, the marking of any documents by Commissioner are only for reference sake, since it is the Court/Tribunal that has to later decide for ultimate marking,

subject to objection if any as per order 18, Rule 4(1) Proviso CPC and Rule 113(7)(g) of Civil Rules of Practice and circular orders, for short, 'CRP'. The venue for recording evidence is at the court premises or at the venue fixed by Court as per the facts of the case or by the Commissioner with consent of parties, as per Rule 113(6)(b) of CRP. The Commissioner can take any records from the Court/Tribunal by filing a memo only on or before the respective dates of recording evidence and return immediately after the purpose as it is in original condition as per Rule 113(8) of CRP.

39. Further in a civil case in Twentieth Century Fox Film Corp. Vs. NRI Film Production Associates (P) Ltd.¹⁰ - it was held by the High Court of Karnataka in a matrimonial matter that, hearing suit and examination of witnesses and recording of evidence by commissioner are once contemplated by Order 18 Rule-4 CPC, the words 'Witness in attendance' are to be understood as person being present and it need not by physical presence. Thus, recording of evidence through Audio, Video link is permissible complying with the words, in attendance. It would be a live communication between the two ends. Everything, including the visual would be recorded at both ends. This would then be available for viewing by the Court. Also the recording would be at both ends. This also

¹⁰ AIR 2003 Karnataka 148=2003(3)ILD-505(Karnataka)

minimizes and or almost eliminates the possibility of loss of material recorded. Also if an officer of the Court is present at the other end i.e. in USA in the same room of witness, the possibility if his being promoted would be eliminated. The officer of the Court can also administer oath.

39(a). There are Safeguards provided therein for the precautions to be taken in recording such evidence, viz.,

"1. Before a witness is examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side. (Identification affidavit).

2. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.

3. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.

4. The witness should not plead any inconvenience on account of time different between India and USA.

5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.

6. Learned Judge is to record such remarks as is material regarding the demur of the witness while on the screen.

7. Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.

8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.

9. The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.

10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.

11. The expenses and the arrangements are to be borne by the applicant who wants this facility”

40. In the matter of *Suvarna Rahul Musale Vs. Rahul Prabhakar Musale*¹¹ the Bombay High Court allowed the plea of the plaintiff to depose using video conference as the witness was staying in U.K. with her minor children and was unable to come to India.

41. In *kalian Chandra Sarkar V. Rajesh Ranjan @ Pappu Yadav*¹² it was held that as a general rule in case where the attendance of accused or witness cannot be procured without any amount of delay, expense or inconvenience the Court could consider by way of video conferencing. The Apex Court directed the trial of the case in Patna shall continue without the presence of the appellant-

¹¹ 2015(2) MHLJ 801

¹² 2005 CrLJ 2033

accused by the court dispensing such presence and to the extent possible shall be conducted with the aid of video conferencing.

41(a). In fact it was way back in March, 2003 the Government of Andhra Pradesh was the first Indian State to introduce electronic pre-trials (E-pre trials) whereby criminals alleged is tried in prison using video conferencing, rather than physically appearing in a Court of law. By now in the entire country almost all Courts have the video linkage facility with prisons for video conferencing of remand extension, enquiry /trial to the extent necessary and the live. It is easy to use and manage system allows Judges, legal professionals, Court officials, inmates and witnesses to seamlessly communicate face to face in real time as effectively as if in same room.

42. In *Amitabh Bagchi Vs. Ena Bagchi*¹³ the Calcutta High Court held including with reference to Sections 65A&B of the Evidence Act as follows:

“It is to be remembered that by virtue of an amendment and insertion of Sections 65A and 65B of the Evidence Act a special provision as to evidence relating to electronic record and admissibility of electronic records has been introduced with effect from 17th October, 2000. Consequential amendments are also made therein. Therefore there is no bar of examination of witness by way of Video Conferencing being essential part of electronic method. Hence, such prayer

¹³ AIR 2005 Calcutta 11

cannot be ignored as unnecessary. It is to be evaluated with the amount of delay, expenses or inconvenience. If it appears that electronic video conferencing is not only much cheaper but also facilitates the Court and avoids delay of justice, a practical outlook is to be taken by the Court. In such circumstances, Court may dispense with such attendance and issue a Commission for examination of the witness. However, in allowing such prayer Court will first of all consider whether linkage of such facility will be available between two places or not".

43. In *CBI v. Tuncay Alankus*¹⁴ the Apex Court held that, trial court can direct examination of witnesses by video-conferencing as per Sections 242 & 243CrPC, however, necessary directions should also be given by the court as to who would bear requisite expenses.

44. Thus recording of evidence by way of video conferencing can be ordered to be done in cases where the attendance of the witness cannot be ensured without delay, expense and inconvenience. It was also held by the Apex Court that recording of evidence by video conferencing was a 'procedure established by law'.

45. As technology improved and the size of the equipment shrunk, experimentation in some American Courts led to a steady growth in the provision of cameras to make video recordings of Court proceedings. Today, in America, Video Recording is common in most Courts.

¹⁴ (2013) 9 SCC 611

46. The influence of information technology in human lives and the storage of information in digital form brought amendment to the law to include the provisions regarding the appreciation of digital evidence. In 2000, the Information Technology Act was enacted, which brought in corresponding amendments to the Indian Evidence Act, 1872, Indian Penal Code, 1860 and the Banker's Book Evidence Act, Reserve Bank of India Act etc., to make digital evidence admissible.

47. Section 4 of Information Technology Act says, where any law provides that information or any other matter shall be in writing or typewritten or in the printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is- (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference.

48. In *Bodala Murali Krishna vs Smt. Bodala Prathima*¹⁵ in the matrimonial matter, it was held that:

"5. The only question that arises for consideration in this C.R.P. is as to whether the petitioner can be extended the facility of deposing as a witness before the trial Court, through the process of video conferencing?

6. The amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as

¹⁵ 2007(2)ALD 72=2007(1)ALT 237

regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added. These provisions are referred only to demonstrate that the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence. It is no doubt true that the recording of evidence through the process of video conferencing is not specifically referred to in these provisions.

7. Examination of witnesses in criminal cases, through video conferencing was approved by the Supreme Court in a judgment reported in *State of Maharashtra v. Dr. Praful B. Desai*. When such is the facility accorded in criminal cases, there should not be any plausible objection for adopting the same procedure, in civil cases as long as the necessary facilities, with assured accuracy exist. In *Twentieth Century Fox Film Corporation and Amitabh Bagchi v. Ena Bagchi*, the High Courts of Karnataka and Calcutta held that recording of evidence through video conferencing is permissible in law, provided that necessary precautions must be taken, both as to the identity of the witnesses and accuracy of the equipment, used for the purpose. Certain guidelines were indicated therein. The party, who intends to avail such facility, shall be under obligation to meet the entire expenditure. In *Praful B. Desai* supra the Apex Court observed that video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The Court allowed the examination of the witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

8. For the foregoing reasons, C.R.P. is allowed and the order under revision is set aside. The I.A. shall stand allowed, subject to the conditions that:

(a) it shall be the obligation of the petitioner to arrange the necessary equipment for recording the evidence through video conferencing, duly satisfying the trial Court as to the accuracy of the equipment and identity of the witness;

(b) the petitioner shall be under obligation to display the passport and its individual pages as may be demanded, on behalf of respondent, and he shall abide by the directions of the Court, issued during the course of recording;

(c) the petitioner shall make necessary arrangements for undertaking this exercise within one month from to-day, in default, the trial Court shall proceed with the other steps."

49. The expression of this Court in *Dasam Vijay Rama Rao V. M.Sai Sri*¹⁶ is a step forward which holds that:

"Increasingly Family Courts have been noticing that one of the parties is stationed abroad. It may not be always possible for such parties to undertake trip to India, for variety of good reasons. On the intended day of examination of a particular party, the proceedings may not go on, or even get completed possibly, sometimes due to pre-occupation with any other more pressing work in the Court. But, however, technology, particularly, in the Information sector has improved by leaps and bounds. Courts in India are also making efforts to put to use the technologies available. 'Skype' is one such facility, which is easily available. Therefore, the Family Courts are justified in seeking the assistance of any practicing lawyer to provide the necessary skype facility in any particular case. For that purpose, the parties can be permitted to be represented by a legal practitioner, who can bring a mobile device. By using the Skype technology, parties who are staying abroad

¹⁶ 2015(5) ALT 150

can not only be identified by the Family Court, but also enquired about the free will and consent of such party. This will enable the litigation costs to be reduced greatly and will also save precious time of the Court. Further, the other party available in the Court can also help the Court in not only identifying the other party, but would be able to ascertain the required information. Accordingly, I direct the Family Court to entertain the I.A. as it is maintainable and permit the GPA of the 2nd petitioner in O.P. to represent and depose on behalf of the 2nd petitioner in the O.P. and the Family Court shall also direct such GPA or any legal practitioner chosen by him to make available the Skype facility for the Court to interact with the 2nd petitioner, who is staying at Melbourne, Australia and record the consent of 2nd petitioner and proceed with the matter thereafter as expeditiously as is possible".

50. A Division Bench of this Court in *K.Ramesh V. Joint Secretary, Ministry of Social Justice, New Delhi*, in WRIT APPEAL No.1135 OF 2015; on 15-02-2016 held that- "If the 3rd respondent incumbent is truly facing any prosecution before the criminal Court, as alleged, it is the duty of Respondents 1 and 2 to ensure that the petitioner-appellant is sanctioned necessary permission to leave Gangtok and travel to Hyderabad/Secunderabad and then, depose before the competent criminal Court. It would also be equally open to them to allow the Petitioner- appellant to depose on the Internet by participating in video-conferencing facility, provided such facility is available at the criminal Court. Otherwise, using 'Skype' technology also, any such deposition of the petitioner- appellant may be urged to be recorded by

the criminal Court, but however, the necessary permission for the appellant to leave the Resource Centre, Gangtok for the said purpose, should be sanctioned.

51. Further, video recording of proceedings will ensure accuracy of the record. Further, by preserving (and making available) matters which are not apparent from the written record, such as demeanors, voice inflections, body language and the like, the Judges can form a better view of the witness and that would lead to better conclusion. The Judge can also re-examine the demeanor of the witness while they give evidence, and can come to a more accurate conclusion. The Judge can even focus on a close-up of the witnesses face in order to better observe facial expressions. These can be re-run and replayed with ease. The Judge thus can replay for himself if necessary the recorded proceedings of any hearing from day one right up to the final arguments, while appreciating the evidence in deciding the lis.

52. In the recent expression of the Apex Court in **Sujoy Mitra Vs. State of West Bengal**¹⁷, while upholding the order of the trial Court in the sessions case for the offence under Section 376 IPC, after examination of four witnesses in permitting recording of evidence of the Prosecutrix, a citizen of

¹⁷ [Crl. Appeal No.1620 of 2015 arising from SLP (Criminal) No.8157/2015], dated.02.12.2015

Ireland and resident of Dublin, as PW5-through video conference, provided the following safeguards:

I) The State of West Bengal shall make provision for recording the testimony of PW5 in the trial Court by seeking the services of the National Informatics Centre (NIC) for installing the appropriate equipment for video conferencing, by using "VC Solution" software, to facilitate video conferencing in the case. This provision shall be made by the State of West Bengal in a room to be identified by the concerned Sessions Judge, within four weeks from today. The NIC will ensure, that the equipment installed in the premises of the trial Court, is compatible with the video conferencing facilities at the Indian Embassy in Ireland at Dublin.

II) Before recording the statement of the prosecutrix-PW5, the Embassy shall nominate a responsible officer, in whose presence the statement is to be recorded. The said officer shall remain present at all times from the beginning to the end of each session, of recording of the said testimony.

III) The officer deputed to have the statement recorded shall also ensure, that there is no other person besides the concerned witness, in the room, in which the testimony of PW5 is to be recorded. In case, the witness is in possession of any material or documents, the same shall be taken over by the officer concerned in his personal custody.

IV) The statement of witness will then be recorded. The witness shall be permitted to rely upon the material and documents in the custody of the officer concerned, or to tender the same in evidence, only with the express permission of the trial Court.

V) The officer concerned will affirm to the trial Court, before the commencement of the recording of the statement, the fact, that no other person is present in the room where evidence is recorded, and further, that all material and

documents in possession of the prosecutrix-PW5 (if any) were taken by him in his custody before the statement was recorded. He shall further affirm to the trial Court, at the culmination of the testimony, that no other person had entered the room, during the course of recording of the statement of the witness, till the conclusion thereof. The learned counsel for the accused shall assist the trial Court, to ensure, that the above procedure is adopted, by placing reliance on the instant order.

VI) The statement of the witness shall be recorded by the trial Court, in consonance with the provisions of Section 278 of the Code of Criminal Procedure. At the culmination of the recording of the statement, the same shall be read out to the witness in the presence of the accused (if in attendance or to his pleader). If the witness denies the correctness of any part of the evidence, when the same is read over to her, the trial Court may make the necessary correction, or alternatively, may record a memorandum thereon, to the objection made to the recorded statement by the witness, and in addition thereto, record his own remarks, if necessary.

VII) The transcript of the statement of the witness recorded through video conferencing(as corrected, if necessary), in consonance with the provisions of Section 278 of the Code of Criminal Procedure, shall be scanned and dispatched through email to the embassy. At the embassy, the witness will authenticate the same in consonance with law. The aforesaid authenticated statement shall be endorsed by the officer deputed by the embassy. It shall be scanned and returned to the trial Court through email. The statement signed by the witness at the embassy, shall be retained in its custody in a sealed cover.

VIII) The statement received by the trial Court through email shall be re-endorsed by the trial Judge. The instant statement endorsed by the trial Judge, shall constitute the testimony of the prosecutrix-PW5, for all intents and purposes."

53. A Division bench of the Delhi High Court, in the very recent expression, in *International Planned Parenthood Federation (IPPF) vs. Madhu Bala Nath*¹⁸, has observed that Courts must be liberal and pragmatic in allowing the witnesses to depose through Video conferencing. Court should make use of modern technology so as to further the process of dispensation of justice. *Relying upon the expression of the Apex Court in Dr. Praful B. Desai* supra noting the difference between the concepts of virtual reality vis-à-vis video-conferencing that:

“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. 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

¹⁸ FAO(OS) 416/2015, dt.07.01.2016-Delhi HC-DB

(mostly a judicial officer) would be required to record the evidence and to ensure/compel attendance. However, 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 demeanor 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".

54. The Division Bench further observed in ordering the recording of evidence through video conferencing as follows:

"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 travelling 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 Annexed 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” .

55. Having regard to the above, examination of witnesses and recording of evidence by commissioner contemplated by Order XVIII Rule 4 C.P.C from the words ‘Witness in attendance’ are to be understood as person being present and it need not be physical presence thus, recording of evidence through Audio, Video link or through internet by Skype or similar technological device is permissible complying the words in attendance.

56) From the above, coming back to facts, for there is no foundation to say the request to record evidence through Skype technology is a device to avoid facing the criminal case allegedly filed against him and so far as the apprehensions as to demeanor and possibility of prompting or tutoring can be taken care of with necessary precautions, the reconciliation

also can be done if need be by use of Skype technology, there are no grounds to interfere with the impugned order of the lower Court permitting the recording of evidence of the party-witness abroad through Advocate Commissioner and by use of Skype technology, but for to give necessary directions of the precautions required to be taken to ease out the apprehensions of the other side in giving disposal of the revision petition.

57. In the result, the revision petition is disposed of with the following directions for the precautions to be taken for recording and in the course of recording evidence through Skype technology.

“1. The audio and visual shall be recorded at both the ends through the Skype technology/audio and video conferencing that is from Khammam Town of the Telangana State, India at the premises of NIC in the Collectorate, Khammam Town and from the New Jersey of USA in the venue to be fixed by the officer to be nominated for the same Indian High Commissioner.

2. The officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA in the venue to be fixed for said recording shall be paid a lumpsum amount of Rs. 20,000/- as honorarium by the petitioner.

3. The petitioner by virtue of this order approach the Indian High Commissioner from USA for said purposes supra and fix the venue and date for recording the evidence.

4. The parties are to be permitted in the course of recording evidence to be represented by legal practitioners at the premises of NIC in the Collectorate, Khammam Town, who can bring

mobile device or other gadgets and make available the Skype facility for the Court/its officer-the Advocate Commissioner to interact with the Petitioner/witness staying abroad supra and record the consent to proceed with the matter of recording evidence thereafter as expeditiously as possible and only after taking of oath through media as per the provisions of the Oaths Act,1969.

5. Before the witness is being examined in terms of the Skype technology, the witness has to file an affidavit with an undertaking of not using any pre-recorded versions to prompt him therefrom or taking any assistance of another for prompting while giving evidence, got the pleadings and documents of the case with him to refer if other side require or Court/Advocate Commissioner permit during evidence and won't allow any other person during course of deposition but for the one to operate the phone or other electronic device/gadgets with internet facility of Skype technology duly verified before a notary or the officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA that the person who is shown as the witness is the same person who is going to depose on the screen without any prompting. The officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA at the venue of recording evidence shall also ensure the above during course of recording evidence and not to allow any device or person to prompt the witness.

6. By using the Skype technology, the Petitioner/witness staying abroad can not only be easily identified by the Court/its officer-the Advocate Commissioner from the above, but also be ascertained by enquiring about the identity with proof with reference to the affidavit of identity that to be filed supra and can verify the same from assistance of opposite party or the Counsel or representative of opposite party present.

7. The witness has to be examined preferably during working hours of Indian Courts. Oath is to be administered through the media.

8. The Court/its officer-the Advocate Commissioner is to record such remarks as is material regarding the demur of the witness

while on the screen and during course of evidence of the witness, including to note any objections raised during recording evidence of witness and to decide the same later.

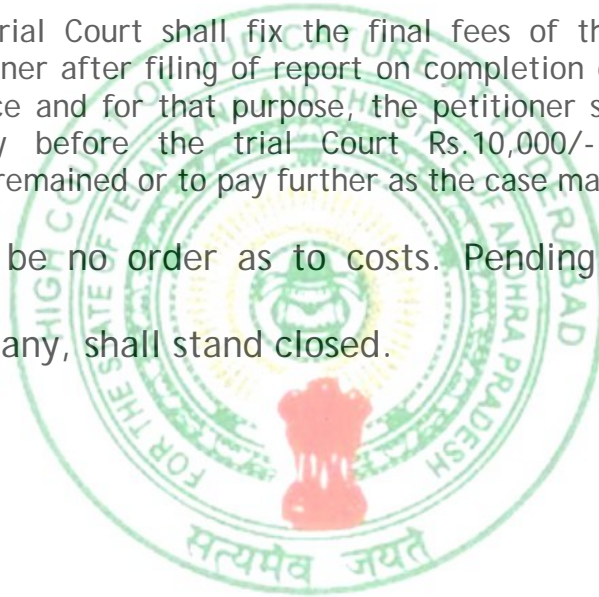
9. After recording the evidence, the witness has to state that the contents are true and he authorises his representative or Advocate on his behalf to sign on the deposition and he is not going to dispute its correctness or authenticity at any time later to make it forms part of the record of the proceedings. Besides that he shall retrieve copy of deposition from other end recording device and sign and submit to the trial Court later through his counsel.

10. The Court/its officer-the Advocate Commissioner may also impose such other conditions as are necessary in a given set of facts and circumstances.

11. For any further difficulty, the Advocate Commissioner and the parties may approach the trial Court.

12. The trial Court shall fix the final fees of the Advocate Commissioner after filing of report on completion of recording of evidence and for that purpose, the petitioner shall deposit tentatively before the trial Court Rs.10,000/- to refund whatever remained or to pay further as the case may be"

There shall be no order as to costs. Pending miscellaneous petitions, if any, shall stand closed.



Dr. B. SIVA SANKARA RAO, J

Dt.19.10.2016

Note: LR Copy to be marked
b/o
Ksh/Vvr/Kvrm.